Translation from the German language

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Refusal order Unsuccessful constitutional complaint made by a mother concerning the return of her son to Ukraine - application not sufficiently justified - but with some constitutional doubts as to the return order contested

Orientation and approach

1a. The rights of parents under Art. 6 (2) sentence 1 Basic Law are affected by court decisions that, by way of a return order under the Hague Child Abduction Convention, remove from one of the parents the ability to decide on the place of residence of the child in question. If the interpretation and application of the relevant provisions of the Hague Child Abduction Convention are not in keeping with the wellbeing of the child in question, this will usually constitute a violation of parental rights (see Federal Constitutional Court 29 October 1998, 2 BvR 1206/98, Federal Constitutional Court decision 99, 145 <164>). (Margin No. 25)

1b. The precedent of the specialist courts views the situation in Ukraine such that the entire country is a war zone and due to the danger to the highest legally protected right, to that of life, the return of the child to Ukraine is not possible due to Art. 13 (1) b Hague Child Abduction Convention (see Stuttgart Higher Regional Court, 13 October 2022, 17 UF 186/22, <margin No. 35>; Jena Higher Regional Court, 4 April 2023, 1 UF 54/23 <margin No. 34ff>). While this initial situation does not preclude a court from taking the opposing view, it requires that it at least be parsed carefully. (Margin No. 30)

1c. Additionally, the courts, must when interpreting and applying Art. 13 (1) b) Hague Child Abduction Convention make it apparent that the guarantees contained in Art. 8 European Convention on Human Rights have been assured and the child's best interests given due consideration. This require a certain level of reasoning with respect to the requirements for a refusal (see ECtHR 15 June 2021, 17665/17 – Y.S. and O.S. vs. Russian Federation– <margin No.96, 98 et seq>). (Margin No. 32)

2. If the constitutional complaint concerns the decision of a court, a detailed discussion taking account of the arguments and the reasoning is required so as to fulfil the

requirements of the reasoning (Secs. 23 Subsec. 1 sentence 2, 92 Act on the Federal Constitutional Court). This must include a description of which basic rights are said to be violated in each case and which constitutional standards the measure contested is in conflict with (see Federal Constitutional Court, 23 June 2021, 2 BvR 2216/20, BVerfGE/Federal Constitutional Court decision158, 210 <230f margin No.51>).

(Margin No. 21)

3. The legitimate interest to protect legal rights in the Federal Constitutional Court proceedings must still be present at the time of the decision being issued. However, under specific conditions, the subject of the constitutional complaint may remain in place even once such the aim of the constitutional complaint has been resolved (see Federal Constitutional Court decision 159, 223 <273 margin No. 98>; consistent case law). If the act of the state has already been concluded, it is incumbent upon the complainants to demonstrate that a legitimate interest to protect legal rights continues to exist (see German Federal Constitutional Court (14 December 2023, 1 BvR 1889/23 <Margin No.13> (Margin No.16)

4. Concerning:

4a. To the extent that the constitutional complaint was also raised on behalf of the child of the complainant in question, her participation in the proceeding is, owing to her lack of legal ability to take part in court proceedings and due to the lack of a guardian-ad-litem, inadmissible. (Margin No.32)

4b. Further to this, the complainant did not demonstrate that the legitimate interest to protect legal rights continued to exist. By staying together with the child in Ukraine, she fulfilled the terms of the return order being contested, meaning that the order was no longer relevant. (margin No.18) (margin No.19)

4c. In conclusion, the violation of basic rights has not been demonstrated in a sufficiently detailed manner. Among other things, there is no reference to the basic parental rights of the complainant. With this in mind, doubts as to whether the contested return order took sufficient account of basic parental rights are of secondary importance. (margin No.22) (margin No.23)

Found in

NJW - *Neue juristische Wochenzeitung* (New Legal Weekly Journal) 2024 2389-2392 (editorial and reasons)
FamRZ - Zeitschrift für das gesamte Familienrecht (Family Law Magazine) 2024 1218-1223 (editorial and reasons)
MDR - *Monatsschrift für Deutsches Recht* (MDR) - (Monthly Journal for German Law?.2024, 1114-1115 (editorial and reasons)

Proceedings to date

from Cologne Higher Regional Court, Senate for Family Matters, 17 July 2023, II-21 UF 100/23, ..., order
This decision cites

Precedent
See Federal Constitutional Court, First Senate 2nd Chamber , 14 December 2023, 1 BvR 1889/23
See Thuringia Higher Regional Court, 1st Senate for Family Matters, 4 April 2023 1 UF 54/23
See Stuttgart Higher Regional Court, Senate for Family Matters, 13 October 2022, 17 UF 186/22
See Federal Constitutional Court, 2nd Senate, 23 June 2021, 2 BvR 2216/20, ..
See European Court of Human Rights, Chamber of the Third Section, 15 June 2021, 17665/17 ... and others

Wording

1. The application for the awarding of legal aid and the appointment of (...) shall be refused, because the legal avenues being pursued do not have sufficient prospects of success.
2. The constitutional complaint shall not be put before this court for a decision.

Reasoning

1 The constitutional complaint concerns a decision for the return of a child to Ukraine.

I.

2 1. The complainant under point 1) is the mother of a son born in 2016, the complainant under point 2.) His birth resulted from the marriage of the [first] complainant to the father. All three parties have Ukrainian nationality, the father is a (...) national in addition to this. The marriage of the parents was dissolved by divorce by a court in Ukraine in 2018. A decision on parental custody was not made, resulting in both parents exercising joint custody of the complainant under point 2) post divorce. However, it was ordered that he should live at the home of the complainant under point 1). In early 2022, a Ukrainian court ruled on access rights of the father to the complainant under point 2). After the outbreak of war, the complainants left Ukraine without the knowledge of the father and made it to Germany. It was only in September 2022 that the father, via social networking sites, found out about the whereabouts of the complainants in Germany.

3 2. In February 2023, the father applied for the return of the complainant under point 2) to Ukraine under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) at the competent domestic court. As a reason for the application, he stated that his son had

been illegally taken to Germany by the complainant under point 1). He said that he had not at any time consented to his son leaving Ukraine and still does not consent. The area near the (...) border where he is living, he said, was not dangerous. There were no acts of war and none were to be expected.

4 a) The Family Court appointed a guardian-ad-litem for the complainant under point 2) and gave him a personal hearing. During the hearing, he said that he did not want to return to Ukraine and that he was afraid because there was a war going on and many buildings had been destroyed. He stated very clearly several times that he did not wish to return to the country, not even to be with his father. The Youth Welfare Office stated that it was unable to advocate the return of the complainant under point 2) to a war zone. The guardian-ad-litem also made a statement to the effect that the entirety of Ukraine was to be considered a war zone. It would not be possible to know where and when artillery or other attacks would take place. The return of the child to a war zone would represent a danger to him within the meaning of Art. 13 (1) b) Hague Child Abduction Convention.

5 b) The family court rejected the father's application for the return of the complainant under point 2). It is true that the facts of the case corresponded to those set out in Art. 12 (1) Hague Child Abduction Convention. However, the return was impeded by Art. 13 (1) b) Hague Child Abduction Convention. It was acknowledged that the exceptional circumstances would certainly be present if the return of the child were to an area where an international conflict or civil war were ongoing and the child would therefore be subjected to certain specific dangers. This was said to be the case here and to apply applies to the entirety of the territory of Ukraine.

6 a) The father lodged a complaint appeal against this. [Saying] the requirements set out in Art. 13 (1) b) Hague Child Abduction Convention were not fulfilled. The Federal Foreign Office's travel warning did not entail a specific risk to the child [he claimed]. The father claims the part of the country in which he lives has not been affected by acts of conflict. This is said to have been confirmed in a declaration by the local military administration of 1 June 2023 and by the Ukrainian Justice Ministry. In addition, he claims that the air defence systems are sufficient to protect the country nearly completely.

7 b) By way of the decision dated 17 July 2023, which is the one being contested here, the Higher Regional Court modified the order issued by the Family Court and ordered that the complainant under point 1) be obliged to return the complainant under point 2) to Ukraine on or before 7 August 2023. In the event that she failed to comply, the court threatened a coercive fine of up to EUR 25,000 or, if she were unable to pay, coercive detention of up to six months. In the event that the complainant under point 1) did not comply with her obligation to return [the child], the court bailiff was to be authorised to enforce the return of the complainant under point 2) using measures to be determined in more detail and by use of force [if necessary]. The grave risk exception as per Art. 13 (1) b) Hague Child Abduction Convention is only said to exist where there is an unusually grave risk to the child's best interests which is particularly

severe, specific and current. It was not to be presumed that the complainant under point 2) would have to be returned to a war zone. As his return would not be taking place to a specific place, but to a country [as a whole], the risks caused by the war leading to the presumption of the requirements set out in Art. 13 (1) b) Hague Child Abduction Convention being met would have to apply to the whole country. In this respect, the Higher Regional Court referred to a decision of Thuringia Higher Regional Court (Thuringia Higher Regional Court, order dated 4 April 2023 - 1 UF 54/23 -, juris, margin No. 36). Ukraine, with its land area of over 600,000km^2, is the second largest in Europe in such terms. The conflict is currently concentrated in the south and east of Ukraine, whereas the whole country is affected by artillery and air attacks, during which it cannot be ruled out that civilian infrastructure and residential buildings will be hit. The source for these claims is the assessment of the Federal Foreign Office. Just because Germany's domestic authorities were warning against travelling to the country, this would not automatically mean that it would be impossible for a child to live there without facing danger. According to information provided by the local military administration on 1 June 2023, the part of the country the father lives in is not an active conflict zone. The complainant under point 1) has not, as the burden of proof and presentation requires of her, provided any contrary findings to the Senate. Her pointing out that there are frequently air raid sirens in the region is not deemed sufficient to conclude there is an unusually high risk to the child's best interests merely from the sound of the sirens and precautionary measures taken.

8 4. In her constitutional complaint, the complainant under point 1) claims, both in her own name and in that of the complainant under point 2), that there has been a violation of Art. 2 (1) in conjunction with Art. 1 (1) and Art. 6 German Basic Law. She claimed that Thuringia Higher Regional Court referred to in the order being contested presumed without the contested decision having taken this into account, that there was danger throughout the territory of Ukraine. The citations are said to have been taken out of context and contradict directly the order referred to.

9 The complainants are also applying for legal aid to cover the cost of the constitutional complaint alongside the appointment of their legal counsel.

10 5. The state (*Land*) of North Rhine-Westphalia and the parties to the proceedings concerning the matter had the opportunity to make a statement. The guardian-ad-litem of the complainant under point 2) stated that the reasoning given for the decision issued by the Higher Regional Court was not convincing, especially given that the conflict was unpredictable and could spread to anywhere in Ukraine, which would be a reason to refuse the return of the child. The father stated that the mother travelled to Ukraine with the child but then returned to Germany just a few weeks later. According to the father, the area he lives in is not in danger of active conflict, with individuals even being accommodated there who are fleeing other parts of Ukraine.

11 The files relating to the original proceedings have been provided to the Chamber.

II.

12 The constitutional complaint shall not be put before this court for a decision. Grounds for its admittance in line with Sec. 93a Subsec. 2 Federal Constitutional Court Act (*BVerfGG*) do not exist, because the constitutional complaint is, on the whole, not permissible and thus does not have any prospect of success.

13 1. The constitutional complaint of the complainant named under point 2) who was born in 2016 was not lodged in a permissible way. He himself is, as a result of his age, unable to be party to proceedings at the Federal Constitutional Court. His mother, complainant under point 1), is unable on her own to represent him in a legally effective way. It is true that parental custody includes the right to legally represent a child who is him or herself unable to participate in court proceedings in constitutional proceedings (See Federal Constitutional Court decision 72, 122 <133>; 162, 378 <400 margin No. 48>). However, according to the decisions issued by the Ukrainian courts on parental custody, this right is borne by both parents. The requirements which would allow a third party to make a claim in exceptional circumstances on behalf of the child (see Federal Constitutional Court decision 72, 122 <136>) are not fulfilled in this scenario. The risk that, without being represented by the complainant under point 1), the rights of the complainant under point 2) would not be [sufficiently] claimed with the constutional complaint, cannot be said to exist. The rights of the complainant under point 2) could have been asserted for him in the constitutional complaint proceedings through permissible representation from the guardian-ad-litem appointed to him in the original proceedings (Sec 158 Act on Proceedings in Family Matters), (see Federal Constitutional Court, order issued by the 1st Chamber of the First Senate of 15 December 2020 - 1 BvR 1395/19 - margin No. 28). However, the guardian-ad-litem did not exercise this right.

14 2. The constitutional complaint brought by the complainant under point 1) in her own name is likewise inadmissible. There is already doubt as to whether she has a recognised legal interest in bringing proceedings and whether this was sufficiently demonstrated by the complainant under point 1) (a). In any event, the reasoning for the constitutional complaint does not fulfil the criteria set out in Sec. 23 Subsec. 1 sentence 2, Sec. 92 Federal Constitutional Court Act (b).

15 a) There are doubts as to the continuation of the recognised legal interest in bringing proceedings in terms of the constitutional complaint of the complainant under point 1), as she has complied with her obligation as per the contested order issued by the Higher Regional Court to return the complainant under point 2) to Ukraine for a period, and it is thus no longer relevant.

16 aa) The recognised legal interest in bringing proceedings in terms of constitutional proceedings must generally continue to be present at the time the decision is made by the Federal Constitutional Court. It may, however, continue to exist under certain circumstances even once the aim of the constitutional complaint has been resolved, if this would otherwise result in an issue of key importance under constitutional law remaining without a ruling and the violation of basic rights would appear especially burdensome or there is cause for concern that the contested measure will be

repeated, or that the measure will continue to place limitations or constraints [on the complainants] (see Federal Constitutional Court decision 159, 223 <273 margin No. 98>, consistent case law). In the event that the contested sovereign measure has been rendered redundant, it is incumbent on the complainants to demonstrate that there remains a recognised legal interest in bringing proceedings (see Federal Constitutional Court, orders of the 2nd Chamber of the First Senate dated 12 July 2023 - 1 BvR 58/23-, margin No. 8 and further citations, and 14 December 2023 - 1 BvR 1889/23 -, margin No. 13).

17 bb) In accordance with these standards, the complainant under point 1) was required to demonstrate in detail why there was still a recognised legal interest in bringing proceedings, despite the fact that the contested order issued by the Higher Regional Court had been rendered redundant (1). As there are no explicit statements in this regard, there are concerns as to whether the complainant under point 1) complied sufficiently with this requirement (2).

18 (1) The complainant under point 1) is no longer restricted by the contested order issued by the Higher Regional Court, as she complied with her obligation to return the child arising therefrom. On the basis of the predominating view in specialist law, the complainant under point 1), by returning the complainant under point 2) to Ukraine temporarily, complied with the duty arising from the contested order. In the overriding view of the specialist courts, the obligation to return under the Hague Convention is already fulfilled once the abducting parent returns the child for any period of time to the country of origin, such as gives the parent requesting the return sufficient opportunity to have an order issued in the country of origin for the child to remain there; according to this view, it is not necessary for habitual residence to be re-established in the country of origin. (see Schleswig Higher Regional Court, order issued on 28 June 2013 - 12 UF 4/12 -, juris. margin No. 6; Frankfurt Higher Regional Court, order issued on 1 March 2023 - 1 UF 26/23 -, juris. margin No. 26; Schweppe, in: Heilmann, *Praxiskommentar Kindschaftsrecht* (Commentary on Legal Practice in Parent/Child relationships), 2nd edition 2020, Art. 12 Hague Child Abduction Convention, margin No. 3; Pirrung, in: Staudinger, *IntFam-RVG* (International Family Law Proceedings), New edition 2018, Last updated 1 March 2022, margin No. G 84; same author., in: Staudinger, *HKÜ* (Hague Child Abduction Convention), New edition 2018, Last updated 1 September 2021, margin No. E 65; Botthof, in: *Münchener Kommentar zum FamFG* (Munich Commentary on Procedure Law in Family Matters), Article 12 Hague Child Abduction Convention, margin No. 13;Erb-Klünemann, in: Heidel/Hüßtege/Mansel/Noack, *BGB Allgemeiner Teil/EGBGB* (Civil Code General Part/Introductory Act to the Civil Code), 4th edition. 2021, Art. 12 Hague Child Abduction Convention, margin No. 5; Siehr, *IPRax* (International Private and Procedural Law Practice) 2015, 144 <148>; dissenting view [necessity of residence in the country of origin fulfilment:] Karlsruhe Higher Regional Court, order dated 14 August 2008 - 2 UF 4/08 -, juris, margin No. 14; Völker/ Clausius, *Sorge- und Umgangsrecht* (Law on custody and access), 8th edition 2021, para. 11 margin No. 143). With a return in this sense having taken place, the return order is fulfilled and thus redundant (see Siehr, IPRax 2015, 144 <148>). As a result of such fulfilment, no

coercive measures may any longer be ordered against the abducting parent, if he or she takes the child back to the country of origin and remains there for longer than three weeks, even if he or she takes the child away again (see Pirrung in: Staudinger, Hague Child Abduction Convention, new edition 2018, updated as of 1 September 2021, margin No. E 65). If, during this period spent in the country of origin [by the child], it was possible for the applicant parent to have an order issued by the courts of the country of origin to retain the child and the child is removed from the country again after a short period, this does not change anything with regard to the obligation to return from the original order having been fulfilled (see Erb-Klünemann, in: Heidel/Hüßtege/Mansel/Noack, Civil Code General Part/Introductory Act to the Civil Code (*BGB Allgemeiner Teil/EGBGB*), 4th edition 2021, Art. 12 Hague Child Abduction Convention, margin No. 5). However, such an act may, in any event, represent a renewed act of child abduction (see Erb-Klünemann, in: Heidel/Hüßtege/Mansel/Noack,) Civil Code General Part/Introductory Act to Civil Code (*BGB Allgemeiner Teil/EGBGB*, 4th edition 2021, Art. 12 Hague Child Abduction Convention margin No. 5; Pirrung, in: Staudinger, Hague Child Abduction Convention, new edition 2018, updated as of 1 September 2021, margin No. E 65).

19 In the meantime, the complainant under point 1) has spent more than three weeks with the complainant under point 2) in Ukraine. During this time, the father could have had an order issued to have the child remain in Ukraine from the courts there. By returning the child for a period, the complainant under point 1) has, in the predominating view in specialist law, fulfilled her obligation arising from the order being contested; the order is thus redundant. It is not possible to carry out enforcement arising from the order again and no coercive measures can be ordered based upon it, meaning that the rights of the complainant under point 1) are no longer restricted as a result.

20 (2) The complainant under point 1) did not make any statement either in her initial constitutional complaint, nor in any other of her subsequent written submissions as to why the recognised legal interest in bringing proceeding continued to exist despite the fulfilment having taken place. At most, statements have been made as to actual circumstances which may suggest that the situation is in danger of repeating itself. In this respect, her legal counsel, in a written submission dated 4 April 2024, stated that the father of the complainant under point 2) had lodged at the competent family court a new application for the return of the child to Ukraine and the family court issued a temporary injunction to prevent the child crossing any of Germany’s borders to prevent him leaving Germany (for any country other than Ukraine) during the ongoing proceedings on the father’s request for a return. No decision is required as to whether this counts as sufficient demonstration of a risk of the situation repeating itself, given that there are renewed return proceedings the outcome of which remains open. This is because the constitutional complaint made by the complainant under point 1) is inadmissible regardless, because it does not fulfil the criteria set out in Sec. 23 Subsec. 1 sentence 2, Sec. 92 Federal Constitutional Court Act.

21 (a) Under the terms of said provision, the constitutional complaint must in a sufficiently detailed way demonstrate stating general law and with a constitutional assessment of the facts that a violation of basic rights appears possible (see Federal Constitutional Court decision 140, 229 <232 margin No. 9>; 157, 300 <310 margin No. 25>). In the event that case law issued by the Federal Constitutional Court already exists as to the constitutional issues which arise in the constitutional complaint, the claimed violation of basic rights must be justified with reference to the standards developed upon in the decision (see Federal Constitutional Court decision 149, 346 <359 margin No. 23> and further citations; 153, 74 <137 margin No. 104>; 158, 210 <230-231 margin No. 51>; 163, 165 <210 margin No. 75>). If the constitutional complaint is contesting a decision of a court, it shall generally require a point-by-point analysis of the arguments and reasoning arrived at therein. In doing so, it must be demonstrated to what extent the basic right in question is being violated and with which constitutional standards the measure is said to be in conflict (see Federal Constitutional Court decision 108, 370 <386-387>; 140, 229 <232 margin No. 9>; 149, 346 <359 margin No. 24>; 158, 210 <230-231 margin No. 51>).

22 (b) This is not sufficient so as to justify the constitutional complaint. The violation is said to be related to Art. 2 (1) in conjunction with Art. 1 (1) and Art. 6 (1) Basic Law, without going into any detail at all as to the standards connected to these guarantees for the review of the contested decision issued by the Higher Regional Court. Accordingly, the possibility that fundamental rights have been violated has not been demonstrated on the basis of these standards. The basic parental rights (Art. 6 (2) sentence 1 Basic Law) of the complainant under point 1) which may have been infringed upon by the return order, are neither explicitly mentioned nor discussed in relation to other matters.

23 3. Although there is considerable doubt as to whether the return order issued by the Higher Regional Court guarantees the parental rights arising from Art. 6 (2) sentence 1 Basic Law in the way that is provided for by the Constitution, no violation of basic rights is so apparent that the fulfilment of the requirements of substantiation arising from Sec. 23 Subsec. 1 sentence 2, Sec. 92 Federal Constitutional Court Act could be dispensed with (in this respect, see Federal Constitutional Court, order issued by the 3rd Chamber of the First Senate dated 24 August 2010 - 1 BvR 1584/10 - margin No. 3; order issued by the 1st Chamber of First Senate dated 10 December 2019 - 1 BvR 2214/19 -, margin No. 13).

24 a) The basic parental rights arising from Art. 6 (2) sentence 1 Basic Law generally guarantee parents the right to care for and raise their children without state influence or interference. In relation to the child, however, it is his or her best interests that are the guiding principle of care and upbringing by the parents. This is to be interpreted comprehensively and ensures that parents with parental responsibility have a constitutionally protected right to influence all of the conditions relating to the child's life and development (see Federal Constitutional Court decision 162, 378 <407-408 margin No. 67-68> and further citations). The basic right as per Art. 6 (2) sentence 1

Basic Law is held by each parent on their own behalf (see Federal Constitutional Court decision 133, 59 <78 margin No. 51>; Federal Constitutional Court, judgment issued by the First Senate dated 9 April 2024 – 1 BvR 2017/21 -, margin No. 39; consistent case law). If a court decision on a conflict between the parents has an effect on the child's future, the decision must be based on the child's best interests and consider the child in terms of his or her individuality as a holder of basic rights (see Federal Constitutional Court decision 37, 217 <252>; 55, 171 <179>; 99, 145 <157>; consistent case law).

25 Parental rights as per Art. 6 (2) sentence 1 Basic Law are affected by court decisions which, by way of a return order under the Hague Convention, remove from a parent the ability to decide on where the child in question shall have his or her residence (see Federal Constitutional Court decision 99, 145 <164>). It is the case that the specialist courts, during the proceedings concerning the return of a child on the basis of the Hague Convention, are responsible for establishing whether the criteria for a grave risk exception set out in Art. 13 (1) b) Hague Child Protection Convention are met. The organisation of the proceedings, the establishment and assessment of facts and the interpretation and application of constitutionally uncontroversial rules in individual cases are matters for the competent specialist courts and cannot be reviewed by the Federal Court of Justice. The latter is responsible only for checking for any recognisable errors of interpretation in the contested decision which are based on a fundamentally incorrect view of the meaning of a fundamental right or the scope of protection afforded to it (see Federal Constitutional Court decision 72, 122 <138>; 99, 145 <160>; 136, 382 <390-391. margin No.27>; consistent case law). However, if the interpretation and application of the relevant provisions of the Hague Convention are incompatible with the best interests of the child in question, this shall generally be regarded as a violation of parental rights arising from Art. 6 (2) sentence 1 Basic Law (see Federal Constitutional Court decision 99, 145 <164>).

26 The protection of fundamental rights has a great influence on the organisation and application of procedural law (see Federal Constitutional Court decision 55, 171 <182>). In accordance with this, the courts must arrange their proceedings in parent/child matters so as to be able to recognise as reliably as possible the basis for a decision in the interests of the child (see Federal Constitutional Court decision 55, 171 <182>; Chamber Rulings of the Federal Constitutional Court 9, 274 <278-279>;12, 472 <476>;17, 407 <412>; consistent case law); this shall also apply to the interpretation and application of treaties at the level of international law such as the Hague Convention (see Federal Constitutional Court decision 99, 145 <158>). Art. 8 ECHR, which is, just as other provisions of the Convention are, to be used as an aid to determine the contents and scope of basic rights under the Basic Law (see Federal Constitutional Court decision 148, 296 <351 margin No 128>; 162, 325 <351 margin No. 94>; consistent case law), also sets out requirements on the type and extent of the reasoning for specialist court decisions in application of Art. 13 (1) b) Hague Child Abduction Convention The reasoning must make it apparent whether the guarantees set out in Art. 8 ECHR have been met and the child's best interests taken into account (see European Court of Human Rights (ECtHR), judgment dated 15 June 2021 -

17665/17 -, margin No. 96 et seq.).

27 b) When applying these standards, doubts arise as to whether the contested order issued by the Higher Regional Court is in line with the parental rights of the complainant under point 1). The decision, in application of Art. 13 (1) b) Hague Child Abduction Convention likely does not, in the way provided for by the Constitution, recognisably take account of the best interests of the child who is the complainant under point 2) and thus the parental rights of the complainant under point 1).

28 aa) It is true that the interpretation of the aforementioned provision to the effect that the grounds for a grave risk exception under Art. 13 (1) b) Hague Child Abduction Convention only apply where there are unusually serious impediments to the best interests of the child, but that this is not the case with impediments usually associated with the return of a child, is uncontroversial in terms of constitutional law (see Federal Court of Justice decision 99, 145 <159> referred to previously). The same applies to the transfer of the burden of presentation and proof of whether the conditions for the grave risk exception are met onto the parent obliged to return the child (see ECtHR judgment dated 15 June 2021, 17665/17-, margin No. 95, in relation to the standards arising from Art. 8 ECHR).

29 bb) The specific reasoning of the Higher Regional Court dismissing a serious risk of physical or psychological harm being done to the complainant under point 2) in the event of his return to Ukraine cannot however be said to demonstrate the appropriate and comprehensive application of Art. 13 (1) b) Hague Child Abduction Convention in terms of the child's best interests. In order to take account of the child’s best interests in applying the grave risk exception, an obvious step to take would have been to have taken a closer look at the decisions issued by courts of final instance with regard to how they handled grave risk exception in relation to the war in Ukraine, and at specific conclusions drawn by the expert parties in the original proceedings as relates to the best interests of the complainant under point 2). The reasoning of the contested decision raises doubts as to whether the Higher Regional Court, in application of Art. 13 (1) b) Hague Child Abduction Convention, was fully aware of the duty to consider the decisions issued by the ECtHR when interpreting Art. 8 ECHR.

30 (1) According to the precedent of the specialist courts published to date, the situation in Ukraine is assessed such that the whole country is a war zone and that, due to the risk posed to supreme legal interests, the life of the child, no return of the child to Ukraine is possible as per Art. 13 (1) b) Hague Child Abduction Convention (see Stuttgart Higher Regional Court, order dated 13 October 2022 - 17 UF 186/22 -, juris, margin No. 35; Thuringia Higher Regional Court, order issued 4 April 2023 – 1 UF 54/23 -, juris, margin No. 34 et seq., each with more detailed reasoning). This scenario, while not ruling out the possibility that the recognising court will come to a different conclusion, does require careful parsing of the situation. While it does make reference to a precedent from Stuttgart Higher Regional Court regarding the application of Art. 13 (1) b) Hague Child Abduction Convention to returns to Ukraine which is contrary to its own application, the order being contested can most likely not be said to represent a careful parsing of the situation. Insofar as the Higher Regional

Court makes reference to the fact that, according to the information provided by the military administration with competence for the father's place of residence, this part of the country is not an active conflict zone and thus Ukraine cannot be said to be a war zone in all areas, this does not, without further investigation, appear to do justice to the fundamental parental rights of the complainant under point 1). The Higher Regional Court works on the presumption – in a way that is constitutionally uncontroversial– that the return ordered does not need to occur to a specific place, but to the country from which the child was unlawfully removed (Art. 3 Hague Child Abduction Convention). It is is concluded from this that, in order to fulfil the requirements of Article 13 (1) b) of the Hague Child Abduction Convention, it must be demonstrated that the adverse effects brought about by the war affect the entire country. The court's referring to the order issued by Thuringia Higher Regional Court dated 4 April 2023 (1 UF 54/23), however, is questionable in terms of its methodology. In the order mentioned, even if this was only in the considerations which did not contribute to the decision, Thuringia Higher Regional Court, providing further explanations and in agreement with Stuttgart Higher Regional Court (order dated 13 October 2022 - 17 UF 186/22 -), arrived at the conclusion that the entirety of Ukraine is a war zone. Above all, the Higher Regional Court does not appear to take into consideration with regard to grounds for the grave risk exception as it has applied them, that the complainant under point 1), in order to comply with the best interests of the child who is the complainant under point 2), would factually have to return the child to the part of Ukraine which the Higher Regional Court has declared to be unaffected by the war. However, this would not comply with the legal point of view stating that the obligation to return the child refers to the country of origin as such. With this, the parental rights of the complainant under point 1), with whom the complainant under point 2) is to live as per the decisions issued by the Ukrainian courts, are impinged on to the extent that she is, factually at the very least, restricted in her decision as to which place or region in Ukraine she wishes to carry out the return in. The statement, made by the Higher Regional Court, that it is for the complainant under point 1) to decide where to base herself in Ukraine so that she does not have to see the father outside of court proceedings, seems somewhat specious in light of the circumstances of the part of the country the father inhabits being unaffected by the war, but no other information is provided as to which other areas are (supposedly) unaffected by the war.

31 (2) The reasoning for the contested order is not without concerns either, insofar as it does not deal with the assessments of the expert parties and the hearing of the child who is complainant under point 2) in the context of obtaining a sustainable basis for an application of Art. 13 (1) b) Hague Child Abduction Convention that is oriented towards the best interests of the child. It is the case that the Higher Regional Court, with the results of the personal hearing of the child and the mother, the reports from the guardian-ad-litem and Youth Welfare Office, has, in principle, formed the basis for the issuance of a decision which is in favour of the child’s best interests. However, it is by no means apparent that it has taken any particular account of the child’s wishes or the recommendations made by the Youth Welfare Office and guardian-ad-litem in

reaching its decision. The guardian-ad-litem and the Youth Welfare Office each presumed that there would be a severe risk of harm to the complainant under point 2) if he were returned to Ukraine. Although it must be stated that these assessments relate to the events of the war and are potentially lacking in a certain expertise in relation to the particular subject area, it is certainly the case that the complainant under point 2) objects to being returned to the country with reference to the ongoing war in Ukraine and the level of destruction taking place. The Higher Regional Court does not explore to what extent the complainant under point 2) could sustain mental harm as a result of a return. Rather, the Higher Regional Court limits itself to considerations relating to the fact that the parent obliged to carry out the return is to prevent the risk of severe mental harm to the child as a result of the return and points out only that this parent can in any event be reasonably expected to accompany the child to the country of origin. No more in-depth statement was made by the Higher Regional Court as to the specific dangers which would result from a return of the complainant under point 2) to a country in which – as he is aware and is shown in the court records of the hearing of the child – there is a war ongoing. This is most likely not sufficient for Art. 13 (1) b) Hague Child Abduction Convention to be applied in a way which is in keeping with the child's best interests.

32 (3) The reasoning of the Higher Regional Court not to apply the grounds for grave risk exception arising from Art. 13 (1) b) Hague Child Abduction Convention, because not the whole of Ukraine is said to be a war zone and because, therefore, the return does not represent a grave risk of physical harm to the complainant under point 2), is at risk of not sufficiently fulfilling the requirements arising from Art. 8 ECHR and set out in more detail in the precedent of the European Court of Human Rights. According to this, the courts of the States Parties must make clear when interpreting and applying Art. 13 (1) b) Hague Child Abduction Convention, that the guarantees set out in Article 8 ECHR have been complied with and the child's best interests taken account of. This requires a certain level of justification relating to the requirements of the grave risk exception (see ECtHR, judgment issued on 15 June 2021 - 17665/17 -, margin No. 96, 98 et seq.) These requirements under the terms of the Convention must be respected. The factual and guiding role afforded to the precedent of the European Court of Human Rights when interpreting the European Convention on Human Rights also applies beyond the specific individual case being decided on (see only Federal Constitutional Court decision 111, 307 <320>; 148, 296 <351-352 margin No. 129>; consistent case law). The Higher Regional Court, however, only looked at these requirements for justification on a rather superficial level with regard to the war in Ukraine and the nature of the war of aggression being waged by the forces of the Russian Federation. Insofar as it is basing its judgement on the aforementioned Order issued by Thuringia Higher Regional Court (margin No. 7, 30), this can most likely be deemed not to be a sufficient basis, because this decision presumes that the whole of the territory of Ukraine is a war zone and that the requirements set out in Art. 13 (1) b) Hague Child Abduction are fulfilled (see Thuringia Local Court, order dated 4 April 2023 - 1 UF 54/23 -, margin No. 34, 36-37). The Higher Regional Court, in contrast to Thuringia Higher Regional Court in the previously mentioned decision,

does not make use of generally accessible sources to ascertain the level of danger in Ukraine. Because of the requirements for justification required under the terms of the Convention, the Higher Regional Court was not permitted to refer to the burden of proof and presentation being incumbent on the complainant under point 1) (see ECtHR judgment issued on 15 June 2021 - 17665/17 -, margin No. 95, 98 et seq.).

33 4. Further reasoning for the constitutional complaint not being accepted has been dispensed with as per Sec. 93d Subsec. 1 sentence 3 Federal Constitutional Court Act.

34 5. The application for the granting of legal aid and appointment of a lawyer was refused because the legal avenues being pursued did not have any prospect of success for the reasons stated previously (analogous to Sec. 114 Subsec. 1 sentence 1 Code of Civil Procedure (*ZPO*)).

35 This decision cannot be contested.