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Case-law of the European Court of Human Rights
Source: site European Court of Human Rights, LEX 2000 and P.Î.C.C.J.

- *Case of Campbell and Cosans v. United Kingdom*
- *Case of Ignaccolo-Zenide v. Romania*
- *Case of Iosub v. România*
- *Case of Lafargue v. România*
- *Case of Monory v. Romania and Hungary*
- *Case of Pini, Bertani, Manera and Atripaldi v. România*
- *Case of Sylvester v. Austria*
- *Case of Maire v. Portugal*

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REPORT of 25 June 1987

Case of Campbell and Cosans against the United Kingdom. Articles 3 și 2(P2). Disciplinary measures in schools. The amendment of the education law. Measures taken in consequence of the judgments

The Committee of Ministers, under the terms of Article 54 (art. 54) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the convention"),

Having regard to the judgments of the European Court of Human Rights in the case of Campbell and Cosans delivered on 25 February 1982 and 22 March 1983 and transmitted the same days to the Committee of Ministers;

Recalling that the case had its origin in two applications against the United Kingdom lodged with the European Commission of Human Rights under Article 25 (art. 25) of the convention by two United Kingdom citizens, Mrs. Grace Campbell and Mrs. Jane Cosans, complaining that the use of corporal punishment as a disciplinary measure in the school attended by their children constituted treatment contrary to Article 3 (art. 3) of the convention and also failed to respect their right as parents to ensure their sons' education and teaching in conformity with their

philosophical convictions, as guaranteed by the second sentence of Article 2 of Protocol No. 1 (P1 - 2), Mrs. Cosans further contending that her son's suspension from school violated his right to education, protected by the first sentence of the last-mentioned article (P1 - 2);

Recalling that the case had been brought before the Court by the European Commission of Human Rights and by the Government of the United Kingdom;

Whereas in its judgment of 25 February 1982 the Court:

- Held unanimously that no violation of Article 3 (art. 3) of the convention was established;
- Held by six votes to one that there had been, with respect to Mrs. Campbell and Mrs. Cosans, breach of the second sentence of Article 2 of Protocol No. 1 (P1 - 2);
- Held by six votes to one that there had been, as regards Jeffrey Cosans, breach of the first sentence of the last-mentioned article (P1 - 2);
- Held unanimously that the question of the application of Article 50 (art. 50) of the convention was not ready for decision;

Whereas in its judgment of 22 March 1983 the Court unanimously:

- Declared that Mrs. Campbell's claim for just satisfaction was inadmissible in so far as it sought an undertaking from the United Kingdom Government;
- Held that the United Kingdom was to pay:
 - a. to Mrs. Campbell, in respect of legal costs and expenses referable to the proceedings before the Commission and the Court, the sum of nine hundred and forty pounds sterling (940);
 - b. to Mrs. Cosans, in respect of legal costs and expenses as aforesaid, the sum of eight thousand eight hundred and forty-six pounds sterling and sixty pence (8 846,60) less two thousand three hundred French francs (2 300 FF) to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
 - c. to Jeffrey Cosans, in respect of pecuniary and non-pecuniary loss, the sum of three thousand pounds sterling (3 000);
- Rejected the remainder of the applicants' claims;

Having regard to the "Rules concerning the application of Article 54 (art. 54) of the convention";

Having invited the Government of the United Kingdom to inform it of the measures which had been taken in consequence of the judgments, having regard to its obligation under Article 53 (art. 53) of the convention to abide by the judgments;

Whereas, during the examination of this case by the Committee of Ministers, the Government of the United Kingdom informed the Committee of Ministers of the measures taken in consequence of the judgments, which information is summarised in the appendix to this resolution;

Having satisfied itself that the Government of the United Kingdom has paid the applicants the sums provided for in the judgment of the Court of 22 March 1983,

Declares, after taking note of the information supplied by the Government of the United Kingdom, that it has exercised its function under Article 54 (art. 54) of the convention in this case.

Appendix to Resolution DH (87) 9

Information provided by the Government of the United Kingdom during the examination of the case of Campbell and Cosans before the Committee of Ministers

The Education (No. 2) Act 1986 which received the Royal Assent on 7 November 1986, provides, in Sections 47 and 48 for the abolition of corporal punishment in state schools. It is

proposed to bring the provisions of the Act into force on 15 August 1987, so as to take effect from the beginning of the coming school year, this being the earliest practicable date, given the need for those schools which may still have corporal punishment to devise alternative disciplinary policies. This will apply in respect of pupils at schools maintained by local education authorities and certain other schools for which the state provides financial assistance and in respect of pupils at independent schools any of whose fees are paid out of public funds.

The Government of the United Kingdom has paid the applicants the sums provided for in the judgment of the Court of 22 March 1983.

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JUDGMENT of 11 January 2000

Case of Ignaccolo-Zenide v. Romania. Articles 8 and 41. Execution of the judgments. Right to respect for private and family life. Non-pecuniary damage

PUBLISHED IN: THE OFFICIAL GAZETTE OF ROMANIA No. 6 of 8 January 2001

FIRST SECTION

CASE OF IGNACCOLO-ZENIDE v. ROMANIA

(Application No. 31679/96)

In the case of Ignaccolo-Zenide v. Romania,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs. E. PALM, President;

Mr. J. CASADEVALL;

Mr. GAUKUR JORUNDSSON;

Mr. R. TURMEN;

Mrs. W. THOMASSEN;

Mr. R. MARUSTE, judges;

Mrs. A. DICULESCU-ȘOVA, ad hoc judge;

and Mr. M. O'BOYLE, Section Registrar,

Having deliberated in private on 14 September 1999 and 11 January 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the Romanian Government ("the Government") on 27 January 1999, within the three-month period laid down by former Articles 32 paragraph 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (No. 31679/96) against Romania lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by a French national, Mrs. Rita Ignaccolo-Zenide ("the applicant"), on 22 January 1996.

The Government's request referred to former Articles 44 and 48 and to the declaration whereby Romania recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention.

2. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 paragraph 4 thereof read in conjunction with Rules 100 paragraph 1 and 24 paragraph 6 of the Rules of Court*), a panel of the Grand Chamber decided on 31 March 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.

3. In accordance with Rule 52 paragraph 1, the President of the Court, Mr. L. Wildhaber, subsequently assigned the case to the First Section. The Chamber constituted within that Section included ex officio Mr. C. Bîrsan, the judge elected in respect of Romania (Article 27 paragraph 2 of the Convention and Rule 26 paragraph 1 (a)), and Mrs. E. Palm, President of the Section (Rule 26 paragraph 1 (a)). The other members designated by the latter to complete the Chamber were Mr. J. Casadevall, Mr. Gaukur Jorundsson, Mrs. W. Thomassen and Mr. R. Maruste (Rule 26 paragraph 1 (b)).

4. Subsequently Mr. Bîrsan, who had taken part in the Commission's examination of the case, withdrew from sitting in the Chamber (Rule 28). The Government accordingly appointed Mrs. A. Diculescu-Şova to sit as an ad hoc judge (Article 27 paragraph 2 of the Convention and Rule 29 paragraph 1).

5. The applicant's representative filed his memorial on 19 February 1999. After being granted an extension of time, the Agent of the Government filed his memorial on 5 July.

6. On 28 May 1999, in accordance with Rule 61 paragraph 3, the President gave leave to the AIRE Centre and Reunite associations to submit joint written observations on certain aspects of the case. Those observations were received on 1 July 1999.

7. On 28 July 1999 the applicant's representative filed additional observations. On 30 July 1999 the Government submitted their comments on the intervening parties' observations, under Rule 61 paragraph 5.

8. In accordance with the Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 14 September 1999.

There appeared before the Court:

(a) for the Government:

Mr. C.-L. POPESCU, Adviser, Ministry of Justice, Agent;

Mr. M. SELEGEAN, Ministry of Justice,

Mr. T. CORLATEAN, Ministry of Foreign Affairs, Advisers;

(b) for the applicant:

Mr. J. LAGRANGE, of the Nancy Bar, Counsel.

The Court heard addresses by Mr. Lagrange and Mr. Popescu.

Note by the Registry:

*) Entered into force on 1 November 1998.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 7 May 1980 the applicant married D.Z., a Romanian national. The couple had two children, Maud and Adele, who were born in 1981 and 1984 respectively.

10. In a judgment of 20 December 1989 the Bar-le-Duc tribunal de grande instance granted the spouses a divorce and approved the agreement they had concluded to deal with the consequences

of the divorce, whereby parental responsibility was given to the father and the applicant was granted access and staying access.

11. During 1990 D.Z. moved to the United States with his daughters.

12. On 3 September 1990 the applicant lodged a complaint against him for failure to hand over the children to her. She asserted that at the beginning of September D.Z. had breached her right of access as, without informing her, he had kept them in the United States beyond the midway point of the school holidays.

13. On 4 September 1990 the applicant brought urgent proceedings against D.Z. in the Metz tribunal de grande instance, applying for parental responsibility and a residence order in her favour, together with an order prohibiting D.Z. from removing the children from France without her consent.

14. The matrimonial causes judge of the Metz tribunal de grande instance dismissed her application in an interim order dated 11 September 1990.

15. The applicant appealed against that order to the Metz Court of Appeal, which set it aside in a judgment of 28 May 1991. The Court of Appeal gave parental responsibility to both parents, ordered that the children should live with their mother and granted D.Z. access and staying access.

16. D.Z. did not comply with the judgment and did not hand the children over to their mother.

17. On an application by D.Z., who had been living in Texas for over a year, the Harris County Court of the State of Texas set aside the judgment of the Metz Court of Appeal in a judgment of 30 September 1991 and awarded custody of the children to the father. The applicant, who was neither present nor represented before that court, was granted only access. After consulting a psychologist, who found that the children had no distinct memory of their life with their mother before the divorce and were delighted to live with their father and stepmother, the court held that the children were happy and well integrated in Texas, where they were receiving special protection and attention from the authorities.

18. In December 1991 D.Z. moved to California with his two children.

19. In a decision of 24 February 1992 the investigating judge of the Metz tribunal de grande instance committed D.Z. for trial on a charge of failure to hand over a child to the person entitled to its custody, an offence under Article 357 of the French Criminal Code. The applicant joined the proceedings as a civil party.

20. On 18 September 1992 the Metz tribunal de grande instance, having tried D.Z. in absentia, convicted him and sentenced him to a year's imprisonment for failure to hand over the children and issued a warrant for his arrest.

21. The warrant could not be executed as D.Z. was not on French territory.

22. On an unknown date D.Z. lodged an appeal on points of law with the Court of Cassation against the Metz Court of Appeal's judgment of 28 May 1991.

23. In a judgment of 25 November 1992 the Court of Cassation pointed out that the jurisdiction of the tribunals of fact to assess the weight and effect of the evidence was exclusive, dismissed D.Z.'s appeal and sentenced him to pay a civil fine of 10,000 French francs.

24. The applicant, who had started proceedings in the United States for the recognition and execution of the judgment of 28 May 1991, obtained five judgments between 1993 and 1994 from California courts ordering D.Z. to return the children to her. Thus on 10 August 1993, for instance, the Superior Court of the State of California granted authority to execute the judgment of the Metz Court of Appeal and ordered D.Z. to return the children to their mother.

25. In a report of 17 August 1993 an expert in family psychology registered with the California courts, L.S., stated after interviewing the girls that they did not want to go back to live with their mother and were happy with their father and his new wife. While Maud did not seem to have any particular feelings towards her mother, Adele told L.S. that her mother was "ugly and nasty" and did not love them but only wanted to show them off to others and buy them toys.

26. In a judgment of 1 February 1994 the California Court of Appeals held that the Harris County Court in Texas had no jurisdiction to set aside the Metz Court of Appeal's judgment of 28 May 1991. In a judgment of 29 April 1994 the Superior Court of the State of California once again affirmed the judgment of the Metz Court of Appeal, holding that the children should reside with the applicant and that their removal from the State of California without the court's express permission would be illegal.

27. D.Z. did not comply with the California judgments. In March 1994 he left the United States and went to Romania with his children.

28. In July 1994, relying on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"), the applicant applied to the French Ministry of Justice - France's Central Authority for the purposes of that instrument - for the return of her daughters.

29. In November 1994 the United States' Central Authority requested the Romanian Ministry of Justice (Romania's Central Authority) to return the children pursuant to Articles 3 and 5 of the Hague Convention.

30. In December 1994 France's Central Authority requested Romania's Central Authority to return the children pursuant to Articles 3 and 5 of the Hague Convention.

31. Relying on Article 2 of the Hague Convention, the applicant made an urgent application to the Bucharest Court of First Instance for an order requiring D.Z. to comply with the court decisions in which a residence order had been made in her favour and the children's return ordered.

32. The court delivered its judgment on 14 December 1994. It noted, firstly, that the Metz Court of Appeal, in its judgment of 28 May 1991, had ordered that the children should live with their mother and that the California courts had ordered the return of the children. It went on to note that D.Z. had abducted the children in breach of those judgments and that he had been sentenced to a year's imprisonment for failure to hand over a child. It held that the applicant's application satisfied the requirement of urgency, as her right might be irreparably affected in the event of delay. Moreover, the measure sought was a precautionary one, which did not prejudice the merits of the case but was designed to protect the applicant's right, which any delay would have jeopardised. Lastly, a prima facie case, which was a requirement for urgent proceedings to be admissible, had clearly been made out. As to the merits, the court held that the provisions of the Hague Convention were applicable to the case, as that convention had been incorporated into Romanian law by Law No. 100/1992 providing for Romania's accession to that instrument, and in particular, Article 14 of this convention, which enabled the court to rely on foreign court judgments directly without any need for a registration procedure. In a judgment enforceable without notice the court therefore ordered that the children should be returned to the applicant.

33. That judgment could not be executed as D.Z. had hidden the children.

34. On an unknown date in December 1994 D.Z. removed the children from school and took them to an unknown location.

35. D.Z. appealed against the judgment of 14 December 1994. On 9 June 1995 the Bucharest County Court adjourned the case to 30 June 1995 and ordered that the children be heard.

36. On 30 June 1995, in the absence of the representative of the Ministry of Justice, which was intervening, and of that of the District Council of the second district of Bucharest, which was responsible for monitoring and ensuring compliance with the obligations of divorced parents, the court adjourned the case. It also granted an application by D.Z. for a stay of execution of the judgment pending the outcome of the appeal. No reasons were given for the latter decision.

37. On 23 August 1995 the Ministry of Justice asked Bucharest City Council to carry out a social inquiry at D.Z.'s home.

38. On an unspecified date the mayor of Bucharest informed the Ministry of Justice that a social inquiry had been carried out by the District Council of the second district of Bucharest in September 1995. The mayor of that district submitted the findings of the inquiry, signed by him, the town clerk and an inspector. They read as follows:

"The children Maud and Adele ... live with their father and his wife in an eight-room house, and each girl has a room of her own.

Their father looks after them very well, as regards both their physical and their mental welfare, providing the best conditions for their upbringing.

It is evident from conversations with the girls in Romanian - they have a command of the language - that they are intelligent, sociable and at ease and that they lead a normal life, read, write and work hard at school.

There is an atmosphere of harmony and friendship and plenty of affection between the girls, their father and his wife.

The girls do not want to go and live with their mother in France, whom they remember as a cold and indifferent person. They say that they have always found their father understanding, warm and affectionate.

They are very impressed by Romania and the Romanians, among whom they have made many friends. During the holidays they went to the countryside and they felt wonderfully well there.

When asked to say whether or not they wanted to see their mother or go and live with her, they replied categorically "no" and insisted that any decision concerning them should take their wishes into account.

In conclusion, we consider that in Romania the children Maud and Adele have the best conditions for their upbringing."

39. In a decision of 1 September 1995 the Bucharest County Court dismissed D.Z.'s appeal against the judgment of 14 December 1994.

40. D.Z. appealed to the Bucharest Court of Appeal, which in a final judgment of 14 March 1996 dismissed the appeal for lack of grounds.

A. Objection to execution

41. On an unknown date D.Z. lodged an objection to the execution (*contestație la executare*) of the judgment of 14 December 1994. After having taken evidence from the children, who reiterated their wish to stay with their father, the Bucharest Court of First Instance dismissed the objection on 7 April 1995.

42. On an appeal by D.Z. against that decision, the Bucharest County Court affirmed it on 9 February 1996.

B. Application to the Bucharest Court of First Instance for transfer of parental responsibility

43. On 27 October 1995 D.Z. lodged an application with the Bucharest Court of First Instance to be given exclusive parental responsibility. He argued that since 1994 he had been living in Bucharest in a spacious eight-room house which afforded the children exceptional conditions. They did not want to go to live with their mother, who belonged to a sect.

The court, informed by D.Z. that the applicant's address for service was the address of Ștefan Constantin, caused the date of the hearing to be served only on him. It is clear from documents available to the Court that neither at that stage of the proceedings nor later was the applicant informed that she had been summoned to appear before the Bucharest Court of First Instance.

44. On 26 January 1996, at the request of the Bucharest Court of First Instance, the District Council of the second district of Bucharest carried out a social inquiry. Following that inquiry, the mayor of Bucharest informed the court that the two girls were well developed, both physically and psychologically, that they led normal lives, had friends at school and in the neighbourhood and were very attached to their father and his wife, who both looked after them very well and with whom they wished to live.

45. After holding two hearings in the absence of the applicant on 8 and 29 January 1996 and interviewing the children in private on 16 January 1996, the court delivered its judgment on 5 February 1996, likewise in the applicant's absence. Emphasising that the children's interests were paramount and basing its judgment on documents drawn up by the children's teachers attesting to their good performance at school, on a letter from the Ministry of Religious Affairs to the effect that the sect to which the applicant belonged was not recognised in Romania, and on the social inquiry carried out by the Bucharest District Council, the court allowed D.Z.'s application, holding that he was providing the best living conditions and upbringing for the children, whom he had, moreover, brought up on his own since the divorce.

46. On 16 October 1996 the Bucharest County Court set aside that judgment on appeal because of an irregularity in the service of notice on the applicant, and remitted the case to the Court of First Instance. It noted that the applicant lived in France, that she had given Ștefan Constantin special authority to represent her in another set of legal proceedings and that consequently, in the absence of special authority in the case before the court, the summons should have been served at her permanent address in France.

47. D.Z. challenged that decision on the ground that the applicant had given Ștefan Constantin general authority to act for her and that consequently the service of the court documents at his address was valid.

48. In a judgment of 9 April 1997, delivered in the absence of either the applicant or any representative of hers, the Bucharest Court of Appeal allowed the appeal on the ground that the applicant had given Ștefan Constantin general authority to act on her behalf. It set aside the decision of 16 October 1996 and remitted the case to the County Court for reconsideration of the appeal.

49. The case was set down for hearing in the County Court on 23 January 1998. According to the record of the hearing made on that date, the hearing was attended by D.Z., his lawyer and the assistant of Florea Constantin, the lawyer who, according to the court, was supposed to be acting on behalf of the applicant. The Court cannot determine from the documents submitted to it which of Florea and Ștefan Constantin was regarded by the County Court as having been appointed by the applicant.

The assistant pointed out that Florea Constantin was absent and sought an adjournment of the hearing. That application was refused after the court had heard the submissions of counsel for

D.Z. It gave its decision on 30 January 1998, in the absence of the applicant or a representative. Without mentioning the issue of the applicant's representation, the court dismissed the appeal and thus upheld the judgment of 5 February 1996, noting that the children wished to stay with their father, who was affording them the best living conditions.

50. It appears that an appeal against the decision of 30 January 1998 was lodged on behalf of the applicant. It cannot be determined from the documents submitted to the Court whether the applicant herself entered the appeal. However that may have been, the Bucharest Court of Appeal dismissed the appeal for lack of grounds on 28 May 1998. As was apparent from that decision, which the Government did not file with the Registry until 13 September 1999, only D.Z. attended the hearing on 28 May 1998.

C. Application to the Metz tribunal de grande instance for transfer of parental responsibility

51. In an application dated 5 January 1995 D.Z. applied to the family judge of the Metz tribunal de grande instance for an order transferring the children's residence to his address and granting him exclusive exercise of parental responsibility.

52. After many adjournments the tribunal de grande instance delivered a judgment on 22 February 1996. It held firstly that it was unnecessary to take account of the judgment of the Bucharest Court of First Instance of 5 February 1996 because that court had no jurisdiction to deal with the merits of the custody of the children, since the Romanian courts could only deal with an application for the return of the children under the Hague Convention. The tribunal de grande instance then declined to take evidence from the children. It found that since 1991 D.Z. had prevented them from seeing their mother and that he had brought them up to feel hatred for her. In letters of 1 and 3 August 1994, in which they spoke of their mother, the girls had used terms such as "idiot" and "my ex-mother" and had hoped that "her house or her flat [would catch] fire and that she [would be] in it when it happen[ed]", terms which the tribunal de grande instance found particularly shocking coming from children of 10 and 14. The tribunal de grande instance concluded that the intolerance, intransigence and hatred found in those letters adequately demonstrated that the upbringing the children had received and the surroundings in which they lived had deprived them of all judgment.

53. The application for transfer of residence was dismissed by the tribunal de grande instance in the following terms:

"The Family Judge must rule in the interests of the children when determining their place of residence.

The Metz Court of Appeal held in a judgment of 28 May 1991 that it was in the children's interests to live with their mother, in France, in their native Lorraine, both their parents having opted for French nationality.

Since that date the mother has had no further contact with her children because of the father's actions.

Mrs. Ignaccolo filed with the Court the various records of proceedings drawn up in Romania when attempts were made to obtain execution of the decision to return the children, letters from the Romanian Ministry of Justice to the Office for International Judicial Mutual Assistance, from which it appears that Mr. Zenide is hiding the children, has acquired a dog which he has trained to attack anyone who approaches the children, and removed the children from school in December 1994 to avoid their whereabouts being discovered.

He maintained that his behaviour was justified because Mrs. Ignaccolo belonged to a sect and had not looked after the children when they cohabited. However, he did not in any way

substantiate his complaints but did no more than make allegations or produce testimony from persons living in the United States or Romania who did not personally know the children's mother.

The educative abilities of a father who totally denies the image of the mother, who brings the children up to hate their mother and does not even allow them to form their own opinion by affording them the opportunity to meet her and who has not hesitated, in order to evade enforcement of court decisions, to completely uproot the children for a second time in order to settle in a country whose language they are not familiar with are seriously in doubt.

The children's interests in such a situation are intangible and indefinable, regard being had, firstly, to the pressure and conditioning they undergo with their father and, secondly, to the fact that for five years they have been away from their mother, whom they no longer know.

The children's wish to stay and live with their father, as expressed both in their letters and when they were interviewed by the Romanian court, cannot on its own determine their interests since, if it did, that would amount to laying upon children of 10 and 14 the responsibility of deciding where they should live.

Mr. Zenide cannot secure ratification of a factual situation that has arisen from the use of force by merely relying on the passing of time. That being so, his application must quite simply be dismissed ..."

D. Attempts to enforce the decision of 14 December 1994

54. Since 1994 the applicant has gone to Romania eight times in the hope of meeting her children.

55. Several attempts were made to execute the decision of 14 December 1994 but without success.

56. On 22 December 1994 a bailiff went to D.Z.'s home, accompanied by the applicant, her lawyer, a locksmith and two policemen. Only D.Z.'s wife O.Z. and a guard dog were at the house. O.Z., a French national, indicated that she would only allow the bailiff to inspect the house if a representative from the French embassy was present. The applicant and her lawyer therefore went to the French embassy, where the French consul, T., and an interpreter agreed to accompany them to D.Z.'s home.

57. During the applicant's absence, but while the policemen and the bailiff were still on the spot, D.Z. and an uncle of his, S.G., entered the house. When the applicant returned, accompanied by T. and the interpreter, O.Z. allowed those present, with the exception of the applicant, to search the premises. As the dog was very fierce, the search was carried out hastily and the girls were not found. D.Z. remained out of sight during the search.

58. On 23 December 1994 the applicant wrote to the Romanian Minister of Justice to complain of the course of events on 22 December. She requested the Minister to lodge a criminal complaint against O.Z. for failure to comply with a court decision. Asserting that she had no news of her daughters, she also asked him to institute criminal proceedings against D.Z., O.Z. and S.G. for ill-treatment of minors, false imprisonment and, if applicable, homicide.

59. On 27 December 1994 a bailiff, the applicant, her lawyer and two police officers again went to D.Z.'s home. Finding no one there, they spoke to a neighbour, who told them that D.Z. had left with the children on 22 December 1994. The group then went to the home of G.A., an uncle of D.Z.'s, with whom D.Z. and the children sometimes lived. There they found G.A. and the same guard dog. G.A. told them that he had not seen either D.Z. or the children since 20 December 1994. As to the dog, he told the bailiff that D.Z. had bought it to protect his daughters.

60. In a letter of 7 February 1995 the French Ministry of Justice informed the applicant that the Romanian Ministry of Justice had lodged a criminal complaint against D.Z. with the appropriate public prosecutor's office.

61. In a letter dated 5 May 1995 the Romanian Ministry of Justice informed the French Ministry of Justice that numerous approaches had been made to the police to locate the children, but to no avail, as D.Z. had withdrawn the children from school. The letter also stated that the Romanian authorities had lodged a criminal complaint against D.Z. for ill-treatment of minors. Lastly, the Romanian Ministry of Justice acknowledged that D.Z.'s bad faith was obvious and gave an assurance that it would continue to support the applicant in her endeavours.

62. On 10 May 1995 a group composed of the applicant, her lawyer, a representative from the Romanian Ministry of Justice, two bailiffs, three police officers and an official from the French embassy in Bucharest went to D.Z.'s home. The group was able to inspect the house but did not find the children there. During the four-hour discussion which followed, D.Z. stated that the girls were in Romania, but he refused to say more. He nevertheless promised to produce them to the Ministry of Justice on 11 May 1995.

63. A report drawn up by the French embassy in Bucharest on the visit of 10 May 1995 states: "Contrary to what had been announced by Mrs. F. [of the Romanian Ministry of Justice] before this search, D.Z. was not arrested by the police for failure to return the children. In the course of the intervention the public prosecutor's office, with which Mrs. F. was in touch by telephone, reconsidered its position and refused to have D.Z. brought before it. This change of mind was probably due to an intervention by Mr. G., a very influential lawyer, after he had been alerted by his client D.Z. ..."

64. Neither D.Z. nor the children kept the appointment on 11 May 1995.

65. As a consequence, D.Z. received an official request to report to the Ministry of Justice with his children on 15 May 1995, with a view to interviewing the children in the presence of their mother. On 15 May 1995 only Mr. G., D.Z.'s lawyer, went to the Ministry and reiterated his client's refusal to produce the children.

66. On 4 December 1995 a fresh attempt to execute the judgment was made. The applicant, her lawyer and a bailiff went to D.Z.'s home. Only the bailiff and the applicant's lawyer were allowed in by the two policemen from the sixth district who were already on the spot, the applicant being requested to stay outside. According to D.Z. and the policemen, the children were not in the house. The bailiff, however, was not allowed to check those assertions for himself. Shortly afterwards a police inspector whom neither the two police officers nor the bailiff knew arrived and asked D.Z. to produce the children to him on the following day. D.Z. finally accepted a proposal from the applicant's lawyer that he should produce the children at 10.30 a.m. the following day at the bailiffs' office at the Bucharest Court of First Instance.

67. On 5 December 1995 the bailiff, the applicant and her lawyer waited for D.Z. in vain. A report was drawn up on that occasion.

68. In a letter of 10 May 1996 the French Minister of Justice informed his Romanian counterpart of the applicant's fears that the Romanian police were turning a blind eye to D.Z.'s conduct. He therefore asked him to intervene with the Romanian police to ensure that they did everything possible to secure the children's return to their mother.

69. On 29 January 1997 the applicant met her daughters for the first time for seven years. The meeting lasted ten minutes and took place in Bucharest in the staffroom of the children's school, where D.Z. was himself a teacher.

70. The meeting was attended by a bailiff, two senior officials from the Romanian Ministry of Justice, the French Consul-General in Bucharest, two officers from police headquarters, the headmaster and deputy headmaster of the school and the girls' two form teachers. According to the report drawn up by the bailiff on that occasion, the purpose of the meeting was to convince those present of the girls' refusal to return to their mother.

71. When she saw the applicant, Maud tried to run away and threatened to throw herself out of the window if she was compelled to have dealings with her mother. There followed, without the applicant being present, a discussion in which Maud stated that her mother had lied to them and done a great deal of harm. She reiterated her wish to stay with her father and never to see her mother again.

72. As to Adele, she began to cry and shouted to the applicant to go away, saying that she never wanted to see her again. Her form teacher took the initiative of terminating the interview so as not to traumatise the girl. Once the girls had been removed by the form teachers, the applicant said she no longer insisted on execution of the order of 14 December 1994 and asked the headmaster to keep her regularly informed of her daughters' performance at school.

73. In a letter of 31 January 1997 the Romanian Ministry of Justice, Romania's Central Authority, informed the French Ministry of Justice, France's Central Authority, of its decision to order that the children should not be returned. The reason for that decision was the children's obstinate refusal to see their mother again, which had been apparent at the meeting of 29 January 1997.

74. In a letter of 17 June 1997 the Romanian Ministry of Justice sent the applicant the girls' average marks for the school year 1996/97.

75. In a letter of 7 July 1997 to the Romanian Ministry of Justice the applicant complained that the headmaster had not honoured his promise to keep her regularly informed of her daughters' school results and expressed her disappointment at the paucity of the information supplied on 17 June 1997. She said she could not accept such a "farce".

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

76. The relevant provisions of the 1991 Constitution provide:

ART. 11 (2)

"Treaties lawfully ratified by Parliament shall form an integral part of the domestic legal order."

ART. 20

"(1) The constitutional provisions on citizens' rights and liberties shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with the covenants and other treaties to which Romania is a party.

(2) In the event of conflict between the covenants and treaties on fundamental human rights to which Romania is a party and domestic laws, the international instruments shall prevail."

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

77. The relevant provisions of the Hague Convention read as follows:

ART. 7

"Central Authorities shall cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures:

- (a) To discover the whereabouts of a child who has been wrongfully removed or retained;
- (b) To prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- (c) To secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- (d) To exchange, where desirable, information relating to the social background of the child;
- (e) To provide information of a general character as to the law of their State in connection with the application of the Convention;
- (f) To initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- (g) Where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- (h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- (i) To keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

ART. 11

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ..."

C. Family Code

78. Article 108 of the Family Code provides:

"The supervisory authority [autoritatea tutelară] must continuously and effectively supervise the manner in which the parents discharge their obligations concerning the person and property of the child.

The delegates of the supervisory authority shall be entitled to visit children in their homes and to inform themselves by all available means about the manner in which the persons in charge of them look after them, about their health and physical development, their education ...; if need be, they shall give the necessary instructions."

D. Criminal Code

79. Article 307 of the Criminal Code provides:

"It shall be an offence punishable by one to three months' imprisonment or a fine for one of the parents of an under-age child to detain it without the permission of the other parent ... who lawfully has responsibility for the child.

The same penalty shall be incurred by a person to whom parental responsibility has been given by a judicial decision who repeatedly prevents one of the parents from having personal relations with an under-age child on the terms agreed by the parties or laid down by the appropriate body.

Criminal proceedings may only be instituted if a criminal complaint has first been lodged by the victim.

No criminal liability shall be incurred where there has been a reconciliation between the parties."

E. Code of Criminal Procedure

80. The relevant provisions of the Code of Criminal Procedure read as follows:

ART. 279

"As regards the offences in respect of which the law requires a criminal complaint to be lodged beforehand, proceedings may only be instituted after a complaint by the victim.

The complaint shall be lodged:

(b) with the body in charge of criminal investigations or with the public prosecutor, in respect of offences other than those referred to in sub-paragraph (a)."

ART. 284

"Where the law requires a criminal complaint to be lodged beforehand, that complaint must be lodged within two months from the date on which the victim discovered the identity of the person who committed the offence..."

ART. 285

"Where a preliminary criminal complaint is improperly lodged with the public prosecutor's office or the court, it shall be forwarded to the appropriate body. In that event, it shall be regarded as valid if it was lodged with the wrong body within the time allowed by law."

F. Code of Civil Procedure

81. The relevant provisions of the Code of Civil Procedure read as follows:

ART. 67

"The parties may exercise their procedural rights in person or through a representative.

A representative with general authority to act may only represent the person for whom he acts before a court if he has been expressly given the right to do so.

If the person who has given the authority to act has no permanent or temporary home in Romania ..., he shall be presumed to have also given authority to represent him in the courts."

ART. 87

"... 8. Unless otherwise provided in a treaty, international convention or special law, persons who are abroad and whose home address abroad is known shall be summoned to appear by registered mail...

In all cases in which those who are abroad have a known representative in Romania, the latter shall be summoned..."

ART. 107

"Whenever the presiding judge finds that an absent party has not been lawfully summoned, he must adjourn the case, failing which the proceedings will be null and void."

G. Administration of Justice (Amendment) Act (Law No. 142 of 24 July 1997)

82. The relevant provisions of Law No. 142 of 24 July 1997 amending the Administration of Justice Act (Law No. 92/1992) read as follows:

Section 30

"The interests of the State shall be represented by State Counsel organised in departments at each court, under the authority of the Minister of Justice.

The work of State Counsel shall be organised in accordance with the principles of the rule of law, impartiality and hierarchical supervision. ..."

Section 31 (i)

"State Counsel's Office shall have the following duties:

(i) defending the rights and interests of minors and persons deprived of legal capacity."

Section 38

"The Minister of Justice shall supervise all State Counsel through State Counsel inspectors attached to the Supreme Court of Justice and the courts of appeal or through other, delegated State Counsel.

Where he considers it necessary, the Minister of Justice, either of his own motion or at the instance of the National Judiciary Council, effects his supervision through inspectors-general or State Counsel on secondment...

... The Minister of Justice may ask Principal State Counsel at the Supreme Court of Justice for information about the work of State Counsel's offices and may give advice on measures to be taken to combat crime.

The Minister of Justice is empowered to give State Counsel written instructions, either direct or through Principal State Counsel, to institute, in accordance with the law, criminal proceedings for offences that have come to his knowledge; he may also have actions and proceedings brought in the courts that are necessary for the protection of the public interest. ..."

H. Practice in respect of service of summonses

83. In decision no. 87 delivered in 1993 the Supreme Court of Justice again confirmed its settled case-law on summoning persons resident abroad, which requires service to be effected at the foreign home but also at the Romanian home of any representative.

Legal writers, for their part, highlight the compulsory requirement of serving a summons on the person concerned at his foreign home, even where he has a representative in Romania (Viorel Mihai Ciobanu, *Tratat Teoretic și Practic de Procedură Civilă* ("Theoretical and Practical Treatise on Civil Procedure"), vol. II, p. 94, Bucharest, 1997).

84. The courts have consistently held that the legal provisions governing summonses are mandatory as they are designed to ensure compliance with the adversarial principle and due process. If these provisions are not complied with, the decision will be null and void and it will be quashed and the case remitted to the tribunal of fact (Bucharest County Court, Third Civil Division, decision no. 226/1990, *Culegere de Jurisprudență Civilă a Tribunalului Județean București* ("Reports of Criminal Cases in the Bucharest County Court"), No. 155, p. 123, Bucharest, 1992; Supreme Court of Justice, Civil Division, decision no. 779 of 6 April 1993, *Buletinul de Jurisprudență al Curții Supreme de Justiție* ("Supreme Court of Justice Case-Law Bulletin") for 1993, p. 126, Bucharest, 1994).

PROCEEDINGS BEFORE THE COMMISSION

85. Mrs. Ignaccolo-Zenide applied to the Commission on 22 January 1996. She alleged that, contrary to Article 8 of the Convention, which guarantees the right to respect for family life, the Romanian authorities had not taken measures to ensure execution of the court decisions whereby custody of the children was split between herself and her former husband and they were to live with her.

86. The Commission (First Chamber) declared the application (No. 31679/96) admissible on 2 July 1997. In its report of 9 September 1998 (former Article 31 of the Convention)*), it expressed the opinion that there had been a violation of Article 8 (unanimously).

Note by the Registry:

*) The report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

87. In their memorial the Government requested the Court to find that they had discharged the positive obligations on them under Article 8 of the Convention and that there had consequently been no violation of that provision.

88. The applicant asked the Court to hold that there had been a violation of Article 8 of the Convention and to award her just satisfaction under Article 41.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

89. The applicant alleged that the Romanian authorities had not taken sufficient steps to ensure rapid execution of the court decisions and facilitate the return of her daughters to her. The authorities had thus breached Article 8 of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

90. The applicant complained, in particular, of the half-hearted attempts made to execute the order of 14 December 1994, which she described as "pretences", and pointed out that nothing had been done to find her daughters, who had been hidden by their father each time before the bailiff arrived. As to the meeting arranged by the authorities on 29 January 1997, she considered that in view of the circumstances in which it had taken place, it was just another pretence. She also criticised the Romanian authorities for their total inactivity between December 1995 and January 1997.

91. The Government maintained that the authorities in question had taken adequate and effective steps to have the order of 14 December 1994 executed, for example by arranging for the bailiff to be assisted by police officers and by summoning the children's father to the Ministry of Justice. They pointed out that the failure to execute the decision was due firstly to non-compliance by the father, for whose behaviour the Government could not be held responsible, and secondly to the children's refusal to go and live with the applicant, again a matter for which the Government could not be blamed.

92. In the Commission's view, the national authorities had neglected to make the efforts that could normally be expected of them to ensure that the applicant's rights were respected, thereby infringing her right to respect for her family life as guaranteed by Article 8 of the Convention.

93. The Court notes, firstly, that it was common ground that the tie between the applicant and her children was one of family life for the purposes of that provision.

94. That being so, it must be determined whether there has been a failure to respect the applicant's family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see the *Keegan v. Ireland* judgment of 26 May 1994, Series A no. 290, p. 19, paragraph 49).

As to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action (see, for example, the following judgments: *Eriksson v. Sweden*, 22 June 1989, Series A no. 156, pp. 26 - 27, paragraph 71; *Margareta and Roger Andersson v. Sweden*, 25 February 1992, Series A no. 226-A, p. 30, paragraph 91; *Olsson v. Sweden* (no. 2), 27 November 1992, Series A no. 250, pp. 35 - 36, paragraph 90; and *Hokkanen v. Finland*, 23 September 1994, Series A no. 299-A, p. 20, paragraph 55).

However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see the *Hokkanen* judgment cited above, p. 22, paragraph 58).

95. Lastly, the Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). This is all the more so in the instant case as the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children.

96. What is decisive in the present case is therefore whether the national authorities did take all steps to facilitate execution of the order of 14 December 1994 that could reasonably be demanded (*ibid.*).

A. Period to be taken into consideration

97. The Government maintained that their obligation to take steps to facilitate the reunion of the applicant and her children had arisen out of the order made on an urgent application by the Bucharest Court of First Instance on 14 December 1994 and had come to an end with the final decision of 28 May 1998 whereby the Bucharest Court of Appeal gave parental responsibility to D.Z.

98. The applicant disputed the Government's submission and argued that the decision of 28 May 1998 had never been brought to her knowledge and that she was unaware of its content. She also denied having appointed a representative to represent her in the proceedings that led to the aforementioned decision and submitted that as she had not been a party to the proceedings, the decision in question had been given in breach of the adversarial principle and could not be relied on against her. Lastly, she disputed that the Romanian courts were competent to take a decision on the merits in respect of parental responsibility and argued that under Article 16 of the Hague Convention, the French courts had exclusive jurisdiction in the matter. In that connection, she pointed out that D.Z. had brought an action in the Romanian courts to vary the arrangements for

exercising parental responsibility although an identical action was already pending in the French courts, likewise on his initiative.

99. The Court must therefore determine whether the authorities' obligation to take steps to facilitate the execution of the order of 14 December 1994 ceased after the judgment of 28 May 1998 giving parental responsibility to D.Z.

The Court points out that in its judgment of 24 February 1995 in the *McMichael v. the United Kingdom* case (Series A no. 307-B, p. 55, paragraph 87) it held that, although Article 8 contained no explicit procedural requirements, "the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8:

"[W]hat ... has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8." (see the ... *W. v. the United Kingdom* judgment [of 8 July 1987, Series A no. 121-A], pp. 28 and 29, paragraphs 62 and 64)".

The Court notes, firstly, that neither the applicant nor any representative of hers was present at the delivery of the Bucharest Court of Appeal's judgment of 28 May 1998, nor was that judgment served on the applicant. Not until 13 September 1999, when the Government submitted it to the Court, was the applicant able to study the judgment in question. Secondly, the applicant was not present at any of the hearings held during the course of the proceedings which led to the decision in issue. It appears from the documents produced by the Government that, contrary to Article 87 paragraph 8 of the Romanian Code of Civil Procedure, no summons was served on the applicant at her home in France, although her address was known.

As regards the notification served on Ștefan Constantin, the Court notes that it was not a substitute for the notification to the applicant required by Article 87 paragraph 8 in fine of the Code of Civil Procedure and the settled case-law of the domestic courts (see paragraph 83 above).

100. In the light of those circumstances, the Court considers that the proceedings that led to the Bucharest Court of Appeal's decision did not satisfy the procedural requirements of Article 8 of the Convention. Consequently, it cannot consider that the aforementioned decision put an end to the Government's positive obligations under Article 8.

B. Enforcement of the applicant's right to parental responsibility and to the return of the children

101. The Court must therefore determine whether the national authorities took the necessary adequate steps to facilitate the execution of the order of 14 December 1994.

102. In a case of this kind the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the granting of parental responsibility, including execution of the decision delivered at the end of them, require urgent handling as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them. In the instant case this was all the more so as the applicant had brought an urgent application in the courts. The essence of such an application is to protect the individual against any damage that may result merely from the lapse of time.

The Court notes that Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay.

103. In the instant case bailiffs went to D.Z.'s home on four occasions between December 1994 and December 1995. While the initial attempts at execution took place immediately after the order of 14 December 1994, on 22 and 27 December 1994, the same cannot be said of the subsequent attempts: the third visit from the bailiffs did not take place until four months later, on 10 May 1995, and the last visit was on 4 December 1995.

The Court notes that no satisfactory explanation was put forward to justify those delays. Similarly, it has difficulty in discerning the reasons why the Bucharest County Court decided to stay execution of the order between 30 June and 1 September 1995.

104. Furthermore, the Court notes that the Romanian authorities were totally inactive for more than a year, from December 1995 to 29 January 1997, when the only meeting between the applicant and her children took place. No explanation for this was provided by the Government.

105. For the rest, it observes that no other measure was taken by the authorities to create the necessary conditions for executing the order in question, whether coercive measures against D.Z. or steps to prepare for the return of the children.

106. Although coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live.

107. The Government alleged that such measures could only have been taken at the instance of the applicant, but she had not made any application to that end. In particular, she could have brought an action in a civil court, under Article 1075 of the Civil Code, for a fine to be imposed for every day's delay in the execution of the order of 14 December 1994, or she could have lodged a criminal complaint with the appropriate bodies for failure to comply with the parental-responsibility measures.

108. The Court is not required to examine whether the domestic legal order allowed of effective sanctions against D.Z. It is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention. The Court's sole task is to consider whether in the instant case the measures taken by the Romanian authorities were adequate and effective.

109. It notes in this connection that D.Z.'s failure to go to the Ministry of Justice on 11 or 15 May 1995 as requested did not have any consequences for him. Similarly, the Romanian authorities imposed no penalty on him after his refusal to present the children to the bailiffs. Furthermore, they took no initiative to try to ascertain the children's whereabouts.

110. As to the alleged failure to lodge a criminal complaint, which was necessary to trigger proceedings against D.Z., the Court notes that in a letter of 23 December 1994 the applicant indicated to the Minister of Justice that she wished to lodge a criminal complaint against D.Z. and, having set out the grounds for the complaint, asked him to do what was necessary. No action was taken on that letter, however.

The Court observes that under sections 30 and 38 of the Administration of Justice (Amendment) Act, State Counsel's offices are under the authority of the Minister of Justice, who has the power to give instructions to State Counsel. That being so, it regards the Government's

argument that the applicant did not lodge a criminal complaint with the appropriate body as being invalid.

111. Inasmuch as the Government criticised the applicant for not having applied for an order imposing a daily fine, the Court considers that such an action cannot be regarded as effective, since it is an indirect and exceptional method of execution. Furthermore, the applicant's omission could not have absolved the authorities from their obligations in the matter of execution, since it is they who exercise public authority.

112. Nor was any preparatory contact between the social services, the applicant and the children arranged by the authorities, who also failed to seek the assistance of psychologists or child psychiatrists (see, *mutatis mutandis*, the Olsson (no. 2) judgment cited above, pp. 35 - 36, paragraphs 89 - 91). The social services, for instance, despite having sufficient relevant powers under Article 108 of the Family Code, only met the children in connection with the proceedings for transfer of parental responsibility (see paragraphs 38 and 44 above) and did no more than make purely descriptive inquiry reports.

Apart from the one on 29 January 1997, no meeting between the applicant and her children was arranged by the authorities, although the applicant had travelled to Romania on eight occasions in the hope of seeing them. As to the meeting on 29 January 1997, which, the Court stresses, took place one year after the present application was lodged with the Commission and two years after the interim order of 14 December 1994, it was not, in the Court's view, arranged in circumstances such as to encourage a positive development of the relations between the applicant and her children. It took place at the children's school, where their father was a teacher, in the presence of a large group of people consisting of teachers, civil servants, diplomats, policemen, the applicant and her lawyer (see paragraph 70 above). No social workers or psychologists had been involved in the preparation of the meeting. The interview lasted only a few minutes and came to an end when the children, who were clearly not prepared in any way, made as if to flee (see paragraphs 71 - 72 above).

On 31 January 1997, immediately after the failure of that one and only meeting, the Romanian Ministry of Justice, acting as Central Authority, ordered that the children should not be returned, on the ground that they were refusing to go and live with their mother (see paragraph 73 above). Since that date no further attempt has been made to bring the applicant and her children together.

113. The Court notes, lastly, that the authorities did not take the measures to secure the return of the children to the applicant that are set out in Article 7 of the Hague Convention.

Having regard to the foregoing, and notwithstanding the respondent State's margin of appreciation in the matter, the Court concludes that the Romanian authorities failed to make adequate and effective efforts to enforce the applicant's right to the return of her children and thereby breached her right to respect for her family life, as guaranteed by Article 8.

There has consequently been a violation of Article 8.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

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

A. Non-pecuniary damage

115. Mrs. Ignaccolo-Zenide sought 200 000 French francs (FRF) in compensation for the non-pecuniary damage due to the anxiety and distress she had experienced on account of the failure to enforce her parental rights.

116. The Government did not express a view.

117. The Court considers that the applicant must indeed have sustained non-pecuniary damage. Having regard to the circumstances of the case and making its assessment on an equitable basis as required by Article 41, it awards FRF 100 000 under this head.

B. Costs and expenses

118. The applicant also claimed reimbursement of the sum of FRF 86 000, which she broke down as follows:

(a) FRF 46 000 for costs and expenses relating to the domestic proceedings, comprising FRF 6 000 for her lawyer's fees in Romania and FRF 40 000 for the travel and subsistence expenses she had to incur for her eight journeys to Romania;

(b) FRF 40 000 for fees payable to the lawyer who had represented her at Strasbourg, in accordance with a fee agreement concluded on 15 July 1998.

119. The applicant requested the Court to add to that sum "any value-added tax".

120. The Government made no submissions.

121. The Court considers that the expenses relating to the steps taken in Romania and at Strasbourg to prevent or redress the situation it has held to be contrary to Article 8 of the Convention were incurred necessarily; they must accordingly be reimbursed in so far as they do not exceed a reasonable level (see, for example, the *Olsson v. Sweden* (No. 1) judgment of 24 March 1988, Series A no. 130, p. 43, paragraph 104).

The Court awards the applicant for costs and expenses the sum of FRF 86 000, together with any value-added tax that may be chargeable.

C. Default interest

122. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.47% per annum.

FOR THESE REASONS, THE COURT,

1. Holds by six votes to one that there has been a violation of Article 8 of the Convention;

2. Holds by six votes to one that the respondent State is to pay the applicant, within three months, the following sums, together with any value-added tax that may be chargeable:

(a) FRF 100 000 (one hundred thousand French francs) for non-pecuniary damage;

(b) FRF 86 000 (eighty-six thousand French francs) for costs and expenses;

3. Holds unanimously that simple interest at an annual rate of 3.47% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 January 2000.

Elisabeth PALM

President

Michael O'BOYLE

Registrar

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

- (a) partly dissenting opinion of Mr. Maruste;
- (b) partly dissenting opinion of Mrs. Diculescu-Şova.

PARTLY DISSENTING OPINION
of judge Maruste

I understand and can accept the formal approach adopted by the majority but nevertheless I voted against finding a violation of Article 8 for the following reasons.

It seems to me that the solution of this case goes against the very purpose and content of a case like this. It is true that the requirements of family life in terms of the relationship between children and divorced or separated parents are complicated and delicate. It is also true that in practice the Strasbourg institutions have been very cautious in reviewing decisions of national bodies. Nevertheless, I think that not only parents but also children should benefit from Article 8. I would go further: they are and should be the first beneficiaries where the interests of their parents are in conflict and they are mature enough to express clearly their own preferences.

Having regard to the United Nations Convention on the Rights of the Child and in particular Article 4, which requires States Parties to undertake all appropriate measures for the implementation of the rights recognised in the said Convention, the rights and best interests of children should be promoted. To that end, children should have the opportunity to exercise their rights, in particular in family proceedings affecting them. Due weight should also be given to children's views (see the European Convention on the Exercise of Children's Rights, European Treaty Series no. 160). Consequently, where parents' interests conflict, the views and preferences of children must be properly heard and taken into account in proceedings and in the making of decisions concerning them. It is clear from the case file that the children have been living for a long time with their father. From the standpoint of the best interests of the child, it is not of decisive importance under what circumstances that came about or what role in that situation was played by each of their parents or by the public authorities. It is also clear that the children in the instant case expressly preferred to live with their father; and their preference must have been taken into account. I much regret that this circumstance was disregarded both in the domestic and in the foreign judicial proceedings, and enforcing an old judicial decision against the will of those who were the subjects of that decision comes close to doing violence. Secondly, I am of the opinion that the procedural miscarriages and delays that occurred come within the ambit of Article 6 of the Convention rather than of Article 8.

PARTLY DISSENTING OPINION
of judge Diculescu-Şova

(Translation)

Having regard to the circumstances of the case, I disagree with the way in which the Court applied Article 41 of the Convention.

The applicant sought compensation for non-pecuniary damage resulting from the fact that it had been impossible for her to exercise her parental rights for nine years.

Yet it is a fact which cannot be disputed by the applicant that in 1989 she renounced her parental rights (see paragraph 10 of the judgment) for financial and tax reasons.

It is also a fact which she cannot dispute that from 1989 to the end of 1994 there was no family life between her and her daughters, for lack of any relations between them.

As the teenagers' intolerance and rejection of their mother have only increased, it has become very difficult for the Romanian authorities to comply with the letter of Article 8 of the Convention.

The Court considered that the positive obligations provided for in that Article in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

The respondent State, however, has complied with the Hague Convention and has consequently respected the children's interests, thereby ensuring that they are not traumatised.

That being so, and in view, firstly, of the fact that the conflict and the alleged non-pecuniary damage originated in the stance taken up by the mother in 1989, secondly, of the fact that for five years the girls were outside the territory and jurisdiction of the respondent State although the sum sought under the head of non-pecuniary damage also covered that period, and, thirdly, of the respondent State's position in this conflict at this stage, I consider that the finding of a violation of Article 8 of the Convention would have represented sufficient satisfaction for non-pecuniary damage in this case.

As regards the expenses, I judge that the sum of 40,000 French francs awarded by the Court for the fees claimed by the French lawyer who represented the applicant at Strasbourg is excessive in relation to the work done (memorial and oral address), especially as no fee note in which the sum was broken down was produced to the Court.

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In the case of Iosub Caras v. Romania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr R. LIDDELL, *Section Registrar*,

Having deliberated in private on 6 July 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7198/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Israeli and Romanian nationals, Mr Andrei Dorian Iosub

Caras (“the first applicant”) and Iris Iosub Caras (“the second applicant”), on 28 November 2003.

2. The applicants were represented by Mr A. Nantel, a lawyer practising in Hod Hasharon, Israël. The Romanian Government (“the Government”) were represented by their Agents, Mrs R. Rizoiu succeeded by Mrs B. Rămășcanu from the Ministry of Foreign Affairs.

3. On 16 November 2004, the President of the Third Section decided, under Rule 41 of the Rules of the Court to give priority to the application.

4. On 25 May 2005 the Court (the Third Section) decided to communicate the complaints concerning the right to respect for family life, access to a court and the protection of property to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1972 and lives in Petah Tikva, Israel. The second applicant, the daughter of the first applicant, was born in 2001. She currently lives in Romania.

6. The first applicant and his wife, both Romanian and Israeli citizens, have had their permanent residence in Israel since 1997. Their child Iris was born there, in 2001, and acquired Israeli citizenship from birth.

7. In September 2001, the family visited Romania. On 11 October 2001, the date scheduled for the return of the family to Israel, only the first applicant left, while the wife and the second applicant remained in Romania.

Subsequently, the first applicant filed for the return of the child, under the Hague Convention (proceedings described under no. 1 below), while the wife filed for divorce and custody of the child with the Romanian courts (proceedings described under no. 2 below).

1. *Proceedings for the return of the child*

8. On 22 November 2001, upon arrival in Israel, the father filed a request for the return of his child under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction (“the Hague Convention”). The request was submitted through the Israeli Ministry of Justice to the Romanian Ministry of Justice (“the Ministry”) which received it on 26 November 2001. The first applicant claimed that his wife was wrongfully retaining their daughter in Romania, without his consent. He also informed the Ministry that he had heard his wife had filed for divorce with the Romanian courts.

9. On 27 November 2001, he asked the Ministry to apply for a stay in the divorce proceedings (see *infra*, §§ 12-17), for as long as the Hague proceedings were pending.

10. On 11 January 2002, the Ministry, acting as the Central Authority for the purpose of the Hague Convention, instituted proceedings on behalf of the first applicant before the Bucharest District Court of the Sixth Precinct.

Based on the evidence adduced in the case, the district court found that the retention of the child in Romania was illegal, under Article 3 of the Hague Convention. However, it considered that, due to the political situation in Israel, which had worsened constantly since September 2000, there was a great risk that the return would expose the child to physical or psychological harm. Therefore, in a judgment of 15 April 2002, the district court rejected the request for the return of the child under Article 13 (b) of the Convention.

11. On 17 December 2002, the Bucharest County Court allowed the appeal lodged by the Ministry and ordered the return of the child on the grounds that the retention was illegal and that

the mother had not proved the grave risk that the child would be exposed to, if returned to her father.

12. On 21 February 2003, the mother filed an appeal against this decision, allowed by the Bucharest Court of Appeal in a final decision of 5 June 2003.

The court rejected the request for return on the ground that, since the date of the commencement of the Hague proceedings, another Romanian court had ruled on the divorce of the parents and had granted sole custody of the child to the mother, in a final decision of 18 September 2002.

It also considered that, bearing in mind the child's age, namely two years and four months, her return would be against her interests in so far as she had effectively been living in Romania, with her mother, since she was 7 months old. Lastly, on the basis of witness testimony, the court found it proved that the father had consented initially to remain in Romania and to establish there the domicile for the whole family.

Therefore, the court found that the child had legally resided in Romania since 12 September 2001.

2. Divorce and custody proceedings

13. On 10 October 2001, the first applicant's wife filed for divorce, custody of their daughter and maintenance before the Bucharest District Court of the Sixth Precinct.

14. The court found that, except for the first hearing, the first applicant had been correctly summoned at his address in Israel through the Ministry, as required by the Code of Civil Procedure. The first applicant was not present at any of the four hearings held in the case.

15. In the judgment of 18 September 2002, as rectified on 6 November 2002, the district court granted divorce on the grounds of fault by the first applicant, awarded the custody of the child to the mother and ordered the first applicant to pay monthly maintenance of 824 American dollars for his daughter.

16. On 11 December 2002 the district court sent the judgment to the first applicant's address.

17. In the absence of appeals against it, the judgment became final.

18. The first applicant informed the Court that he had not received any of the summonses sent to him or the judgment of 18 September 2002. It appears that he did not appeal at any point against the judgment.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

1. The Hague Convention on the Civil Aspects of International Child Abduction

Article 3

“The removal or the retention of a child is to be considered wrongful where

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. (...)”

Article 7

“Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.”

Article 11

“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.”

Article 12

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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

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

Article 13

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Article 16

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice."

Article 17

"The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention."

Article 18

"The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

2. *Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Elisa Pérez-Vera in 1980*

Paragraph 121 of the Explanatory Report on the 1980 Hague Convention comments on Article 16 of the Hague Convention as follows:

"This article, so as to promote the realisation of the Convention's objectives regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge."

3. *The Code of Civil Procedure*

Article 87 § 8

"Unless otherwise provided in a treaty, international convention or special law, persons who are abroad and whose home address abroad is known shall be summoned to appear by registered mail. Article 114¹ (4) applies accordingly..."

In all cases in which those who are abroad have a known representative in Romania, the latter shall be summoned..."

Article 114¹ § 4

"Persons resident abroad... shall be informed [through the summons] of the obligation to establish residence in Romania for the purpose of service of procedural acts. If they do not comply with this requirement, service shall be effected by registered mail, the proof that the

letter was presented to a Romanian post office being sufficient evidence that the summoning procedure was respected.”

Article 614

“The parties [in divorce proceedings] shall be present before the courts ruling on the merits, except where one of the spouses... resides abroad; in the latter situation the parties may participate through a representative.”

THE LAW

I. PRELIMINARY OBJECTION

19. The Government submitted that the first applicant was not entitled to lodge the application on behalf of the second applicant, as he did not have custody of his daughter.

20. The first applicant contested the argument and recalled that he had lost custody of his child as a result of court proceedings that had contravened the Hague Convention and recalled that prior to the retention of the child, the two parents had had joint custody of their child. Neither of them had superior parental rights over their daughter.

21. The Court recalls that in principle a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a parent who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. In such cases, the standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the child’s behalf, too, in order to protect the child’s interests (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 138, ECHR 2000-VIII, *Iglesias Gil et Urcera Iglesias v. Spain* (dec.), no. 56673/00, 5 March 2002 and *Sylvester v. Austria* (dec.), nos. 36812/97 and 40104/98 (joined), 26 September 2002).

22. This principle applies in the present case, especially as the first applicant also contested the way in which the Romanian courts had decided on the custody rights, which, in his view, had violated his Article 8 rights.

23. In conclusion the Court finds that the first applicant has standing to act on his daughter’s behalf.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicants complained that their right to respect for their family life, as provided in Article 8 § 1 of the Convention, had been violated by the courts that had dealt with both the Hague Convention and the divorce proceedings. In particular, they claimed that the courts had ignored the provisions of Articles 16 and 17 of the Hague Convention. According to these Articles no decision on the merits of the custody matter could have been taken as long as the Hague proceedings were pending and, at the same time, the courts should not have been bound by a custody decision when assessing the request for the return of the child. Furthermore, the authorities had not acted expeditiously in the Hague proceedings.

In so far as the custody and divorce proceedings were concerned, the first applicant contested the fact that he had been deprived of his guardianship and visiting rights and of any possibility to participate in the education of his daughter. The absence of any legal documents attesting to the divorce had made it impossible for him to update the civil register, with the risk of being accused of bigamy should he have tried to remarry. He considered that the amount of alimony had been arbitrarily fixed by the courts. He could not pay it and, therefore, risked being imprisoned for

non respect of his obligations, should he visit Romania. This prohibited him from seeing his daughter and his parents who were still living in Romania.

Lastly, the first applicant complained, on behalf of his daughter, of a violation of the child's Article 8 rights by reason of the fact that the two sets of proceedings that took place before the Romanian courts deprived her of the right to see her father and her paternal grandparents and thus to establish normal relations with them.

Article 8 reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

25. The Court finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

26. The Government considered that the interference with the applicants' family life caused by the Hague proceedings was in accordance with the law, namely Article 13 (b) of the Hague Convention, and recalled that, on the one hand, the right to return of the child was not absolute and that, on the other hand, the domestic courts enjoyed wide margins of appreciation when called upon to interpret and apply the domestic law. They relied on authorities such as *Winterwerp v. the Netherlands* (judgment of 24 October 1979, Series A no. 33, p. 20, § 46), *Iglesias Gil and A.U.I. v. Spain* (no. 56673/00, § 61, ECHR 2003-V) and *De Diego Nafria v. Spain* (no. 46833/99, § 39, 14 March 2002).

Lastly, in so far as the divorce proceedings were concerned, they claimed that according to Romanian law, it was in the child's interest that, in case of divorce, one of the parents was entrusted with the child's custody. However, the other parent, in this case the first applicant, preserved the right to have personal ties with the child and to watch over her education.

They concluded that no breach of Article 8 had occurred in the case.

27. The applicants contested the argument. In particular they considered that the interference with their family life had not been in accordance with the law or necessary in a democratic society. In their view, the authorities had not acted expeditiously for the return of the child and for the stay of the divorce proceedings, violating thus their obligations under Article 7 of the Hague Convention.

28. The Court notes, firstly, that it is common ground that the relationship between the applicants comes within the sphere of family life under Article 8 of the Convention.

29. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (see *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

30. The events under consideration in the instant case, in so far as they give rise to the responsibility of the respondent State, amounted to an interference with the applicants' right to respect for their family life, as it restricted the enjoyment of each other's company.

31. The Court must accordingly determine whether there has been a breach of the applicants' right to respect for their family life.

1. Proceedings for the return of the child under the Hague Convention

32. The Court reiterates that, although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are in addition positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I, *Iglesias Gil and A.U.I.*, cited above, § 48 and *Sylvester v. Austria*, no. 36812/97, 40104/98, § 51, 24 April 2003).

33. The positive obligations imposed on States by Article 8 include taking measures to ensure a parent's reunification with his or her child (see *Ignaccolo-Zenide*, cited above, § 94, and *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII). The Court has already interpreted these positive obligations in the light of the Hague Convention, Article 7 of which contains a non-exhaustive list of measures to be taken by States in order to secure the prompt return of the child, including the institution of judicial proceedings (see *Ignaccolo-Zenide*, cited above, § 95). The same interpretation can be followed in the present case in so far as, at the material time, Romania was party to the Hague Convention (see *Monory*, cited above, § 73).

34. Under Article 7 of the Hague Convention, the authorities have the obligation to take all necessary measures to prevent further harm to the child or prejudice to the interested parties.

However, in the present case, although the authorities had knowledge of the existence of the divorce proceedings before the Romanian courts, they did nothing to defer the judgment until the Hague proceedings would be finalised, contrary to Article 16 of the Hague Convention.

35. It is true that the first applicant did not inform the district court dealing with the divorce and custody proceedings of the Hague proceedings. However, the Court recalls that no law obliges him to do so. Moreover, it was reasonable for him to expect the Ministry to take action for at least the following two reasons: first, the Ministry was deemed to take all measures, including extra judicial, on his behalf, to secure the respect of the Hague Convention and, second, he expressly asked the Ministry to take the necessary steps for a stay of the divorce proceedings (see paragraph 9 above).

On this point, the Court recalls that the Ministry acted both as Central Authority under the Hague Convention and as the authority responsible for the international summons procedure in the divorce proceedings. It therefore had knowledge of and to a certain extent participated in both sets of proceedings. Bearing in mind that the Hague Convention is an international instrument binding on States, it is primarily for the States and not for the private individuals to regulate their behaviour in such a way as to ensure respect for this Convention.

36. By failing to inform the divorce courts of the existence of the Hague proceedings, the authorities, in particular the Ministry, deprived the Hague Convention of its very purpose, that is to prevent a decision on the merits of the right to custody being taken in the State of refuge (see Article 16 of the Hague Convention and the annotation in the Explanatory Report).

37. In this context, the Court expresses its concern that the domestic courts ruling on the Hague proceedings based their judgment, among other arguments, on the fact that the custody rights had been decided on the merits, while the Hague proceedings were still pending.

This was not the sole argument that led the national jurisdiction to refuse to order the return of the child. The other arguments put forward by the courts, namely the child's best interest and the evidence that the applicant had consented initially to remain in Romania, constitute an interpretation of the facts and evidence adduced in the case that does not appear to be arbitrary. With the Government, the Court recalls that it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, *mutatis mutandis*, *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34; and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

38. In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide*, cited above, § 102, and *Nuutinen*, cited above, § 110). Indeed, Article 11 of the Hague Convention imposes a six-week time-limit for the required decision, failing which the decision body may be requested to give reasons for the delay. Despite this recognised urgency, in the instant case a period of more than eighteen months elapsed from the date on which the first applicant lodged his request for the return of the child to the date of the final decision. No satisfactory explanation was put forward by the Government for this delay.

39. It follows that the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation.

40. Based on its conclusions reached at paragraphs 36 and 39 above, and notwithstanding the respondent States' margin of appreciation in the matter, the Court concludes that the Romanian authorities failed to fulfil their positive obligations under Article 8 of the Convention.

There has accordingly been a violation of that Article on this account.

2. *Divorce and custody proceedings*

41. The Court notes from the outset that there is a dispute between the parties as to whether the summoning procedure was respected in the instant case. While the first applicant claimed that none of the summonses had reached him, the Government contended that the documents had been correctly sent to his address in Israel.

However, the Court has already held that whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8:

“[W]hat ... has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as “necessary” within the meaning of Article 8.” (see the ... *W. v. the United Kingdom* judgment [of 8 July 1987, Series A no. 121-A], pp. 28 and 29, §§ 62 and 64, *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 55, § 87 and *Ignaccolo-Zenide*, cited above, § 99).

The facts of the present case indicate that, although he had knowledge, to a certain extent, of the existence of the divorce and custody proceedings, the first applicant did not participate at all in these proceedings and that the judgment of 18 September 2002 was never brought to his

knowledge. Moreover, it seems very unlikely, under Article 114¹ of the Code of Civil Procedure, that it would have been possible for him to obtain a reopening of the case before the national courts.

42. However, the Court does not find it necessary to resolve this matter as it has already found a violation of Article 8 in so far as the respondent State's positive obligations are concerned (see paragraph 40 above).

3. *Other aspects of the Article 8 complaint*

43. Bearing in mind the violation of Article 8 already found in the case (paragraph 40 above), the Court considers that it is not necessary to examine the other aspects of the complaint raised by the applicants, namely: lack of visiting rights and access of the daughter to her paternal grandparents, impossibility for the first applicant to return to Romania and to resolve his marital status in Israel.

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

44. The first applicant complained that his right to a fair trial guaranteed by Article 6 § 1 of the Convention had been infringed by the district court's ruling on the divorce and custody matters, in so far as he had not been legally summoned to participate in the proceedings and the decision adopted had never been served on him.

On behalf of his daughter he also complained that the two sets of proceedings that had taken place before the Romanian courts had deprived her of her right to see her father and her paternal grandparents and thus to establish normal relations with them.

45. Article 6 § 1 reads as follows, in so far as relevant:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

46. The Government contested the arguments. They considered that the first applicant had been legally served with the summonses long before the hearings had taken place. Furthermore, they considered that the fact that he had mentioned the divorce proceedings when he had filed the application under the Hague Convention proved that he had been well aware of their existence. In any event, the absence of a summons would not have prohibited the applicant's active participation in the proceedings.

47. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

48. It further reiterates the difference in the nature of the interests protected by Articles 6 and 8 of the Convention. While Article 6 affords a procedural safeguard, namely the “right to a court” in the determination of one's “civil rights and obligations”, Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see for instance *McMichael*, cited above, p. 57, § 91 and *Sylvester*, cited above, § 76).

49. However, in the instant case, the Court finds that the lack of respect for the applicants' family life resulting from the non-involvement of the first applicant in the divorce and custody proceedings is at the heart of their complaint. Therefore, having regard to its above findings under Article 8 (see paragraph 40 above) and notwithstanding certain misgivings as to the conformity of Article 114¹ of the Code of Civil Procedure with the access to court requirement of Article 6 § 1, the Court considers that it is not necessary to examine the facts also under Article 6 (see *Sylvester*, cited above, § 77).

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

50. Under Article 1 of Protocol No. 1 to the Convention, the first applicant complained of the procedure by which the alimony had been fixed, of the amount of alimony and of the fact that his daughter had never received it. He also contended that the second applicant can no longer receive benefits under the Israeli law.

51. Article 1 of the Protocol No. 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

52. The Government considered that no interference with the first applicant’s right to peaceful enjoyment of his possessions had occurred, in so far as Romanian law established a duty on the parents to provide for their underage children. Lastly, they recalled that the second applicant, through her legal guardian, had not requested the *exequatur* for the enforcement in Israel of the judgment of 18 September 2002.

53. The Court notes that this complaint is linked to the one examined under Article 8 above and must therefore likewise be declared admissible.

54. Having regard to its finding under Article 8 (see paragraph 40 above) and in view of the fact that the alleged violation of Article 1 of Protocol No. 1 is the direct outcome of the proceedings that gave rise to the breach of Article 8 of the Convention, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 1 (see, *mutatis mutandis*, *Sylvester*, cited above, § 77; and *Glod v. Romania*, no. 41134/98, § 46, 16 September 2003).

V. ALLEGED VIOLATION OF ARTICLE 5 OF PROTOCOL NO. 7

55. Lastly, the first applicant complained that the aspects that caused a violation of his Article 8 rights also infringed the equality between spouses requirement of Article 5 of Protocol No. 7 to the Convention, which reads:

“Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.”

56. The Court recalls that it has previously decided that Article 5 of Protocol No. 7 essentially imposes a positive obligation on States to provide a satisfactory legal framework under which spouses have equal rights and obligations concerning such matters as their relations with their children (see *Cernecki v. Austria*, (dec.), no. 31061/96, 11 July 2000).

57. In the present case, the first applicant does not question the legislative framework. His criticism only concerns the way in which the national courts applied it. The Court finds no indication that the law in question violates the equality clause provided for in Article 5 of Protocol No. 7 (see also *Monory v. Romania* (dec.), no. 71099/01, 17 February 2004).

58. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

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

A. Damage

60. The first applicant claimed 1,355,000 euros (EUR) in respect of non-pecuniary damage, divided as follows: EUR 200,000 for violation of his civil status, EUR 500,000 for the impossibility to exercise his parental rights and duties, EUR 195,000 for failure of the Romanian courts to grant him visiting rights, EUR 180,000 for the impossibility for him to preserve normal contact with his parents, EUR 80,000 in damages for the abduction of the child and the need to reconstruct the father-daughter relationship, EUR 200,000 for the anguish, distress, depression, loss of joy of life and faith in the family life.

He further claimed under this head, on behalf of his daughter, EUR 1,364,382, in particular: EUR 300,000 in damages for loss of the Israeli medical care, EUR 9,382 for the monthly allowances that she should have received from the Israeli state, EUR 500,000 for the infringement of the right to enjoy the family life, EUR 195,000 for failure of the Romanian courts to establish visiting rights for her father, EUR 80,000 for the impossibility to see her paternal grandparents, EUR 180,000 of psychological damages, EUR 100,000 for the anguish, distress, depression, loss of joy of life and faith in the family life.

61. The Government considered the amounts unjustified and excessive. In their view, there was no causal link between the alleged violations and the damages claimed. They considered that the finding of a violation could constitute in itself sufficient just satisfaction for any non-pecuniary damage which the applicants may have suffered.

62. The Court sees no reason to doubt that the applicants suffered distress as a result of the impossibility to enjoy each other's company. It considers that, in so far as the first applicant is concerned, sufficient just satisfaction would not be provided solely by a finding of a violation. Having regard to the sums awarded in comparable cases (see *Ignaccolo-Zenide*, §117; *Sylvester*, § 84; *Iglesias Gil and A.U.I.*, § 67, and *Monory*, § 96, cited above, *Sophia Gudrun Hansen v. Turkey*, no. 36141/97, § 115, 23 September 2003, as well as *Maire v. Portugal*, no. 48206/99, § 82, ECHR 2003-VII), and making an assessment on an equitable basis as required by Article 41, the Court awards the first applicant EUR 20,000 under this head.

As to the second applicant, the Court considers that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the violation of her Article 8 rights (see *Sylvester*, cited above, § 80).

Lastly, the Court considers that the remainder of the claims for compensation under Article 41 of the Convention are unsubstantiated.

B. Costs and expenses

63. The first applicant also claimed EUR 141,500 for the costs and expenses incurred before the domestic courts and before the Court, namely EUR 61,500 for the costs incurred with doctors, psychologists, groups of support, EUR 60,000 in legal fees for lawyers and EUR 20,000 for plane tickets, phone calls and telecommunications. On behalf of his daughter, he asked the Court to award a reasonable sum in legal fees for lawyers, leaving the exact amount at the Court's discretion.

64. The Government recalled that the applicants did not justify the expenses.

65. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The applicants submitted the claims without any supporting documents except for a letter of 2 August 2005, in which the representative asked the first applicant to pay EUR 47,000 and 6,750 Swiss francs in respect of the application submitted to the Court. However, no bill was submitted to the Court concerning these sums or any other sum that the first applicant might have paid or have to pay. Therefore the full claim cannot be awarded. Nevertheless, the Court accepts that the first applicant must have incurred some legal costs and expenses. Accordingly, regard being had to the information in its possession, the above criteria and the awards made by the Court in similar cases, it considers it reasonable to make an award of EUR 1,500 in this respect to the first applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the right to respect for family life, access to court and the peaceful enjoyment of possessions admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there is no need to examine the complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1;
4. *Holds*
 - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Roderick LIDDELL
Section Registrar

Boštjan M. ZUPANČIČ
President

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LaFargue v Romania, Application No. 37284/02, 13 July 2006

Facts

The application related to a boy born in May 1995 to a French father and Romanian mother. In November 1997 the parents divorced and the mother was awarded care of the child.

On 16 December 1999 a Bucharest court of first instance awarded the father a right of access comprising a week of contact during the winter holidays and two weeks during the summer vacation. This decision was challenged but was finally confirmed by the Bucharest Court of Appeal on 3 May 2000.

The father made repeated attempts from 2000 - 2004 to have the access order enforced. This involved making repeated visits to the home of the mother with a baliff, or having the mother summoned to appear at the offices of the baliff. On these occasions the mother either did not appear or refused, for a variety of reasons, to produce her son.

In addition the father sought to rely on Article 21 of the Hague Convention. The French Ministry of Justice wrote to its Romanian counterpart, as central authority, in June 2002. In August 2004 the Romanian Ministry of Justice commenced proceedings to put in place a contact regime. On 17 December 2004, due to delays, an application was made for a provisional ruling in the matter. On 24 January 2005 a Bucharest first instance court awarded the father access on alternate weekends. Several unsuccessful attempts were made at enforcing this order during 2005.

The father made several attempts to seek redress through the criminal courts but on each occasion these were rejected, although on one occasion the mother was levied with an administrative fine of €160.

The father filed a petition with the European Court on 25 September 2002.

Ruling

The Court ruled unanimously that Romania had breached Article 8 of the ECHR in failing to take adequate measures to ensure respect for the father's right of access over a period of 6 years. The Court also made an award of compensation to the father under Article 41 of the ECHR.

Cases and authorities referred to

Judges

MM. B.M. Zupancic, président,

J. Hedigan,

L. Caflisch,

C. Bîrsan,

V. Zagrebelsky,

E. Myjer,

David Thór Björgvinsson, juez,

Legal basis for decision

Rights of Access (Art 21)

The Romanian government argued that the Convention was not applicable in the present proceedings given the case related to rights of access and not of custody. Nevertheless it also argued that it had instituted proceedings in May 2004 on behalf of the father and that a provisional access timetable was set down in a judgment of January 2005.

The Court did not specifically consider the role of Article 21 of the Hague Convention in its judgment. However, it did reiterate that the positive obligations imposed on States by virtue of Article 8 of the ECHR had to be interpreted in the light of the Hague Convention.

Procedural Matters

The Court noted that it was only at the start of 2005, after the Romanian authorities had been notified of the present proceedings, that the father had been able to see his son. The Court stated that these meetings showed the State did possess the means to facilitate the father's right of access.

The Court rejected the argument of the State that the father bore responsibility by failing to initiate proceedings to have the mother subjected to a fine for non-compliance. The Court held that such a step would have been inadequate and was in any event an indirect and exceptional method of enforcement. The Court further held that the inaction of the father did not relieve the authorities of their obligations in the matter. It drew attention to the fact the mother had only been subjected to one very limited fine after 6 years of non-compliance with the access order.

The Court ruled that the Romanian authorities had failed to deploy adequate and sufficient measures to ensure respect for the father's right of access over a period of almost six years and as a consequence his right to family life had been breached.

DAMMAGES

The father was awarded €15000 in respect of non-pecuniary damage and €7400 in respect of costs and expenses.

Comments

ECrHR JUDGMENTS

In an increasing body of case law the ECtHR has stressed the positive obligations of Council of Europe Member States arising from Article 8 ECHR in both child abduction and trans-frontier contact cases. This obligation exists independently of the 1980 Hague Convention. The latter instrument has though been held up as an international standard for those CoE Member States which are not yet parties.

The ECtHR has upheld challenges against States deemed not to have taken all necessary steps to facilitate the enforcement of Hague Convention return orders, see:

Ignaccolo-Zenide v. Romania, 25 January 2000 [INCADAT cite: HC/E/ [336](#)];

Sylvester v. Austria, 24 April 2003 [INCADAT cite: HC/E/ 502];
H.N. v. Poland, 13 September 2005 [INCADAT cite: HC/E/ 811];
Karadžic v. Croatia, 15 December 2005 [INCADAT cite: HC/E/ 819];

The positive obligation to act when faced with a child abduction was equally applied in a case involving a non-Member State of the 1980 Hague Convention, see:
Bajrami v. Albania, 12 December 2006 [INCADAT cite: HC/E/ 898];
The ECrtHR has also upheld a challenge were all necessary steps were not taken to protect a parent's right of access in a case where Article 21 of the Hague Convention was invoked, see:
LaFargue v Romania, 13 July 2006 [INCADAT cite: HC/E/ 868];

This positive obligation was equally applied in a case involving a non-Member State of the 1980 Hague Convention, see:

Hansen v Turkey, 23 September 2003 [INCADAT cite: HC/E/ 539];
The ECHR has also upheld challenges against States deemed not to have taken adequate and effective efforts to enforce a parent's right to the return of his / her child, see:
Iglesias GIL & A.U.I v. Spain, 29 April 2003 [INCADAT cite: HC/E/ 542];
Maire v. Portugal, ECHR 26 June 2003 [INCADAT cite: HC/E/ 543];
Monory v Hungary & Romania, 4 May 2005 [INCADAT cite: HC/E/ 802].

In Monory the ECHR also found that there had been a breach of the right to family life in Article 8 ECHR where the Romanian courts had so misinterpreted Article 3 of the Hague Convention that the guarantees of the latter instrument itself were violated.

Karadžic v. Croatia, 15 December 2005 [INCADAT cite: HC/E/ 819];

Iosub Caras v. Romania, 27 July 2006 [INCADAT cite: HC/E/ 867];

In Iosub Caras the Court ruled that Article 8 ECHR had been breached where the Romanian authorities had failed to prevent a decision on the merits of the right to custody being taken in the State of refuge and where the requisite degree of urgency was not used with regard to the Convention proceedings.

Bianchi v Switzerland, 22 June 2006 [INCADAT cite: HC/E/ 869];

In Bianchi also the Court ruled that the requisite degree of urgency was not used with regard to the Convention proceedings.

For academic commentary on the inter-relationship of the 1980 Convention and the ECHR see:

A. Fiorini 'Enlèvements internationaux d'enfants - solutions internationales et responsabilités étatiques ' (2006) 51 McGill LJ 279-326.

A. Schulz 'The 1980 Hague Convention and the European Convention on Human Rights' 2002, Transnational Law & Contemporary Problems, 355.

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CASE OF MONORY v. ROMANIA AND HUNGARY

(Application no. 71099/01)

JUDGMENT

STRASBOURG, 5 April 2005

FINAL 05/07/2005

THE FACTS

1. THE CIRCUMSTANCES OF THE CASE

The applicant was born in 1946 and lives in Nagymaros, Hungary.

In 1994 the applicant married Ms C.M., who is a national of both Romania and Hungary. On 16 February 1995 their daughter V. was born. The parents had joint custody in respect of the child, according to Hungarian law. They lived in Nagymaros.

In December 1998 they visited the wife's family in Romania. The applicant returned to Hungary, while C.M. stayed in Romania with V. and promised to return by 30 January 1999.

On 4 January 1999 C.M. filed for divorce, custody of V. and maintenance before the Satu Mare District Court in Romania. On 17 January 1999, she informed the applicant by telephone that she had decided to live in Romania and would not allow him to take V. to Hungary, despite him still being her husband and having joint custody of their daughter.

In a decision of 8 October 2003, the Satu Mare District Court established the residence of the child with her mother, pending the outcome of the divorce proceedings and required the applicant to pay alimony for his daughter. It also granted the applicant visiting rights to his child. On 19 February 2004 the decision became final.

In the meantime, on 20 January 1999 the applicant submitted a request for the return of his daughter to Hungary under Article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). The request was submitted through the Hungarian Ministry of Justice ("the Hungarian Ministry") to the Romanian Ministry of Justice ("the Romanian Ministry"). He argued that V. was the victim of international kidnapping and had been retained in Romania unlawfully within the meaning of Article 72 § 1 of the Hungarian Code on Family Law.

The Romanian Ministry, acting as the Central Authority responsible for the obligations established by the Hague Convention, instituted proceedings on behalf of the applicant before the Satu Mare District Court. On 8 June 1999 the District Court found no violation of the relevant Articles of the Hague Convention and refused the applicant's request. It considered that the retention of the child was not unlawful in so far as the applicant did not have exclusive custody rights in respect of his daughter and, thus, Article 3 of the Hague Convention was not applicable. The court considered that, in any case, the return of the child would constitute a great risk for her since she was already integrated into the new environment created by the mother during her stay in Romania.

On 5 October 1999 the Hungarian Nagymaros Guardianship Authority, at the applicant's request, declared that C.M. had not instituted the correct administrative proceedings, as required by the Hungarian Code on Family Law, with respect to their daughter's lawful removal to, and retention in Romania. It proposed that the child's residence be established with her father.

On 22 October 1999 the Satu Mare County Court dismissed the applicant's appeal against the decision of 8 June 1999. It recalled that the applicant did not have exclusive custody rights with respect to his daughter. It further considered that the return of the child would deprive the mother of the exercise of her parental rights. Lastly, the county court stated that, as long as the marriage of the parents was still valid, they should have the custody matters resolved by a competent court.

The Romanian Ministry appealed on points of law against this decision, alleging that the county court had incorrectly interpreted the applicable law and the facts of the case. They recalled that, according to the Hague Convention, the court should have applied Hungarian law, by which the retention of the child across the border by her mother without the father's consent was illegal.

On 2 February 2000 the Oradea Court of Appeal dismissed the appeal. It recalled that under Hungarian law the parents exercised parental rights jointly. However, due to the concrete family situation, it was normal that the parent living abroad would have to make more effort in order to exercise these rights. Furthermore, it considered that the child had already become integrated into the new environment. It held therefore that it was in the best interests of the child that she remain with her mother.

In parallel, on 29 April 1999 the applicant filed for the custody of V. before the Vác District Court in Hungary. On 17 May 1999 the applicant requested the court to proceed with the case as a matter of urgency and to hear witnesses.

On 21 May 1999 the District Court, via the Ministry of Justice, notified the defendant in Romania of the action.

On 30 August 1999 the applicant requested, by way of an interim measure, that V. be temporarily placed in his care and that the mother's custody rights be terminated.

On 8 September 1999 the District Court held a hearing, dismissed the applicant's request for interim measures and suspended the case until the proceedings on the Hague Convention issues had been finalized. The District Court noted that the divorce proceedings before the Romanian District Court had also been suspended on an earlier date for the same reason. The applicant appealed against this decision on 16 September 1999.

On 21 September 1999 the Pest County Public Prosecutor's Office interceded in the proceedings for the applicant and endorsed his appeal of 16 September filed against the decision of the Vác District Court. On 30 September 1999 both the applicant's and the public prosecutor's appeals were served on the defendant, who received them on 28 December 1999.

On 24 October 1999 the applicant requested the District Court to grant him, by way of an interim measure, custody of the child, to terminate the mother's parental rights and to proceed with the case urgently.

On 31 January 2000 the applicant renewed his request for custody of the child.

On 29 February 2000 the Pest County Regional Court upheld the dismissal of the applicant's request for interim measures but instructed the District Court to resume its proceedings. This decision, notified via the Hungarian Ministry, reached the defendant on 29 May 2000.

On 19 May 2000 the District Court ordered that a study be made in the homes of both parties in order to ascertain their living conditions.

On 5 January 2001 the District Court joined to the proceedings the applicant's further claim for divorce which had been filed on 3 July 2000. The defendant was notified of this step on 1 March 2001.

On 21 and 30 January 2001 respectively, the applicant submitted further documents and requested the court to summon other witnesses.

The applicant's renewed request of 31 January 2001 for an interim measure was dismissed by the District Court on 15 February 2001.

On 6 June 2001 the District Court held a hearing and heard four witnesses. The defendant failed to appear. The court therefore requested her to submit her observations on the minutes of the hearing within 15 days and ordered her to submit a written response to the applicant's claim for custody of the child.

On 8 June 2001 a lawyer practicing in Hungary informed the court that the defendant had authorized him to represent her in the case. On 2 July 2001 the defendant submitted her counter-claim and motions for evidence.

On 5 July and 30 October 2001 the Hungarian Ministry made an enquiry with its Romanian counterpart as to whether the envisaged study of the defendant's home could be carried out. In their reply of 10 December 2001, the Romanian Ministry stated that the relevant documents had been lost.

A hearing was held on 7 November 2001 at which the District Court heard a witness. The defendant's representative informed the court that the request to carry out a study of the defendant's living conditions had been served on the defendant by mistake. Consequently, the District Court asked the Hungarian Ministry to send the request again to the Satu Mare District Court.

On 8 November 2001 the District Court refused to regulate the applicant's access rights by way of an interim measure.

On 22 and 29 November 2001 the District Court invited the applicant to update the addresses of two of his witnesses who could not be summoned. On the previous day the applicant had appealed against the order of 8 November 2001.

On 19 December 2001 the District Court held a hearing and heard witnesses. It also set a statutory three-month time-limit for the parties to reconsider or confirm the continuation of the divorce proceedings.

Meanwhile, on 14 November 2001 the witness requested by the Vác District Court was heard by the Satu Mare District Court. The minutes were forwarded to the Hungarian Ministry and their translation was completed on 3 December 2001 and 27 February 2002, respectively.

On the applicant's appeal, the Pest County Regional Court quashed the order of 8 November 2001 and requested the District Court to take a new decision.

After the Hungarian Ministry had replaced the lost documents, on 13 February 2002 the Romanian Satu Mare District Court carried out the requested home study. The translation of the resultant documents reached the Hungarian Vác District Court on 21 May 2002.

Meanwhile, on 15 February 2002 the District Court regulated the applicant's access rights. This order was amended by the Regional Court on 2 April 2002.

On 26 March 2002 the Pest County Regional Court rejected the applicant's renewed motion for bias against the Vác District Court and fined him 15,000 Hungarian forints (HUF) for having repeatedly challenged judges without substantiating the requests.

On 27 May 2002 the District Court appointed an expert in child psychology. The expert's examination of V., scheduled for 2 July 2002, was cancelled as the defendant was unwilling to attend because she was unable to meet the travel costs.

On 16 July 2002 the District Court dismissed the applicant's request for an interim measure of 4 July 2002 to order that V. spend her summer vacation in Hungary.

The defendant failed to appear with the child at examinations scheduled for 2 July and 11 November 2002, 13 January and 26 February 2003. On 4 December 2002 the District

Court imposed a fine of HUF 20,000 on the defendant. On 22 January 2003 the court warned the defendant that she was obliged to appear at the examinations. At a later date, the court amended the instructions for the expert and ordered her to assess who was the most suitable parent to raise the child. The defendant was examined on 14 May 2003.

On 26 June 2003 the expert submitted her opinion, finding the mother more suitable to raise V.

On 4 July 2003 the District Court, as an interim measure, regulated the applicant's access rights for the summer of 2003.

The District Court held hearings on 12 September and 29 October 2003. In a judgment delivered on the latter date, the court declared the couple's divorce and divided the matrimonial property. It also granted the defendant custody of V. and ordered the applicant to pay her maintenance of HUF 10,000 per month.

On 5 January 2004 the applicant appealed against the judgment. He withdrew the appeal 15 days later. Consequently, on 21 January 2004 the judgment became final.

2. RELEVANT DOMESTIC LAW

The relevant provisions of the Hungarian Code on Civil Procedure are:

Section 2

"(1) A court shall - in accordance with Section 1 - enforce the parties' right to have their disputes determined in fair proceedings and within a reasonable length of time."

Section 3

"(1) The task of a law court is to endeavour to find out the truth in accordance with the aim of the present Act. The court shall, therefore, see in its line of duties that the parties exercise their rights properly throughout the procedure and meet the obligations they are bound to meet in the lawsuit. The court is obliged to provide the necessary information to a party who has no counsel and to remind him of his rights and obligations. The court shall consider pleas and declarations submitted by a party not by their formal designation but according to their contents.

(2) The court shall see, in its line of duties, that cases be tried thoroughly and within a reasonable length of time."

3. CASE I COMPLAINTS AGAINST ROMANIA

A. Alleged violation of Article 8 of the Convention

The applicant complained that the Romanian authorities, namely courts and administrative bodies, had failed to ensure the swift return of his daughter after his wife had retained the child in Romania without his consent. In so doing, the authorities had failed to secure his parental rights with respect to his daughter, in violation of his right to respect for his family life enshrined in Article 8 of the Convention

The Court recalls that the admissibility decision of 17 February 2004, based on the parties' submissions, limited the examination of the complaint to the proceedings concerning the return of the child to Hungary where the family had a common residence. The applicant also maintained in his observations that his aim was to have his child returned to Hungary. Therefore, reference to the proceedings for access or visiting rights was made only in so far as it was necessary to examine the Government's submissions concerning the other possible avenues which the applicant could have pursued.

In his supplementary observations of 15 April 2004, the applicant broadened the complaint and submitted that the failure of the Romanian authorities to return the child, and thus

to re-establish his parental rights, had violated his access and visiting rights. By dismissing his request for the return of the child, the courts had obliged him to conduct two parallel sets of proceedings for divorce, custody and alimony before both the Romanian and Hungarian courts. This had led to a violation of his right to respect for his family life, in so far as the Romanian courts failed to take into account the proceedings before the Hungarian courts and to regulate visiting rights in his favor.

In this context, he claimed that the visiting rights which were granted to him by the Romanian courts, in the decision of 19 February 2004, might have proved difficult to implement should he have chosen to enforce them.

Subsequently, the applicant submitted, in his written observations on the merits of the complaint raised under this Article, that his visiting rights have been brought to the Court's attention only in so far as they were a direct consequence of the outcome of the Hague proceedings initiated before the Romanian courts. In a letter of 22 September 2004, he had recalled that, in the initial application submitted to the Court, he could not have raised the issue of visiting rights, as at that time the proceedings focused solely on the return of his child.

The Romanian Government pointed out that Article 21 of the Hague Convention creates a separate procedure for the establishment of visiting rights, distinct from proceedings for the return of a child. However, the applicant did not institute the former proceedings. Furthermore, although he was granted visiting rights in the decision of 19 February 2004, the applicant did not prove that he had taken any steps towards their implementation.

The Court agrees with the Government that, as regards visiting rights, the applicant did not exhaust all effective remedies as he did not institute proceedings for access rights under Article 21 of the Hague Convention, nor did he seek the enforcement of the decision granting him visiting rights.

Therefore, the Court will only take this matter into account to the extent that it is relevant to the applicant's complaint under Article 8 of the Convention due to the failure to return the child to Hungary. It will, therefore, limit its examination to the complaint as it was communicated and assessed in the admissibility request of 17 February 2004

Submissions of the parties

a) The applicant

The applicant contended that the decisions of the Romanian courts dealing with his request for the return of his child and the position of the Romanian Ministry throughout the proceedings, initiated at his request under the Hague Convention, constituted an interference with his right to respect for his family life. The authorities made it impossible for him to have his child returned to the family's common residence and to exercise his parental rights according to Hungarian law.

The proceedings, instituted by the applicant on 20 January 1999 and finalised by the courts on 2 February 2000, took too long for a case of this type. Furthermore, had the Romanian courts applied Hungarian law, as required by the Hague Convention, they would have acknowledged his custody rights as outlined in that Convention, and allowed his request for the return of his child. He concluded that there had been flaws and shortcomings in the proceedings that resulted in the violation of his Article 8 rights.

b) The Government

In the Government's view there was no interference with the applicant's right to respect for his family life.

Concerning the period before the final decision of the domestic courts, ruling on the Hague Convention procedure, the State authorities had fulfilled their duties under the Convention, which were limited to lodging the application for the return of the child, as requested by the applicant, representing him before the courts and availing themselves of all possible appeals against the court decisions that were unfavorable to him.

Moreover, the State authorities had no further obligations under the Hague Convention as no court had granted the applicant the right to exercise sole parental responsibility or any other right superior to that of the mother. The present case is therefore distinct from those of *Ignaccolo-Zenide v. Romania* (application no. 31679/96, settled on 25 January 2000), *Maire v. Portugal* (application no. 48206/99, settled on 26 June 2003), where the respective applicants had been granted such rights by means of final court decisions.

As for the proceedings for the return of the child and their outcome, no interference with the applicant's Article 8 rights occurred, in so far as the domestic courts had found that the removal of the child by the applicant's wife had not been "wrongful" within the meaning of the Hague Convention.

The Government contended, therefore, that once the domestic courts had established that the removal of the child had not been unlawful, the applicant's request for the return of his child no longer satisfied the requirements of the Hague Convention and the Romanian authorities had no further obligations towards the applicant.

Should the Court consider that there had been an interference with the applicant's rights, the Government contended that it was in accordance with Article 8 § 2 of the Convention. The domestic courts had rejected the applicant's request in the light of the provisions of the Hague Convention which had been incorporated into the domestic legal system by law no. 100/1992. The courts had adopted their decisions in the best interests of the child, as required by both the Hague and the European Conventions.

The Court's assessment

The Court notes, firstly, that it is common ground that the relationship between the two applicants came within the sphere of family life under Article 8 of the Convention.

The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8.

The events under consideration in the instant case, in so far as they give rise to the responsibility of the respondent State, clearly amounted to an interference with the applicant's right to respect for his family life, as it restricted his enjoyment of his daughter's company.

The Court must accordingly determine whether there has been a breach of the right of the applicant to respect for his family life.

Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are in addition positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition.

The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation.

The positive obligations imposed on States by Article 8 include taking measures to ensure a parent's reunification with his or her child (see *Ignaccolo-Zenide*). The Court has

already interpreted these positive obligations in the light of the Hague Convention, Article 7 of which contains a non-exhaustive list of measures to be taken by States in order to secure the prompt return of the child, including the institution of judicial proceedings (see *Ignaccolo-Zenide*, cited above).

The same interpretation can be followed in the present case in so far as, at the material time, both Romania and Hungary were parties to the Hague Convention.

The Court notes that the Romanian Ministry, acting as the Central Authority for the purpose of the Hague Convention, had chosen to act upon the applicant's request for the return of his child. It transpires that the authorities acted genuinely as if the removal had been unlawful.

The Court recalls that Article 13 of the Hague Convention allows the Central Authority to reject applications which are clearly ill-founded. However, in the present case, the State organs did not reject the applicant's request and, by choosing to act upon it, they must be presumed to have consented to all the obligations arising under that Convention. The Court therefore disagrees with the Government's view that their duties were limited to bringing the law suit for the return of the child before the competent courts.

Moreover, the Court does not share the Government's view that no further obligation lay with the State authorities under the Hague Convention as no court had granted the applicant sole parental responsibility. The Court recalls that joint custody, exercised by parents who are not divorced, is recognized by Article 3 of the Hague Convention. This is supported by the Explanatory Report on the Hague Convention. There is nothing in the Convention excluding married couples. Moreover, the Hague Convention has been interpreted by domestic courts of other European States as being applicable prior to the proceedings on divorce and child custody.

The Hungarian law applicable in the present case granted the parents joint custody. Neither of them, therefore, had superior parental rights over their daughter. As for the residence of the child, Hungarian law imposed an obligation on the mother to obtain the approval of the father or of the Hungarian Guardianship Authority if she wished to change the child's residence. It appears from the file that she did not fulfill this obligation. Moreover, it was not until 3 October 2003 that the child's residence was formally established with her mother in Romania.

The Court acknowledges that the present case is to be distinguished from the cases of *Ignaccolo-Zenide*, and *Maire*, cited above, where the applicants were in possession of a return order which the State authorities had failed to enforce. However, this distinction has little impact on the Article 8 issue in the present case. While in the previous cases the authorities' obligation to act arose from a court order, in the present case their obligation arose by virtue of the applicable Hungarian law and Article 3 of the Hague Convention.

Consequently, the Romanian authorities were bound to comply with all obligations set out in Article 7 of the Hague Convention. They should have taken or caused to be taken all provisional measures, including extra-judicial ones, which could have helped prevent "further harm to the child or prejudice to the interested parties". However, the authorities did not take any such measure but limited themselves to representing the applicant before the Romanian courts. The Court considers therefore that the authorities failed to observe their full obligations under Article 7 of the Hague Convention.

As for the interpretation given by the courts to the Hague Convention in the light of Hungarian law, it is to be noted that all court instances that dealt with the case dismissed from the outset the applicability of Article 3 of the Hague Convention. The courts found that, according to Hungarian law, the applicant did not have the right to have the child returned to

him. However, it appears that the child had been removed from her usual place of residence in breach of the formalities under Hungarian law. Moreover, the applicant had not been successful in his attempt to have the legality of the situation restored, despite his joint custody rights over the child.

In the Court's view, this interpretation by the Romanian courts contradicts the obvious meaning of the Hague Convention which transpires from its very text, its Explanatory Report and the recognized common practice. It deprives Article 3 and, therefore, the Hague Convention itself, of much of its useful effect. Furthermore, as Article 8 of the European Convention was examined in the light of the Hague Convention, the national courts' interpretation of the latter weakened the guarantees of Article 8. In these circumstances, the Court considers that the matter went beyond a simple matter of the interpretation and application of domestic legislation falling within the exclusive competence of the national authorities. The Court concludes that the domestic courts' interpretation of the guarantees of the Hague Convention led to a violation of Article 8 of the European Convention.

Furthermore, in matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide*). Indeed, Article 11 of the Hague Convention imposes a six-week time-limit for the required decision, failing which the decision body may be requested to give reasons for the delay. Despite this recognized urgency, in the instant case a period of more than twelve months elapsed from the date on which the applicant lodged his request for the return of the child to that on which the final decision was taken. However, no satisfactory explanation was put forward by the Government for this delay.

The Court recalls that the interests of the child are paramount in such cases. Thus it may well have been justified, eight months after the removal from Hungary of the applicant's daughter, for the courts to hold that the child had adapted to her new environment and that it was in her best interests to remain in Romania with her mother although, at that time, no final decision had established her residence there. However, where the Court accepts that a change in the relevant facts may exceptionally justify such a decision, it must be satisfied that the change was not brought about by the State's actions or inactions.

Having found that the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation, the Court concludes that the change in the child's circumstances was considerably influenced by the slow reaction of the authorities.

The Court concludes that the Romanian authorities failed to make adequate and effective efforts to assist the applicant in his attempt to have his child returned to him with a view to exercising his parental rights. Consequently, there has been a breach of Article 8 of the Convention.

B. Alleged violation of Article 13 of the Convention

The applicant contended that the Romanian authorities did not provide him with an effective remedy for his Article 8 complaint, in violation of Article 13 of the Convention, which reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government submitted that the applicant was able to bring his claim for the return of his child before the judicial bodies in Romania. The domestic courts ruled on the matter with full jurisdiction and examined the merits of the applicant's arguments. They recalled that Article 13 did not require the successful outcome of the proceedings (see, *mutatis mutandis*, *Lindberg v. Sweden* (dec.), no. 48198/99, 15 January 2004).

However, having regard to its conclusion in paragraph 85 above, the Court does not find it necessary to rule separately on this complaint

C . Alleged violation of article 6 para 1 of the Convention by Hungary

The applicant complained that the length of the proceedings for divorce and child custody in his case exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention, which, in so far as relevant, reads:

The Government contested this view. They maintained that the international aspects of the dispute – namely, the involvement of the Romanian authorities in the examination of the parties' living conditions, the correspondence between the Hungarian and the Romanian authorities and the translation of documents – had inevitably slowed down the proceedings.

The Court observes that the proceedings commenced on 28 April 1999 and ended on 21 January 2004. They thus lasted nearly four *years and nine months. Despite the fact that the examination of interim measures on most occasions involved two court instances, the merits of the case were determined by only one instance. However, as of 29 October 2003, the applicant was solely responsible for the further delay, as he lodged an appeal which he subsequently withdrew.

The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute. Regarding this latter element, special diligence is required in child custody disputes. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the overall length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6.

4. Application of article 41 of the Convention

Article 41 of the Convention provides:

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

A. Damage

1. Non-pecuniary damage in respect of Romania

The applicant claimed non-pecuniary damage of 80,000 euros (EUR) in respect of the violation of his rights by Romania.

The Romanian Government contended that the amount claimed by the applicant was excessive and asked for an assessment on an equitable basis inspired by the case-law of the Court in the matter.

The Court sees no reason to doubt that the applicant suffered distress as a result of the impossibility to have his child returned to him or to exercise his parental rights. It considers that

sufficient just satisfaction would not be provided solely by a finding of a violation. Having regard to the sums awarded in comparable cases, and making an assessment on an equitable basis as required by Article 41, the Court awards the applicant EUR 15,000 under this head.

2. Non-pecuniary damage in respect of Hungary

The applicant claimed EUR 60,000 in respect of non-pecuniary damage from Hungary.

The Hungarian Government found the applicant's claim excessive.

The Court considers that the applicant must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 3,000 under this head.

B. Costs and expenses

The applicant claimed HUF 1,100,000, around EUR 4,550, for costs and expenses incurred during the proceedings before both the Romanian and Hungarian courts, and HUF 424,000 (around EUR 1,750) in attorneys' fees, of which HUF 100,000 (around EUR 415) is owed to his previous legal counselor, Mr. L. Molnar.

Both Governments agreed to reimburse those legal costs and expenses which the applicant could prove he had actually advanced in respect of the proceedings concerning them, in so far as they had been actually and necessarily incurred and were reasonable as to quantum.

According to Rule 60 of the Rules of the Court, which was brought to the applicant's attention in a letter of 23 February 2004, itemized particulars of all claims made, together with the relevant supporting documents, are to be submitted, failing which the Chamber may reject the claim in whole or in part.

The applicant submitted his claims without any supporting documents. Therefore the full claim cannot be awarded. Nevertheless, it accepts that the applicant must have incurred some legal costs and expenses. Accordingly, it considers it reasonable to make an award of EUR 1,000 in this respect (EUR 500 to be paid by each respondent Government).

C. Default interest

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

FOR THESE REASONS, THE COURT

Holds that there has been a violation of Article 8 of the Convention by Romania;

Holds that there has been a violation of Article of the Convention by Hungary;

Holds that the Romanian Government is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, plus EUR 500 (five hundred euros) in costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement, plus any tax that may be chargeable;

Holds that the Hungarian Government is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, plus EUR 500 (five hundred euros) in costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement, plus any tax that may be chargeable;

Holds that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

*
* *

In the case of Pini and Others v. Romania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 25 November 2003 and on 10 February, 6 April and 25 May 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

67. The case originated in two applications (nos. 78028/01 and 78030/01) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Italian nationals, Mr Carlo Pini and Ms Annalisa Bertani (“the first applicant couple”) and Mr Salvatore Manera and Ms Rosalba Atripaldi (“the second applicant couple”), on 10 March and 20 April 2001 respectively.

68. The applicants were represented by Mr S. Papa, a lawyer practising in Reggio Emilia. The Romanian Government (“the Government”) were represented by their Agent, Mr B. Aureescu, then Under-Secretary of State at the Ministry of Foreign Affairs.

69. The applicants complained, in particular, of an infringement of their right to respect for their family life under Article 8 of the Convention on account of the failure to execute decisions of the Braşov County Court concerning their adoption of two Romanian minors, as a result of which they had been deprived of all contact with their children. They further alleged that the Romanian authorities had refused to allow their adopted daughters to leave Romania, in breach of Article 2 § 2 of Protocol No. 4 to the Convention.

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

71. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). These cases were assigned to the newly composed Second Section (Rule 52 § 1).

72. The Chamber decided on 25 June 2002 to give the applications priority (Rule 41) and on 16 September 2003 to join them (Rule 42 § 1).

73. On 2 October 2002 and 7 October 2003 the President gave various third parties leave to intervene in the written and oral procedure (Article 36 § 2 of the Convention and Rule 44 § 2): the Poiana Soarelui Educational Centre in Braşov, represented by Mr N. Mîndrilă; Baroness Nicholson of Winterbourne, a British national and rapporteur for the European Parliament; Mr I.

Țiriac, founder member of the Poiana Soarelui Educational Centre; and Mr V. Arhire, a lawyer practising in Bucharest, representative of the minors Florentina Goroh (“Florentina”) and Mariana Estoica (“Mariana”). The third parties submitted written observations, to which the parties each replied (Rule 44 § 5).

The Italian Government, who were invited on 18 September 2003 to take part in a hearing and/or to submit written comments, did not indicate any intention to exercise that right (Article 36 § 1 of the Convention and Rule 61).

74. A hearing on admissibility and the merits took place in public in the Human Rights Building, Strasbourg, on 25 November 2003 (Rule 59 § 3 and Rule 54 § 3).

There appeared before the Court:

(a) *for the Government*

Mr B. AURESCU, Under-Secretary of State, *Agent*,
Ms R. RIZOIU, Head of the Government Agent's Department,
Mr R. ROTUNDU, *Co-Agents*;

(b) *for the applicants*

Mr S. PAPA, *Counsel*;

(c) *for the third parties*

Mr N. MÎNDRILĂ,
BARONESS NICHOLSON OF WINTERBOURNE,
Mr I. ȚIRIAC,
Mr V. ARHIRE, *Counsel*.

The applicants, Mr Pini, Ms Bertani, Mr Manera and Ms Atripaldi, also attended the hearing.

75. By a decision of 25 November 2003, the Chamber declared the applications partly admissible (Rule 54 § 3). Among other things, it decided to join to the merits the questions raised by the Government as to the applicability of Article 8 of the Convention and to examine of its own motion under Article 6 § 1 of the Convention the issue of the failure to enforce the final adoption orders, the applicants having relied solely on Article 8 of the Convention on that point.

76. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

77. The applicants were born in 1957, 1952, 1951 and 1953 respectively. The first applicant couple live in Reggio Emilia and the second in Mantua. At the time when they lodged their applications they were deemed to be the adoptive parents of Florentina and Mariana, Romanian nationals who were born on 31 March and 17 April 1991 respectively and were living at the Poiana Soarelui Educational Centre in Braşov (“the CEPSB”).

A. Adoption proceedings

1. Adoption of Florentina

78. In a final decision of 17 June 1994 the Iaşi County Court declared that Florentina, who at the time was 3 years old, had been abandoned. Parental rights over her were assigned to a public welfare institution, L.

79. On 6 September 1994, by a decision of the Iaşi Child Welfare Board, the child was placed in the care of the CEPSB.

80. On 15 May 2000, after the entry into force of Government Emergency Ordinance no. 25/1997 on the rules governing adoption (“Ordinance no. 25/1997”), the Romanian government entrusted a private association, C., with the task of finding a family or a person to adopt Florentina. It also instructed the Romanian Committee for Adoption to support the C. association in this process and to draw up a psychosocial report on the child.

81. The first applicant couple informed the C. association of their wish to adopt a Romanian child, and were sent a photograph of Florentina. They met her for the first time on 3 August 2000 at the CEPSB. They were subsequently informed by the C. association of the child's desire to join them and of her love of music.

82. On 30 August 2000 the Braşov Child Welfare Board, on a proposal by the C. association, gave its approval to the adoption of Florentina by the first applicant couple, and on 21 September 2000 it referred the file on their application for adoption to the Braşov County Court, in accordance with section 14(2) of Ordinance no. 25/1997.

83. On 28 September 2000 the court granted the first applicant couple's application. It noted that the Braşov Child Welfare Board had given its approval to the adoption and had confirmed that position before the court. Observing that the child was in the care of the CEPSB, it ordered the Population Registry Office to amend Florentina's birth certificate and to issue her with a new one.

84. The Romanian Committee for Adoption appealed against that decision. On 13 December 2000 the Braşov Court of Appeal dismissed the appeal as being out of time. The decision became final.

85. On 5 February 2001 the Romanian Committee for Adoption attested that Florentina's adoption was in conformity with the domestic legislation in force and with the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, and issued the first applicant couple with a certificate to that effect.

86. On 14 February 2001 the Commission for Intercountry Adoption granted the child leave to enter Italy and to reside there permanently and ordered the notification of that decision, *inter alia*, to the Italian embassy in Bucharest.

87. On an unspecified date the Procurator-General lodged an application to set aside the Braşov County Court's decision and the Braşov Court of Appeal's judgment. On 5 June 2001 the Supreme Court of Justice declared the application inadmissible.

2. Adoption of Mariana

88. On 28 September 2000, following a procedure similar to that outlined in paragraphs 16 to 18 above, the Braşov County Court granted the second applicant couple's application to adopt Mariana. It observed that the child, who had been declared to have been abandoned in a final decision of 22 October 1998, was in the care of the CEPSB, and ordered the Population Registry Office to amend her birth certificate and to issue her with a new one.

89. The Romanian Committee for Adoption appealed against that decision. On 13 December 2000 the Braşov Court of Appeal dismissed the appeal as being out of time. The decision became final.

90. On 28 December 2000 the Romanian Committee for Adoption attested that Mariana's adoption was in conformity with the domestic legislation in force and with the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, and issued the second applicant couple with a certificate to that effect.

B. Attempts to enforce the adoption orders

1. The order for Florentina's adoption

(a) Urgent application for the handing over of the child's birth certificate

91. On an unspecified date the first applicant couple made an urgent application to the Braşov Court of First Instance for an order requiring the CEPSB to hand over the child's birth certificate to them and to give them custody of her. On 24 October 2000 the court allowed their application.

92. The CEPSB appealed against that judgment and applied for a stay of its execution, arguing that the requirements for submitting an urgent application had not been satisfied and that the adoption order was not final and had been made in breach of the relevant statutory provisions.

93. On 7 March 2001 the court dismissed the appeal on the ground that the child's interests and the fact that the adoptive parents lived abroad warranted an urgent examination of the case and that the applicants had therefore complied with the procedural requirements for making an urgent application. The court also found that, according to the documents in the file, the adoption order was final and constituted *res judicata*. It therefore considered that it was no longer possible for the substantive issues relating to the adoption to be re-examined in the context of the urgent proceedings. The court refused the application for a stay of execution on the ground that it was no longer justified in view of its decision to dismiss the appeal.

94. A subsequent appeal by the CEPSB was likewise dismissed by the Braşov Court of Appeal in a final judgment of 7 June 2001.

(b) Proceedings for the enforcement of the decisions in the urgent proceedings

95. The first applicant couple sought to have the decisions of 28 September 2000 and 7 June 2001 enforced by the bailiffs at the Braşov Court of First Instance. On 22 February 2001 the bailiffs notified the CEPSB that it was required to hand over the child's birth certificate to the applicants and to give them custody of her by 2 March 2001. The president of the court subsequently ordered a stay of execution pending a ruling on the CEPSB's objection to enforcement (see paragraphs 30-32 below).

(c) First objection to enforcement

96. On 23 February 2001 the CEPSB lodged an objection to the enforcement of the decision of 28 September 2000, arguing that the operative provisions were unclear and that the adoption order had not complied with the relevant statutory provisions. It also applied for a stay of execution.

97. On 30 March 2001 the court dismissed the objection on the ground that the operative provisions of the decision were clear and did not give rise to any problems regarding execution. As to the second limb of the objection, the court held that the impugned decision constituted *res judicata* and that, accordingly, it was not possible to re-examine the merits of the case in the context of an objection to enforcement. The court also dismissed the CEPSB's application for a stay of execution.

98. The CEPSB appealed to the Braşov County Court, which dismissed the appeal on 2 July 2001 as being ill-founded.

(d) Resumption of the enforcement procedure

99. On 12 June 2001 the first applicant couple asked the bailiffs at the Braşov Court of First Instance to resume the enforcement procedure, having regard in addition to the fact that the Supreme Court of Justice had in the meantime dismissed the Procurator-General's application to set aside.

100. On 13 June 2001 the bailiffs notified the CEPSB that it was required to hand over the child's birth certificate to her adoptive parents and to give them custody of her by 15 June 2001.

101. On 19 July 2001 they again served notice on the CEPSB, requesting it to comply by 8 August 2001.

(e) Second objection to enforcement

102. The CEPSB lodged an objection with the Braşov Court of First Instance to the enforcement of the decisions in the first applicant couple's favour, arguing that the urgent application procedure was intended to deal with temporary situations and that, in the present case, the execution of the decision in the urgent proceedings would, on the contrary, have permanent consequences. The first applicant couple contested those submissions and sought the imposition of a fine for failure to execute a final judgment, together with a penalty for delay.

103. On 8 August 2001 the court allowed the application for a provisional stay of execution until the hearing on 22 August 2001. On that date it extended the stay of execution until the date of the following hearing, scheduled for 11 September 2001. When that day arrived, the court again extended the stay of execution until the hearing on 25 September 2001, on which occasion it dismissed the applications by the CEPSB and the applicants as being ill-founded. The court held that the issue raised by the CEPSB went to the merits of the case, which had already been determined in a judgment that constituted *res judicata*. It also dismissed the first applicant couple's claim on the ground that they had neither proved that the CEPSB had acted in bad faith nor established the extent of the damage they had sustained.

(f) Further resumption of the enforcement procedure

104. On 5 November 2001 the bailiffs notified the CEPSB that it was required to hand over Florentina's birth certificate to the first applicant couple and to give them custody of her as her adoptive parents, warning it that if it did not do so they would resort to coercion.

(g) Third objection to enforcement

105. On an unspecified date the CEPSB lodged an objection to enforcement with the Braşov Court of First Instance, by means of urgent proceedings issued against the first applicant couple, on the ground that an action to set aside the adoption order was pending in the Braşov County Court, as was an application for a review of the order, and that a criminal complaint concerning the adoption process had been lodged. The CEPSB further requested a stay of execution.

106. On 14 December 2001 the court found against the CEPSB, holding that since an ordinary objection to enforcement had already been dismissed, there were no longer any grounds for bringing a similar action under the urgent procedure. As to the merits, it noted that the adoption order and the decision on the applicants' urgent application were final and binding, and that it was immaterial that an application to have them set aside or reviewed was pending.

(h) Application for a stay of execution

107. On an unspecified date the CEPSB applied to the President of the Braşov Court of First Instance for a stay of execution. On 25 January 2002 that application was refused.

(i) Resumption of the enforcement procedure

108. On 30 January 2002 at 2 p.m. the bailiffs at the Braşov Court of First Instance arrived at the CEPSB building, accompanied by police officers. The doorman refused to let them in and locked the door. Half an hour later the director of the CEPSB and his deputy came to the entrance and informed the bailiffs and police officers that the child was not on the centre's premises but had gone on an excursion outside the city. Following a check, Florentina was not found inside the building.

109. The bailiffs pointed out to the director of the CEPSB that he was required to let Florentina join the applicants.

110. On 27 March 2002 the bailiffs ordered the CEPSB to return the child's birth certificate and to allow her to join the applicants within ten days, and informed it that in the event of it refusing they would resort to coercion.

111. On 3 September 2002 at 10.45 a.m. a bailiff, accompanied by the first applicant couple and their lawyer, went to the CEPSB building. In the report drawn up on that occasion the bailiff stated that the centre's doormen had detained them all inside the building. He also indicated that he had telephoned the police station and that, after he had explained the incident to Superintendent D., the latter had replied that he should have called the police before attempting enforcement. The bailiff lastly noted that it was impossible to provide the necessary legal assistance for the procedure and that an objection to the enforcement had been lodged. He stated that the enforcement attempt had ended at 1 p.m.

(j) Urgent application for a stay of execution

112. The CEPSB brought an urgent application in the Braşov Court of First Instance for a stay of execution on the ground that it had lodged a fresh objection to enforcement with the court. On 8 April 2002 the court dismissed the application as being ill-founded.

(k) Fourth objection to enforcement

113. The CEPSB lodged an objection with the Braşov Court of First Instance to the enforcement of the decisions in favour of the first applicant couple, on the ground that an application to have the adoption order set aside was pending in the Braşov Court of Appeal. The Court has not been informed of the outcome of those proceedings.

(l) Urgent application for a stay of execution

114. The CEPSB brought an urgent application in the Braşov Court of First Instance for a stay of execution on the ground that it had lodged a fresh objection to enforcement with the court. In a judgment of 4 September 2002, the court allowed its application and provisionally ordered a stay of execution.

115. It appears from the evidence produced that the stay of execution was ordered for a period lasting until 3 April 2003. A further stay of execution was subsequently ordered, from 23 August to 12 September 2003.

2. *The order for Mariana's adoption*

(a) Urgent application for the handing over of the child's birth certificate

116. On an unspecified date the second applicant couple made an urgent application to the Braşov Court of First Instance for an order requiring the CEPSB to hand over Mariana's birth certificate to them and to give them custody of her. On 24 October 2000 the court allowed their application.

117. That judgment was upheld on appeal by the Braşov County Court in a final judgment delivered on 22 August 2001.

(b) First objection to enforcement

118. On 1 February 2001 the CEPSB lodged an objection with the Braşov Court of First Instance to the enforcement of the decision of 28 September 2000, arguing that the operative provisions were unclear and that the adoption order had not complied with the relevant statutory provisions. It also applied for a stay of execution.

119. The court allowed that application and granted a stay of execution until 30 March 2001, on which date it dismissed the objection on the ground that the operative provisions of the decision were clear and did not give rise to any problems regarding execution. As to the second limb of the objection, the court held that the impugned decision constituted *res judicata* and that, accordingly, it was not possible to re-examine the merits of the case in the context of an objection to enforcement.

120. That judgment was upheld by the Braşov County Court in a final decision delivered on 2 July 2001 on an appeal by the CEPSB.

(c) Enforcement proceedings

121. The second applicant couple sought to have the decisions of 28 September 2000 and 24 October 2000 enforced by the bailiffs at the Braşov Court of First Instance. On 22 February, 13 June and 19 July 2001 the bailiffs notified the CEPSB that it was required to hand over Mariana's birth certificate to the applicants and to give them custody of her.

(d) Second objection to enforcement

122. On 15 June 2001 the CEPSB lodged an objection to the enforcement of the decisions in the second applicant couple's favour. They applied several times to the Braşov Court of First Instance for a stay of execution, arguing that decisions on urgent applications were generally intended to deal with temporary situations but that, in the present case, the execution of the decision in the urgent proceedings would, on the contrary, have permanent consequences. The second applicant couple contested those submissions and sought the imposition of a fine for failure to execute a final judgment, together with a penalty for delay.

123. The court ordered a stay of execution from 15 June to 11 July 2001, from 8 August to 11 September 2001 and from 14 to 25 September 2001, and on the last-mentioned date it dismissed the CEPSB's objection and the second applicant couple's application as being manifestly ill-founded. The court held that the issue raised by the CEPSB went to the merits of the case, which had already been determined in the decision of 28 September 2000 that constituted *res judicata*.

It also dismissed the adoptive parents' claim on the ground that they had neither proved that the CEPSB had acted in bad faith nor established the extent of the damage they had sustained.

(e) Further resumption of the enforcement procedure

124. On 5 November 2001 the bailiffs enjoined the CEPSB to hand over Mariana's birth certificate to the second applicant couple and to give them custody of her, warning it that if it did not do so they would resort to coercion.

(f) Third objection to enforcement

125. On an unspecified date the CEPSB lodged an objection to enforcement with the Braşov Court of First Instance, by means of urgent proceedings issued against the second applicant couple, on the ground that an action to set aside the adoption order was pending in the Braşov County Court, as was an application for a review of the order, and that a criminal complaint concerning the adoption process had been lodged. The CEPSB applied in addition for a stay of execution.

126. On 14 December 2001 the court refused its application, holding that since an ordinary objection to enforcement had already been dismissed, there were no longer any grounds for bringing a further, similar action. As to the merits, it noted that the adoption order and the decision on the second applicant couple's urgent application were final and binding, and that it was immaterial that an application to have them set aside or reviewed was pending.

(g) Further resumption of the enforcement procedure

127. On 25 March 2002 the bailiffs again notified the CEPSB that it was required to hand over the child's birth certificate to the second applicant couple and to give them custody of her.

128. On 30 January and 9 April 2002 a bailiff went to the CEPSB building, accompanied by the second applicant couple and police officers. He noted that Mariana was not on the centre's premises.

(h) Fourth objection to enforcement

129. The CEPSB lodged an objection with the Braşov Court of First Instance to the enforcement of the decisions in the second applicant couple's favour on the ground that an application to have the adoption order set aside was pending in the Braşov Court of Appeal. The Court has not been informed of the outcome of those proceedings.

(i) Urgent application for a stay of execution

130. The CEPSB made an urgent application to the Braşov Court of First Instance for a stay of execution of the adoption order on the ground that it had lodged a fresh objection to enforcement with the court. In a judgment of 4 September 2002, the court allowed its application and provisionally ordered a stay of execution.

131. It appears from the evidence produced that the stay of execution was ordered for a period lasting until 3 April 2003. A further stay of execution was subsequently ordered, from 23 August to 12 September 2003.

C. Actions brought by the CEPSB to set aside the orders for the adoption of Florentina and Mariana

132. On an unspecified date the CEPSB brought two actions in the Braşov County Court against the applicants, the Romanian Committee for Adoption and the Braşov Child Welfare Board, seeking to have the adoption orders for both of the children set aside on the ground that they were not lawful as it had not given its prior consent.

133. On 14 February 2002 the court found against it on the ground that the sole requirement for the children's adoption had been the approval of the Braşov Child Welfare Board, which exercised parental rights over them in accordance with section 8 of Government Emergency Ordinance no. 26/1997 ("Ordinance no. 26/1997"). The court observed that the Board had given its consent to the adoptions and had notified its position to the court dealing with the applicants' applications for adoption.

134. The CEPSB appealed against that decision. At a hearing on 2 April 2002 in the Court of Appeal, the Romanian Committee for Adoption submitted that the opposing party's numerous applications to the domestic courts were an abuse of process in that they were not in the children's best interests, namely integration into a family, but were intended to delay and hinder the adoption process, thereby prolonging the children's current placement in institutional care.

135. The CEPSB requested that the cases be referred to the Constitutional Court for a ruling on the constitutionality of section 7(1)(a) and (2) of Ordinance no. 25/1997, concerning consent to adopt. On 10 December 2002 the Constitutional Court declared the plea of unconstitutionality inadmissible on the ground that it had already given a ruling, on 12 November 2002, on the constitutionality of the statutory provisions cited by the CEPSB.

136. In a final judgment of 11 February 2004, the Ploieşti Court of Appeal declared the CEPSB's appeal against the judgment of 14 February 2002 void for failure to satisfy procedural requirements. It observed that the centre had omitted to state reasons for its appeal within the statutory period and held in that connection that the plea of unconstitutionality which it had raised at the hearing on 2 April 2002 in respect of certain provisions of Ordinance no. 25/1997 did not dispense it from having to satisfy the statutory formal requirements. The judgment of 14 February 2002 accordingly became final and no ordinary appeal lay against it.

D. Criminal complaint alleging false imprisonment of the children

137. On an unspecified date the applicants lodged a criminal complaint with the public prosecutor's office at the Braşov Court of First Instance against the director of the CEPSB, alleging false imprisonment of the children.

138. On 6 August 2001 the public prosecutor's office informed the applicants that it had decided on 9 July 2001 not to institute criminal proceedings in the case.

139. On 18 February 2002 the applicants filed another complaint against the CEPSB management with the public prosecutor's office at the Braşov County Court, levelling accusations of, among other things, false imprisonment of their adopted daughters, in breach of Article 189 of the Criminal Code. They also expressed their disagreement with the decision of 9 July 2001 not to institute criminal proceedings.

140. A report drawn up by the Braşov police on 15 July 2002 stated that in connection with the investigation opened following the applicants' criminal complaint, police officers had visited the

CEPSB, where they had interviewed Florentina and the director. It was noted in the report that the child, who was more than 10 years old on the date of the interview, had expressed the wish to remain in the centre and had refused to join the family of her adoptive parents, whom she had never met.

141. On 28 November 2002 the public prosecutor's office at the Braşov County Court discontinued the proceedings against the director of the CEPSB.

E. Actions brought by the children to have the adoption orders revoked

1. Action brought by Florentina

142. On 4 November 2002 Florentina, represented by counsel and by S.G., director of the CEPSB, as her guardian, brought an action in the Braşov County Court against the first applicant couple, the Romanian Committee for Adoption and the Braşov Child Welfare Board, seeking to have the order for her adoption revoked and relying on section 22 of Ordinance no. 25/1997. In the alternative, she sought 3 billion Romanian lei for non-pecuniary damage if the adoption order was not revoked. Submitting that she had never met the first applicant couple – her adoptive parents – either before or after the date on which the adoption order had been made, she stated that she had seen them only once, on 3 September 2002, when they had come to try to take her away from the CEPSB against her will, accompanied by their lawyer and the bailiff.

143. In a judgment of 9 June 2003, the Prahova County Court, to which the case had been referred by the Supreme Court of Justice, dismissed Florentina's action as being ill-founded. On the basis of the written evidence submitted by the parties, the court considered that it was in the claimant's interests for the adoption order not to be revoked. It noted that she had not in any way established, through her guardian, that her adoptive parents had shown a lack of interest in her; on the contrary, it appeared from the evidence that they had taken numerous steps for her to be able to join them in Italy. The court accordingly rejected the statements by C.V. and D.M., who had given evidence in support of the child in their respective capacities as her “substitute” “mother” and “aunt” at the CEPSB.

144. The court further noted that the adoption order had satisfied the relevant statutory requirements and pointed out that the Braşov Child Welfare Board, which, under section 8 of Ordinance no. 25/1997, had exercised parental rights on the date on which the application for adoption had been lodged with the court, had found the adoption to be in the child's interests and had given its approval.

145. That judgment was upheld on an appeal by the claimant in a final judgment delivered by the Ploieşti Court of Appeal on 22 September 2003 after a public hearing which Florentina had attended, represented by counsel and by her guardian.

146. In an unappealable decision of 16 December 2003, the Ploieşti Court of Appeal dismissed an application by Florentina to set aside its final judgment of 22 September 2003.

2. Action brought by Mariana

147. On 4 September 2002 Mariana, relying on section 22 of Ordinance no. 25/1997, brought an action in the Braşov County Court against the second applicant couple, the Romanian Committee for Adoption and the Braşov Child Welfare Board, seeking to have the order for her adoption revoked.

148. At the hearing on 31 October 2003, Mariana stated in the presence of her guardian that she did not know her adoptive parents and did not wish to move to a different country as she was satisfied with her life at the CEPSB, where the conditions were good.

149. In a judgment of 31 October 2003, the court allowed her application, relying in particular on the statements by her “mothers” and “aunts” at the CEPSB, who confirmed that she had been residing there since 1994 or 1995 and was being provided with a sound education and good living conditions. Noting that there was no evidence of the emotional ties that should have formed between the adoptive parents and the child after the final decision of 28 September 2000, the court revoked the order for Mariana's adoption by the second applicant couple and decided that the child should revert to the name she had used before 28 September 2000.

150. Although an appeal lay against that judgment, the defendants did not avail themselves of that possibility, and the judgment thus became final.

F. Other steps, complaints and petitions by the applicants to secure the execution of the adoption orders

151. On 27 February 2001 the C. association requested the Braşov Child Welfare Board to revoke its decision to place the children in the care of the CEPSB. On 2 March 2001 the Board informed it that as a result of the final orders of 28 September 2000 for the adoption of the children by the applicants, the decision on their placement had been implicitly revoked and that any such request would be superfluous.

152. On 16 July 2001 the Department for Child Welfare and Adoption, in reply to a request from the applicants, informed them that it was not empowered to take the necessary steps for the children to be returned to them. It indicated that it had ceased to have any powers in the matter on the date on which the certificate attesting that the adoption order conformed to the relevant national and international rules had been issued.

153. On 27 August 2001 the applicants lodged a complaint with the Senate committee responsible for examining administrative abuses, on account of the Romanian authorities' failure to execute final decisions.

154. The applicants sought assistance on 6 September 2001 from the Italian embassy in Bucharest and on 12 September 2001 from the Commission for Intercountry Adoption.

155. On 13 September 2001 they lodged a petition with the President of Romania, the Prime Minister and the Minister of Justice.

156. On 23 February, 5 March, 19 April, 6 August, 12 September and 15 November 2001 they complained to the Ministry of Justice about the situation resulting from the failure to execute the adoption orders.

157. On 27 October 2000 and on 19 February, 15 April and 5 June 2001 they travelled to Romania in the hope of seeing their adopted daughters, but to no avail.

158. They regularly sent the girls letters in Romanian and presents, encouraging them to write back in Romanian as they had learnt the language while waiting to see them again, and telling them that their greatest wish was to have them by their side to give them love and affection.

G. The CEPSB and the children's current circumstances

159. It appears from the observations submitted by the parties that the CEPSB, where the children are resident, is a private institution licensed by the Braşov Child Welfare Board and entrusted with the tasks of providing a home for orphans or abandoned children, taking care of them and giving them an education.

160. Reports by the national authority responsible for monitoring the activities of welfare institutions attest to the following: the material and sanitary conditions at the CEPSB are good; medical assistance is provided there in the form of regular check-ups by doctors and permanent supervision by the medical staff; the centre runs special programmes including educational, sports and recreational activities for the children in its care; the children attend schools in the area around the centre and are integrated into the State education system; children at the centre demonstrating particular sporting and artistic abilities are encouraged to develop them; numerous practical activities are arranged; the centre is structured into groups of seven or eight children who are closely supervised by employees assigned to act as “substitute parents”; and the centre employs a full-time psychologist.

161. On 7 September 2000 and 4 February 2002 a CEPSB employee who worked at the centre's bakery was convicted by the Braşov Court of First Instance and given prison sentences for sexually abusing children in the CEPSB's care aged 9, 11 and 12. Florentina and Mariana were not involved.

162. A number of articles in the Braşov local newspaper *M.* reported that after her visit to the CEPSB on 9 January 2001, Baroness Nicholson of Winterbourne, rapporteur for the European Parliament, had expressed the view that children in the centre's care should not travel abroad to join their adoptive families because the CEPSB had formed a genuine family in which the children received a good upbringing and education. The articles also reported that Mr Ioan Ţiriac, the CEPSB's founder, had stated that none of the children would be leaving the centre as they had all become members of his family and that it was time to stop “exporting” Romanian children.

163. It appears from the evidence produced by the parties that Florentina and Mariana regularly go to school, visit their close acquaintances and travel abroad on trips organised by the CEPSB. In particular, Florentina is currently attending the College of the Arts, where she is taking violin and piano lessons, while Mariana is being encouraged by the CEPSB staff to develop her skills in dance and sport.

164. Photocopies of Florentina's passport reveal that she went on a trip to Hungary and Austria in July 2003.

165. A video recording submitted by the Government and produced with the assistance of a psychologist at the centre where the children are living indicates that they have not received any detailed practical information about the ongoing proceedings for their adoption or about the identity of their adoptive parents. It does not appear from the recording that they have been prepared for the possibility of leaving the CEPSB and joining the applicants' families. During the recording Florentina, in particular, expressed her desire to be part of a traditional family, but was also hesitant as to her adoption by the applicants, which she said that she had initially wanted. It is uncertain whether, before the applicants' visit to the centre in September 2002, the children received the letters which they had been writing to them in Romanian for several years.

It appears from the recording that the girls do not currently wish to travel to Italy to join the applicants, whom they know only vaguely, but would prefer to remain at the CEPSB, where they seem to have established social and emotional ties with the other children and with the “substitute” “mothers” and “aunts”.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant international law and practice

166. The following provisions and aspects of international law and practice are relevant to the present case.

1. The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, ratified by Romania on 18 October 1994

Article 4

“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- (a) have established that the child is adoptable;
- (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- (c) have ensured that
 - 1. the persons, institutions and authorities whose consent is necessary for adoption have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
 - 2. such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
 - 3. the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
 - 4. the consent of the mother, where required, has been given only after the birth of the child; and
- (d) have ensured, having regard to the age and degree of maturity of the child, that
 - 1. he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
 - 2. consideration has been given to the child's wishes and opinions,
 - 3. the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
 - 4. such consent has not been induced by payment or compensation of any kind.”

Article 9

“Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

...

- (b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- (c) promote the development of adoption counselling and post-adoption services in their States;
- ...”

Article 10

“Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.”

Article 17

“Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

- (a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- (b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- (c) the Central Authorities of both States have agreed that the adoption may proceed; and
- (d) it has been determined ... that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.”

Article 18

“The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.”

Article 19

“1. The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.

2. The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the ... adoptive parents.

...”

2. United Nations Convention of 20 November 1989 on the Rights of the Child, ratified by Romania on 28 September 1990

Article 21

“States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognise that inter-country adoption may be considered as an alternative means of childcare, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

...”

3. European Convention on the Adoption of Children, opened for signature in Strasbourg on 24 April 1967 and ratified by Romania on 18 May 1993

Article 4

“An adoption shall be valid only if it is granted by a judicial or administrative authority (hereinafter referred to as the 'competent authority').”

Article 5

“1. ... an adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:

(a) the consent of the mother and, where the child is legitimate, the father; or if there is neither father nor mother to consent, the consent of any person or body who may be entitled in their place to exercise their parental rights in that respect;

(b) the consent of the spouse of the adopter.

2. The competent authority shall not:

(a) dispense with the consent of any person mentioned in paragraph 1 of this Article, or

(b) overrule the refusal to consent of any person or body mentioned in the said paragraph 1, save on exceptional grounds determined by law.

...”

Article 10

“1. Adoption confers on the adopter in respect of the adopted person the rights and obligations of every kind that a father or mother has in respect of a child born in lawful wedlock.

Adoption confers on the adopted person in respect of the adopter the rights and obligations of every kind that a child born in lawful wedlock has in respect of his father or mother.

2. When the rights and obligations referred to in paragraph 1 of this Article are created, any rights and obligations of the same kind existing between the adopted person and his father or mother or any other person or body shall cease to exist. ...”

4. Report of 24 July 2001 to the European Parliament on Romania's application for membership of the European Union

167. In her report to the European Parliament, Baroness Nicholson of Winterbourne, noting with satisfaction the progress made by Romania in consolidating the rule of law and respect for human rights, emphasised in her capacity as rapporteur that the situation of children in Romania required further improvements. She noted that the fate of children in institutions remained a major cause for concern and a problem in terms of fundamental rights, with an impact on the accession procedure.

B. Relevant domestic law and practice

168. The following provisions and aspects of domestic law and practice are relevant to the present case.

1. Government Emergency Ordinance no. 25 of 9 June 1997 on the rules governing adoption (published in the Official Gazette on 12 June 1997), approved by Law no. 87 of 25 April 1998

Section 1

“(1) Adoption is a special measure for the protection of the child's interests, establishing a parental relationship between the adopter and the adopted person and family ties between the child and the members of the adopter's family.

...

(3) An adoption order shall take effect on the date when a judicial decision [granting the application for adoption] becomes irrevocable.”

Section 7

“(1) The following shall be required for an application for adoption to be granted: (a) the consent of the adopted person's parents or, as appropriate, parent ...; (b) the approval of the Child Welfare Board for the child's place of residence; (c) the consent of the child if he or she is ten or more years of age; (d) the consent of the person or family adopting the child.

(2) If ... the child has been declared to have been abandoned in a final court decision, the consent referred to in section 7(1)(a) shall not be necessary.”

Section 18

“(1) The court shall decide on the application for adoption in private, as a panel of two judges ...

(2) The following shall be summoned to attend the hearing: the Child Welfare Board which approved the adoption, representing the child; the person or family wishing to adopt; and the Romanian Committee for Adoption. State Counsel's attendance shall be compulsory. ...

(3) The court may examine any evidence admitted by law.

(4) The consent of the child, if he or she is aged ten years or more, shall be obtained in court.”

Section 21

“The child shall acquire the surname of the person who adopts him or her. ... Pursuant to an irrevocable decision by the court that makes the adoption order, the relevant registry office shall draw up a new birth certificate for the child, on which the adoptive parents shall be entered as the biological parents. The previous birth certificate shall be retained, with a marginal note referring to the issuing of the new document.”

Section 22

“(1) An adoption order may be set aside or revoked in accordance with the law.

(2) An adoption order may be revoked at the request of the child, if he or she is aged ten years or more, or of the Child Welfare Board for the child's place of residence, if revocation is in the child's best interests.

(3) The court [revoking an adoption order] shall also rule on the surname which the child is to take after the adoption order has been revoked.”

2. Government Emergency Ordinance no. 26 of 9 June 1997 on the protection of children in difficulty (published in the Official Gazette on 12 June 1997)

Section 7

“In order to ensure the best interests of a child in difficulty, the Child Welfare Board may order:

...

(e) the placement of the child in the care of a specialist public welfare institution or a licensed private institution.”

Section 8

“If the child has been declared to have been abandoned in a final judicial decision ... parental rights shall be exercised by the county council, through the Child Welfare Board.”

3. Government Decision no. 502 of 12 September 1997 on the organisation and functioning of the Romanian Committee for Adoption

Paragraph 1

“(1) The Romanian Committee for Adoption shall be structured and shall act as a specialist body under the authority of the Government with the purpose of supervising and supporting activities

for the protection of children's rights through adoption and ensuring international cooperation in this field.

(2) The Romanian Committee for Adoption shall be the central Romanian authority responsible for assuming the obligations laid down in the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption ...”

4. Government Decision no. 770 of 3 July 2003 on the organisation and functioning of the National Authority for Child Protection and Adoption

Paragraph 1

“The National Authority for Child Protection shall act as a specialist body of the central Government, with legal personality and under the authority of the Ministry of Labour, Social Solidarity and Family Affairs.”

Paragraph 7

“The Authority shall have the following duties:

...

(f) proposing that the relevant authorities suspend or terminate any activities that pose a serious and immediate danger to the health or physical or psychological development of children, and withdrawing the operating licences of the legal entities responsible;

(g) taking action to prevent or put an end to the consequences of any acts or deeds contrary to the principles and rules laid down in international treaties on children's rights and adoption to which Romania has acceded ...”

5. Family Code

Article 75

“[From the date on which the adoption order becomes final], the rights and obligations of the adopted person in relation to the adopter shall be the same as those of a child born to a married couple in relation to his or her parents ...”

Article 100

“Children below the age of majority shall live with their parents ...”

Article 103

“Parents shall be entitled to request that their child be returned to them by any person having unauthorised custody of the child. The courts shall refuse to grant such a request if this would not be in the child's interests. The child shall be consulted if he or she is aged ten years or more.”

169. These provisions were repealed and replaced by Government Emergency Ordinance no. 25/1997 on adoption (see paragraph 102, point 1, above).

6. *Criminal Code*

Article 189

- “1. False imprisonment shall be punishable by a prison sentence of between one and five years.
2. If ... the victim is a minor, the penalty shall be a prison sentence of between five and twelve years.”

7. *Code of Criminal Procedure*

Article 275

- “1. Anyone whose legitimate interests have been adversely affected by measures and decisions taken during criminal proceedings may lodge a complaint.
...”

Article 278

- “Complaints about measures or decisions taken by the public prosecutor or under his orders shall be submitted to the Principal Public Prosecutor.”

8. *Constitutional Court decision no. 308 of 12 November 2002*

170. The Constitutional Court allowed an objection that section 7(1)(a) and (2) of Government Emergency Ordinance no. 25/1997 on the rules governing adoption was unconstitutional on the ground that, in the case of a child who had been judicially declared to have been abandoned, it did not require the prior consent of the person or body entitled to exercise parental rights over the child in question.

9. *The Constitution*

Article 11

- “2. Treaties lawfully ratified by Parliament shall form an integral part of the domestic legal order.”

Article 20

- “1. The constitutional provisions on citizens' rights and liberties shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with the covenants and other treaties to which Romania is a party.
2. In the event of conflict between the covenants and treaties on fundamental human rights to which Romania is a party and domestic laws, the international instruments shall prevail.”

10. Government Emergency Ordinance no. 121 of 8 October 2001 on the temporary suspension of all international adoption proceedings

Section 1

“All proceedings relating to the adoption of Romanian children by persons and families of foreign nationality shall be suspended ... for a period of twelve months from the date on which this Ordinance comes into force.”

Section 2

“During the period referred to in section 1, the National Authority for Child Protection and Adoption and the Ministry of Justice shall review the rules governing international adoption, in order to bring the national legislation into line with the relevant international law and practice.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

171. The applicants complained of the failure to execute the domestic courts' final decisions concerning the adoption of Florentina and Mariana, and submitted that this amounted to an infringement of their right to respect for their family life as guaranteed by Article 8 of the Convention, the relevant parts of which provide:

“1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others.”

A. The parties' submissions

1. The applicants

(a) Whether there was a bond amounting to “family life” within the meaning of Article 8 § 1 of the Convention

172. The applicants submitted that the relationship established between them and their respective adopted daughters constituted a family tie, protected by Article 8 of the Convention, which was therefore applicable in the present case. They referred to *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (judgment of 28 May 1985, Series A no. 94), *Eriksson v. Sweden* (judgment of 22 June 1989, Series A no. 156), *Marckx v. Belgium* (judgment of 13 June 1979, Series A no. 31) and *Ignaccolo-Zenide v. Romania* (no. 31679/96, ECHR 2000-I).

173. They submitted that the Court had already held that the word “family” applied to the relationship between two people who believed themselves to be married and genuinely wished to cohabit and lead a normal family life, on the ground that the committed relationship thus established was sufficient to attract the application of Article 8 (see *Abdulaziz, Cabales and*

Balkandali, cited above, pp. 32-33, § 63). On the basis of the final adoption orders, they argued that the relationship between them and their respective adopted children *a fortiori* amounted to a family tie.

174. Furthermore, they pointed out that they had met Florentina and Mariana and that, although the CEPSB had denied them the right to pay them further visits, they had constantly thought of them, showing them affection and frequently sending them letters and presents.

175. Referring in particular to their visit on 3 August 2000, they disputed Florentina's and Mariana's allegations and doubted that they had actually been made by the children, bearing in mind the atmosphere of hostility and resistance fostered by the CEPSB. They pointed out that a video recording proved that the girls had been pleased with their visit and had expressed the desire to join them as they had appreciated spending time with them.

176. While accepting that the girls had been able to develop emotional ties with the other children in the CEPSB or with the “substitute mothers”, they argued that children needed support when they had to leave surroundings which they had regarded for years as their real life in order to join their new family; however, no such support had been provided in the present case. In the applicants' submission, the very foundations of the institution of adoption suggested that children should be assisted in this delicate stage of their lives.

(b) Whether their “family life” was respected

177. The applicants pointed out that all the international treaties on children's rights stated unequivocally that the family provided the best environment for the development of the child's personality. Referring in addition to a European Parliament report (see “Relevant international law and practice” above, paragraph 101), they noted that one of the areas given priority by the Romanian government with a view to European Union accession was the question of children in institutions. Notwithstanding the CEPSB's qualities, they considered that the centre could not under any circumstances replace a family in so far as it merely provided the children in its care with “contract substitute mothers”, who were nothing but ordinary employees and could be dismissed or resign at any moment.

178. In any event, the applicants contended that the role of such an institution was not to hinder the adoption process; nor should it engage in a smear campaign by making unsubstantiated allegations against adoptive parents, which the newspapers had taken up using the epithet “child traffickers”.

179. The centre's intention to discredit at all costs those foreigners who wished to adopt Romanian children raised doubts, in the applicants' submission, as to its qualities, particularly as it would have sufficient opportunity to find other children to replace those who left as a result of adoption orders made by the competent authorities. They submitted that such doubts were further reinforced by the recent conviction of one of the centre's employees for sexually abusing three of the children in its care (see paragraph 95 above).

180. Lastly, they noted that if the girls had not become aware of the adoption orders until 3 September 2002 and only “by chance”, as they had alleged, that proved that the centre had never told them about the orders.

181. With regard to the CEPSB's alleged lack of consent to the adoptions, they emphasised that the procedures for adopting Florentina and Mariana had complied with Romanian legislation and with the relevant international treaties, seeing that pursuant to section 8 of Government Emergency Ordinance no. 26/1997, parental rights over children who had been judicially

declared to have been abandoned had been exercised by the Braşov Child Welfare Board and that the Board had given its approval to the children's adoption and had reiterated that position before the court that had ruled on the applicants' applications for adoption orders.

2. *The Government*

(a) Whether there was a bond amounting to “family life” within the meaning of Article 8 § 1 of the Convention

182. The Government argued, as their main submission, that Article 8 of the Convention did not apply to the circumstances of the applicants, who could not claim that there was “family life” meriting protection under that provision. They submitted that, although the applicants had been acknowledged as the adoptive parents of Florentina and Mariana in final judicial decisions, that fact alone should not be regarded as bringing their cases within the scope of Article 8, seeing that no family life had ever existed in practice. They observed in that connection that the applicants had never met their adopted daughters in their capacity as parents and had never enjoyed genuine family relations with them.

183. Although they had visited the CEPSB on 3 August 2000, the visit could not in the Government's opinion be taken to have created any bond that was sufficiently deep to amount to family life. They submitted that the adoptions had been arranged through the C. association and that the children had never lived with the applicants and had never regarded them as their parents.

184. The Government contended that the applicants had not in fact shown any real interest in getting to know the girls or in ensuring that their well-being came first. They observed in that connection that, during the adoption process, the first applicant couple had travelled to Romania on only five occasions, and the second applicant couple on only three; just one of those visits had taken place before the adoption order had been made on 28 September 2000.

185. They argued that the applicants were still in the position of “prospective” parents, as there were no blood ties and no *de facto* family life binding them to their children. That being so, the existence of a formal family tie established by a court decision should not, they maintained, enjoy the protection of Article 8, the Convention institutions having always favoured an approach based on substantive aspects rather than a formal approach based on the definition of the concept of family in domestic law.

186. Relying in particular on the judgments in *Fretté v. France* (no. 36515/97, ECHR 2002-I) and *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96, ECHR 1999-IX), the Government submitted that an adoptive parent attempting to establish actual relations with the adopted child could not be treated in the same manner for the purposes of Article 8 as a person claiming the existence of a family relationship based on biological descent or on existing emotional ties. They considered that in the former case the prospective parent was seeking to obtain a right, whereas a biological parent was attempting to preserve it.

187. The Government submitted in conclusion that the concept of family life within the meaning of Article 8 could not apply to a relationship based on adoption, which only the adoptive parents viewed as a family tie while the child refused to live with them.

(b) Whether the applicants' "family life" was respected

188. In the alternative, the Government maintained that the particular circumstances of the present cases effectively altered the scope of the positive obligations arising for the State from the concept of "respect for family life". They pointed out in the first place that the family ties established between Florentina and Mariana and the CEPSB staff did not equate merely to the relationship between a social worker and her clients but had attained the same depth as the bonds developed in a traditional parent/child relationship. The girls' respective "mothers" and "aunts" at the centre had "witnessed" their growing up, having shared in the most significant moments of their childhood; this, in the Government's submission, was of great significance for their personal development.

189. The Government submitted that the girls' feelings towards these people and the other children in the centre were extremely warm, sincere and strong. The sudden and deliberate severing of such ties, which had built up over time, could have devastating consequences for the children's psyche.

190. Pointing out that the centre's management made efforts to trace the biological parents of the children in its care, the Government considered that there were major issues at stake in the present case, as it concerned intercountry adoption. They noted in that connection that the possibility for the children to see their biological parents or their close friends from the CEPSB would be greatly reduced if they were adopted and taken to Italy, and that the suffering resulting from their separation from those people would be heightened in a foreign environment, in view of the cultural and religious differences and the lack of familiar reference points.

191. The Government further observed that the girls were not treated in an "institutionalised" or "arithmetical" manner at the centre but that, on the contrary, they lived there as in a family, without fearing that they might be thrown out when they reached adulthood, since they knew that they would receive support from the centre until the point where they took control of their own lives. They also pointed out that the centre provided the girls with all the necessary conditions for pursuing their own vocations. In particular, the Government noted that Florentina was attending the College of the Arts, where she was taking violin and piano lessons, while Mariana was being encouraged to develop her skills in dance and sport.

192. All those aspects, together with the girls' consistent attitude towards their adoption, had a strong bearing, in the Government's submission, on the steps that should be taken by the authorities to ensure respect for the applicants' family life. They argued in that connection that the two children had always been opposed to moving to Italy, as was clear, for example, from their applications to have the adoption orders revoked and from the statement made by Florentina in the course of criminal proceedings instituted by the applicants against the centre's director for false imprisonment of the girls (see paragraph 74 above).

193. The Government submitted, lastly, that no breach of Article 8 could be made out in the instant case, since that provision could not be construed as requiring the State to take radical steps to enforce an adoption order with police assistance or to use other means of psychological preparation to develop a family relationship while court proceedings to determine the children's interests were still pending.

B. Submissions of the third parties

1. Whether there was a bond between the applicants and the children amounting to “family life” within the meaning of Article 8 § 1 of the Convention

194. The third parties all considered that Article 8 of the Convention was not applicable in the instant case, in the absence of any genuine family life between Florentina and Mariana, on the one hand, and the applicants, on the other. They observed in that connection that in weighing up the interests at stake, regard had to be had to those of the children, since it was for them to accept their adoptive family and not vice versa. In the third parties' submission, the only family that the children accepted was the CEPSB.

195. Florentina and Mariana submitted, in particular, that it had not been until 3 September 2002 that they had learned, quite by chance, of the existence of a final and binding decision on the basis of which their respective adoptive parents were seeking to force them to leave their country and the family within which they had been living at the CEPSB for eight and four years respectively. They pointed out that they were not related to the applicants by blood or by *de facto* family ties and argued that the applicants' alleged visit to the centre on 3 August 2000, of which they had no recollection, could not be regarded as a sufficiently close bond to commit them to a new family life.

2. Whether the applicants' “family life” was respected

196. The third parties submitted that the CEPSB was structured in such a way as to provide the children with living conditions resembling those offered by a traditional family. They pointed out that Florentina and Mariana lived there in a modern house with their respective families, each comprising a “substitute aunt and mother” and eight other children. There were eleven similar families at the CEPSB, each living in a modern house and providing for all the children's needs. The third parties emphasised that Florentina and Mariana, like the other children, lived there without being forced to do so.

197. Noting that on 3 September 2002 Florentina had been physically assaulted by her adoptive parents, their lawyer and the police, who had come to remove her from the centre, they submitted that that incident had traumatised both Florentina and Mariana.

198. They expressed doubts as to the lawfulness of the children's adoption, submitting, firstly, that by the date of their adoption they had already been integrated into one of the families formed at the centre. They observed that both the United Nations Convention of 20 November 1989 on the Rights of the Child and the European Convention on the Adoption of Children, opened for signature in Strasbourg on 24 April 1967, permitted intercountry adoptions only where the child could not be adopted or cared for in a suitable manner in his or her own country (see paragraph 100 above).

199. They further submitted that the adoption of the children without their consent or that of the CEPSB would have infringed Article 5 § 1 (a) of the European Convention on the Adoption of Children.

200. Accordingly, relying on the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, they observed that adoption orders should be made with due regard to the wishes and views of those being adopted; that had not occurred in the present case.

201. Florentina and Mariana emphasised, in particular, that they intended to pursue their family life in Romania, at the CEPSB, where they took part in sports and musical activities and had made friends. They submitted that they could not imagine any other kind of family life and that their opinions and wishes should be respected, especially as they were now more than eleven years old. They considered that being in the care of the CEPSB was the best solution and opposed the enforcement of the orders for their adoption.

C. The Court's assessment

1. Applicability of Article 8 of the Convention

202. The Court notes that this is a matter of dispute, in so far as the applicants, relying on the lawfulness of the adoption orders and on the actual contact they had been able to have with their respective adopted daughters, argued that there was a family tie protected by Article 8 of the Convention, which was therefore applicable in the instant case, whereas the Government disagreed, for reasons relating mainly to the absence of *de facto* family relations between the adoptive parents and the children. The third parties shared the Government's opinion.

203. The Court must therefore determine whether the facts of the case fall within the scope of Article 8 of the Convention.

204. The Court reiterates that the Convention must be applied in accordance with the rules of international law, in particular those concerning the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI).

205. With regard in particular to the obligations imposed by Article 8 of the Convention on the Contracting States in the field of adoption, and to the effects of adoption on the relationship between adopters and those being adopted, they must be interpreted in the light of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, the United Nations Convention of 20 November 1989 on the Rights of the Child and the European Convention on the Adoption of Children, opened for signature in Strasbourg on 24 April 1967.

206. In this connection, the Court would refer to an older line of case-law to the effect that, although the right to adopt is not, as such, included among the rights guaranteed by the Convention, the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention (see *X v. France*, no. 9993/82, Commission decision of 5 October 1982, Decisions and Reports (DR) 31, p. 241, and *X v. Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975, DR 7, p. 75).

207. In the instant case the Court notes that the applicants are able to rely on final and irrevocable decisions by the domestic courts, which allowed their applications for adoption and acknowledged them as the parents of Florentina and Mariana.

208. It must be pointed out that the adoption orders conferred on the applicants the same rights and obligations in respect of their adopted children as those of a father or mother in respect of a child born in lawful wedlock, while at the same time ending any rights and obligations existing between the adopted children and their biological father or mother or any other person or body, as is clear from Article 10 of the European Convention on the Adoption of Children, which

Romania ratified on 18 May 1993. The Court further notes that the relevant domestic legislation, in particular section 1 of Government Emergency Ordinance no. 25/1997, approved by Law no. 87 of 25 April 1998, which replaced the former Article 75 of the Family Code, likewise makes no distinction between the parents of children born in lawful wedlock and adoptive parents (see paragraphs 100 and 102 above).

209. Admittedly, by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family (see *Marckx*, cited above, pp. 14-15, § 31, and *Abdulaziz, Cabales and Balkandali*, cited above, p. 32, § 62), a requirement which does not seem to have been met in the instant case as the applicants did not live with their respective adopted daughters or have sufficiently close *de facto* ties with them, either before or after the adoption orders were made. However, this does not mean, in the Court's opinion, that all intended family life falls entirely outside the ambit of Article 8. In this connection, the Court has previously held that Article 8 may also extend to the potential relationship between a child born out of wedlock and his or her natural father (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI), or apply to the relationship that arises from a lawful and genuine marriage, even if family life has not yet been fully established (see *Abdulaziz, Cabales and Balkandali*, cited above, p. 32, § 62).

210. There is no reason in the instant case to cast doubt on the compliance of the adoption orders with domestic legislation or with the relevant international treaties. The national authorities established that the children, who had been judicially declared to have been abandoned, were eligible for adoption, and considered that intercountry adoption would be in their best interests, having obtained the consent of the prospective adopters and of the Braşov Child Welfare Board, which exercised parental rights over the children, in accordance with section 8 of Government Emergency Ordinance no. 26/1997 (see paragraphs 100-04 above).

211. It is true that the children's consent was not obtained by the courts that allowed the applicants' applications for adoption. The Court observes, however, that that was not an omission. As the children were nine and a half years old on the date on which the national courts ruled on the applications for adoption, they had not yet reached the age at which their consent should have been obtained for the adoption order to be valid, set at ten years under the domestic legislation. Such a threshold does not appear unreasonable, since the relevant international treaties leave the national authorities some discretion as to the age from which children are to be regarded as sufficiently mature for their wishes to be taken into account (see paragraph 100 above – point 1, Article 4 (d)).

212. Lastly, the Court notes that, although family life has not yet been fully established in the instant case, seeing that the applicants have not lived with their respective adopted daughters or had sufficiently close *de facto* ties with them either before or after the adoption orders were made, that fact is not attributable to the applicants. In selecting the children solely on the basis of a photograph without having had any real contact with them that would have served as preparation for the adoption, the applicants were simply following the procedure put in place by the respondent State in such matters.

213. It further appears from the evidence before the Court that the applicants always viewed themselves as the girls' parents and behaved as such towards them through the only means open to them, namely by sending them letters written in Romanian (see paragraph 92 above).

214. In the light of the foregoing, the Court considers that such a relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention, which accordingly is applicable.

2. Compliance with Article 8 of the Convention

215. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are, in addition, positive obligations inherent in effective “respect” for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

216. As regards the State's obligation to take positive measures, the Court has repeatedly held – where it has established the existence of family relations based on descent or on existing emotional ties – that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with the child and an obligation on the national authorities to take such action (see, for example, the following judgments: *Eriksson*, cited above, pp. 26-27, § 71; *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A no. 226-A, p. 30, § 91; *Olsson v. Sweden (no. 2)*, judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90; and *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55).

217. However, the obligation on the national authorities to take measures to that end is not absolute – even in the case of family relations based on descent – especially where the parent and child are still strangers to one another (see *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII). The nature and extent of such measures will depend on the circumstances of each case, but the understanding and cooperation of all concerned will always be an important ingredient. While the national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests and the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contact with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see *Hokkanen*, cited above, p. 22, § 58; *Nuutinen*, cited above, § 128; and *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 221, ECHR 2000-VIII).

218. What is decisive in this case is therefore whether the national authorities took the necessary steps to enable the applicants – who had been acknowledged as the adoptive parents of Florentina and Mariana and had in both cases obtained a court order, on an urgent application, requiring the CEPSB, a private institution, to hand over the child to them – to establish family relations with each of the children they had adopted.

219. As the Government stated, at issue here are the competing interests of the applicants and of the adopted children. There are unquestionably no grounds, from the children's perspective, for creating emotional ties against their will between them and people to whom they are not biologically related and whom they view as strangers. It is clear from the facts of the case that at present Florentina and Mariana would rather remain in the social and family environment in which they have grown up at the CEPSB, into which they consider themselves to be fully integrated and which is conducive to their physical, emotional, educational and social development, than be transferred to different surroundings abroad.

220. The adoptive parents' interest derived from their desire to create a new family relationship by forging ties with Florentina and Mariana, their adopted children.

221. Although such a desire on the part of the applicants is legitimate, the Court considers that it cannot enjoy absolute protection under Article 8 in so far as it conflicts with the children's refusal to be adopted by a foreign family. The Court has consistently held that particular importance must be attached to the best interests of the child in ascertaining whether the national authorities have taken all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents. In particular, it has held in such matters that the child's interests may, depending on their nature and seriousness, override those of the parent (see *E.P. v. Italy*, no. 31127/96, § 62, 16 November 1999, and *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, pp. 1008-09, § 78).

222. The Court considers that it is even more important that the child's interests should prevail over those of the parents in the case of a relationship based on adoption, since, as it has previously held, adoption means "providing a child with a family, not a family with a child" (see *Fretté*, cited above, § 42).

223. It must be pointed out that in the instant case the children rejected the idea of joining their adoptive parents in Italy once they had reached an age at which it could reasonably be considered that their personality was sufficiently formed and they had attained the necessary maturity to express their opinion as to the surroundings in which they wished to be brought up (see paragraphs 74, 76, 82, 99 and 135 above). The Court further notes that Romanian law expressly affords them the opportunity to express their opinion on the matter since, firstly, children who are the subject of adoption proceedings are required to give their consent from the age of 10 onwards and, secondly, children who have already been adopted are entitled to apply to have the adoption order revoked once they have reached that age.

224. Admittedly, it is not in doubt that the children's interests were assessed by the relevant authorities in the course of the adoption proceedings. In the Court's opinion, however, that does not rule out the possibility of a fresh examination of all the relevant evidence at a later stage where this is required by specific circumstances and where the child's best interests are at stake (see, *mutatis mutandis*, *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 63, 24 April 2003).

225. In this connection, the Court notes, as the Government did, that after 28 September 2000 the applicants' relationship with the girls was recognised on a purely formal basis and was not accompanied by any real ties. They have never truly known the children, since the adoption was carried out through the C. association and the children had not lived with them beforehand and did not regard them as their parents. The girls, who at the time of their adoption were nine and a half years old and were thus close to the age from which their consent to the adoption would have been compulsory, did not accept this relationship and were opposed to it.

226. They also lodged applications in their own name to revoke the adoption orders on the ground that they did not wish to leave the country and the surroundings in which they had been raised and into which they felt fully integrated. It is of some significance here that Mariana's application was successful and the order for her adoption has now been revoked in a final decision effective *ex nunc* (see paragraph 83 above).

227. The Court also notes that for a number of years after the decisions of 28 September 2000 in the applicants' favour, various other sets of proceedings were pending in the national courts to have the adoption orders declared void on the ground that, among other things, provisions of the international treaties on the subject had been infringed. The Court does not find it unreasonable that the authorities awaited the conclusion of those proceedings, whose outcome could not have

been foreseen, before taking measures of a permanent nature that were likely to create a new family life for the applicants.

228. Indeed, in so far as allegations of irregularities in adoption procedures were the subject of proceedings before the competent courts, the authorities had a duty to ensure that any uncertainty as to the lawfulness of the adoption was dispelled. That conclusion is particularly valid in the present case as the enforcement of the decisions in the applicants' favour, with the children moving to Italy, would have made it difficult for the children and harmful to their interests to return to Romania in the event of a subsequent court decision setting aside or revoking the adoption orders.

229. The Court deplores the manner in which the adoption proceedings were conducted, in particular the lack of real, effective contact between the interested parties before the adoption, a state of affairs made possible by shortcomings in the relevant domestic legislation at the material time. It finds it particularly regrettable that the children clearly did not receive any psychological support capable of preparing them for their imminent departure from the centre which had been their home for several years and in which they had established social and emotional ties. Such measures would probably have made it possible for the applicants' interests to converge with those of their adopted children, instead of competing with them as occurred in the present case.

230. Nevertheless, in the circumstances of the case, given that the applicants' interests were weaker as they had been acknowledged as the adoptive parents of children aged almost 10 without having any genuine pre-existing ties with them, there could be no justification for imposing on the Romanian authorities an absolute obligation to ensure that the children went to Italy against their will and irrespective of the pending judicial proceedings instituted with a view to challenging the lawfulness and well-foundedness of the initial adoption orders. The children's interests dictated that their opinions on the subject should have been taken into account once they had attained the necessary maturity to express them.

The children's consistent refusal, after they had reached the age of 10, to travel to Italy and join their adoptive parents carries a certain weight in this regard. Their conscious opposition to adoption would make their harmonious integration into their new adoptive family unlikely.

231. In the light of the foregoing, the Court concludes that the national authorities were legitimately and reasonably entitled to consider that the applicants' right to develop ties with their adopted children was circumscribed by the children's interests, notwithstanding the applicants' legitimate aspirations to found a family.

232. There has therefore been no violation of Article 8 of the Convention.

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

233. The Court considers it necessary in the circumstances of the case to examine the applicants' complaint about the failure to execute final decisions relating to the adoption of Florentina and Mariana under Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ...”

A. The parties' submissions

234. The applicants submitted that the Romanian State had for several years failed in its duty to execute final and irrevocable judgments. They referred in particular to the bailiff's report of 3 September 2002, which stated that the attempt to enforce the final judgments had resulted, through the intervention of the centre's doormen, in their being unlawfully detained, together with the bailiff and their lawyer (see paragraph 45 above).

235. The respondent Government highlighted the sensitive nature of the issues to which the final decisions in question had related and contended that no breach of Article 6 § 1 could be made out in the instant case, as that provision could not be construed as requiring the State to take radical measures, with police assistance, to enforce decisions that could upset a child's equilibrium.

236. Accepting that the right to execution of a decision was recognised in the Court's case-law as an element of the right of access to a court enshrined in Article 6, and referring to the respective dissenting opinions of Judges Thomassen and Maruste in *Ruianu v. Romania* (no. 34647/97, 17 June 2003) and *Ignaccolo-Zenide* (cited above), the Government considered that there could be exceptional circumstances in which the authorities were entitled not to execute a decision, such as a change in the factual situation (see, *mutatis mutandis*, *Sylvester*, cited above).

237. In the Government's submission, the present cases constituted exceptional circumstances of that nature, justifying the authorities' failure to execute the decisions in question. They argued in that connection that the right of the adopted children to keep their family and home within the CEPSB should prevail over the adoptive parents' procedural right to the enforcement of a decision potentially causing significant damage to the children's future and equilibrium.

238. Pointing out that the bailiffs had commenced the procedure for enforcing the judicial decisions concerning the adoption, the Government submitted that there had not been any lengthy periods of inactivity on the part of the authorities during the times when execution had not been stayed by the national courts, and that in any event, the State could not be held responsible for the refusal of the CEPSB, a private institution, to hand the children over to the applicants.

239. They emphasised, lastly, that the question should be addressed with due regard to the efforts by the State and Romanian society as a whole to adapt to the body of European Union legislation ("*acquis communautaire*"), including in the field of child protection and intercountry adoption. The Government submitted that, at the European Commission's request, a moratorium on intercountry adoption had been introduced in Romania until such time as the domestic legal framework was capable of fully protecting children's rights.

B. The Court's assessment

240. The Court notes that the judgments delivered on 28 September 2000 by the Braşov County Court – involving the determination of the applicants' civil rights, namely their recognition as the adoptive parents of Florentina and Mariana – and the subsequent orders by the same court requiring the CEPSB to hand the children over have yet to be enforced, despite being final and irrevocable.

241. It reiterates that the enforcement of decisions of this kind requires urgent handling as the passage of time can have irremediable consequences for relations between children and parents

who do not live with them (see, *mutatis mutandis*, *Maire v. Portugal*, no. 48206/99, § 74, ECHR 2003-VII).

242. The Court would further reiterate its settled case-law to the effect that Article 6 also protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, pp. 510-11, § 40; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003; and *Ruianu*, cited above, § 65).

243. In the instant case the Court notes that the proceedings to enforce the decisions in the applicants' favour have been pending since September 2000. It observes at the outset that this situation is not in any way attributable to the applicants, who have made approaches to the national authorities to put an end to it and have regularly taken steps to have the children and their birth certificates handed over to them.

244. The Court also notes, as the Government did, that the bailiffs have not remained inactive either. Outside the periods during which execution of the decisions in issue has been stayed by the national courts, they have put the CEPSB on notice to comply with the final and binding judicial decisions in the applicants' favour (see paragraphs 29, 34, 35, 38, 42, 43, 44, 55, 58, 61 and 62 above).

245. It must be recognised, however, that all the attempts by the bailiffs to enforce the adoption orders have met with manifest opposition on the part of the private institution where the children live, and have remained unsuccessful.

246. It would therefore appear that, in the circumstances of the case, the failure to execute the decisions granting the applicants' applications for adoption was due solely to the actions of the CEPSB staff and its founder members, who consistently opposed the children's departure to Italy by lodging various objections to enforcement or by thwarting the steps taken by the bailiffs.

247. While the Government argued that they could not be blamed for the actions of a private institution, the Court should look behind appearances to assess whether the State may be held responsible for the situation complained of. A number of facts are particularly striking in this regard.

248. The Court notes, firstly, that in spite of the efforts by the bailiffs to ensure the execution of the decisions in question, their actions were wholly ineffective in the instant case. The events recorded by the bailiff in his report of 3 September 2002 are a significant example, since the attempt at enforcement on that date appears to have resulted in the bailiff himself, the applicants and their lawyer actually being detained within the CEPSB building (see paragraph 45 above).

249. The Court considers that such conduct towards bailiffs, who work to ensure the proper administration of justice and thus represent a vital component of the rule of law, is incompatible with their position as law-enforcement officers and that action should be taken against those responsible. In this connection, it is for the State to take all the necessary steps to enable bailiffs to carry out the task they have been assigned, particularly by ensuring the effective participation of other authorities that may assist enforcement where the circumstances so require, failing which the guarantees enjoyed by a litigant during the judicial phase of the proceedings will be rendered devoid of purpose (see, *mutatis mutandis*, *Hornsby*, cited above, p. 511, § 41).

250. In the instant case the Court observes that the uncomfortable situation in which the bailiff responsible for enforcing the decisions in the applicants' favour found himself on 3 September

2002, when he was detained inside the CEPSB building, resulted directly from the police authorities' failure to assist the enforcement, and that no subsequent action has been taken.

251. In that connection, the Court notes that a wide range of legislative measures have been implemented by the Romanian government in order to comply with European and international treaties on adoption. Its attention has been drawn in particular to Decisions nos. 502 and 770, governing the organisation and functioning of the Romanian Committee for Adoption and the National Authority for Child Protection, which are, among other things, empowered to suspend or terminate activities that endanger children's health or physical or psychological development, for example by withdrawing the operating licences of the bodies responsible.

252. However, in spite of those domestic legal provisions, the Court observes that no sanctions have been taken in respect of the lack of cooperation of the private institution in question with the authorities empowered to enforce the adoption orders made in the instant case. It further notes that the CEPSB director's refusal to cooperate with the bailiffs has had no repercussions for him in almost three years.

253. The Court agrees with the Government that the use of force to execute the final decisions in question would have been a very delicate matter in the present case. Nevertheless, as the orders for the adoption of the two children have become final but have not been executed, they have been deprived of their binding force and have remained mere recommendations. Such a situation contravenes the principles of the rule of law and of legal certainty, notwithstanding the existence of special reasons potentially justifying it, the Government having cited the obligations on the respondent State with a view to its future accession to the European Union legal order.

254. By refraining for more than three years from taking the effective measures required to comply with final, enforceable judicial decisions, the national authorities deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

That conclusion is made all the more necessary in the present case by the probably irreversible consequences of the passage of time for the potential relationship between the applicants and their adopted daughters. Here, the Court notes with regret that the prospects of that relationship flourishing now appear if not seriously jeopardised, then at least highly unlikely, particularly as the children, now aged 13, recently indicated that they were strongly opposed to being adopted and moving to Italy.

255. There has consequently been a violation of Article 6 § 1 of the Convention.

...

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

199. Article 41 of the Convention provides:

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

A. Damage

200. With regard to pecuniary damage, the applicants sought the reimbursement of the costs they had incurred in travelling to Romania, amounting to 5,708 euros (EUR) for the first applicant couple and to EUR 2,348.48 for the second applicant couple. The first applicant couple

claimed a further sum of EUR 2,360, corresponding to their loss of earnings during their trips to Romania.

201. They also sought an award in respect of the non-pecuniary damage sustained both by themselves and by their adopted daughters as a result of the failure to execute the decisions in which their applications for adoption had been granted. They argued that the opposition they had encountered for many years had ultimately led to frustration and suffering, as well as a loss of opportunities for them and for their adopted children, and had also affected their initial motivation and legitimate desire to found a family through adoption.

Leaving it to the Court to assess the amount to be awarded under that head, they submitted that it should not in any event be less than EUR 750,000 for each of the two applicant couples.

202. The Government submitted that the costs incurred by the applicants before the adoption orders had been made, in particular those relating to their journey to Romania in August 2000, were not connected to the violations alleged in the proceedings before the Court, which concerned the failure to execute the decisions in issue – in other words, events occurring after that journey. The Government accordingly asked the Court not to award any compensation under that head.

203. They further submitted that the sum claimed by the applicants in respect of non-pecuniary damage was excessive and that the claim was a serious abuse of the purpose of the proceedings before the Court. Lastly, they submitted that no sum should be awarded in respect of the damage allegedly sustained by the children, since they were not applicants in the present case and the applicants had no real entitlement to receive compensation on their behalf.

204. As regards pecuniary damage, the Court notes that there is a direct causal link between only part of the sums claimed and the violation of Article 6 § 1 of the Convention found in paragraph 189 above.

205. As regards non-pecuniary damage, it does not find it unreasonable to conclude that the applicants undoubtedly sustained some damage – particularly on account of the frustration caused by the failure to execute final and binding decisions in their favour for several years, and of the probably irreversible consequences of that situation – for which the mere finding of a violation cannot constitute sufficient redress. However, the amounts claimed under this head are excessive.

206. In these circumstances, having regard to all the evidence before it and making its assessment on an equitable basis as required by Article 41 of the Convention, the Court awards the first applicant couple EUR 12,000 and the second applicant couple EUR 10,000, in respect of all heads of damage taken together.

B. Costs and expenses

207. The applicants sought reimbursement of all the costs which they had incurred in the proceedings before the Romanian authorities and before the Court, which they broke down as follows, submitting vouchers in support of their claim:

(a) EUR 868 (the first applicant couple) and EUR 868.36 (the second applicant couple) for translation costs;

(b) EUR 8,754 (the first applicant couple) and EUR 7,133.28 (the second applicant couple) for their lawyer's fees in the proceedings before the Court; and

(c) EUR 5,002 (the first applicant couple) and EUR 652.18 (the second applicant couple) for their lawyers' fees in the proceedings before the national authorities.

They further sought reimbursement of EUR 35,107 (the first applicant couple) and EUR 36,824.63 (the second applicant couple) in respect of “provisional costs linked to the outcome of the proceedings”, without giving further details.

208. The Government objected to the award of the sums claimed by the applicants in respect of “provisional costs”, submitting that such a description was unclear. They disputed that those amounts had actually been incurred and pointed out that they had not been substantiated as required by the Court's case-law in relation to Article 41 of the Convention.

209. The Court has assessed the claims in the light of the principles set forth in its case-law (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II; *Öztürk v. Turkey* [GC], no. 22479/93, § 83, ECHR 1999-VI; and *Witold Litwa v. Poland*, no. 26629/95, § 88, ECHR 2000-III).

210. Applying these criteria to the present case, and making its assessment on an equitable basis as required by Article 41 of the Convention, the Court considers it reasonable to award EUR 7,000 to the first applicant couple and EUR 6,000 to the second applicant couple in respect of all their costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there was a bond between the applicants and the adopted children amounting to “family life” within the meaning of Article 8 § 1 of the Convention, which is applicable in the present case;

2. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention;

3. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;

...

5. *Holds* by five votes to two

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 12,000 (twelve thousand euros) to the first applicant couple and EUR 10,000 (ten thousand euros) to the second applicant couple in respect of pecuniary and non-pecuniary damage;

(ii) EUR 7,000 (seven thousand euros) to the first applicant couple and EUR 6,000 (six thousand euros) to the second applicant couple in respect of costs and expenses;

- (iii) any tax that may be chargeable on the above amounts;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in French, and notified in writing on 22 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence EARLY
Deputy Registrar

Jean-Paul COSTA
President

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

- (a) concurring opinion of Mr Costa;
- (b) partly dissenting opinion of Mr Loucaides;
- (c) partly dissenting opinion of Mr Bîrsan;
- (d) dissenting opinion of Mrs Thomassen joined by Mr Jungwiert.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

I agree with the conclusions reached in the judgment. However, it was only after considerable hesitation that I voted in favour of finding that there had been no violation of Article 8 of Convention. The two girls, Florentina and Mariana, who had been declared to have been abandoned at the ages of three and seven respectively, were adopted by the two applicant couples in final judgments when both of them had reached the age of nine. The educational centre which had been their home since they had been abandoned created numerous obstacles to the execution of the judgments and, to put it mildly, hardly facilitated exchanges and physical meetings between the children and their adoptive parents, who live in Italy. For their part, Florentina and Mariana, who are now 13 years old, have never shown any desire to go and live with their parents, whose language they do not speak, and seem to be enjoying a happy life at the centre and developing their personalities and abilities in a satisfactory way. Furthermore, they have applied to have the adoption orders revoked and we are now faced with a strange situation in which the order for Florentina's adoption has been upheld but the one concerning Mariana has been revoked in a final judgment!

Such circumstances elicit mixed feelings. The Romanian government has scarcely any powers in dealing with a private institution which is, in fact, functioning well and offers guarantees as to the quality of education provided. While it is clear that the Government's responsibility is engaged under Article 6 in that they have not succeeded in enforcing the relevant judgments

and/or have not wished to do so, their responsibility under Article 8 is much less evident. It actually relates more to positive obligations than to interference with the right to respect for family life; above all, it is difficult to deny that it is in the best interests of the children (to which our case-law rightly attaches considerable weight), who were adopted at a late stage (perhaps too late) and have barely formed any ties with their adoptive parents, to remain in the educational centre where they have lived for many years rather than to undergo a complete change of lifestyle, environment, language and culture. Admittedly, it is very irritating that the centre's stubbornness and the public authorities' inefficiency have resulted, since time cannot be turned back, in a situation where the teenagers now have little chance of being able to develop a harmonious relationship within their adoptive families. But irritation is a poor counsellor. On reflection, I consider, like the majority of my colleagues, that the violation of the Convention by the respondent State is to be found under Article 6 rather than under Article 8.

PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

While I agree with the majority that there has been a violation of Article 6 § 1 of the Convention for the reasons set out in the judgment, I do not agree with the finding that there has been no violation of Article 8 of the Convention in this case. In deciding this question, I endorse the following approach set out in paragraph 152 of the judgment:

“What is decisive in this case is therefore whether the national authorities took the necessary steps to enable the applicants – who had been acknowledged as the adoptive parents of Florentina and Mariana and had in both cases obtained a court order, on an urgent application, requiring the CEPSEB, a private institution, to hand over the child to them – to establish family relations with each of the children they had adopted.”

On the basis of the facts and circumstances of the case I find that the respondent State has failed to discharge its positive obligations under Article 8 of the Convention and this is in substance confirmed by what the majority state in paragraph 163 of the judgment where it is accepted that there has been

“... [a] lack of real, effective contact between the interested parties before the adoption, a state of affairs made possible by shortcomings in the relevant domestic legislation at the material time”

and

“that the children clearly did not receive any psychological support capable of preparing them for their imminent departure from the centre which had been their home for several years and in which they had established social and emotional ties. Such measures would probably have made it possible for the applicants' interests to converge with those of their adopted children, instead of competing with them as occurred in the present case.”

In spite of these findings the majority found that there has been no violation of Article 8 of the Convention taking into account “the children's consistent refusal, after they had reached the age of ten, to travel to Italy and join their adoptive parents” (see paragraph 164 of the judgment) and that “their conscious opposition to adoption would make their harmonious integration into their new adoptive family unlikely” given also the absence of “genuine pre-existing ties” with their

adoptive parents (ibid.). The majority found that an “absolute obligation” on the part of the authorities of the respondent State “to ensure that the children went to Italy against their will and irrespective of the pending judicial proceedings instituted with a view to challenging the lawfulness and well-foundedness of the initial adoption orders” was not justified (ibid.).

Yet all these problems relied on by the majority (the children's objection after they had reached the age ten, the absence of previous ties with their adoptive parents and the fact that legal proceedings against the adoption were pending) were problems created by the authorities of the respondent State. As the Court points out in finding a violation of Article 6 § 1 of the Convention in this case, “... the enforcement of decisions of this kind requires urgent handling as the passage of time can have irremediable consequences for relations between children and parents who do not live with them” (see paragraph 175 of the judgment).

The failure to execute the relevant decisions concerning the adoptions in this case and the ensuing delay and the negative repercussions it had on the implementation of those decisions were attributable to the authorities of the respondent State.

Judge Costa points out in his concurring opinion that “admittedly, it is very irritating that the centre's stubbornness and the public authorities' inefficiency have resulted, since time cannot be turned back, in a situation where the teenagers now have little chance of being able to develop a harmonious relationship within their adoptive families”.

In the circumstances, I do not see how the respondent State can, on the basis of its own wrongful conduct, be absolved of its responsibility to take the necessary positive measures in time to enable the adoption to proceed. Nobody can take advantage of his own wrongdoing to avoid his responsibilities (“*Nullus commodum capere potest de injuria sua propria*”).

The positive obligations of the respondent State in this case were not confined to ensuring that the children joined their adoptive parents. They included all the preparatory acts which would make that result possible (see *Kosmopoulou v. Greece*, no. 60457/00, § 45, 5 February 2004). In my opinion, a failure to carry out those acts amounts by itself to a violation of the right to respect for family life and therefore a breach of Article 8 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE BÎRSAN

(Translation)

I regret that I am unable to agree with the majority's conclusion that there has been a violation of Article 6 § 1 of the Convention in the present case. To my mind, the majority have adopted an overly formal approach under Article 6 § 1, which I cannot accept for the following reasons.

The judgment, it has to be emphasised, reaches a finding of a violation of Article 6 § 1 of the Convention on the ground that the authorities refrained for more than three years from taking the effective measures required to comply with final, enforceable judicial decisions (see paragraphs 187 and 188 of the judgment). In my opinion, such a conclusion is difficult to reconcile with that reached by the majority under Article 8 of the Convention (see paragraph 166 of the judgment), which I wholly endorsed after careful reflection.

I acknowledge that the majority's arguments in finding a violation of Article 6 § 1 – based, in particular, on the lack of police assistance in the enforcement procedure – are sound and do not in any way conflict with our Court's case-law (see, among other authorities, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 510-11, § 40; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III; *Ruianu v. Romania*, no. 34647/97, § 65, 17 June 2003; and *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003).

While emphasising my firm attachment to the principles established in such settled case-law, to the effect that “the right to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party” and “execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6”, I nonetheless consider that a less formalistic approach was required here, in view of the very particular circumstances of the case.

With all due respect to my colleagues, I feel that more consideration should have been given to the fact that the judicial decisions in question concerned extremely sensitive and delicate issues, since in my opinion a certain paradox emerges from the judgment. The majority attached decisive weight under Article 8 to the children's overriding interest in remaining within the CEPSB; that interest dictated that their opinions on the subject should have been taken into account once they had attained the necessary maturity to express them (see paragraph 164 *in fine*). I had no hesitation in agreeing with that conclusion. From a reading of the judgment it is quite understandable that such an interest was deemed sufficient to justify the authorities' lack of cooperation in allowing the applicants to develop ties with the children.

But was the same overriding interest of the children not also relevant, in the same manner and to the same extent, under Article 6 § 1 of the Convention? How, in the particular circumstances of the case, can a purely theoretical approach have prevailed – correct though it may have been from a dogmatic or procedural standpoint – with no consideration being given to the importance of what was at stake in terms of the children's best interests?

I consider that a more balanced approach was highly advisable in this case and, in this connection, I am pleased to note that the Court's more recent case-law concerning the execution of judicial decisions is less characterised by formalism than before. I would simply refer to the *Sylvester v. Austria* judgment of 24 April 2003 (nos. 36812/97 and 40104/98), in which the Court held in paragraph 63 that “a change in the relevant facts may exceptionally justify the non-

enforcement of a final return order”. I consider that that judgment marks a significant change from the Court's previous strictly theoretical approach to the matter.

Nor can I neglect the views expressed recently along similar lines in dissenting opinions in judgments concerning the execution of judicial decisions, to the effect that “access to a tribunal cannot require a State to enforce all judgments in civil cases regardless of their nature and the circumstances” (see the dissenting opinion of Mrs Thomassen in *Ruianu*, cited above). I would stress that that particular case concerned the demolition of a building which the applicant's neighbours had begun to erect, adjoining his house and occupying a small part of his land; this caused me to vote with the majority in favour of finding that there had been a violation of Article 6 § 1 of the Convention.

The circumstances of the present case were quite different, being at once much more delicate and more complicated: two young girls were required to move to a foreign country to join adoptive families whom they barely knew. The only criticism that could be made of the national authorities, in my opinion, would be that they did not take all the necessary measures to allow bonds to develop between the girls and the applicants' families prior to adoption; that, moreover, would appear to be a problem for any intercountry adoption in any State party to the Convention. In any event, I am persuaded that in this case there were indeed exceptional circumstances justifying the non-enforcement of the adoption orders in respect of Florentina and Mariana.

In finding a violation of Article 6 § 1, the majority tipped the balance of the interests at stake in favour of the adoptive parents' procedural right to the enforcement of a judicial decision, appearing to disregard the considerations that had led them to find that there had been no violation of Article 8. Such considerations, rightly outlined in paragraphs 159 and 160 of the judgment, were to my mind also entirely applicable under Article 6 § 1 of the Convention and constituted relevant and sufficient grounds for finding no violation of the right guaranteed by that provision.

It should not be forgotten that in paragraph 162 of the judgment the majority themselves observed that “the enforcement of the decisions in the applicants' favour, with the children moving to Italy, would have made it difficult for the children and harmful to their interests to return to Romania in the event of a subsequent court decision setting aside or revoking the adoption orders”.

Furthermore, the respondent Government's argument, as summarised in paragraph 172 of the judgment, that there had not been any lengthy periods in the present case during which no steps had been taken to enforce the adoption orders in issue does not appear unreasonable to me, having regard to the repeated stays of execution ordered by the national courts pending the conclusion of the various judicial proceedings in progress across the country. I consider that such proceedings were likely to dispel any uncertainties regarding the lawfulness of the adoptions and that the authorities were right to await their conclusion before resorting to enforcement measures of a permanent nature.

It is not insignificant in this context to note that one of the sets of proceedings in question recently resulted in the order for Mariana's adoption being revoked (see paragraph 83 of the judgment).

For all these reasons, I find it regrettable that the Court did not grasp the opportunity afforded to it by this sensitive and delicate international adoption case to confirm a new, more balanced and less formalistic approach to the issue of execution of judicial decisions.

DISSENTING OPINION OF JUDGE THOMASSEN JOINED BY JUDGE JUNGWIERT

(Translation)

I agree with the conclusion of the majority that there has been no violation of Article 8 of the Convention in the present case. However, unlike the majority, I consider that no family life within the meaning of Article 8 of the Convention ever existed between the applicants and their adopted children. Nor do I share the majority's opinion that the Romanian authorities' failure to execute the adoption orders infringed the applicants' rights under Article 6 of the Convention.

The applicants are two Italian couples who, under Romanian law, had each adopted a child in Romania. At the time when the adoption orders were made, the children, Florentina and Mariana, were both nine and a half years old and had never seen their adoptive parents. They did not wish to move to Italy with the applicants. The order for Mariana's adoption was subsequently revoked at her request, while a similar application was pending in respect of Florentina. The adoption orders were not executed by the Romanian authorities because of uncertainties as to whether the proper procedure had been followed (see also the opinion of the majority as set out in paragraphs 161 and 162 of the judgment).

The applicants complained of the failure to execute the decisions in question, submitting that this amounted to a breach of their right to respect for their family life as guaranteed by Article 8 of the Convention.

The first issue which the Court had to address was whether there were family ties between the applicants and the children.

In my opinion, that was not the case. The Court's case-law concerning the bonds between adults and children as protected by Article 8 has always emphasised the actual existence of family life, normally based on biological ties. Relationships between adoptive parents and their children deserve the same protection, precisely because of the existence of this genuine family life. The Commission decisions cited in paragraph 140 concern genuine ties of this kind, contrary to the relationship between the applicants and the two children in the present case. In *X v. France* (no. 9993/82, Commission decision of 5 October 1982, Decisions and Reports (DR) 31) the adoptive father had lived with the child for seven years, and in *X v. Belgium and the Netherlands* (no. 6482/74, Commission decision of 10 July 1975, DR 7) the applicant had for several years looked after the child whom he wished to adopt.

To my mind, therefore, what deserves protection under Article 8 is not simply the adoption order itself but what it represents in terms of social reality. To hold otherwise would produce a surprising, and in my view unacceptable, result, namely that the relationship between a biological father and his child, without any additional factors, would not automatically give rise to family life (see *Lebbink v. the Netherlands*, no. 45582/99, ECHR 2004-IV), whereas family life would, on the contrary, be created by an adoption order, irrespective of the manner in which adoption had taken place and of the relations between those concerned.

I consider that in the present case there were no additional factors to warrant affording the protection of Article 8 to the legal relationship between the applicants and the children. At the time when the adoption orders were made, the children had never seen the applicants or had the slightest direct contact with them. It does not appear from the evidence that they were ever asked for their opinion, either directly in an interview with a judge or a counsellor or indirectly through

expert assessments which would have provided an opportunity to ascertain their views and feelings about the adoption in practical terms. The centre where the children had lived for approximately five and six years respectively at the time of the adoption orders, and where they had been looked after and brought up, had no means of conveying its opinion, based on its knowledge of them, during the proceedings. Once this became possible, the children themselves instituted proceedings to have the adoption orders revoked, thereby finally being able to express the view that they did not wish to move to Italy to live with the applicants. In short, there were no emotional or *de facto* ties that would have allowed the children to feel close to the applicants and would have provided the legal fiction of the adoption order with some substance that could be held to constitute family life.

I will readily admit that the manner in which the adoption proceedings were conducted must have been hard for the applicants to endure. But the fact that the proceedings in their case were not conducted properly cannot in my opinion be decisive for determining whether family life existed between them and the children. Nor, to my mind, is the existence of family life sufficiently established by the fact that the applicants always viewed themselves as the girls' parents and behaved as such towards them through the only means open to them, namely by sending them letters written in Romanian. That would imply that, in this context, the position of children aged nearly 10 should be completely disregarded.

Admittedly, intercountry adoption proceedings that have clearly been conducted in a scrupulous manner, and even those concerning very young children, often raise delicate issues both for the parents and for the children. In this connection, the need for the child to move to the country where the parents live can play a significant role. I am not saying that this factor in itself constitutes a reason to abandon efforts to find a family to provide a loving environment for a child, even if this has to be in another country. However, the very delicate position in which such children find themselves certainly requires special protection. In the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, such protection is afforded, for example, by the obligation on States to give due consideration to the possibilities for placing the child within the State of origin (Article 4 (b)) and to ensure, having regard to the age and degree of maturity of the child, that he or she has been counselled and duly informed of the effects of the adoption and that consideration has been given to the child's wishes and opinions (Article 4 (d)).

I consider that in this case there are serious doubts as to whether those requirements have been complied with.

Accepting the existence of family life in the circumstances of the present case would afford insufficient protection to children involved in intercountry adoptions who have reached an age at which their wishes and opinions should be taken seriously *before* a final order is made for their adoption, in view of the consequences of such an order (see, for example, paragraph 152 of the judgment).

The Court examined of its own motion the question whether the non-enforcement of the adoption orders constituted a violation of Article 6. The majority consider that “such a situation contravenes the principles of the rule of law and of legal certainty, notwithstanding the existence of special reasons potentially justifying it” (see paragraph 187 of the judgment). I cannot endorse such an interpretation of Article 6, which amounts to acknowledging the absolute pre-eminence of every legal rule. In my opinion, Article 6 cannot justify the execution of a judicial decision whose application infringes the fundamental rights of others. In the present case the execution of the decisions in question would have forced the children to leave their country against their will to live with parents whom they had never met. I do not believe that the Romanian authorities should have enforced such decisions. To do so would in my view have constituted an act of State raising serious problems as to the respect due for the children's rights under Article 8. For that reason, I consider that there was no violation of Article 6.

*
* *

CASE OF SYLVESTER v. AUSTRIA
(Applications nos. 36812/97 and 40104/98)
JUDGMENT
STRASBOURG 24 April 2003
FINAL 24/07/2003

In the case of Sylvester v. Austria,
(...)

THE FACTS

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1. THE CIRCUMSTANCES OF THE CASE

10. The applicants were born in 1953 and 1994 respectively. The first applicant lives in West Bloomfield (Michigan) and the second applicant lives in Graz.

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11. The first applicant married an Austrian citizen in April 1994. The marriage was concluded in the United States of America, where the couple set up their common residence. On 11 September 1994 their daughter, the second applicant, was born. The family's last common residence was in Michigan. Under the law of the State of Michigan the parents had joint custody over the second applicant.

12. On 30 October 1995 the first applicant's wife, without obtaining his consent, left the United States with the second applicant and took her to Austria.

13. On 31 October 1995 the first applicant, relying on the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), requested the Austrian courts to order the second applicant's return. In these and the subsequent proceedings the first applicant was represented by counsel.

14. On 3 November 1995 the second applicant's mother filed an application with the Graz District Civil Court (*Bezirksgericht fUr Zivilrechtssachen*) for the award of sole custody over the second applicant.

15. On 20 December 1995 the Graz District Civil Court, after having heard evidence from the first applicant and his wife and the oral statement of an expert in child psychology, Dr. K., ordered that the second applicant be returned to the first applicant at her former place of residence in Michigan.

16. The court, noting that under Michigan law the first applicant and his wife had joint custody of their daughter, found that the first applicant's wife had wrongfully removed the child within the meaning of Article 3 of the Hague Convention. Moreover, it dismissed the mother's claim that the child's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention. It considered that the second applicant's return could not be hindered by the fact that the mother was her main person of reference and that returning could cause a massive trauma affecting her development. Otherwise, mothers of small children could easily circumvent the aim of the Hague Convention. As to the mother's allegation that the first applicant regularly masturbated in the presence of the child, the court referred to the expert's statement that such conduct would, in view of the child's tender age, not cause immediate harm. The fact that such conduct, if proved, could in the long run be harmful to the child would have to be assessed in the custody proceedings. Finally, it held that the mother could be expected to return with the second applicant to the United States.

17. On 19 January 1996 the Graz Regional Civil Court (*Landesgericht fUr Zivilrechtssachen*) dismissed an appeal by the second applicant's mother.

18. The Regional Court confirmed the District Court's assessment as regards the question whether the second applicant's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention. It noted that the onus of proof was on the person opposing the return, i.e. the second applicant's mother. Further, it noted that the statement of the expert in child psychology had denied that there was any such risk. That statement had been made on the assumption that the mother's allegations were true. However, the Regional Court emphasised that the truth of these allegations had not been proved and that the District Court had had the benefit of hearing the first applicant and, thus, of forming a personal impression of him.

19. On 27 February 1996 the Supreme Court (*Oberster Gerichtshof*) dismissed a further appeal by the second applicant's mother.

20. On 27 February 1996 the first applicant filed an application for enforcement of the return order of 20 December 1995.

21. Meanwhile, the first applicant had started divorce proceedings before the Oakland Circuit Court (Michigan). By a decision of 16 April 1996, the court pronounced a default judgment of divorce. Further, it awarded the first applicant sole custody of the second applicant and ordered that the second applicant should reside with the first applicant in the event of her return.

22. On 7 May 1996 the file arrived again at the Graz District Civil Court.

23. On 8 May 1996 the Graz District Civil Court ordered the enforcement of the return order under section 19 (1) of the Non-Contentious Proceedings Act (*Ausserstreitgesetz*). It noted that it was necessary to order coercive measures as there were indications that the mother was obstructing the child's return. She had given an interview to a local newspaper according to which she frequently changed her whereabouts and was determined not to let the child be taken away from her.

24. In the early hours of 10 May 1996, an attempt to enforce the return order was made in accordance with the terms set out in the order of 8 May. A bailiff, assisted by a police officer, a locksmith and a representative of the Youth Welfare Office, appeared at the house where the second applicant and her mother were living. The first applicant was also present. A search carried out in the house, necessitating the use of force against the second applicant's mother and the forceful opening of several doors, remained unsuccessful. On the occasion of the enforcement attempt the Supreme Court's decision of 27 February 1996 and the enforcement order of 8 May 1996 were served on the second applicant's mother.

25. On 15 May 1996 the second applicant's mother appealed against the decision of 8 May 1996 and again filed an application for the award of sole custody of the second applicant.

26. On 29 May 1996 the United States District Court, Eastern District of Michigan, issued an arrest warrant against the second applicant's mother on suspicion of international parental kidnapping.

27. On 18 June 1996 the first applicant made a further application for enforcement of the return order.

28. By a decision of 25 June 1996 the Graz District Civil Court, at the request of the second applicant's mother, transferred jurisdiction to the Leibnitz District Court, in the judicial district of which the second applicant had purportedly established her residence.

29. On 29 August 1996 the Graz Regional Civil Court granted an appeal by the first applicant against the transfer of jurisdiction and, on the mother's appeal, quashed the Graz District Civil Court's enforcement order of 8 May 1996 and referred the case back to it.

30. Referring to section 19 (1) of the Non-Contentious Proceedings Act, the court found that, in the enforcement proceedings, the child's well-being had to be taken into account in so far as a change in the situation had occurred since the issue of the return order and the taking of coercive measures. However, under Article 13 of the Hague Convention, this question was not to be examined by the court of its own motion but only upon an application by the person opposing the return. Following the service of the enforcement order of 8 May 1996 the mother had submitted, in particular, that she was the second applicant's main person of reference. Because of the lapse of time, the second applicant no longer recognised her father when she was shown his picture. By being taken away from her mother the child would suffer irreparable harm. The court therefore ordered the District Court to examine whether the situation had changed since the return order of 20 December 1995. It also ordered the District Court to obtain the opinion of an expert child psychologist on the question whether the child's return would entail a grave risk of physical or psychological harm and whether coercive measures were compatible with the interests of the child's well-being.

31. Between May and December 1996 numerous letters were exchanged between the United States Department of State and the Austrian Ministry of Justice, acting as their respective States' Central Authorities under the Hague Convention. The United States Department of State repeatedly requested information as to which steps had been taken to locate the second applicant and to enforce the return order of 20 December 1995. The Austrian Ministry of Justice replied that the first applicant was represented by counsel in the Austrian proceedings and that it was up to him to take all necessary steps to obtain the enforcement of the return order. It also pointed out that there were only rather limited possibilities to locate a child who had disappeared after a

return order had been made.

32. On 15 October 1996 the Supreme Court dismissed an appeal by the first applicant and set aside the enforcement order of 8 May 1996. It noted in particular that the notion of the child's well-being was central to the entire proceedings. When ordering coercive measures under section 19 (1) of the NonContentious Proceedings Act, the court had to take the interests of the child's well-being into account, despite the fact that the return order was final, if the relevant situation had changed in the meantime. Having regard to the aims of the Hague Convention, a refusal of coercive measures was only justified if the child's return would entail a grave risk of physical or psychological harm for the child within the meaning of Article 13 (b) of the Hague Convention.

33. The Supreme Court acknowledged that particularly difficult problems arose in cases in which the abductor had created the situation in which the return represented a serious danger to the child's wellbeing. Where the abductor of a small child was the latter's main person of reference and refused to return with the child, a serious threat to the child's well-being might arise. Nevertheless, Article 13 (b) of the Hague Convention made clear that the child's well-being took priority over the Convention's general aim of preventing child abduction. Reasons of general deterrence or, in other words, the aim of showing that child abduction was not worthwhile could not justify exposing a child to a grave risk of physical or psychological harm.

34. In the present case, the mother had claimed that the child, who was now more than two years old, had become alienated from the father. The child's abrupt removal from her main person of reference and her return to the United States would cause her irreparable harm. The Supreme Court emphasised that the particularity of the case lay in the fact that, in the main proceedings, the courts had denied that there was any risk of psychological harm (as a result of the alleged sexual behaviour of the first applicant) exclusively on account of the child's tender age. In these circumstances, it could not be excluded that the child, who was now more than two years old and had been living solely with her mother for more than a year, would suffer grave psychological harm in the event of a return to her father. Thus, the Regional Court had rightly found that the question whether the return order could be enforced by coercive measures needed further examination, including an opinion by an expert in child psychology. It might also prove necessary to assess whether or not the mother's allegations were at all true.

35. In accordance with the Supreme Court's decision, the case was referred back to the Graz District Civil Court.

36. On 23 April 1997 the Oakland Circuit Court issued a "safe harbour" order, valid until 21 October 1997, which provided, *inter alia*, that pending determination of custody in expedited proceedings, the first applicant would not exercise his right to sole custody of the child; the second applicant would live with her mother away from the first applicant, who would undertake to cover their living expenses; and the arrest warrant against the mother would be set aside as soon as she and the second applicant boarded a direct flight to Michigan.

37. On 29 April 1997 the Graz District Civil Court dismissed an application by the first applicant for enforcement of the return order.

38. In the continued proceedings, the expert on child psychology, Dr. K., had submitted his opinion on 26 March 1997 and the first applicant had been given an opportunity to comment. On the basis of the expert opinion, the court found that since the second applicant's birth her mother had been her main person of reference. However, the first applicant had had regular contact with her until 30 October 1995, the date of her abduction. Thereafter they had had no contact at all. Since the return order had been made, a year and four months had elapsed and the first applicant had become a complete stranger to the second applicant. Given that a young child needed a stable relationship with the main person of reference at least until the age of six, the second applicant's removal from her main person of reference, namely her mother, would expose her to serious psychological harm. Having regard to the considerable lapse of time since the return order had been made on 20

December 1995, the District Court found that there had been a change in the relevant circumstances, in that the second applicant had lost all contact with the first applicant while her ties with her mother and her maternal grandparents had become ever closer. Consequently, her return would expose her to serious psychological harm.

39. The court noted the first applicant's statement of 28 April 1997 and his offer within the meaning of the "safe harbour" case-law but considered that this offer did not guarantee that the second applicant's relationship with her main person of reference would be preserved in the long run. As this relationship was indispensable for her well-being, the application for enforcement of the return order had to be dismissed.

40. On 28 May 1997 the Graz Regional Civil Court dismissed an appeal by the first applicant. It shared the District Court's view that the situation had changed fundamentally since the issuing of the return order. At that time the second applicant had been much younger and, given the short time which had elapsed between her abduction and the issuing of the return order, had not yet lost contact with the first applicant. A return of the second applicant accompanied by her mother could not be envisaged either. Apart from the reasons adduced by the District Court, the mother would face criminal prosecution in the United States and the child would, accordingly, be taken away from her.

41. On 2, 3 and 4 June 1997 the first applicant was granted a couple of hours of supervised access to the second applicant.

42. On 9 September 1997 the Supreme Court dismissed a further appeal by the first applicant on the ground that it did not raise any important legal issues.

43. On 29 December 1997 the second applicant's mother was awarded sole custody of the second applicant by the Graz District Civil Court. It noted that Article 16 of the Hague Convention, which prohibited the State to which the child has been abducted from taking a decision on custody while proceedings for the child's return were pending, no longer applied, as the decision not to enforce the return order had become final. Following appeal proceedings the judgment became final on 31 March 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

44. The preamble of the Convention, which has been incorporated into Austrian law, includes the following statement as to its purpose:

"...to protect children internationally from the harmful effects of their wrongful removal or Retention and to establish procedures to ensure their prompt return to the State of their habitual residence,..."

45. The object of such a return is that, following the restoration of the status quo, the conflict between the custodian and the person who has removed or retained the child can be resolved in the State where the child is habitually resident. This principle is based on the consideration that the courts of the State of - habitual residence are usually best placed to take custody decisions.

Article 3

"The removal or the retention of a child is to be considered wrongful where

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or the retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. ..."

Article 7

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures

- (a) To discover the whereabouts of a child who has been wrongfully removed or retained;
- (b) To prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- (c) To secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- (d) To exchange, where desirable, information relating to the social background of the child;
- (e) To provide information of a general character as to the law of their State in connection with the application of the Convention;
- (f) To initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- (g) Where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- (h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- (i) To keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

Article 11

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay ..."

Article 12

"Where a child has been wrongfully removed or retained in terms of Article 3, the authority concerned shall order the return of the child forthwith."

Article 13

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. ..."

B. The Non-Contentious Proceedings Act

46. Section 19 (1) provides that adequate coercive measures are to be taken without any further proceedings against a party refusing to comply with court orders.

47. According to the Supreme Court's case-law the courts have, in any proceedings relating to the removal of a child, the courts have to take the interests of the child's well-being into account when assessing whether coercive measures are to be ordered and, if so, which ones are to be applied.

THE LAW

1. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The applicants complained that the Supreme Court, in its decision of 15 October 1996 in the enforcement proceedings, had ordered a review of questions which had already been dealt with in the final return order under the Hague Convention and that this review had eventually led to the non-enforcement of the return order. They alleged a violation of Article 8 of the Convention which, as far as material, reads as follows:

"1. Everyone has the right to respect for his private and family life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. *The applicants*

49. The applicants contended that the interference with their right to respect for their family life was not justified under the second paragraph of Article 8. They submitted, in particular, that the Supreme Court's decision had been based on an erroneous interpretation of the Hague Convention and had not served a legitimate aim. The interference occasioned by the non-enforcement of the final return order had not been necessary. Rather, as in the *Ignaccolo-Zenide v. Romania* case ([GC], no. 31679/96, ECHR 2000-1), the courts had failed to take all reasonable measures to enforce the return order and the delays caused by them had eventually made the enforcement of the return order impossible. In particular, two and a half months had passed between the Supreme Court's decision of 27 February 1996 and the return of the file to the Graz District Civil Court on 7 May 1996. The applicants also contested that no further enforcement measures could be taken after the mother had appealed against the enforcement order. Moreover, the interference complained of had not corresponded to a pressing social need as the second applicant's mother could have participated in the custody proceedings before the Oakland Circuit Court.

2. *The Government*

50. The Government conceded that the Supreme Court's decision had constituted an interference with the applicants' right to respect for their family life. However, it had its legal basis in section 19 (1) of the Non-Contentious Proceedings Act and Article 13 (b) of the Hague Convention and served a legitimate aim, namely the child's well-being. As to the necessity of the interference, the Government emphasised that the Hague Convention did not grant an absolute right to obtain the return of an abducted child but gave priority to the child's well-being. Referring to *Nuutinen v. Finland* (no. 32842/96, ECHR 2000-VIII), they pointed out that a State could be obliged at the enforcement stage to review whether a given decision was still in the best interests of the child. Consequently, a review of whether the child's return entailed a grave risk of harm for her within the meaning of Article 13 (b) of the Hague Convention was not to be excluded at that stage. The Government contended that at the time of the Regional Court's decision of 29 August 1996 and the Supreme Court's decision of 15 October 1996, the Oakland Circuit Court had already awarded the first applicant sole custody without hearing the child's mother and without examining the first applicant's ability to take care of the child. Thus, contrary to the situation obtaining when the return order had been made, it could no longer be expected that the mother's accusations raised against the first applicant would be examined in custody proceedings before the United States' courts.

51. As to the procedural requirements inherent in Article 8, the Government asserted that the first applicant had been sufficiently involved in the decision-making process. He had been represented by counsel throughout the proceedings and had been informed about all the relevant procedural steps and given the opportunity to comment on them. Moreover, there had not been any unnecessary delays in the proceedings. Unlike in the case of *Ignaccolo-Zenide v. Romania*, the return of the child had not been delayed by the inactivity of the courts. The Graz District Civil Court had issued an enforcement order on 8 May 1996, one day after it had received the file with the Supreme Court's final decision on the return order, and an unsuccessful attempt to enforce the order had been made on 10 May 1996. No further attempts could be made as the mother had appealed against the enforcement order. Thereafter, no further enforcement attempts had been made in view of the Graz Regional Court's decision of 29 August 1996 to review the

question whether the second applicant's return would entail a grave risk of harm for her. The decisions in the appeal proceedings had followed at reasonable intervals. Finally, the enforcement of the return order had been rejected on the basis of comprehensively considered judicial decisions which had weighed all the interests involved and had given priority to the child's well-being. In so doing, the courts had not exceeded the margin of appreciation afforded to them by Article 8 § 2 of the Convention.

3. *The third parties*

52. The third parties, Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, argued that the present case was similar to the *Ignaccolo-Zenide v. Romania* case. The main question therefore was whether Austria had complied with its positive obligations under Article 8. Consequently, the "all reasonable measures" standard developed in *Ignaccolo-Zenide*, which referred in turn to the standards laid down in the Hague Convention, in particular in its Articles 7 and 11, had to be applied. In their view, the main point in issue in the case was the Austrian courts' failure to enforce the return order in a timely manner.

The review of the return order in the enforcement proceedings - which, in their submission, had been contrary to the Hague Convention and the contracting State's positive obligations under Article 8 - was merely a consequence of this failure and not a justified interference with the applicants' rights under Article 8. In addition, they emphasised that the enforcement of final court orders was generally required by respect for the rule of law.

53. The mother of the second applicant, Mrs Sylvester, also as a third party, agreed with the Government that there was no indication of a violation of Article 8, as the Austrian courts had refused to enforce the return order on the ground that it would entail a grave risk for the child's well-being. Thus, their decisions were in line with the Court's case-law, according to which the State's obligation to reunite a parent with his child is not an absolute one, as the interests of the child's well-being may override the parent's interest in reunion.

B. The Court's assessment

54. The Court notes, firstly, that it was common ground that the tie between the two applicants was one of family life for the purposes of Article 8 of the Convention.

55. That being so, it must be determined whether there has been a failure to respect the applicants' family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Ignaccolo-Zenide*, cited above, § 94; *Nuutinen*, cited above, § 127; *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299, p. 20, § 55).

56. The Court notes at the outset that the present case concerns the non-enforcement of a final return order under the Hague Convention.

57. It is comparable to the above-cited *Ignaccolo-Zenide v. Romania* case, in which the Court found that the positive obligations that Article 8 lays on the Contracting States in the matter of reuniting a parent with his or her child must be interpreted in the light of the Hague Convention, all the more so where the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children (*ibid.*, § 95).

58. More generally, a Contracting State's positive obligations under Article 8 include a parent's right to the taking of measures with a view to his or her being reunited with his or her

child and an obligation on the national authorities to take such action. However, the national authorities' obligation to take such measures is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. Any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (*ibid.*, § 94; see also *Hokkanen*, cited above, § 58; and *Olsson v. Sweden* (no.2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90).

59. In cases concerning the enforcement of decisions in the realm of family law, the Court has repeatedly found that what is decisive is whether the national authorities have taken all the necessary steps to facilitate execution as can reasonably be demanded in the special circumstances of each case (see *Hokkanen*, cited above, § 58; *Ignaccolo-Zenide*, cited above, § 96; *Nuutinen*, cited above, § 128). In examining whether non-enforcement of a court order amounted to a lack of respect for the applicants' family life the Court must strike a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law (see *Nuutinen*, cited above, § 129).

60. In cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her. In proceedings under the Hague Convention this is all the more so, as Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay (see *Ignaccolo-Zenide*, cited above, § 102).

61. The Court notes the Government's argument that there was a change in circumstances after the Supreme Court's decision of 27 February 1996 by which the return order became final, justifying a review in the enforcement proceedings of whether the second applicant's return entailed a grave risk of harm within the meaning of Article 13 (b) of the Hague Convention. They submitted, in particular, that, on 16 April 1996, the Oakland Circuit Court had issued a default judgment of divorce, awarding the first applicant sole custody of the second applicant. In contrast to the situation obtaining when the return order had been made, it could no longer be expected that an examination of the mother's accusations regarding the first applicant's harmful behaviour, namely his allegedly masturbating in the presence of the child, would take place in custody proceedings before the United States' courts.

62. For their part, the third parties Ms Jan Rwers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, considered that to conduct a review under Article 13 (b) of the Hague Convention in the enforcement proceedings was in conflict not only with the aims of the Hague Convention, but also with a Contracting State's positive obligations under Article 8. They emphasised that the enforcement of final court orders was generally required by respect for the rule of law.

63. The Court accepts that a change in the relevant facts 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 of relevant facts was not brought about by the State's failure to take all measures that could reasonably be expected to facilitate execution of the return order.

64. The Court observes that the Graz Regional Civil Court's decision of 29 August 1996 (see paragraphs 29-30 above), setting aside the enforcement order, and the Supreme Court's decision of 15 October 1996 (see paragraphs 32-34 above) do not even mention the change of circumstances now relied on by the Government. That argument cannot, therefore, serve to

justify the non-enforcement of the return order.

65. However, the Supreme Court advanced another argument, namely that the courts, when issuing the return order, had denied that there was any risk of psychological harm being caused by the alleged sexual behaviour of the first applicant, exclusively on account of the child's tender age at the time. Therefore, a review of the question whether the second applicant would suffer grave harm in the event of her return required further examination, including the taking of an expert opinion. However, the child psychology expert apparently did not deal with this issue in his opinion prepared in the continued proceedings; nor did the issue play any role in the subsequent decisions. Accordingly, that consideration equally cannot serve to justify the non-enforcement of the return order.

66. The fact remains that the decisions of 29 August and 15 October 1996 relied rather heavily on the lapse of time and the ensuing alienation between the first and second applicants. The Court will therefore examine whether or not this lapse of time was caused by the authorities' failure to take adequate and effective measures for the enforcement of the return order.

67. The Court observes that, while the main proceedings relating to the issuing of the return order were conducted with exemplary speed, as the case came before three instances in just four months, ending with the Supreme Court's decision of 27 February 1996, there is no explanation for the delay of more than two months which occurred before the file was returned from the Supreme Court to the Graz District Court on 7 May 1996. Moreover, such a delay has to be viewed as an important one, given that under Article 11 of the Hague Convention any inaction of more than six weeks may give rise to a request for a statement of reasons.

68. Admittedly, the District Court immediately ordered the enforcement of the return order. But after the first unsuccessful enforcement attempt on 10 May 1996 no further steps towards enforcement were taken despite the first applicant's request of 18 June 1996. The Government argued that no further enforcement attempts could be made as long as the mother's appeal of 15 May 1996 was pending, while the applicants contested this. The Court is not required to examine which was the position under domestic law, as it is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention (see *Ignaccolo-Zenide*, cited above, § 108). At the very least, the courts were under a particular duty to give an expeditious decision on the appeal in question. Nevertheless, it took three and a half months for the Graz Regional Civil Court to decide, on 29 August 1996, to quash the enforcement order of 8 May and to refer the case back to the District Court.

69. After the Supreme Court's decision of 15 October 1996, which confirmed the setting aside of the enforcement order, it took the District Court more than five months to obtain an opinion from the expert in child psychology, although he was already familiar with the case, as he had participated in the main proceedings. Relying on this expert's opinion, the District Court found on 29 April 1997 that, given the considerable lapse of time, the removal of the second applicant from her main person of reference, namely her mother, would expose her to serious psychological harm, as her father, the first applicant, had in the meantime become a complete stranger to her. The District Court's decision, which was upheld by the Graz Regional Court and, on 9 September 1997, by the Supreme Court, shows that the case was ultimately decided by the time that had elapsed. Without overlooking the difficulties created by the resistance of the second applicant's mother, the Court finds, nevertheless, that the lapse of time was to a large extent caused by the authorities' own handling of the case. In this connection, the Court reiterates that effective respect for family life requires that future relations between parent and child not be determined by the mere effluxion of time (see *W v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 65).

70. Moreover, the Court observes that the authorities did not take any measures to create the necessary conditions for executing the return order while the lengthy enforcement proceedings were pending.

71. The Court notes in particular that following the first unsuccessful enforcement attempt of 10 May 1996, the mother of the second applicant apparently changed her whereabouts with the aim of defying the execution of the return order. However, the authorities did not take any steps to locate the second applicant with a view to facilitating contact with the first applicant. On the contrary, it transpires from the correspondence exchanged from May to December 1996 between the Austrian Ministry of Justice and the United States Department of State that, in the Austrian authorities' view, it fell to the first applicant's counsel to take all necessary steps to obtain the enforcement of the return order. In this connection, the Court points out that it has refuted such a line of argument in *Ignaccolo-Zenide v. Romania*, finding that an applicant's omission cannot absolve the authorities from their obligations in the matter of execution, since it is they who exercise public authority (*ibid.*, § 111).

72. Having regard to the foregoing, the Court concludes that the Austrian authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the return order, and thereby breached the applicants' right to respect for their family life, as guaranteed by Article 8.

Consequently, there has been a violation of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

73. The applicants maintained that the Supreme Court's decision of 15 October 1996 ordering a review of questions which had already been dealt with in the final return order had eventually led to the non-enforcement of the return order. They alleged a violation of Article 6 of the Convention, which, as far as material, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal."

74. The Government asserted that the courts were obliged in the enforcement proceedings to take the child's well-being into account in accordance with section 19 (1) of the Non-Contentious Proceedings Act. However, Article 6 did not prevent a review of a final court order if there had been a change in the relevant facts.

75. The third parties, Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, asserted that the failure to enforce the return order and its reconsideration in the enforcement proceedings raised an issue under Article 6. They referred to *Hornsby v. Greece* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-II), in which the Court had held that the execution of a judgment had to be regarded as an integral part of the "trial" for the purposes of Article 6 (*ibid.*, p. 510, § 40).

76. The Court reiterates the difference in the nature of the interests protected by Articles 6 and 8 of the Convention. While Article 6 affords a procedural safeguard, namely the "right to a court" in the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see for instance *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91).

77. In the instant case, the Court finds that the lack of respect for the applicants' family life resulting from the non-enforcement of the final return order is at the heart of their complaint. Having regard to its above findings under Article 8, which focus on the non-enforcement of a final court order, the Court considers that it is not necessary to examine the facts also under Article 6.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and

if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

79. The first applicant requested a total amount of 276,461.58 United States dollars (USD) equivalent to 278,021 euros (*EUR*). [Nota: On 2 December 2002, the date on which the claims were submitted.] in respect of pecuniary damage, broken down as follows:

(i) USD 31,033.54 for travel costs and related car rental, taxi and hotel costs for sixteen trips between Michigan and Graz from December 1995 to September 2002 in connection with the enforcement proceedings and subsequently for the purpose of obtaining contact with or access to the second applicant.

This sum includes USD 4,228.92 for travel and subsistence costs relating to a trip to Graz between 17 and 30 December 1995, USD 3,310.74 for travel and subsistence costs relating to a trip to Graz between 8 and 11 May 1996 and USD 2,667.56 for travel and subsistence costs relating to a trip to Graz between 31 May and 8 June 1997. The remainder relates to thirteen trips to Graz undertaken after the termination of the enforcement proceedings in September 1997.

(ii) USD 500 for the costs of assistance from an interpreter in an interview with a court-appointed expert in June 1999 in the context of access proceedings;

(iii) USD 181,901.04 for lost wages following the loss of his job in June 2001 allegedly as a result of the time and attention spent pursuing the Hague Convention proceedings and the ensuing custody and access proceedings in Austria;

(iv) USD 2,000 for the costs of supervision of access visits to the second applicant in June and December 1997;

(v) USD 41,328 for payments made to Mrs Sylvester allegedly to obtain her agreement to supervised access visits since July 1999;

(vi) USD 19,699 for the costs of psychological counselling and medical treatment relating to emotional and physical difficulties allegedly suffered as a result of the Austrian authorities' failure to enforce the return order.

The first applicant conceded that some or all of the above losses could also be examined under the head of costs and expenses.

80. As to non-pecuniary damages the first applicant requested an award of USD 1 million on his own behalf as compensation for the anger, anxiety, humiliation and frustration suffered as a result of the non-enforcement of the return order. He emphasised that the loss of having a life with his daughter was priceless. However, he suffered - to an extent affecting his physical and emotional health - as a result of the fact that he had effectively been prevented, by the second applicant's mother and the Austrian authorities, from playing any significant role in his daughter's life. Further, he claimed USD 2 million on behalf of the second applicant for her being deprived of her father and of any family life with her paternal family in the United States.

81. The Government contended that the first applicant's claims for pecuniary damage were excessive. In any case, as far as they related to the exercise of his access rights (travel costs, alleged payments to Mrs Sylvester, costs for supervision, interpreters' costs), the alleged damage did not have any causal link with the breach of the Convention at issue. The same applied to other items, such as lost wages and costs of medical treatment. As far as the travel and subsistence costs related to the Hague Convention proceedings, which was only the case for a minor part of them, their necessity had not always been convincingly established (for instance the need to use a taxi instead of public transport).

82. As to non-pecuniary damage, the Government also contended that the sums claimed were excessive and disregarded the Court's case-law in comparable cases. As regards non-pecuniary damage claimed on behalf of the second applicant, the Government contested that there was any causal link with the breach of the Convention at issue. Had the violation of the Convention not taken place, the second applicant would equally suffer by being separated from her mother and

her maternal family.

83. As to pecuniary damage, the Court finds that there is no causal link between the damage claimed and the violation found, with the exception of travel and subsistence costs related to the enforcement of the return order under the Hague Convention. As regards the said travel and subsistence costs, the Court considers it appropriate to deal with them under the head of costs and expenses.

84. As to non-pecuniary damage, the Court sees no reason to doubt that the first applicant suffered distress as a result of the non-enforcement of the return order and that sufficient just satisfaction would not be provided solely by the finding of a violation. Having regard to the sums awarded in comparable cases (see, for instance, *Ignaccolo-Zenide*, cited above, §117, *Hokkanen*, cited above, p. 27, § 77; see also, *mutatis mutandis*, *Elsholz v. Germany* [GC], no. 25735/94, § 71, ECHR 2000-VIII and *Kutzner v. Germany*, no. 46544/99, § 87, ECHR 2002-1) and making an assessment on an equitable basis as required by Article 41, the Court awards the first applicant EUR 20,000. As to the second applicant, the Court considers that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the non-enforcement of the return order.

85. In sum, the Court therefore awards the first applicant EUR 20,000 under the head of non-pecuniary damage.

B. Costs and expenses

86. The first applicant requested a total amount of EUR 288,419.72 under the head of costs and expenses broken down as follows

(i) USD 146,689.14, equivalent to EUR 147,517, for legal expenses paid to two United States law firms which advised him on matters relating to the Hague Convention proceedings and subsequent proceedings;

(ii) EUR 127,553.13 for costs of the Hague Convention proceedings and subsequent proceedings in Austria and of the Convention proceedings;

(Hi) USD 3,556.37 equivalent to EUR 3,576.43 for telephone and postal costs;

(iv) USD 9,718.33 equivalent to EUR 9,773.16 for costs of a hearing in the United States Congress concerning the workings of the Hague Convention.

87. As to the costs of the domestic proceedings, the Government asserted, firstly, that the basis for their assessment was not in accordance with the Lawyers' Fees Act (*Rechtsanwaltstarijgesetz*). Secondly, they submitted that the bill of fees contained a number of unspecified items and numerous costs incurred after the termination, in September 1997, of the Hague Convention proceedings at stake in the instant case, costs which had probably been incurred in other sets of proceedings relating to access, custody or maintenance issues. Thirdly, the first applicant had failed to show to what extent the costs had been necessarily incurred to prevent the breach of the Convention at issue.

88. According to the Court's consistent case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, for instance, *Venema v. the Netherlands*, no. 35731/97, § 117, to be published in ECHR 2002).

89. The Court considers that the costs and expenses relating to the domestic proceedings, as far as they concern the enforcement proceedings found to cause a violation of the Convention (see paragraph 72 above) and the costs of the Strasbourg proceedings were incurred necessarily. They must, accordingly, be reimbursed in so far as they do not exceed a reasonable level (see *Ignaccolo-Zenide v. Romania*, cited above, § 121).

90. The Court finds that the costs claimed are excessive. Making an assessment on an equitable basis and considering, in particular, that the case was indisputably complex, it awards

the first applicant EUR 20,000 for legal costs and expenses.

91. The Court now turns to travel and subsistence costs related to the enforcement of the return order under the Hague Convention. It notes that only two of the sixteen trips listed by the first applicant were undertaken during the enforcement proceedings. The first one from 8 to 10 May 1996 and the second one from 31 May to 8 June 1997. The Court finds that only the costs relating to the latter can be regarded as having been incurred in order to seek prevention or rectification of the violation of the Convention found, as the first one was apparently related to the one and only enforcement attempt, which would also have taken place had the violation of the Convention not occurred. The Court, therefore, grants compensation for the costs of this trip, which amount to USD 2,667.56, equivalent to EUR 2,682.61.

92. In sum, the Court awards the first applicant EUR 22,682.61 under the heading of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that there is no need to rule on the complaint under Article 6 of the Convention;

3. *Holds* unanimously

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 22,682.61 (twenty-two thousand six hundred and eighty-two euros sixty-one cents) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Holds* by 4 votes to 3 that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the second applicant;

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

Done in English, and notified in writing on 24 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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

(a) joint partly dissenting opinion of Mr Bonello, Mrs Tulkens and Mrs Vajic;

(b) separate opinion of Mr Bonello.

JOINT PARTLY DISSENTING OPINION OF JUDGES BONELLO, TULKENS AND V AJIC (*Translation*)

As regards the non-pecuniary damage sustained by the second applicant, the Court holds: "The finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the non-enforcement of the return order" (see paragraph 84, *in fine*, of the judgment). However, in like circumstances, it awards the first applicant 20,000 euros for non-pecuniary damage (*ibid.*). The imbalance between the two awards does not appear to us to be justified, especially as the fundamental aim of the Hague Convention with which the present case is concerned is to protect children (see paragraph 44 of the judgment). Although a finding of a violation may in certain cases take on a symbolic value, in the present instance it amounts to reparation at its most frugal.

Personally, we do not share the view that, owing to its tender age, the child has not suffered or may not in the future suffer any non-pecuniary damage (such as stress or anxiety) of its own,

warranting an award of compensation for the violation of Article 8 of the Convention which the Court has found as a result of the Austrian authorities' failure to take, without delay, the measures they could reasonably have been expected to take in order to enforce the return order, in breach of the second applicant's right to respect for her family life (see paragraph 72 of the judgment).

We consider that, as in the *Scozzari and Giunta v. Italy* judgment of 13 July 2000, in which the Court held that it had to take into account the non-pecuniary damage sustained by the children in view of their position as applicants (§ 253), the Court should have granted the second applicant, whose conduct cannot be criticised in any way, compensation reflecting the level of damage she sustained.

SEPARA TE OPINION OF JUDGE BONELLO

1. The majority's ruling as to what just satisfaction to award the applicant and his minor daughter Carina Maria, to redress the ascertained violation of their fundamental right to the enjoyment of family life, finds me in radical disagreement. I am participating in the joint dissent disputing the majority's decision to award nothing to Carina Maria in so far as, in their view, the mere finding of a violation constitutes in itself sufficient just satisfaction for moral damages suffered by her. I have now to clarify my views concerning the damages and costs awarded to the applicant personally.

2. I voted with the Court on the amounts liquidated in favour of the applicant as material and moral damages and as costs and expenses. I did so not because I endorse the majority's reasoning and its mathematical outcome, but lest my negative vote be read as implying that, according to me, no damages or costs at all were due. On the contrary, I consider the amounts granted in favour of the applicant as mean and beggarly. I believe' that the compensation awarded conspicuously fails the test of proportionality between the harm inflicted and the redress afforded.

3. The applicant's existence was skilfully and organically disrupted by the Austrian authorities' defiance of their responsibilities under Article 8 of the Convention - which, as the majority agreed, in the present case imposed on them a duty to ensure the enforcement of the final return order issued in his favour in terms of the Hague Convention on the Civil Aspects of International Child Abduction. The applicant and his wife had established the matrimonial residence in Michigan, USA. The wife 's relocation to Austria, together with the illicitly appropriated child, coerced the applicant into instituting legal proceedings in Austria, which necessitated his presence there to ensure their diligent and successful prosecution.

4. The Court has identified two main sources of violation of the guarantees of Article 8 by the Austrian tribunals: some 'unexplainable delays' in the progress of the proceedings (para. 67) and the fact that they negated the final return order previously issued in favour of the applicant. I believe that, in accordance with the Court's case law, all the losses, costs and expenses "actually and necessarily" incurred by the applicant for the prevention or rectification of a violation of the Convention, ought to have been reimbursed to the victim of that infringement.

5. I would, of course, exclude from the liquidation of damages, costs and expenses, those the applicant incurred to counteract the actions of his wife at a time when the liability of the Austrian state had not yet been engaged. Before that instant, nothing is due by Austria. But, as from then on, the unreasonable delays and the resistance to the enforcement of the final return order (for both of which the majority found the Austrian courts responsible) played a determining conjoint role in infringing the applicant's Convention rights. This cut-off point, after which the applicant was no longer battling his wife but was contending with the failures of the Austrian system, occurred in April 1996. It is my view that, from this moment when the state's responsibility was fully engaged, all losses, damages costs and expenses incurred by the applicant to redress the ongoing state of infringement, clearly became the liability of the respondent state.

6. It, in June 2001 the applicant lost his job in the USA, as the diligent prosecution of the proceedings in Austria prevented the diligent prosecution of his work responsibilities in the

USA, then this loss too falls to be compensated. The Court considered that there is no causal link between the material damages claimed and the violation found (para. 83). In my view, the bond of causality between the efforts put in by the applicant to obtain redress for the infringement suffered, on the one hand, and the loss of his job (and various other substantial damages), on the other, is as compelling as it is overwhelming. To believe otherwise is also to believe that the applicant could have carried on working industriously in the USA, while engaging in a full-time legal affray in Austria, continually crossing the globe to attend court sittings and conferences with his lawyers thousands of kilometres away. Not one euro's worth of material damages was recognised and awarded to the applicant by the majority, under any head whatsoever.

7. The liquidation of 20,000 euros to the applicant as moral damages for pain and suffering, I consider paltry and uncaring. To a person who has had the core of his existence irretrievably gutted by the violation of fundamental rights, to a father who has been irrevocably barred from the covenant with his only daughter, to a victim of atrocity born of the distressed use of the law against him, the majority responded with the award of what, in my view, amounts to an almost offensive trifle. That is hardly the most eloquent idiom to underscore how hallowed the sanctity of fundamental rights is in the eyes of the Court. It neutralizing the Convention comes so cheap, states may well find it foolish not to have a brave try.

*

* *

CASE OF MAIRE v. PORTUGAL
(Application no. 48206/99)
JUDGMENT
STRASBOURG 26 June 2003
FINAL 26/09/2003

In the case of Maire v. Portugal,
(...)

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1967 and lives in Larnod (France).

11. On 4 September 1993 the applicant married S.C., a Portuguese national. The couple had a child, Julien, born in 1995.

A. Proceedings in the French courts

12. By a judgment of 19 February 1998, the Besançon *tribunal de grande instance* granted the couple a divorce based on S.C.'s fault and ordered that the child reside at the applicant's home, with the mother to have rights of access. Earlier, on 6 August 1996, the applicant had already been granted interim custody of Julien by a decision of the same court.

13. On 3 June 1997 S.c. abducted Julien from his paternal grandmother's home and took him with her to Portugal. The applicant filed a complaint against S.C. for child abduction and assault. By a judgment of the Besançon *tribunal de grande instance* of 12 June 1998, S.c. was found guilty and sentenced *in absentia* to one year's imprisonment. A warrant was issued for her arrest.

B. Proceedings in the Portuguese courts

1. Application/or the child's return

14. On 5 June 1997, relying on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and on the Convention on Judicial Cooperation between France and Portugal for the Protection of Minors of 20 July 1983, the applicant lodged

an application for the child's return with the French Ministry of Justice, which was the French "Central Authority" within the meaning of both instruments. On the same day, the French Central Authority requested the Institute for Social Reinsertion ("the IRS"), which forms part of the Portuguese Ministry of Justice and is the Portuguese Central Authority, to secure the child's return pursuant to the provisions of the Franco-Portuguese convention.

15. On 18 June 1997 the IRS referred the application to the prosecution service of the Oeiras judicial district, where the applicant had indicated that S.C. was living. On 16 July 1997 the prosecution service applied to that court for the judicial return (*entrega judicial*) of the child pursuant to section 191 et seq. of the Minors Act (*Organiza~iao Tutelar de Menores*) and relying on the above-mentioned FrancoPortuguese cooperation convention.

16. On 17 July 1997 the judge of the Third Civil Division of the Oeiras District Court, to which the case had been allocated, summoned the child's mother to appear before the court to make submissions concerning the prosecution's application. Registered letters with acknowledgment of receipt were sent on 17 and 22 July 1997 to the address given by the applicant. However, both letters were returned to the court with the acknowledgments of receipt unsigned and unclaimed. On 27 August 1997 the judge, at the prosecution's request, asked the police to find out where Julien's mother was living. On 10 September and 6 October 1997 respectively the security police and the republican national guard informed the court that S.C. was not living at the stated address.

17. On 23 September 1997 the IRS asked the Oeiras District Court for information about the progress of the proceedings. The judge replied on 6 October 1997 to the effect that the child's mother had not yet been found.

18. On 21 October 1997 the prosecution service asked the judge to write to the Lisbon social security office to request information concerning S.C.'s address and workplace. On 27 October 1997 the judge ordered the registry to send the letter in question, which was sent on 7 November 1997. On 27 November 1997 the social security office replied that it had no record of S.c. on file.

19. On 5 December 1997 the judge asked the IRS to find out S.C.'s current address. When it was reported that she might be in the Oporto area, the relevant social security office was contacted but indicated in a letter of 12 January 1998 that it had no record of her.

20. On 10 March 1998 the Second Civil Division sent the Third Civil Division a copy of the decision taken on that day as part of proceedings for the award of parental responsibility (see paragraph 47 below). On 26 March 1998 the judge sent a copy of the decision to the prosecution service, pointing out that the address from which S.c. had been summoned to appear in those proceedings was the same as that originally given by the applicant.

21. On 27 March 1998 the prosecution service asked the judge to seek information from Portugal Electricity and Portugal Telecom. On 13 and 20 May 1998 those companies replied that they did not have any contracts in S.C.'s name.

22. On 25 May 1998 the judge insisted that S.C. be summoned from the address in question. The registered letter sent for that purpose was however returned to sender.

23. On 2 July 1998 S.C. informed the court that she had applied to the Oeiras District Court (First Civil Division) for a transfer of parental responsibility for Julien.

24. On 6 July 1998 the judge ordered a court bailiff to compel S.c. to appear. The bailiff went to the address in question on 1 September 1998 to be told, by one of S.C.'s aunts, that S.C. did not live there. S.C.'s aunt also said that she did not know her niece's current address.

25. On 2 September 1998 the judge asked the civil identification services of the Ministry of Justice for information about S.C.'s whereabouts.

26. By a letter of 2 September 1998 the IRS informed the court that they had asked the police to discover S.C.'s whereabouts. They observed that the police had since told them that the child's mother had brought proceedings for a transfer of parental responsibility for Julien and

pointed out that it was now possible to locate S.C. by the address she had given when she brought those proceedings.

27. By an order of 28 September 1998 the judge decided to ask the police again for S.C.'s current address. He also asked the registry to inform the First Civil Division of the existence of the application for the child's return with a view to securing a stay of the proceedings for the transfer of parental responsibility then pending before that division.

28. On 11 November 1998 the applicant, through his representative, filed an *ad litem* power of attorney and a request to be kept informed of the steps in the proceedings. He also indicated that he had lodged a criminal complaint against S.c. By a decision of 16 November 1998, the judge rejected the applicant's request on the ground that he was not a party to the proceedings.

29. On 27 November 1998 the security police indicated that the address in question was that of S.C.'s parents, who claimed that they did not know her current address. On 11 December 1998 the judge again decided to seek information from Portugal Electricity and Portugal Telecom and from the social security offices of Lisbon, Oporto, Coimbra and Faro. Between January and March 1999 all these organisations replied that they had no record of S.c. on their files. On 18 March 1999 the judge again asked the police for information about S.C.'s current address. On 9 April 1999 the security police indicated that the address was unknown.

30. On 19 April 1999 the IRS sent the court a copy of a police report according to which Julien might be found in a flat recently purchased by one of S.C.'s sisters in Algueirao (Sintra district).

31. Acting on information supplied by the IRS the applicant travelled to Portugal, where he claimed to have seen his son and a third party in the apartment in question on 25 April 1999. He informed the French consulate general in Lisbon, which asked the Portuguese Ministry of Justice to contact the police and the Oeiras District Court as a matter of urgency in order to secure the child's return. On 26 April 1999 the IRS informed the court and asked it to take all necessary steps to secure the child's return. On 27 April 1999 the judge ordered that Julien be immediately handed over to the IRS and issued a warrant to that effect. On 30 April 1999 the IRS advised the court that the republican national guard had been to the address in question on the previous day. However, the warrant did not give it the power to force entry into the flat and, since Julien's mother had refused to open the door, it had not been possible to return the child.

32. The judge subsequently asked the republican national guard why the warrant had not been executed. On 1 June 1999 the national guard stated that officers had been to the address in question several times but no one had answered the door.

33. In the meantime, on 17 May 1999, S.C. applied for the proceedings to be discontinued, relying on Article 20 of the Franco-Portuguese cooperation convention and submitting that Julien was fully integrated in his new environment.

34. The judge delivered his judgment on 15 June 1999. First he found that S.c. should be regarded as having been properly summoned to appear because she had already intervened in the proceedings. He then rejected her application for a discontinuation and ruled that Julien should be handed over immediately to the IRS. Lastly, he ruled that if she failed to comply with the decision S.C. was liable to be prosecuted under section 191(4) of the Minors Act for non-compliance with a legal order (*desobediencia*).

35. On 25 June 1999 S.c. appealed against that judgment to the Lisbon Court of Appeal (*Tribunal da Relafio*). On 29 June 1999 the judge found the appeal admissible and ordered that it should be referred, without suspensive effect, to the Court of Appeal. The Court of Appeal dismissed the appeal by a ruling of 20 January 2000.

36. On 7 February 2000 S.C. appealed on points of law to the Supreme Court (*Supremo Tribunal de Justifa*), but on 7 April 2000 her appeal was ruled to have lapsed (*deserto*) for want of pleadings having been filed.

37. On 29 May 2000 the Oeiras District Court judge asked a bailiff to warn S.C. that if she failed to hand Julien over to the IRS she would be prosecuted for non-compliance. On 9 June 2000 the bailiff reported that no one seemed to be living at the address indicated. On 20 June 2000 the judge again asked the police for information about S.c.'s current address.

38. On 14 December 2001 the police found Julien and S.C. On the same day the judge ordered Julien to be placed in a children's home under the IRS's supervision. S.C. was permitted to remain with Julien in the children's home. The principal of the children's home then refused to hand Julien over to the applicant, without a "court order to that effect". On that day S.C. lodged a summary application with the Oeiras District Court seeking to prevent Julien being handed over to the applicant. The applicant claimed that he was not told of the outcome of that application. On 21 December 2001 Julien was handed over to S.C. in accordance with the decision of the Cascais Family Court on the same day (see paragraph 50 below).

39. On 19 December 2001 the prosecution service asked the judge to suspend the 15 June 1999 judgment, on the ground that, after so much time had elapsed, Julien ought to be examined by child psychiatrists before being handed over to the applicant.

40. By a decision of the same day the judge dismissed that request, on the ground that the disputed judgment had already become *res judicata*.

41. On 21 December 2001 the prosecution service appealed to the Lisbon Court of Appeal. By a judgment of 9 April 2002, the Court of Appeal quashed the disputed decision. It considered, among other things, that Julien already seemed well settled in his new environment and that the examinations in question were entirely appropriate.

42. On 11 July 2002 the Oeiras District Court judge asked the Lisbon Institute of Forensic Medicine to proceed with the examinations.

43. On 4 December 2002 the applicant was advised that Julien would be undergoing a medical examination on 14 February 2003. The applicant has not been informed of the results of those examinations. The proceedings are still pending.

2. *The applications for determination of parental responsibility*

(a) In the Oeiras District Court

44. In April 1997 the prosecution service applied to the Oeiras District Court for the terms of parental responsibility for Julien to be fixed. The case was allocated to the Second Civil Division of that court.

45. S.C. was summoned to appear from the address given by the applicant when he lodged his application for the child's return, which was pending before the Third Civil Division of the Oeiras District Court.

46. On an unspecified date the prosecution service asked the judge to stay the proceedings in view of the fact that the application for the child's return had not yet been decided.

47. By an order of 10 March 1998 the judge stayed the proceedings.

48. Further to the 15 June 1999 ruling by the Oeiras District Court, the judge issued a decision on 5 November 2000 to discontinue the proceedings.

(b) In the Cascais Family Court

49. On 21 December 2001 the prosecution service lodged a further application for determination of the terms of parental responsibility for Julien at the Cascais Family Court. It sought a variation of the Besançon *tribunal de grande instance's* judgment of 19 February 1998 on the ground that the child had settled in his new environment. It also asked the court to grant interim custody of Julien to S.C.

50. By a decision of the same day the court granted S.C. interim custody of Julien.

51. On 15 May 2002 a meeting (*conferencia*) was arranged between the parents. Following that meeting, the court decided that the applicant could be granted rights of access. The applicant was thus able to visit Julien at S.C.'s home on 17, 18 and 19 May 2002 for a few hours.

52. The proceedings are still pending.

3. Contact between the French and Portuguese authorities

53. The French Central Authority had remained in contact with the IRS throughout all the abovementioned proceedings. The French embassy in Lisbon and the French consulate general in Lisbon sent several requests to the Portuguese authorities for information on the progress of the case.

54. Thus, on 28 March 2000 the French embassy in Lisbon asked the Portuguese Foreign Ministry to intervene in order to "expedite enforcement of the Oeiras District Court's decision of 15 June 1999 requiring Mrs [S.C.] to hand over the child Julien Maire to his father immediately... pursuant to the Convention on Judicial Cooperation between Portugal and France oo. The police must oo. now be formally required actively to search for the child .OO whose mother's family in Oeiras seem to know where he is because last year he was located in a flat belonging to his aunt in Algueirio".

55. By a letter of 11 June 2001 the consul general informed the applicant as follows:

"oo. the Ambassador discussed your case with the director of the [Portuguese] Minister of Justice's private office and with the public prosecutor. What emerged from those discussions is that recognition by the Portuguese courts of the French court decision to convict your former wife of a criminal offence is a complex issue and may not be satisfactorily resolved. However, oo. the decision of the Portuguese civil courts that the child should be returned to you is final. The Oeiras prosecutor has asked the IRS and the security [police] to carry out a search. This search oo. has not so far been successful, which is why the Portuguese authorities fear that mother and child may have left Portugal. Our Ambassador was nonetheless advised that the search would continue for as long as there was no proof that they had left the country..."

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. International law

56. Article 11 of the Convention on the Rights of the Child of 20 November 1989, which was ratified by France on 7 August 1990 and by Portugal on 21 September 1990, requires States Parties to "take measures to combat the illicit transfer and non-return of children abroad". For that purpose, States "shall promote the condJ,lsion of bilateral or multilateral agreements or accession to existing agreements".

57. The relevant provisions of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which was ratified by Portugal on 29 September 1983 and by France on 16 September 1982, provide:

Article 1

„The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting

State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 2

"Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For tbs purpose they shall use the most expeditious procedures available."

Article 3

"The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 6

"A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities...."

Article 7

"Central Authorities shall cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures: (a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (d) to exchange, where desirable, information relating to the social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

Article 11

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ..."

Article 12

"Where a child has been wrongfully removed or retained ... and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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

Article 13

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: .

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority

58. The relevant provisions of the Convention on Judicial Cooperation between France and Portugal for the Protection of Minors of 20 July 1983 provide:

Article 18 - Right of action

"1. Where the voluntary return of the child is refused, Central Authorities shall refer the case without delay, through the intermediary of the court prosecution service, to the appropriate judicial authorities to secure either the enforcement in the requested State of the enforceable decisions taken in the requesting State, or a ruling on the application for the child's return.

2. The case may also be referred to the judicial authorities by the interested party.

3. Enforcement of decisions shall be sought from the court within whose jurisdiction the minor is located or presumed to be located."

Article 19 - Protective procedure for restoring the status quo

"1. The court of the State to or in which the child has been removed or wrongfully retained shall order, as a protective measure, the child's immediate return unless the person who removed or retained the child establishes that:

(a) more than one year has elapsed between the removal or retention and the making of an application to the judicial authorities of the State where the child is located; or

(b) at the time of the alleged violation the person to whom custody had been awarded before such removal was not exercising his right of custody of the child either effectively or in good faith; or

(c) the child's return would seriously jeopardise its health or safety owing to the occurrence of an exceptional event since the award of custody.

2. In assessing the circumstances listed above, the judicial authorities of the requested State shall take direct account of the law and judicial decisions of the State where the child is habitually resident. They shall take into consideration the information provided by the Central Authority of the State where the child is habitually resident concerning the legislation on custody in that State and concerning the child's social background.

3. A decision on the child's return shall not affect the merits of the custody issue. ..."

Article 20 - Variation of custody rights

"Where a court in the State to or in which the child has been removed or wrongfully retained finds that one of the exceptions listed in paragraphs 1 (b) or (c) of the preceding Article applies, it may rule on the merits of custody on the expiry of a period of one year after the child's removal or retention provided that the child has settled in its new environment."

B. Domestic law

59. Section 191 of the Minors Act adopted by Legislative Decree no. 314/78 of 27 October 1978 provides, *inter alia*:

"(1) If the minor has left his parents' house or the house provided for him by his parents or

if he has been removed from it or if he is not in the custody of the person or institution to which legal custody has been awarded, an application for his return shall be made to the court with jurisdiction over the area where the minor is located.

(2) If proceedings are brought, the guardian and the person who cared for or retained the minor shall be summoned to make submissions in reply within a period of five days.

(4) If there are no submissions in reply, or if such submissions are manifestly ill-founded, the court shall order the child's return and indicate where it is to take place; the court shall order such return only where it considers it necessary; the person concerned shall be served with the order so as to be able to effect the return in accordance with its terms, on penalty of being prosecuted for noncompliance with a legal order. "

60. Under Article 348 of the Criminal Code, non-compliance with a legal order is punishable by a term of imprisonment of up to one year or by a fine not exceeding 120 day-fines.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained of failure to act and negligence on the part of the Portuguese authorities in enforcing the judicial decisions awarding him custody of his child.

62. The Court considers that this case must be examined under Article 8 of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions of the parties

63. The applicant submitted that the Portuguese authorities had not done all that they could to enforce the decisions of the French courts. He stressed that he had provided all the necessary information at the appropriate time for Julien and his mother to be located, and that they had not been found because of inexplicable negligence on the part of the Oeiras District Court.

64. The applicant considered that this situation had detrimentally affected his private life and had been particularly harmful to the child himself who, according to the information on file, had remained for a long time without social security cover and without going to school.

65. The Government did not deny that Article 8 applied to the circumstances of the case but considered that there had not been any violation. They submitted that States enjoyed a margin of appreciation which allowed them to select on a case-by-case basis the course of action best designed to meet their positive obligations. The Government maintained that the Portuguese authorities had taken every possible step to ensure compliance with the decisions of the French courts regarding the custody of the child.

66. The Government considered that the course of the proceedings showed that the Portuguese authorities - the prosecution service, the courts, and the IRS as the Central Authority - had conducted themselves properly throughout. The difficulties encountered in locating the minor had been due to the mother's lack of cooperation.

67. With regard to the events of April 1999, the Government submitted that it would not have been possible for the 27 April 1999 warrant to allow forced entry into the home in question. They observed that such a power could have been conferred only as part of criminal, rather than civil, proceedings. The Government submitted that, in circumstances such as those prevailing at the time, a forced entry by the authorities into the home in question would have surely entitled the owners to counter-allege that their rights under Article 8 of the Convention had been violated.

B. The Court's assessment

68. The Court notes that it is accepted that the tie between the applicant and his son comes within the scope of family life within the meaning of Article 8 of the Convention. That Article is therefore applicable to the situation of which the applicant complained.

69. That being so, what must be determined is whether there has been a failure to respect the applicant's and his son Julien's family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

70. In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his child and an obligation on the national authorities to take such measures (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-1, and *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII).

71. However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. While national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. In a situation where ~, contact between parent and child might jeopardise such interests or infringe such rights, the national authorities are under a duty to ensure that a fair balance is struck between them (see *Ignaccolo-Zenide*, cited above, § 94).

72. Lastly, the Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001II, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). The Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (see *Ignaccolo-Zenide*, cited above, § 95) and the Convention on the Rights of the Child of 20 November 1989.

73. What is decisive in this case is whether the Portuguese authorities took all the necessary steps that could reasonably be demanded of them to facilitate the enforcement of the decision of the French courts granting the applicant sole custody of and parental responsibility for his child (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 22, § 58).

74. It must be reiterated that in a case of this kind the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with it. The Hague Convention recognises this fact because it provides for a whole series of measures to ensure the immediate return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention requires the

judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any failure to act for more than six weeks may give rise to a request for a statement of reasons for the delay.

75. On the date of the request transmitted by the French Central Authority to its Portuguese counterpart, 5 June 1997, there is no doubt that Julien had been wrongfully removed. The prosecution service subsequently, about forty days after that date, lodged an application for his judicial return with the Oeiras District Court. That court then made several attempts to discover S.C.'s whereabouts, but without success. While no significant delay due to failure to act can be attributed to the authorities in charge of the case during this initial stage in the proceedings, the Court finds it difficult to understand why those authorities were unable to compel S.C. to appear, particularly since she had been located at the address given by the applicant (see paragraphs 20 and 45 above) in different proceedings brought before another division of the same court. Lastly, the Court notes that the Oeiras District Court finally decided on 15 June 1999 that S.C. had to be regarded as having been properly summoned to appear because she had already intervened in the proceedings on 2 July 1998. An explanation may be in order as to why one whole year had to elapse after the latter date before such a decision was taken. The Government have not given one. Julien was finally located by the police only on 14 December 2001, in other words four years and six months after the request sent by the French Central Authority to the IRS.

76. The Court acknowledges that these difficulties are, as submitted by the Government, essentially due to the mother's behaviour. It stresses however that the appropriate authorities should then have imposed adequate sanctions in respect of the mother's lack of cooperation. Although coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the children live. Even if the domestic legal order did not allow for the imposition of effective sanctions, the Court considers that each Contracting State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by Article 8 of the Convention and the other international agreements it has chosen to ratify.

77. It should not be forgotten that the interests of the child are paramount in such a case, which is why the Portuguese authorities may be right in considering that parental responsibility must now be granted to the mother. In its request of 21 December 2001, the prosecution service gave the integration of the child into his new environment as its reason for seeking a variation of the 19 February 1998 judgment of the Besançon *tribunal de grande instance*. However, the fact remains that the considerable length of time it took for Julien to be located placed the applicant in an unfavourable position, particularly with the child being so young.

78. Having regard to the foregoing, and notwithstanding the respondent State's margin of appreciation in the matter, the Court concludes that the Portuguese authorities failed to make adequate and effective efforts to enforce the applicant's right to the return of his child and thereby breached his right to respect for his family life as guaranteed by Article 8 of the Convention.

79. There has accordingly been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

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

A. Damage

81. The applicant claimed 45,734.71 euros (BUR) for non-pecuniary damage. The Government considered that amount excessive.

82. The Court considers that the applicant effectively sustained non-pecuniary damage which calls for pecuniary compensation. Having regard to the circumstances of the case and

making its assessment on an equitable basis as required by Article 41, it awards him EUR 20,000 under this head.

B. Costs and expenses

83. The applicant also claimed the reimbursement of an amount of EUR 14,353.17 which he broke down as follows:

(a) EUR 3,728.90 for expenses incurred by the applicant himself on travel to Portugal;

(b) EUR 10,624.27 for legal fees, including EUR 2,370 in respect of the lawyer who represented him in Strasbourg.

84. The Government submitted that only the costs and expenses incurred in the proceedings before the Court could be reimbursed. As to quantum, it left it to the discretion of the Court.

85. The Court notes that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum (see *Attridge v. Greece* (just satisfaction), [GC], no. 31107/96, § 54, ECHR 2000-XI). Moreover, legal costs are only recoverable in so far as they relate to the violation found (see *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 21, § 66).

86. The Court considers that the expenses incurred both in Portugal and in Strasbourg to prevent or remedy the situation which the Court has found to be contrary to Article 8 of the Convention were necessarily incurred and should be reimbursed up to a reasonable level. However, the costs incurred in the proceedings in the French courts do not relate directly to the violation found and should not therefore be reimbursed.

The Court considers it reasonable to award the applicant EUR 6,100 under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from "the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 6,100 (six thousand one hundred euros) for cost~ and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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