



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF FERRARI v. ROMANIA

(Application no. 1714/10)

STRASBOURG

28 April 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ferrari v. Romania,

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

Josep Casadevall, *President*,

Luis López Guerra,

Ján Šikuta,

Dragoljub Popović,

Kristina Pardalos,

Valeriu Grițco,

Iulia Antoanella Motoc, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 7 April 2015,

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

PROCEDURE

1. The case originated in an application (no. 1714/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Argentinean national, Mr Adrian Rodolfo Ferrari (“the applicant”), on 21 December 2009.

2. The applicant was represented by the law firm Dawson Cornwell from London. The Romanian Government (“the Government”) were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. On 2 April 2013 the complaint concerning the alleged interference with the applicant’s family life resulting from the application of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the Hague Convention”) was communicated to the Government under Article 8 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1971 and lives in Buenos Aires. He is a military pilot.

5. On 11 August 2005 his child was born of his marriage with M.T.R. who holds both Romanian and Argentinean nationality. At the date of the facts, the family’s permanent residence was in Argentina, but they travelled due to the applicant’s various work assignments.

6. In September 2006 the applicant was sent to a UN mission in Cyprus where his family joined him shortly after. While in Cyprus, the family travelled to Spain to visit the applicant's sister. In order to facilitate the travelling, the applicant and his wife signed an authorisation form allowing each one of them to travel abroad with the child.

7. After having lived together for seven months in Cyprus, the applicant and M.T.R. decided together that M.T.R. would take their child to Romania for a few months, and would join the applicant in Buenos Aires in October, at the end of his contract in Cyprus. The parents agreed that M.T.R. and the child would return to Argentina before 15 October 2007, the date at which the child's passport would expire.

8. M.T.R. was unable to make travel arrangements on time, as the applicant had been late in sending money for the tickets, and eventually the child's passport expired. M.T.R. sought the applicant's consent to request a Romanian passport for the child, but the applicant refused.

9. On 14 November 2007 M.T.R. informed the applicant that she would not return with the child to Argentina. Later on, on 3 February 2008 she filed for divorce and custody of the child before the Romanian courts.

10. On 16 November 2007 the applicant withdrew the authorisation that he had given to the wife to travel with the child. On 4 December 2007 he also lodged a request for the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), with the Argentinean Ministry of Foreign Relations, the Central Authority for the purpose of the Hague Convention.

A. The Hague proceedings

11. On 4 January 2008 the notification made by the applicant was received by the Romanian Ministry of Justice, the Central Authority for the purpose of the Hague Convention ("the Ministry"). At the Ministry's request, the police visited M.T.R.'s home and inquired about their situation. She provided copies of their identity papers and of the authorisation form allowing her to travel with the child.

12. On 12 February 2008 the Romanian Central Authority tried unsuccessfully to engage the mother in negotiations concerning the return of the child to Argentina. On 30 March 2008 they lodged before the Bucharest County Court an application under the Hague Convention for the return of the child.

13. Five hearings took place in the case. At the first hearing M.T.R. filed a response to the applicant's motion; a postponement was granted at the Ministry's request. At the second hearing M.T.R. learned, allegedly for the first time, that the authorisation to travel had been withdrawn by her husband. This hearing as well as the next one were postponed at M.T.R.'s request. At the next hearing M.T.R. asked that the applicant's request be

dismissed; she claimed that he was sexually deviant and stated that she feared for her child's safety should he be returned to his father. The applicant did not appear in court.

14. On 8 July 2008 the County Court granted the applicant's request and ordered M.T.R. to return the child to the habitual residence in Buenos Aires within two weeks from the date of its decision. It noted that while the applicant had given his consent to the travel to Romania, his wife retained the child in Romania against the applicant's will contrary to what had been initially agreed upon. It also observed that the parents maintained joint custody of the child, as they had been legally married at the date of the wrongful retention. It further noted that on 16 April 2008 the Huși District Court had granted the couple's divorce but had not decided on the custody of the child (see paragraph 21 below). It dismissed as unfounded the mother's allegations that the applicant was not taking active part in the child's upbringing and that his presence constituted a major risk for "the child's physical, psychical, emotional and affective development". The decision was final and enforceable within two weeks.

15. On 12 August 2008 M.T.R. appealed in cassation. The case was heard on 27 November 2008 by the Bucharest Court of Appeal. In a final decision of 4 December 2008 the court upheld the County Court's decision.

16. On 22 December 2008 the Ministry requested the assistance of a bailiff for the enforcement of the final decision. On 8 January 2009 the bailiff informed M.T.R. of the obligation to comply with the court order. The next day M.T.R. lodged an application for a stay of execution which was dismissed by the Bucharest County Court on 25 March 2009.

A new enforcement attempt took place on 2 April 2009 when M.T.R. informed the bailiff that she refused to comply with the return order. She explained that the applicant could keep contact with the child through internet and webcam, that she kept him updated with the developments of the child and that he did not support the child financially. On that day the bailiff decided to postpone the enforcement proceedings.

17. At the same time, M.T.R. requested the annulment of the final decision of 4 December 2008 (*contestație în anulare*) which she considered to be "unfounded and unlawful" (*netemeinică și nelegală*). On 23 February 2009 the Bucharest Court of Appeal granted her request, quashed the return order and sent the case back for re-examination of the appeal on points of law. The Court of Appeal retried the appeal and in a final decision of 4 May 2009 dismissed the initial request for the return of the child. The court considered that the child's arrival to Romania was not unlawful as both parents had consented to the trip. It also found that the child was already integrated in his new environment. It considered that it would not be in the child's best interest to return to Argentina, because the applicant travelled often due to his job as a military pilot and consequently could not take proper care of the child:

“The social workers’ reports in the case and the child’s psychological evaluation show that the child is harmoniously developed – affectively, emotionally and intellectually -, is affectively attached to his mother and maternal grandmother, and is integrated in the environment in which he lives since his arrival in Romania. His return to Argentina is perceived by the court as not corresponding to his superior interest in so far as, notably, his father being a military pilot, is selected for missions within the United Nations, which makes it impossible for him to be preoccupied with raising, caring for and educating the child; in addition frequent travel by the child with his father in these missions is unfavourable to the child’s harmonious development.”

18. On 15 May 2009 the Ministry informed the Argentinean Central Authority of the outcome of the proceedings and advised the applicant to request a right of access under the Hague Convention. The Argentinean Central Authority sent the decision to the applicant and expressed their disagreement with the court’s reasoning. They argued mainly that the protractions leading to the child becoming integrated in his new environment, in Romania, were not imputable to the applicant, but to the Romanian authorities themselves. Moreover, they claimed that the Romanian courts were wrong in considering that because of his profession the applicant could not take care of the child; in any event, such consideration should have been examined and decided by the courts ruling on the custody of the child.

19. The Ministry kept close contact with the Argentinean Central Authority throughout the proceedings, informing them of the progress of the case and seeking information requested by the courts about the applicant.

B. The divorce and custody proceedings

20. On 3 February 2008 M.T.R. filed for divorce and custody of the child. On 27 February 2008 the Ministry informed the applicant of those proceedings.

21. On 16 April 2008 the Husi District Court granted the divorce but decided not to rule on the custody matters before the end of the Hague proceedings which were pending at that time.

The applicant did not appeal and the decision became thus final.

22. On 26 September 2011 the Bucharest District Court granted M.T.R. custody of the child and awarded the applicant visiting rights. The parties appealed; the applicant contested the alimony set by the court. The decision became final with certain amendments on 6 December 2012 when the Court of Appeal dismissed the appeals on points of law lodged by the two parents.

C. Developments of the case

23. In the latter part of 2009 the applicant travelled for the first time to Romania since the beginning of the conflictual situation. He stayed with M.T.R. and his child in M.T.R.’s apartment in Husi for a month.

24. In 2010 the applicant travelled to Romania on two occasions, once accompanied by the child's paternal grandmother. The child was able to spend time with his father and shared his hotel room for one night.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

25. The relevant provisions of Law no. 369/2004 on the enforcement of the Hague Convention, in so far as relevant, read as follows:

Article 6

"The proceedings under Article 3 of the Convention seeking the return of the child living in Romania shall be examined urgently."

Article 12

"The judgment shall be reasoned within ten days from the date it was delivered on.

The judgment is subject to appeal on points of law before the Bucharest Court of Appeal within ten days from the date it was communicated to the parties."

26. The relevant provisions of the Hague Convention, which entered into force in respect of Romania on 30 September 1992, read, in so far as relevant, as follows.

"The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring 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, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

...

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 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 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

(a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;

(b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

...

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 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 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 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

...

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 this Convention is not lodged within a reasonable time following receipt of the notice.

...

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”

27. The Explanatory Report on the 1980 Hague Child Abduction Convention, prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982, seeks to throw into relief the principles which form the basis of the 1980 Convention and to supply to those who must apply the Convention a detailed commentary on its provisions. It appears from this report that, in order to discourage the possibility for the abducting parent to have his or her action recognised as lawful in the State to which the child has been taken, the Convention enshrines, in addition to its preventive aspect, the restoration of the status quo, by an order for immediate return of the child, which would make it possible to restore the situation that had been unilaterally and wrongfully changed. Compliance with custody rights is almost entirely absent from the scope of this Convention, as this matter is to be discussed before the relevant courts in the State of the child’s habitual residence prior to removal. The philosophy of the Hague Convention is to fight against the multiplication of international abductions, based always on a wish to protect children by acting as interpreter of their real interests. Accordingly, the objective of prevention and immediate return corresponds to a specific conception of “the child’s best interests”. However, as the child’s removal

may be justified for objective reasons which have to do either with his or her person, or with the environment with which he or she is most closely connected, the Convention allows for certain exceptions to the general obligations on the States to ensure an immediate return (§ 25). Since the return of the child is the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty, and it is possible to distinguish exceptions which derive their justification from three different principles (§ 27). Firstly, the authorities of the requested State are not bound to order the return of the child if the person requesting the return was not actually exercising custody rights or where his or her behaviour shows acceptance of the new situation (§ 28). Secondly, paragraphs 1b and 2 of Article 13 contain exceptions which clearly derive from a consideration of the interests of the child, to which the Convention gives a definite content. Thus, the interest of the child in not being removed from his or her habitual residence without sufficient guarantees of stability in the new environment gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation (§ 29). Lastly, there is no obligation to return a child when, in terms of Article 20, his or her return “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms” (§ 31). The explanatory report, which sets out those exceptions, also emphasises the margin of appreciation inherent in the judicial function.

28. In 2003 the HCCH published Part II of the “Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”. Although primarily intended for the new Contracting States and without binding effect, especially in respect of the judicial authorities, this document seeks to facilitate the Convention’s implementation by proposing numerous recommendations and clarifications. The Guide repeatedly emphasises the importance of the Explanatory Report to the 1980 Convention, known as the Pérez-Vera Report, in helping to interpret coherently and understand the 1980 Convention (see, for example, points 3.3.2 “Implications of the transformation approach” and 8.1 “Explanatory Report on the Convention: the Pérez-Vera Report”). In particular, it emphasises that the judicial and administrative authorities are under an obligation, *inter alia*, to process return applications expeditiously, including on appeal (point 1.5 “Expedition procedures”). Expedition procedures should be viewed as procedures which are both fast and efficient: prompt decision-making under the Convention serves the best interests of children (point 6.4 “Case management”). The Guide to Good Practice specifies that delays in enforcement of return orders, or their non-enforcement, in certain Contracting States are matters of serious concern, and recommends that State Parties ensure that there are simple and effective mechanisms to

enforce orders for the return of children within their domestic systems, noting that the return must actually be effected and not just ordered (point 6.7 “Enforcement”).

29. The relevant provisions of the United Nations Convention on the Rights of the Child and the General Comment No. 7 (2005) on Implementing child rights in early childhood, those of the Charter of Fundamental Rights of the European Union and those of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Brussels II bis Regulation”) are reproduced in *X v. Latvia* [GC] (no. 27853/09, §§ 37-42, ECHR 2013).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. The applicant complained under Articles 6 and 8 of the Convention about the length of the proceedings instituted through the Romanian Central Authority for the return of his child. He further considered that in failing to act expeditiously, the Romanian authorities allowed for the family ties between him and his child to break.

31. As the Court is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the parties. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; *Schwizgebel v. Switzerland*, no. 25762/07, § 69, ECHR 2010 (extracts); or *Karrer v. Romania*, no. 16965/10, § 25, 21 February 2012). In the present case, the Court notes that the complaint mainly focuses on the interference with the applicant’s right to respect for his family life. Therefore, by virtue of the *jura novit curia* principle, the Court considers that the applicant’s complaints are to be examined only under Article 8 of the Convention which 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.”

A. Admissibility

32. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant's position

33. The applicant reiterated that the purpose of the Hague Convention is to allow for the swift return of the child to his habitual residence in order to allow the courts of that country to decide on the matters of custody. Under the Hague Convention the courts are to decide on the summary return by means of a prompt and effective in-depth enquiry in the child's welfare. He pointed out that consideration of the welfare or "best interest" of the child appropriate within the context of an enquiry pursuant to the Hague Convention will not be undertaken as a free or wide ranging enquiry as would be necessary when seeking to establish long-term arrangements for the child.

34. He considered that the proceedings had lasted too long and the delays had not been necessary either during the court proceedings or at the enforcement stage. He contended that no substantive or effective steps had been taken for the enforcement of the return order. He further submitted that by allowing for such delays in the proceedings to occur, the authorities had made it possible for the mother to successfully plead a change in circumstances and thus to obtain annulment of the return order.

35. In his view, the Romanian courts deciding on the request for return entertained and determined the substance of the custody matter rather than the procedural issue of which jurisdiction should deal with the custody matter. Accordingly, the Romanian courts misinterpreted the concept of child's welfare in the context of the Hague Convention.

(b) The Government's position

36. The Government averred that throughout the proceedings the applicant had made no effort to regain custody of his child. The mother had never attempted to hide the child or to hinder personal contacts as the child had remained in contact via telephone and internet with his father.

37. They considered that the overall length of the proceedings under the Hague Convention had not been unreasonable and pointed out that the proceedings had developed at a constant pace and there had been no

unnecessary postponements of the case. They also observed that the family ties had never been interrupted between the applicant and his son.

38. The Government further contended that the domestic courts had taken into account the child's best interest and their change of position had been caused by the finding that the child was settled in his new environment, an exception expressly provided in Article 12 of the Hague Convention.

39. They further pointed that due to the quashing of the return order, the Romanian courts had been finally able to resolve the custody issue. On this point they observed that the applicant had not contested the court order in so far as it concerned the attribution of custody and visiting rights, being thus satisfied with that outcome.

40. In their view, the domestic authorities had met all the requirements set in the Hague Convention and in Article 8 of the Convention.

2. The Court's appraisal

(a) General principles

41. The Court notes, firstly, that the relationship between the applicant and his son amounts to family life within the meaning of Article 8 of the Convention.

42. It further makes reference to the general principles in the field of family life and the impact of the Hague Convention in the Court's work, as they have been established most recently in *X*, cited above, §§ 92-108.

43. In particular, the Court reiterates that the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life and is protected under Article 8 of the Convention (see *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005; and *Iosub Caras v. Romania*, no. 7198/04, §§ 28-29, 27 July 2006).

44. In the sensitive area of family relations, the State is not only bound to refrain from taking measures that would hinder the effective enjoyment of family life, but, depending on the circumstances of each case, should take positive action in order to ensure the effective exercise of such rights. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007), bearing in mind, however, that the child's best interests must be the primary consideration (see *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX) and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child" (see *X v. Latvia*, cited above, § 95).

45. Moreover, in the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the

light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child of 20 November 1989, and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (see *X v. Latvia*, cited above, § 93 with further references).

46. In the context of an application for return, which is distinct from the custody proceedings, it is primarily for the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties, to establish the best interests of the child and evaluate the case in the light of the exceptions provided for by the Hague Convention. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation, which, however, remains subject to a European supervision (see *X v. Latvia*, cited above, § 101). Notwithstanding the State's margin of appreciation, the Court is called upon to examine whether the decision-making process leading to an interference was fair and afforded those concerned to present their case fully, and that the best interests of the child were defended (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 99, ECHR 2000-I, with further references, and *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

47. To that end, the Court considers that a harmonious interpretation of the European Convention and the Hague Convention can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention (see *X v. Latvia*, cited above, § 106; and *Neulinger and Shuruk v. Switzerland [GC]*, no. 41615/07, § 133, ECHR 2010).

48. In consequence, the Court considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable objections to the child's return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing or accepting such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently

detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see *X v. Latvia*, cited above, § 107).

49. The Court also reiterates that 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 require 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 *Iosub Caras*, § 38; and *Blaga*, § 72, judgments cited above). The delays in the procedure alone may enable the Court to conclude that the authorities had not complied with their positive obligations under the Convention (see *Shaw v. Hungary*, no. 6457/09, § 72, 26 July 2011).

(b) Application of those principles to the facts of the case

50. Turning to the facts of the case under consideration, the Court will start by looking at the manner in which the domestic courts applied the Hague Convention in the case under examination. It thus notes that the request for return of the child was examined by two ordinary courts which agreed, based on the evidence in the file, that the child was unlawfully retained in Romania and consequently ordered his return to his habitual residence in Argentina.

51. These decisions were nevertheless quashed by means of an extraordinary appeal lodged by the mother who considered the return order to be “unfounded and unlawful”. The Court notes that such arguments normally pertain to the merits of a case and reiterates that quashing a final and binding decision for the mere reason that there are different views as to the interpretation of the evidence adduced is not justified and infringes the applicant’s right to a fair hearing (see, among many other judgments, *Mitrea v. Romania*, no. 26105/03, §§ 27 to 30, 29 July 2008). In the present case, the county court examined the allegations that the applicant was unfit to take care of the child and dismissed them; in this context, the re-examination of the same issue, albeit supported by other arguments (the applicant’s travels) does not seem compatible with the criteria set out by the Court in its case-law (see paragraphs 14 *in fine* and 17 above). Moreover, there is no indication in the file that M.T.R. could not raise that argument during the first set of proceedings (see, *mutatis mutandis*, *Popov v. Moldova* (no. 2), no. 19960/04, §§ 50 – 54, 6 December 2005).

52. Furthermore, in its final ruling after the quashing of the return orders, the court of appeal established that the child had not been wrongfully brought to Romania as both parents consented to the trip. It nevertheless failed to examine whether the retention beyond what was agreed upon initially, met the requirements of the Hague Convention. Moreover it appears that the main reason that founded the new final decision was that the father was unable to take care of the child due to his repeated travels (see paragraph 17 above). The Court is not convinced that

these arguments are relevant to the scope of the Hague Convention proceedings and, even less so that they are sufficient for reversing the return order (see paragraphs 46 and 48 above).

53. The Court reiterates that the domestic courts are better fit to examine the circumstances of the case before them (see paragraph 46 above). It therefore can accept that the passage of time brought about a change in the child's situation which triggered the application of Article 12 of the Hague Convention. It remains nevertheless to be ascertained whether this change was caused or permitted by the authorities, in particular, by the overall length of the proceedings and the authorities' attitude towards enforcement. It reiterates that effective respect for family life requires that the future relations between parents and children are not determined by the mere effluxion of time (see, among others, *H. v. the United Kingdom*, 8 July 1987, § 90, Series A no. 120).

54. In particular, the Court notes that it took the domestic courts thirteen months to decide on the matter (30 March 2008 to 4 May 2009). The Court has previously considered similar periods to be excessively long, in particular given the requirement of expedition which lies at the core of the Hague Convention procedure (see, in particular *Monory*, cited above, § 82 – 12 months; *Karrer*, cited above, § 54 – 11 months; but also, conversely, *Strömblad*, cited above, § 93 – less than one year). The Court reiterates that the domestic authorities are under an obligation to process return applications expeditiously, including on appeal (see paragraph 28 above).

55. Furthermore, the Court notes that, although the return order issued on 8 July 2008 was final and therefore immediately enforceable, the authorities did not commence enforcement proceeding until 22 December 2008; the period of almost five month of inactivity is not accounted for. Moreover, there is no information in the case as to what actions the bailiff took, except for engaging the mother in discussions and recording her refusal to comply with the return order. The Court notes that as long as the return order was valid, namely until 23 February 2009, the authorities had no reason not to proceed to the enforcement of that order. This situation raises at least questions as to whether the procedural framework in place allowed the applicant to pursue his rights effectively.

56. The foregoing considerations are sufficient to enable the Court to conclude that in not giving sufficient reasons for the non-return order, in allowing for the procedure to last for thirteen months and in protracting the enforcement proceedings, the authorities failed to facilitate the expeditious and efficient conduct of the return proceedings. In sum, the applicant did not receive effective protection of his right to respect for his family life.

There has accordingly been a violation of Article 8 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

57. The applicant further complained, under Article 14 of the Convention, that he had been discriminated against based on his profession, in so far as the only reason why the Romanian courts denied him the return of his child was the fact that he belonged to the military forces. Lastly, invoking Article 17 of the Convention, he complained that the Romanian courts had made an erroneous interpretation of the rights guaranteed under Article 8 of the Convention and of the notion of “the child’s best interest”.

58. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. 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 applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

61. The Government argued that finding of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. In any case, they considered that the amount claimed by the applicant was excessive.

62. The Court considers that the applicant must have suffered distress as a result of the conduct of the proceedings under the Hague Convention in which he was involved. It considers that sufficient just satisfaction would not be provided solely by a finding of a violation. Consequently, making an assessment on an equitable basis, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage.

B. Costs and expenses

63. The applicant also claimed EUR 7,950 for the costs and expenses incurred during the proceedings, representing namely legal fees in

Argentina and Romania, trips to Romania, translation fees and non-authorised use of credit card by M.T.R.

64. The Government contested the reality of at least a part of the claims and pointed out that the applicant failed to substantiate the reality of the alleged costs.

65. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

66. The Court considers it appropriate that the default interest rate 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 complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand and five hundred euros) plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 April 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Josep Casadevall
President