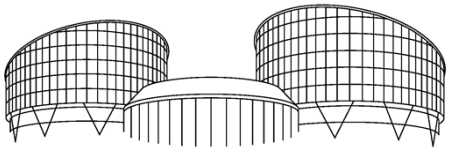

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF THOMPSON v. RUSSIA

(Application no. 36048/17)

JUDGMENT

Art 8 • Failure of domestic courts to comply with positive obligations to secure respect for family life through inadequate interpretation and application of Hague Convention, leading to refusal of father's request to return son after wrongful and arbitrary removal from Spain

STRASBOURG

30 March 2021

FINAL

30/06/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Thompson v. Russia,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Edward Michael Thompson ("the first applicant), on behalf of himself and his daughter ("the second applicant"), who holds British and Russian citizenship, on 15 May 2017;

the decision to give notice of the application to the Russian Government ("the Government");

the decision to grant the application priority under Rule 41 of the Rules of Court;

the parties' observations;

the letter from the British Government informing the Court that they do not wish to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

Having deliberated in private on 16 February 2021,

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

INTRODUCTION

1. The present case concerns the decision of the Russian courts to refuse the first applicant's request for the return of the second applicant to Spain under the Hague Convention on the Civil Aspects of International Child Abduction.

THE FACTS

2. The applicants were born in 1973 and 2013 respectively. The first applicant lives in Seville, Spain. The second applicant lives in St Petersburg, Russia. The applicants were represented by Mr A.Y. Zuyev and Ms O. Khazova, lawyers practising in St Petersburg and Moscow, respectively.

3. The Government were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE CIRCUMSTANCES OF THE CASE

A. Background information

5. In 2007 the first applicant married a Russian national, Ms Yu.T., in St Petersburg.

6. In 2009 the couple moved to Seville, Spain, where they settled on a permanent basis.

7. On 15 July 2013 their daughter, the second applicant, was born. She is a British national by birth.

8. On 27 April 2016 Yu.T. telephoned the first applicant from Barcelona Airport to inform him that she was leaving for Russia with the second applicant and did not intend to return.

9. On 4 October 2016 Yu.T. obtained Russian citizenship for the second applicant.

10. On 25 May 2016 the first applicant, who did not know where the second applicant was resident in Russia, applied to the Spanish Ministry of Justice for assistance in securing her return.

11. On 21 July 2016 the first applicant applied to the Russian Ministry of Education and Science, through the Spanish Ministry of Justice, with a request to organise a search for the second applicant and return her to Spain, and to facilitate negotiations with Yu.T.

12. In July-August 2016 the first applicant travelled to Russia. He made enquiries with the St Petersburg Ombudsman for Children and local childcare authorities in order to establish his daughter's whereabouts.

13. Following these requests, the Russian Ministry of Education and Science asked the St Petersburg Bailiffs' Service to conduct an investigation; this established the second applicant's exact location in St Petersburg.

14. At the request of both the first applicant and Yu.T., officials from the Office of the St Petersburg Ombudsman for Children, including psychologists specialising in conflict management, attempted extrajudicial reconcilement procedures. However, these did not result in a friendly settlement between the parties. In the absence of any documents outlining the circumstances which would argue against contact between the applicants, the Ombudsman indicated that the parties were to take all necessary measures to ensure communication between the father and child.

B. Proceedings in Russia

1. Proceedings for the second applicant's return to Spain

15. On 18 August 2016 the first applicant lodged an application with the Dzerzhinskiy District Court of St Petersburg ("the District Court"), seeking the second applicant's return to Spain on the basis of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), to which both Russia and Spain are parties.

16. Yu.T. objected to the second applicant's return to Spain, claiming that it would run contrary to the child's best interests and place her in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention.

17. On 27 October 2016 the District Court found that although the second applicant's removal from Spain to Russia had been wrongful (Spain had been the second applicant's habitual residence at the time of removal, the first applicant had actually been exercising custody rights and had not consented to or subsequently accepted the removal), and although less than one year had elapsed from the date of the removal, the return request had to be dismissed in view of Article 13 (b) of the Hague Convention, which provided that the judicial authority of the requested State was not bound to order the return of a child if such an action would place the child in an intolerable situation. In that connection, the District Court noted that the second applicant was three years and three months old at the time of its examination of the return application, an age at which a child was deeply attached to his or her mother, both physiologically and psychologically. It was clear from Yu.T.'s submissions that she had no intention of returning to Spain and was not considering such an option, that she intended to divorce the first applicant and could not therefore stay at his flat, and that she had no residence of her own in Spain and no income. The District Court further relied on Principle 6 of the United Nations 1959 Declaration of the Rights of the Child, which provided that a child of tender years should not, save in exceptional circumstances, be separated from his or her mother. In view of these factors, the District Court considered that the child's return to Spain without Yu.T. would run contrary to her best interests and those of Yu.T. In such circumstances, taking into account the interests of the child, her young age and her need to be cared for by the mother, the District Court concluded that there were no grounds for granting the first applicant's request for the return of the child to the place of her habitual residence. The District Court took into account the opinion of the Childcare authority of the Municipal Unit "Yekateringofskiy", which considered that granting the first applicant's claim would run contrary to the second applicant's interests and would constitute an intolerable situation in view of her young age. The District Court also took into account the opinion of the St Petersburg

Ombudsman for Children, who considered that a decision which might lead to the child's separation from her mother would not be in her best interests.

18. On 21 December 2016 the St Petersburg City Court ("the City Court") upheld the above judgment on appeal. It found that the second applicant's retention in Russia by Yu.T. could not be considered unlawful under Article 3 of the Hague Convention in view of the fact that the second applicant had been living in St Petersburg since April 2016, that she had left Spain when she was two years and nine months old, when a child had both a psychological and a physiological need for a mother, and that Yu.T. had no intention of returning to Spain. Yu.T. also planned to divorce the first applicant and to obtain a ruling that the child's place of residence was with her. The child, who had lived in St Petersburg since April 2016, had also become well integrated into her social and family environment in Russia. Relying on Article 38 of the Constitution of the Russian Federation, Articles 63 § 1 and 65 § 1 of the Family Code of the Russian Federation, Principle 6 of the UN 1959 Declaration of the Rights of the Child and Article 3 § 2 of the United Nations 1989 Convention on the Rights of the Child, the City Court agreed with the first applicant that discrimination against fathers was unacceptable. It noted, however, that the best interests of the child were of the utmost importance in every case, and that the District Court had reached its decision on the basis of that principle. Relying further on Articles 15 § 4, 17 § 1 and 18 of the Russian Constitution, the City Court held that the provisions of Principle 6 of the UN 1959 Declaration of the Rights of the Child were reasonable and justified and could therefore be applied to the dispute between the parties. Therefore, the exceptions to the immediate return of a child under Articles 13 (b) and 20 of the Hague Convention allowed for the conclusion that there were no grounds for granting the first applicant's claims. The return of the child without the mother was unacceptable and would run contrary to the goal of securing the child's best interests. The City Court further held that the first applicant's argument that he had been deprived of the possibility of communicating with his daughter had not been demonstrated, as he had not been deprived of parental authority and Yu.T. had not prevented him from having contact with the child in Russia. The domestic authorities had taken all the necessary measures to provide the first applicant with opportunities to have contact with his daughter and to participate in her upbringing.

19. On 6 February and 10 March 2017 cassation appeals by the first applicant were rejected by a judge of the City Court and a judge of the Supreme Court of the Russian Federation ("the Supreme Court"), respectively.

20. On 4 April 2017 the Deputy President of the Supreme Court found that there were no grounds to disagree with the decision of 10 March 2017, which had been taken by a single judge.

2. Divorce, child residence and child maintenance proceedings

21. On an unspecified date Yu.T. brought proceedings against the first applicant for divorce, determination of the second applicant's residence as being with her and child maintenance. She claimed that since 27 April 2016 the first applicant had not shown any interest in his daughter, had been out of touch and had had no contact with the child.

22. On 5 October 2017 the Leninskiy District Court of St Petersburg granted Yu.T.'s claims. The court further noted that the first applicant had not been deprived of the opportunity to exercise his parental authority over his daughter or to meet her, and that Yu.T. was not creating any obstacles to such meetings.

II. RELEVANT LEGAL FRAMEWORK

A. International law and practice

1. 1980 Hague Convention on the Civil Aspects of International Child Abduction

23. The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") entered into force between Russia and Spain on 1 March 2013. It provides, in so far as relevant, as follows:

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 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.

..."

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.

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 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.

..."

2. *Explanatory Report to the Hague Convention*

24. The Explanatory Report to the Hague Convention, prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982 ("the Explanatory Report"), provides as follows:

(a) The notion of 'the best interests of the child'

"24. ... [the philosophy of the Hague Convention] can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. ... the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child.

... the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.

25. It is thus legitimate to assert that the two objects of the Convention – the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment – both correspond to a specific idea of what constitutes the 'best interests of the child'. However, ... it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore, the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained."

(b) The notion of the child's 'habitual residence' and the 'wrongfulness of his or her removal or retention'

"64. Article 3 [of the Hague Convention] as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention.

...

66. ... the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile.

...

68. The first source referred to in Article 3 is law, where it is stated that custody 'may arise ... by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child.

...

71. ... from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are

also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

(c) The exceptions to the principle of the child's prompt return under Article 13 (b) of the Hague Convention

"34. ... [the exceptions] to the rule concerning the return of the child must be applied only as far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter ... The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

...

...113. ... the exceptions [in Articles 13 and 20] do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances.

114. With regard to Article 13, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs (a) and (b) is imposed on the person who opposes the return of the child ...

...

116. The exceptions contained in [Article 13] (b) deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests ... Each of the terms used in this provision, is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects, that the exceptions are to receive a wide interpretation ..."

3. Part VI of the Guide to Good Practice under the Hague Convention – Article 13 (1) (b) of the Hague Convention

25. Part VI of the Guide to Good Practice under the Hague Convention, published by the HCCH in 2020, provides as follows:

"29. The grave risk exception is based on "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

...

34. The term ‘grave’ qualifies the risk and not the harm to the child. It indicates that the risk must be real and reach such a level of seriousness to be characterised as ‘grave’. As for the level of harm, it must amount to an “intolerable situation”, that is, a situation that an individual child should not be expected to tolerate. The relative level of risk necessary to constitute a grave risk may vary, however, depending on the nature and seriousness of the potential harm to the child.

35. The wording of Article 13(1)(b) also indicates that the exception is “forward-looking” in that it focuses on the circumstances of the child *upon return* and on whether those circumstances would expose the child to a grave risk.

...

40. As a first step, the court should consider whether the assertions are of such a nature, and of sufficient detail and substance, that they could constitute a grave risk. Broad or general assertions are very unlikely to be sufficient.

41. If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child’s return has been established by examining and evaluating the evidence presented by the person opposing the child’s return / information gathered, and by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence. This means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established.

42. Once this evaluation is made:

– where the court is *not* satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it orders the return of the child;

– where the court *is* satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order the return of the child, which means that it is within the court’s discretion to order return of the child nonetheless.

...

63. Assertions of grave risk of psychological harm or of being placed in an intolerable situation resulting from a separation of the child from the taking parent when this parent is unable or unwilling to return are frequently raised in return proceedings in a wide range of circumstances. Judicial decisions from numerous Contracting Parties demonstrate, however, that the courts have only rarely upheld the Article 13(1)(b) exception in cases where the taking parent cannot or will not return with the child to the child’s State of habitual residence.

64. The primary focus of the grave risk analysis in these instances is the effect on the child of a possible separation in the event of an order for return or of being left without care, and whether the effect meets the high threshold of the grave risk exception, taking into account the availability of protective measures to address the grave risk. The circumstances or reasons for the taking parent’s inability to return to

the State of habitual residence of the child are distinct from, although they may form part of, the assessment of the effect on the child of a possible separation.

65. Where the separation from the taking parent would meet the high threshold of grave risk, the circumstances or reasons for the taking parent's inability to return to the State of habitual residence of the child may in particular be relevant in determining what protective measures are available to lift the obstacle to the taking parent's return and address the grave risk.

...

v. Unequivocal refusal to return

72. In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child.

..."

4. 1959 Declaration of the Rights of the Child

26. Principle 6 of the 1959 Declaration of the Rights of the Child reads:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.

..."

5. 1989 Convention on the Rights of the Child

27. Article 3 of the 1989 Convention on the Rights of the Child reads:

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

..."

28. Article 18 reads:

"1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary

responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

...”

6. *Implementation Handbook for the Convention on the Rights of the Child*

29. Implementation Handbook for the Convention on the Rights of the Child prepared for United Nations International Children’s Emergency Fund (UNICEF) by Rachel Hodgkin and Peter Newell (3rd ed. Geneva, 2007) reads as follows:

> “The State should be able to demonstrate that the competent authorities are genuinely able to give paramount consideration to the child’s best interests, which presupposes a degree of flexibility in this decision-making. Any inflexible dogma defining “best interests”, for example stating that children ought to be with their fathers or mothers, should be regarded as potentially discriminatory and in breach of the Convention. It is true to say that article 6 of the Declaration of the Rights of the Child, the precursor of the Convention on the Rights of the Child, did make a statement in favour of keeping, save in exceptional circumstances, children of “tender years” with their mothers. However, this bias towards giving mothers custody young children, though common in many countries and an important protection in very patriarchal societies, does not find expression in the Convention.”

B. Domestic law

1. *The Constitution of the Russian Federation*

30. The relevant provisions of the Constitution read as follows:

Article 15

“4. The universally recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international agreement shall apply.”

Article 17

“1. The rights and freedoms of human beings and citizens, in conformity with the universally recognised principles and norms of international law, are recognised and guaranteed by the Russian Federation and under the present Constitution ...”

Article 18

“1. Everyone shall be equal before the law and the courts of law.

2. The State shall guarantee equality of rights and freedoms regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, or any other circumstance. Any restriction on the human rights of citizens on social, racial, national, linguistic or religious grounds is forbidden ...”

Article 38

"1. Maternity and childhood and the family shall be protected by the State.

2. The care of children and their upbringing shall be both the right and obligation of parents ..."

2. *Family Code of the Russian Federation*

31. The Family Code provides that parents enjoy equal rights and discharge equal duties with respect to their children (Article 61 § 1).

32. Parents are entitled, and have an obligation, to raise and educate their children. Parents are obliged to take care of their children's health and their physical, psychological and moral development. Parents have a right to take priority over any other person in raising and educating their children (Article 63 § 1).

33. The exercise of parental rights must not contravene their children's interests. Providing for a child's interests is the principal object of parental care. Parents who exercise parental rights to the detriment of the rights and interests of their children are answerable under procedures established by law (Article 65 § 1).

3. *Code of Civil Procedure of the Russian Federation*

34. The procedure for the examination of requests for the return of children who have been unlawfully removed to or retained in the Russian Federation and for securing protection of access rights in respect of such children, in accordance with the international treaties signed by the Russian Federation, is governed by Chapter 22.2 of the Code.

35. The Code provides that a return application must be submitted to a court by a parent or other person who considers that his or her custody or access rights have been violated, or by a prosecutor. The return application must be submitted to the Dzerzhinskiy District Court of St Petersburg if the child is within the territory of the North-Western Federal Circuit (Article 244.11).

36. The return request is examined by the court, with the mandatory participation of a prosecutor and the childcare authority, within forty-two days of receipt, which includes the time for preparation of the hearing and for drawing up the judgment (Article 244.15).

37. A judgment ordering the return of a child who has been unlawfully removed to or retained in Russia must set out the reasons justifying the need to return the child to the State of his or her habitual residence in accordance with the Russian Federation's international treaties, or the reasons for refusing the request for return in accordance with the Russian Federation's international treaties (Article 244.16).

38. An appeal may be lodged against the judgment within ten days. An appeal is examined within one month of receipt by the appellate court (Article 244.17).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

39. Under Article 8 of the Convention and Article 14 of the Convention taken in conjunction with Article 5 of Protocol No. 7 to the Convention, the first applicant complained, on his own behalf and that of the second applicant, about the Russian courts' refusal to grant his application for the second applicant's return to Spain under the Hague Convention. Articles 8 and 14 of the Convention and Article 5 of Protocol No. 7 to the Convention read as follows:

Article 8

"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."

Article 14

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 5 of Protocol No. 7

"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."

40. Being the master of the characterisation to be given in law to the facts of the case, the Court considers it appropriate to analyse the applicants' complaint from the standpoint of Article 8 of the Convention only.

A. Admissibility

41. The Government did not dispute that the first applicant had standing to lodge an application on behalf of his daughter. Given that the first applicant has parental authority over the second applicant, and in the absence of any indication that the representation of her rights by the first

applicant would not be in her interest, the Court finds that he has standing to act on her behalf (see, most recently, *Petrov and X v. Russia*, no. 23608/16, § 83, 23 October 2018, with further references).

42. The Court does not consider that this complaint is 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 applicants

43. The first applicant noted at the outset that the Government's observations were made only in relation to his right to respect for family life under Article 8 of the Convention, whereas the application also concerned his daughter's rights under that provision. He further submitted that the judgment of 21 December 2016 refusing his application for his daughter's return to Spain under the Hague Convention amounted to an interference with their rights under Article 8. The first applicant argued that such interference had not been in accordance with the law and had not been necessary in a democratic society within the meaning of Article 8 § 2 of the Convention. The provisions of the Hague Convention as regards the existence of a grave risk under Article 13 (b) of the Hague Convention had been incorrectly interpreted in a broad manner that went far beyond its meaning and the philosophy of the Hague Convention. In the absence of any objective grounds for the best interests of the child, the Russian courts had substituted the interests of the child's mother in not returning to Spain, and thus failed to strike a fair balance between the interests at stake. In this connection, the Russian authorities relied on Principle 6 of the 1959 Declaration of the Rights of the Child, which stipulates that "a child of tender years shall not, save in exceptional circumstances, be separated from his mother" and had therefore proceeded on the basis of a belief in the supremacy of the mother's rights in respect of a minor child over those of the father. The applicant submitted that the above provision reflected outdated stereotypes and contradicted the European Convention, the Convention on the Rights of the Child and the Hague Convention.

(b) The Government

44. The Government submitted that there had been no interference with the first applicant's right to respect for his family life, since his personal ties with his daughter, the second applicant, had not been severed. He had not been deprived of his parental authority and nothing prevented him from communicating with her (see paragraphs 14 and 21-22 above). If, however,

the Court were to find that there had been an interference with the first applicant's right to respect for his family life, the Government considered that it had been in accordance with the law, proportionate and necessary in a democratic society.

45. Referring to the domestic and international law cited by the District Court in its judgment of 21 December 2016 refusing the first applicant's application for the return of the second applicant to Spain (see paragraphs 23-33 above) and reiterating the District and the City Courts' arguments (see paragraphs 17-18 above), the Government submitted that the Russian courts had thoroughly examined the applicants' family situation and various aspects of a factual, emotional, psychological and financial nature, assessed the corresponding interests of all the individuals involved and reached a decision reflecting the best interests of the child. The decision-making process had been fair and ensured due respect for the interests protected by Article 8 of the Convention. Throughout the proceedings the first applicant had been represented by professional lawyers, which ensured their adversarial nature and respect of the principle of equality of arms. He had been able to adduce evidence in order to challenge Yu.T.'s arguments as to the existence of circumstances constituting an exception to the second applicant's immediate return in application of Articles 13 (b) and 20 of the Hague Convention. However, this could not be viewed as shifting to him the burden of proof regarding the circumstances precluding the child's return. The domestic courts' decisions had thus been based on a widely accepted practice of application of the Hague Convention, other international acts and domestic law, and were compatible with Article 8 § 2 of the Convention.

2. *The Court's assessment*

(a) General principles

46. In *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131-40, ECHR 2010) and *X v. Latvia* ([GC], no. 27853/09, §§ 92-108, ECHR 2013) the Court set out a number of principles which have emerged from its case-law on the issue of the international abduction of children, as follows.

47. 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, as well as the relevant rules and principles of international law applicable in relations between the Contracting Parties.

48. The decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of

appreciation afforded to States in such matters, taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention of unlawful removal and immediate return correspond to a specific conception of "the best interests of the child".

49. There is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the *status quo* by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13 (b)).

50. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.

51. In the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Hague Convention (Article 13 (a)) and the existence of a "grave risk" (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). This task falls in the first instance to the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation which, however, remains subject to European supervision. Hence, the Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8.

52. 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 Hague 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 ascertain that those questions have been effectively examined. Secondly, those factors must be evaluated in the light of Article 8 of the Convention.

53. Lastly, Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this regard: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of 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 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, is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

(b) Application of these principles to the present case

54. The Court notes that a parent and child's mutual enjoyment of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see *Edina Tóth v. Hungary*, no. 51323/14, § 49, 30 January 2018). Consequently, the relationship between the applicants falls within the sphere of family life under Article 8 of the Convention. That being so, the Court must determine whether there has been a failure to respect the applicants' family life. "Respect" for family life implies an obligation for a State to act in a manner calculated to allow these ties to develop normally (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 221, ECHR 2000-VIII).

55. The Court observes that in April 2016 the second applicant's mother, Yu.T., took the child, aged two years and nine months at the material time, from Spain, where she had been born and lived for her entire life, to Russia and never returned. The interference with the applicants' right to respect for their family life cannot therefore be attributed to an action or omission by the respondent State, but rather to the actions of a private individual.

56. That action nevertheless placed the respondent State under positive obligations to secure for the applicants their right to respect for their family

life, which included taking measures under the Hague Convention with a view to ensuring their prompt reunification (see *Vladimir Ushakov v. Russia*, no. 15122/17, § 86, 18 June 2019, with further references).

57. The Court observes that by the judgment of the District Court of 27 October 2016, upheld on appeal by the City Court on 21 December 2016, the first applicant's request for the second applicant's return to Spain was refused. The Court will therefore proceed, in the exercise of its task of European supervision (see paragraph 51 above), with the assessment of whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of Article 8 of the Convention and whether, when striking a balance between the competing interests at stake, appropriate weight was given to the child's best interests, within the margin of appreciation afforded to the State in such matters. In order to do so, the Court will have regard to the reasoning advanced by the domestic courts for their decisions.

58. The Court observes that under Article 3 of the Hague Convention, the removal or retention of a child is to be considered wrongful where "it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention" (see paragraph 23 above).

59. The Explanatory Report emphasises that from the Hague Convention standpoint, the removal of a child by one of the joint custody holders without the consent of the other is wrongful; this wrongfulness derives not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent, which are also protected by law, and has interfered with their normal exercise. The Explanatory Report further clarifies that the setting in motion of the Convention's machinery for the return of the child depends entirely on whether the removal or retention is considered wrongful in terms of the Convention and that in the absence of the wrongfulness of the removal or retention, no duty to return arises (see paragraph 24 above).

60. The question of whether the second applicant's removal was wrongful or not within the meaning of Article 3 of the Hague Convention required, therefore, the ascertaining of the following circumstances: (1) the second applicant's habitual residence immediately before her removal; (2) whether the first applicant had custody rights in respect of the second applicant immediately before the removal; and (3) whether the first applicant actually exercised his custody rights in respect of the second applicant at the time of the removal.

61. In line with the above test, the District Court established that Spain had been the second applicant's habitual residence at the time of removal and that the first applicant had custody rights in respect of the second applicant which he had been actually exercising at the time of the removal.

Consequently, it concluded that the second applicant's removal from Spain to Russia had been wrongful (see paragraph 17 above).

62. The City Court disagreed with the District Court as to the wrongfulness of the second applicant's removal. Instead of applying the above test stemming from Article 3 of the Hague Convention, it relied on the following circumstances: (1) the child's age at the moment of removal; (2) the length of her residence in Russia after the removal; (3) the level of her integration into the social and family environment in Russia; and (4) the refusal of the abductor parent to return to Spain with the child (see paragraph 18 above); – factors which were irrelevant for the assessment of the wrongfulness of the removal under the criteria of the Hague Convention.

63. Regardless, however, of their different conclusions as to the wrongfulness of the second applicant's removal, both the District Court and the City Court proceeded as though the duty to return the second applicant under the Hague Convention had been triggered. They examined whether the second applicant's return would correspond to her interests and, having established the existence of a grave risk of the child being placed in an intolerable situation upon her return, dismissed the return request with reference to Article 13 (b) of the Hague Convention.

64. The Court reiterates that it is not its task to take the place of the competent domestic authorities in determining whether a grave risk existed that the child would be exposed to any harm within the meaning of Article 13 of the Hague Convention if she returned to Spain. However, the Court is in a position to ascertain whether the domestic courts, in applying and interpreting the provisions of that Convention, secured the guarantees set forth in Article 8 of the European Convention, particularly taking into account the child's best interests (see paragraph 51 above).

65. The Court observes that it was the second applicant's mother, Yu.T., who opposed the child's return. It was therefore for her to make and to substantiate any potential allegation of specific risks under Article 13 (b) of the Hague Convention (see paragraph 24 above). While this provision is not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" – it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return. The exception provided for in Article 13 (b) concerns only situations which go beyond what a child might reasonably be expected to bear (see *X v. Latvia*, cited above, § 116; *Maumousseau and Washington v. France*, no. 39388/05, §§ 69 and 73, 6 December 2007; *K.J. v. Poland*, no. 30813/14, §§ 64 and 67, 1 March 2016; and *Vladimir Ushakov,* cited above, § 97).

66. In the present case, Yu.T. objected to the second applicant's return to Spain, giving as reasons her refusal to return to Spain, her intention to divorce the first applicant, and the absence of an income and a residence of her own in Spain. She believed, therefore, that the second applicant's return

would lead to their separation, which would amount to an intolerable situation for the young child.

67. The Court considers that these arguments fell short of the requirements of Article 13 (b) of the Hague Convention as described above. The domestic courts nevertheless proceeded with the case, assessing the said Article 13 (b) risks in view of what appears to be a rather arbitrary refusal on the part of the child's mother to return with the child (see *K.J. v. Poland,* cited above, § 66). They took into account the second applicant's young age and held that her return to Spain without Yu.T. would be unacceptable as it would run contrary to her best interests and those of Yu.T. They relied in this connection on Principle 6 of the United Nations 1959 Declaration of the Rights of the Child, which provided that a child of tender years should not, save in exceptional circumstances, be separated from his or her mother.

68. The Court has consistently stated that the exceptions to return under the Hague Convention must be interpreted strictly (see *X v. Latvia*, cited above, § 116), and that the harm referred to in Article 13 (b) of the Hague Convention cannot arise solely from separation from the parent who was responsible for the wrongful removal or retention. This separation, however difficult for the child, would not automatically meet the grave risk test (see *K.J. v. Poland,* cited above, § 67; *G.S. v. Georgia*, no. 2361/13, § 56, 21 July 2015).

69. Nothing in the circumstances unveiled before the domestic courts objectively ruled out the possibility of the mother's return together with the child. It was not implied that Yu.T. did not have access to Spanish territory (see, *mutatis mutandis*, *Maumousseau and Washington*, cited above, § 74) or that she would have faced criminal sanctions upon her return (see, *a contrario*, *Neulinger and Shuruk*, cited above, §§ 149 and 150). In addition, nothing indicated that the first applicant might actively prevent Yu.T. from seeing the second applicant in Spain or might deprive her of parental rights or custody (see, *mutatis mutandis*, *Paradis and Others v. Germany* (dec.), no. 4783/03, 15 May 2003).

70. In relation to situations of unequivocal refusal of the abducting ("taking") parent to go back to the State of habitual residence, Part VI of the Guide to Good Practice under the Hague Convention highlights that such parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child (see paragraph 25 above). The Court considers that allowing the return mechanism to be automatically deactivated on the sole basis of a refusal by the abducting parent to return would subject the system designed by the Hague Convention to the unilateral will of that parent.

71. The Court further considers that the domestic courts' reliance on Principle 6 of the United Nations 1959 Declaration in the assessment of the

"grave risk" exception under Article 13 (b) of the Hague Convention despite the fact that the second applicant had been wrongfully removed by her mother and in disregard of other international instruments, such as the European Convention, the Convention on the Rights of the Child and the Hague Convention, is unacceptable. This approach was tantamount to a finding by the domestic courts that the option of returning very young children who have been abducted by their mothers is not necessarily envisaged under the Hague Convention, a conclusion that is contrary to the letter and spirit of that Convention.

72. Lastly, the Court observes that the issues of custody and access are not to be intertwined in the Hague Convention proceedings (see *K.J. v. Poland,* cited above, § 70). Consequently, whether assessed in the light of international or of domestic law, it was erroneous for the domestic courts in the present case to assume that, if returned to Spain, the second applicant would be placed in the first applicant's custody or care.

73. Having regard to the circumstances of the case as a whole and notwithstanding the respondent State's margin of appreciation in the matter, the Court concludes that the interpretation and application of the provisions of the Hague Convention by the domestic courts failed to secure the guarantees of Article 8 of the Convention and that the respondent State failed to comply with its positive obligations under Article 8 of the Convention to secure to the applicants the right to respect for their family life.

74. There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicants claimed 200,000 euros (EUR) and EUR 150,000 respectively in respect of non-pecuniary damage as compensation for the emotional distress that they had suffered from the moment of the second applicant's abduction until April 2018, plus an additional EUR 100,000 and EUR 75,000 respectively for each subsequent year if the second applicant was not returned to Spain. The first applicant submitted a statement by his psychotherapist with an estimate of the approximate costs for psychological counselling for him and for his daughter – varying between EUR 50,000 and EUR 100,000 – if the abduction was not brought to an end.

77. The Government considered that the applicants' claims for non-pecuniary damage were excessive, unreasonable and speculative.

78. The Court considers that the applicants must have suffered and continue to suffer profound distress as a result of their inability 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. In the light of the circumstances of the case, and making an assessment on an equitable basis as required by Article 41 of the Convention, the Court awards the first applicant EUR 16,250 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 *Hromadka and Hromadkova v. Russia*, no. 22909/10, § 180, 11 December 2014).

B. Costs and expenses

79. The first applicant also claimed EUR 10,000 for costs and expenses incurred in relation to the proceedings before the domestic courts, comprising his own (EUR 6,000) and his witnesses' (EUR 4,000) travel expenses (flights and hotels) incurred between August and December 2016.

80. The Government argued that the first applicant's claims were unreasonable and had no connection with the subject matter of the application before the Court.

81. 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 considers it reasonable to award the sum of EUR 2,260 for the first applicant's costs and expenses in connection with his participation in the domestic proceedings, plus any tax that may be chargeable to him.

C. Default interest

82. 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

1. *Declares*, unanimously, the application admissible;

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

3. *Holds*, by six votes to one,
   (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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 16,250 (sixteen thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,260 (two thousand two hundred and sixty euros), plus any tax that may be chargeable to the first applicant, 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. *Dismisses,* unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 30 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

P.L.
M.B.

DISSENTING OPINION OF JUDGE DEDOV

1. I regret that – as in other previous similar "abduction" cases – I cannot agree with the majority in the present case (see my recent dissenting opinion in *Vladimir Ushakov v. Russia*, no. 15122/17, 18 June 2019, with further references). I still believe that the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") is not sensitive to (i) the young age of certain minors; (ii) their natural emotional attachment to their mothers; (iii) the vulnerable position of mothers residing in a foreign country; (4) the limited possibility for foreign mothers to be granted a residence order so to live together with their children after a divorce. This discriminatory practice against women continues, and the victims are left without the protection of human-rights mechanisms.

2. The women concerned could be safe only if they are integrated into the foreign society in question, if they have become independent and give birth only once they have attained a strong position in the family. However, such confident women do not need the Hague Convention. Miraculously, the Hague Convention was adopted when States started to open their borders and many women from developing countries (mostly from the former communist regimes) followed their husbands to find a better life abroad. They were not familiar with the principles of western feminism and relied completely on their husbands, believing that their major role was to become a mother and to create a united family. They were disappointed. I have never seen a former husband voluntarily propose shared custody of the children and the provision of financial support after family life is ruined. This is a typical story for many women who then become very vulnerable, and the Hague Convention plays against them.

3. Moreover, I believe that the Hague Convention and the Strasbourg Convention have never been in harmony with each other. In determining child custody after a divorce (this issue inevitably arises once the child must be returned to the country of origin) the Hague Convention sets out a much higher threshold than the European Convention on Human Rights. This is evident from the present judgment. In paragraph 65 the Court explains that while the provision of Article 13(b) of the Hague Convention "is not restrictive as to the exact nature of the 'grave risk' – which could entail not only 'physical or psychological harm' but also 'an intolerable situation' – it cannot be read, in the light of Article 8 of the Convention, as including all the inconveniences necessarily linked to the experience of return. The exception provided for in Article 13(b) concerns only situations which go beyond what the child might reasonably be expected to bear ..." Obviously, the Hague Convention is blind as to what will happen after the child has been returned, since the best-interests-of-the-child concept is not within the

scope of the Hague Convention: the child must simply be returned promptly to the father, who has the right of custody under Article 3; no exceptions are allowed, save in the case of domestic violence.

4. In contrast, the Convention is based on completely different principles, as is clear from the judgment in the case of *Leonov v. Russia* (no. 77180/11, 10 April 2018):

> "64. In determining whether the refusal of custody or access was justified under Article 8 § 2 of the Convention, the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient. Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding child custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see *Sahin v. Germany* [GC], no. 30943/96, § 64, ECHR 2003-VIII; *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII (extracts); *C. v. Finland*, no. 18249/02, § 52, 9 May 2006; and *Z.J. v. Lithuania,* no. 60092/12, § 96, 29 April 2014). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 139, ECHR 2010, and *Antonyuk v. Russia*, no. 47721/10, § 134, 1 August 2013).
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> 65. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Sahin*, cited above, § 65, and *Sommerfeld*, cited above, § 63).
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> 66. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see *Sahin*, cited above, § 66, and *Sommerfeld*, cited above, § 64)".

5. In the same vein as the Hague Convention, in paragraph 71 of the present judgment the Court criticises the national courts' reliance on Principle 6 of the United Nations 1959 Declaration of the Rights of the Child, which provides that a child of tender years should not be separated from the mother. In the Court's view, since the mother "wrongfully

removed" the child, their separation is inevitable, regardless of the child's young age. Obviously, the Hague Convention operates here in favour of the father, without taking into account the child's best interests and completely ignoring the vulnerable situation of the mother, who would be separated from her child and would lose her custodial rights immediately after the child's return. In my view, with a view to ensuring effective rather than merely theoretical equality between the parents, the international community should amend the Hague Convention so as to provide protective measures for women after a child has been returned. In so far as possible, shared custody should be guaranteed for both parents and the mother should receive financial support. The Court's case-law regarding child custody should also be developed to take account of the vulnerable position of mothers in this situation. The national authorities in the present case were mindful of the mother's situation. However, the Hague Convention, running counter to the European Convention on Human Rights, does not allow for the protection of vulnerable persons.

6. I wonder when European civilisation lost its sense of humanity? The concept of human rights cannot be completely rational and bereft of any moral element. Antoine de Saint-Exupery's phrase "*Tu deviens responsable pour toujours de ce que tu as apprivoisé*" corresponds to the responsibility of a man who attracts a woman and invites her to a different world, and who should therefore bear responsibility for the well-being of his wife and their child. Therefore, certain guarantees should be institutionalised and provided to vulnerable persons before their return.