



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

THIRD SECTION

**CASE OF SPINELLI v. RUSSIA**

*(Application no. 57777/17)*

JUDGMENT

Art 8 • Family life • Fair balance struck in domestic court decision  
establishing child's residence in Russia with mother

STRASBOURG

19 October 2021

**FINAL**

**19/01/2022**

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



**In the case of Spinelli v. Russia,**

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

Georges Ravarani, *President*,

Georgios A. Serghides,

Dmitry Dedov,

Darian Pavli,

Anja Seibert-Fohr,

Peeter Roosma,

Andreas Zünd, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 57777/17) 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 an Italian national, Mr Carlo Spinelli (“the applicant”), on 3 August 2017;

the decision to give notice to the Russian Government (“the Government”) of the complaints under Articles 8 and 13 of the Convention and to declare inadmissible the remainder of the application;

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

the parties’ observations;

noting that the Italian Government did not make use of their right under Article 36 § 1 of the Convention to intervene in the proceedings;

Having deliberated in private on 14 September 2021,

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

## INTRODUCTION

1. The present case concerns the alleged failure of the Russian authorities to assist the applicant in being reunited with his child after the latter had been taken from Italy to Russia by his mother and retained there and the absence of an effective remedy in Russia in this respect.

## THE FACTS

2. The applicant was born in 1973 and lives in Vimercate, Italy. The applicant was represented by Mr A.N. Kotvitskiy, a lawyer practising in Moscow.

3. The Government were represented initially by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Vinogradov.

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

## THE CIRCUMSTANCES OF THE CASE

### A. Background information

5. On 10 January 2009 the applicant married a Russian national, Ms A.Sh. The couple settled in Italy.

6. On 12 January 2012 in Russia A.Sh. gave birth to their son, A., who holds joint Italian and Russian nationality. Shortly afterwards the family returned to Italy.

7. On 28 December 2014 the family travelled to Moscow to visit A.Sh.'s parents.

8. On 1 January 2015 the applicant returned to Italy. It was agreed that A.Sh. and A. would join him on 4 January 2015.

9. However, on 2 January 2015 A.Sh. informed the applicant by telephone that she had decided to stay in Russia.

10. The applicant returned to Moscow on three occasions in January 2015 in an attempt to persuade A.Sh. to return to Italy, in vain.

11. The applicant has not seen his son since April 2015.

12. In May-July 2015 he repeatedly applied to the head of the Moscow Gagarinskiy district administration and childcare authority and the Odintsovo town childcare authority in Moscow Region for assistance in securing contact with the child.

### B. Proceedings in Italy

#### 1. Judicial separation proceedings

13. On 29 January 2015 the applicant instituted judicial separation proceedings (*ricorso per separazione giudiziale*) asking the court to grant him a judicial separation in respect of his marriage with A.Sh., with attribution of responsibility to the latter (*con addebito*), to grant him sole care of A. and a residence order in respect of him, to assign the family home to him, and to secure his obligation to provide entirely for the needs of A.

14. On 21 January 2016 the Monza District Court allowed the applicant's claims. It further held that the applicant was to take all decisions concerning the child, including care, upbringing, education and determination of the child's place of residence. A.Sh. was granted contact rights, in the presence of the applicant or the applicant's parents and in accordance with an agreement to be reached between them.

15. On 4 May 2016 the Milan Court of Appeal upheld the above judgment on appeal.

16. On 16 September 2016 the judgment of 21 January 2016, as upheld on appeal on 4 May 2016, became final.

*2. Criminal proceedings against A.Sh.*

17. On 24 January 2017 the Monza District Court convicted A.Sh. *in absentia* of abducting the child. She was given a four-year prison sentence and her parental rights were terminated.

**C. Proceedings in Russia**

*1. Divorce proceedings*

18. On 26 February 2015 A.Sh. initiated divorce proceedings in Russia.

19. On 3 April 2015 she further asked the court to determine the child's residence as being with her and to recover child maintenance from the applicant. The applicant objected to the examination of A.Sh.'s claims in Russia, relying on the proceedings pending in Italy on the same subject matter.

20. On 14 October 2015 the Gagarinskiy District Court of Moscow ("the District Court") left A.Sh.'s claims without examination. It noted that identical proceedings were ongoing before the Monza District Court in Italy. Reference was made to the Convention of 25 January 1979 between the Union of Soviet Socialist Republics and the Italian Republic on Legal Assistance in Civil Matters ("the Bilateral Convention") and Article 406 § 2 of the Code of Civil Procedure of the Russian Federation.

21. On 2 December 2015 the Moscow City Court ("the City Court") quashed the above decision and remitted the case to the District Court for examination on the merits. The City Court noted that the child had Russian nationality, that he had been registered at his mother's place of residence in Moscow and had been living with his mother in Moscow Region. Therefore, the Italian courts had no competence to examine the applicant's claims. The applicant's objections to the effect that the child had been permanently resident in Italy until January 2015 were considered to be unsupported by the case-file material; it showed that A.Sh. had chosen Russia as her and her son's place of residence; and the fact that the child had been staying at his father's place of residence in Italy before the couple's separation did not indicate that that state had been chosen as the child's permanent place of residence.

22. On 15 February and 14 April 2016 the applicant's cassation appeals were rejected by a judge of the City Court and a judge of the Supreme Court of the Russian Federation ("the Supreme Court"), respectively.

23. On 17 February 2016 the District Court dissolved the marriage between the applicant and A.Sh. Having taken into account the age of the child and his attachment to his mother, the District Court considered it reasonable and in accordance with the child's best interests to determine his place of residence as being with A.Sh. The District Court also ordered the applicant to pay child maintenance. The judgment referred to Articles 21,

65, 80 and 81 of the Family Code of the Russian Federation and was based on the following considerations:

- the child had been registered at his mother's place of residence in Moscow and had actually been living with her in Moscow Region, where suitable conditions had been created for his life and upbringing;

- A.Sh. submitted that since the applicant's working schedule required frequent business trips all over the world, they had agreed that she and their child would be permanently resident in Russia. She further submitted that from time to time she and the child had stayed temporarily in Italy with the applicant or accompanied him on his business trips;

- A. and P. submitted as witnesses that A.Sh. had been permanently resident in Russia in her parents' family house, because the applicant had often been away on long business trips, that occasionally A.Sh. had lived with the applicant in Italy and accompanied him on business trips, that the child had always remained with and been taken care of by A.Sh., who had created all the necessary conditions for his development and upbringing, that the boy was deeply attached to A.Sh., that he was attending a kindergarten, which he was taken to and picked up from by A.Sh.;

- the child had been born on 12 November 2012 in Moscow, he had Russian nationality, for two months following his birth he had been monitored by a paediatrician in the Moscow Perinatal Medical Centre, since April 2013 his health had been monitored at Lapino Clinical Hospital in Moscow, where the child was regularly seen by doctors and vaccinated, the child came for appointments accompanied by his mother, he was healthy and had met his development milestones, since 4 February 2015 he had attended a local pre-school educational centre;

- in 2014-15 the child had attended a kindergarten in Italy;

- the childcare authority considered that the child's residence with his mother, A.Sh., did not run contrary to the child's interests;

- pursuant to Principle 6 of the United Nations 1959 Declaration of the Rights of the Child a child of tender years should not, save in exceptional circumstances, be separated from his or her mother.

24. The applicant appealed, referring to the judgment of the Monza District Court on the same subject matter, as well as the unlawfulness of the child's removal from Italy to Russia by A.Sh. He considered that the District Court's judgment should have been based on the Bilateral Convention, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Child ("Jurisdiction and Applicable Law Convention"), and the International Convention of 20 November 1989 on the Rights of the Child. He demanded that the proceedings in Russia be terminated.

25. On 22 July 2016 the City Court upheld the judgment of 17 February 2016 on appeal. Relying on Article 24 § 1 of the Bilateral Convention,

Articles 160 § 1 and 163 of the Family Code and Article 402 §§ 1-3 of the Code of Civil Procedure, the City Court held that when instituting the proceedings in Russia for divorce, residence and child maintenance A.Sh. had had her habitual residence in Moscow. At the same time, when the applicant had initiated judicial separation proceedings in Italy A.Sh. had not had her habitual place of residence or stay in Italy. A.Sh.'s statement to the effect that she and the child had had their habitual residence in Russia had been confirmed by their registration in Moscow and other evidence examined by the court. The District Court's judgment had not contradicted Articles 8 and 9 of the 1989 Convention on the Rights of the Child as the questions of the applicant's contact with the child and the former's participation in the child's upbringing, development and education had not been the subject matter of those proceedings. Referring further to Articles 5 and 7 of the Jurisdiction and Applicable Law Convention and Article 244.11 §§ 1-2 of the Code of Civil Procedure, the City Court noted that the applicant had not lodged an application for return of the child or for organising access rights. By the time the District Court had pronounced its judgment the child had been living in Russia for over a year since the applicant had considered his custody right to have been breached, which also proves that the District Court had had competence to examine the case. The District Court found it established that the child had been well settled in Russia, that the conditions created by A.Sh. for the child had been normal for the latter and had provided him with comfortable and secure accommodation and met his needs. The City Court admitted and examined additional evidence provided by the applicant, including statements by Z., a witness, receipts from San Raffaele Hospital in Milan proving the child and A.Sh. had had consultations and check-ups there, receipts for the child's language classes, which were found to support the applicant's argument to the effect that at his place of residence in Italy there had been all the necessary conditions for the child's living, upbringing and development. Lastly, reiterating Principle 6 of the United Nations 1959 Declaration of the Rights of the Child, and taking into account the fact that since birth the child had been living with A.Sh. and was therefore deeply attached to her, that A.Sh. had created favourable conditions for the child's living, upbringing and development, the City Court agreed with the District Court that preserving the child's habitual environment corresponded to his best interests.

26. On 8 December 2016 and 3 February 2017 the applicant's cassation appeals were rejected by a judge of the City Court and a judge of the Supreme Court, respectively.

*2. Proceedings relating to the applicant's request for recognition and enforcement of the judgment by the Monza District Court*

27. On 22 June 2016 the applicant applied to the City Court seeking formal recognition of the judgment of the Monza District Court of 21 January 2016.

28. On 6 August 2016 the City Court rejected the applicant's application in so far as the judgment of 21 January 2016 concerned the judicial separation of the spouses with attribution of the responsibility to A.Sh., the attribution of the family home to the applicant and the obligation imposed on the latter to fully provide for the child, which did not require any compulsory enforcement measures.

29. On 10 October 2016 the City Court examined on the merits the applicant's application in so far as the judgment of 21 January 2016 concerned the remaining claims and dismissed it, relying on the existence of a final judgment of 17 February 2016 in a dispute between the same parties, on the same subject matter and the same grounds, by which the child's residence was determined as being with his mother A.Sh. The City Court made reference to Articles 13 and 25 § 1 (b) of the Bilateral Convention, and Articles 13 § 2 and 412 § 1 of the Code of Civil Procedure.

30. The applicant appealed, claiming that the judgment of the Monza District Court of 21 January 2016 had entered into force earlier than the judgment of the Gagarinskiy District Court of 17 February 2016 which concerned the same subject matter.

31. On 14 December 2016 the City Court upheld the judgment of 10 October 2016 on appeal.

32. On 26 June 2017 the applicant's cassation appeal was rejected by a judge of the City Court.

## RELEVANT LEGAL FRAMEWORK

### I. INTERNATIONAL LAW

#### **A. 1979 Convention between the Union of Soviet Socialist Republics and the Italian Republic on Legal Assistance in Civil Matters**

33. The 1979 Bilateral Convention on Legal Assistance in Civil Matters between Italy and the Soviet Union ("the Bilateral Convention", still in force) provides that each Contracting Party recognises final judicial decisions in civil and family matters rendered in the territory of the other Contracting Party by a court considered to have jurisdiction within the meaning of this Convention. Each Contracting Party also recognises decisions rendered by the competent authorities of the other Contracting Party concerning paternity, adoption and who has care of a child (Article 19).

34. The procedure for the recognition and enforcement of judicial decisions is governed by the law of the Contracting Party addressed, in so far as this Convention does not provide otherwise (Article 23).

35. Courts of the Contracting Party from which a decision originates shall be considered to have jurisdiction for the purposes of this Convention if the defendant had his or her habitual residence in that State when proceedings were instituted, or, where the object of an action was the determination of financial maintenance payments, the plaintiff had his or her habitual residence in the Contracting Party from which the decision originates when the proceedings were instituted (Article 24 § 1).

36. Recognition of a judicial decision may nevertheless be refused in any of the following circumstances: (a) if the defendant did not participate in the proceedings because she or he had not been duly notified of the institution of the proceedings and the date of the hearing; (b) if there has been a final decision by the courts of the Contracting Party addressed in the proceedings between the same parties which is based on the same facts and has the same purpose; (c) if proceedings between the same parties, based on the same facts and having the same purpose, are ongoing before the courts of the Contracting Party addressed, provided that those proceedings were the first to be instituted; or (d) if, in accordance with international treaties ratified by both Contracting Parties, the courts of the Contracting Party addressed have exclusive jurisdiction over the case (Article 25 § 1). Recognition of a judicial decision may also be refused if enforcement of that decision may be detrimental to the sovereignty or national security of the Contracting Party addressed, or if it is manifestly incompatible with the basic principles of law of the Contracting Party addressed (Article 13).

#### **B. 1980 Hague Convention on the Civil Aspects of International Child Abduction**

37. The 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”) entered into force between Italy and Russia on 1 July 2016. For the relevant provisions of the Hague Convention see *X v. Latvia* [GC], no. 27853/09, § 34, ECHR 2013.

#### **C. 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Child**

38. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of the Child (“Jurisdiction and Applicable Law Convention”) entered into force in respect of Russia on

1 July 2013 and in respect of Italy – on 1 January 2016. It provides as follows:

**Article 5**

“1. The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child’s person or property.

2. Subject to Article 7, in case of a change of the child’s habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.”

**Article 7**

“1. In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

(b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

...”

**Article 50**

“This Convention shall not affect the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.”

**Article 53**

“1. The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.

2. The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.”

**D. 1959 Declaration of the Rights of the Child**

39. The 1959 Declaration of the Rights of the Child provides as follows:

**Principle 6**

“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.

...”

## **E. 1989 New York Convention on the Rights of the Child**

40. The 1989 New York Convention on the Rights of the Child provides as follows:

### **Article 8**

“1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

### **Article 9**

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

...

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

...”

## **II. DOMESTIC LAW**

### **A. Family Code of the Russian Federation**

41. The Family Code provides that if the spouses have common minor children a marriage shall be dissolved by a court (Article 21 § 1).

42. In the event of the parents’ separation, a child’s residence arrangements are to be determined by an agreement between them. If no such agreement can be reached, the child’s residence arrangements are determined by a court, having regard to the child’s best interests and his or her opinion on the matter. In particular, the court must take into account the child’s attachment to each of the parents and siblings, the relationship between the child and each of the parents, the child’s age, the parents’ moral and other personal qualities and the possibilities each of them have for creating conditions for the child’s upbringing and development (in the light of such considerations as each parent’s occupation, employment schedule, and financial and family situation) (Article 65).

43. Parents must provide for their minor children. If the parents don't provide for their minor children, child maintenance is recovered from them by a court on a monthly basis in the amount of a quarter of their income for one child, a third of their income for two children, and a half of their income for three or more children (Articles 80 and 81).

44. Dissolution of a marriage between Russian nationals and foreign nationals or stateless persons, or of a marriage between foreign nationals on the territory of Russia, is carried out in accordance with the legislation of the Russian Federation (Article 160 § 1).

45. The rights and obligations of parents and children, including parents' obligation to provide for their children, are determined by the legislation of a State where they have their common place of residence. In the absence of a common place of residence of the parents and their children, the rights and obligations are determined by the legislation of a State whose national the child is. The legislation of the State where the child permanently resides may be applied to claims concerning child maintenance and other relations between the parents and the children (Article 163).

## **B. Code of Civil Procedure of the Russian Federation**

46. Judicial decisions which entered into legal force are obligatory without exception to all State bodies, local-authority bodies, public associations, officials, persons, organisations, and are to be enforced unflinching across the whole territory of Russia (Article 13 § 2).

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

48. An application for return of a child unlawfully removed to or retained in Russia or an application for exercise of access rights in respect of such a child on the basis of an international treaty of Russia must be lodged with 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 lodged with the Tverskoy District Court of Moscow if the child is within the territory of the Central Federal Circuit (Article 244.11 §§ 1 and 2).

49. Courts in Russia have competence to examine cases with the participation of foreign nationals if, *inter alia*, in a case concerning alimony payments a plaintiff has his or her residence in Russia and if in a divorce case a plaintiff has his or her residence in Russia or if either one of the spouses is a Russian national (Article 402).

50. A court in Russia returns a claim or leaves it without examination if a foreign court, the decisions of which are subject to recognition and

enforcement on the territory of Russia, has already opened a case in a dispute between the same parties on the same subject and on the same grounds (Article 406 § 2).

51. Enforcement of a foreign court judgment may be refused in any of the following circumstances: (1) if the judgment is not final or enforceable in accordance with the domestic law of the State in which it was issued; (2) if the defendant was deprived of an opportunity to participate in the proceedings because he or she was not duly notified of the time and place of the hearing; (3) if Russian courts have exclusive jurisdiction over the case; (4) if there is a final judgment by a Russian court in the proceedings between the same parties based on the same facts and having the same purpose, or if the proceedings between the same parties based on the same facts and having the same purpose are ongoing before the Russian courts, provided that the proceedings before the Russian courts were the first to be instituted; (5) if enforcement of the judgment may be detrimental to Russian sovereignty or national security, or if it is manifestly incompatible with Russian public order; (6) the time-limit for applying for enforcement has expired and has not been extended by a Russian court at the plaintiff's request (Article 412).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicant complained that the Russian authorities had failed to assist him in being reunited with his son in violation of Article 8 of the Convention, which reads as follows:

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

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

#### A. Admissibility

53. The Government submitted that it had been open to the applicant to seek the child's return to Italy or assistance in securing his access rights in Russia pursuant to Jurisdiction and Applicable Law Convention. However, the applicant had not had recourse to the remedy in question. They considered, therefore, that the applicant's complaint should be rejected for non-exhaustion.

54. The applicant submitted that Jurisdiction and Applicable Law Convention had not yet entered into force in respect of Italy at the time

when A.Sh. had retained their son in Russia and, therefore, he had been prevented from applying to the Russian courts for the return of the child or assistance in securing his access rights in respect of the child. The applicant had no other option than to apply to the court at the child's permanent place of residence in Italy.

55. The Court considers that the Government's objection is closely linked to the merits of the applicant's complaint, and that therefore this objection should be joined to the merits and examined below.

56. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicant**

57. The applicant challenged the jurisdiction of the Russian courts to examine the merits of A.Sh.'s claims for child residence, which had been in breach of international and domestic law of the Russian Federation. The family's habitual place of residence was Italy and the applicant never gave his consent to A.Sh.'s changing the child's place of habitual residence to Russia. It was, therefore, for the Italian courts to deal with the issue of child residence. The judgment of the Monza District Court of 21 January 2016 was delivered and entered into force earlier than the judgment of the Gagarinskiy District Court of Moscow of 17 February 2016. It should have therefore been prejudicial to the legal process in Russia. By refusing to recognise and enforce the judgment of the Monza District Court of 21 January 2016 the Russian authorities failed to fulfil their positive obligation to assist him in being reunited with his son after the latter's wrongful retention in Russia by his mother. This unrooted the child and had irremediable consequences for his relationship with the applicant: until now the child is deprived of the possibility to communicate with his father, his paternal grandparents, to speak Italian language and to be brought up in the Italian culture.

#### **(b) The Government**

58. The Government argued, referring to the relevant domestic law (see paragraphs 44-45 and 49 above), that since A.Sh. had her permanent residence in Moscow when she brought proceedings for divorce, child residence and maintenance, the Russian court was competent to examine her claims. The Italian court, on the contrary, had no competence to examine similar claims by the applicant since at the time when they were brought A.Sh. had no longer resided in Italy. In determining the child's residence

with his mother the Russian courts were guided by the best interests of the child. The Russian courts refused to recognise and to enforce the judgment of the Monza District Court of 21 January 2016 in the part concerning child's residence for the reason that there had already been a final decision by the Russian courts on the same dispute – the judgment of the Gagarinskiy District Court of Moscow of 17 February 2016 (see paragraph 51 above). The fact that the judgment of the Monza District Court was delivered earlier than the above judgment of the Gagarinskiy District Court had no legal significance. Furthermore, according to the information from the childcare authority (*Управление опеки и попечительства министерства образования Московской области по Одинцовскому муниципальному району и городскому округу Краснознаменск*) of 28 February 2018, the applicant did not apply for assistance in securing his contact with the child. In any event, the applicant's contact rights with the child were not the subject-matter of the dispute.

## 2. *The Court's assessment*

59. The general principles relevant for the Court's assessment have been summarised in *McIlwrath v. Russia*, no. 60393/13, §§ 121 and 123-24, 18 July 2017.

60. It is common ground that the relationship between the applicant and his son falls within the sphere of family life under Article 8 of the Convention. The Court will therefore proceed to determine whether the State acted in a manner calculated to allow these ties to develop normally.

61. The Court observes that in December 2014 the applicant, his wife A.Sh. and their son travelled from Italy to Russia to visit A.Sh.'s parents, and that when it was time for A.Sh. and the child to go back to Italy in the beginning of January 2015 A.Sh. refused to return, informing the applicant of her decision to stay in Russia together with the child. The alleged interference with the applicant's right to respect for his family life cannot therefore be attributed to an action or omission by the respondent State, but rather to the actions of a private individual.

62. That action nevertheless placed the respondent State under positive obligations to secure for the applicant his right to respect for his family life, which included taking measures with a view to ensuring their prompt reunification.

63. The Court observes that cases with comparable factual circumstances, that is, where a child habitually resident in one State has been removed to or retained in the territory of another State by a parent, are usually examined with reference to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. That Convention sets out criteria for defining whether the removal or retention of a child by one parent was "wrongful" and whether it required appropriate measures to be taken by the

authorities of the State where the child was retained (see *X v. Latvia* [GC], no. 27853/09, §§ 96-98 and 106-07, ECHR 2013).

64. Turning to the present case, the Court notes, however, that in January 2015 when the alleged retention took place, the Hague Convention was not yet in force between Russia and Italy (see paragraph 37 above) and had, therefore, no application in the present case.

65. According to the Government, it was open to the applicant to seek the child's return to Italy or assistance in securing his access rights in Russia pursuant to Jurisdiction and Applicable Law Convention (see paragraphs 38 and 53 above). The Court observes, nevertheless, that the above Convention entered into force in respect of Italy in January 2016, that is a year after the alleged retention took place. Therefore, prior to that date its provisions could not be applied in disputes involving Russia and Italy and the applicant was prevented from seeking assistance from the Russian authorities in obtaining the child's return to Italy (see paragraph 38 above). The Government's objection as to the applicant's failure to exhaust the above remedy should therefore be dismissed.

66. Consequently, in the absence of a regulatory legal framework for determining the issue of the child's return at the moment when the allegedly unlawful retention took place, a conflict between the Russian and the Italian legal systems arose in respect of which of the two States had jurisdiction to take measures directed at the protection of the child, each State guided by the provisions of its domestic law. As a result, the proceedings for determination of the child's residence were instituted in both States – in January 2015 before the Monza District Court in Italy (see paragraph 13 above) and in February 2015 before the Gagarinskiy District Court in Russia (see paragraph 18 above) – and ended in Italy with the decision to grant the residence order to the applicant (see paragraph 14 above) and in Russia with the decision to grant the residence order to A.Sh. (see paragraph 23 above).

67. The Court notes the applicant's arguments to the effect that the Russian court had no jurisdiction to examine the case (see paragraph 57 above). It is, however, not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention: it is for the domestic courts to resolve problems of interpretation and application of domestic legislation, and of rules of general international law and international treaties (see *X v. Latvia*, cited above, § 62, with further references).

68. The Court will therefore determine whether the judgment of the Gagarinskiy District Court establishing the child's residence as being with A.Sh. struck a fair balance between the interests of the child and those of the parents. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on

their nature and seriousness, may override those of the parent. 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 *Hromadka and Hromadkova v. Russia*, no. 22909/10, § 160, 11 December 2014, with further references).

69. The Court observes that on the basis of the evidence in their possession, the domestic courts established that the child, aged almost three years old at the time of the alleged retention, was born in Moscow, had Russian nationality and registration of his place of residence in Moscow, that the applicant's working schedule required frequent business trips all over the world, for which reason the parties had agreed that the child's place of habitual residence would be Russia, where he was regularly monitored by doctors and where suitable conditions had been created for his life and development. The domestic courts further established that A.Sh. and the child had also temporarily lived with the applicant in Italy or accompanied him on his business trips, but that the child had always remained with and been taken care of by A.Sh. to whom he had been deeply attached (see paragraph 23 above). In view of the above findings, the domestic courts concluded that it had been in the child's interests that his residence be determined as being with his mother A.Sh. There is nothing to indicate that the findings reached by the domestic courts, which had the benefit of direct contact with all the persons concerned, fell outside their margin of appreciation. Given that the national authorities are in principle better placed than an international judge to evaluate the evidence before them, it is not the Court's task to take their place in establishing and assessing the facts and deciding what is in the best interests of the child in the present case.

70. The Court further notes that the decision at issue was reached following adversarial proceedings in which the applicant was placed in a position enabling him to put forward all arguments against A.Sh.'s claim, he also had access to all relevant information that was relied on by the courts.

71. The Court concludes from the above that the decision-making process was fair and that the reasons advanced by the domestic courts were relevant and sufficient.

72. In such circumstances the Court considers that the judgment of the City Court of 10 October 2016 rejecting the applicant's claim for recognition and enforcement of the judgment of the Monza District Court of 21 January 2016 on the ground of the existence of a final judgment of the Gagarinskiy District Court of 17 February 2016 in a dispute between the same parties, on the same subject matter and the same grounds, by which the child's residence was determined as being with his mother A.Sh., had not been arbitrary or manifestly unreasonable. It remains open to the applicant to apply to the Russian courts for a contact order and, through regular contact, to gradually re-establish the bond with his son.

73. In the light of the foregoing, the Court concludes that there has been no violation of Article 8 of the Convention in the present case.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

74. The applicant also complained of a violation of Article 13 of the Convention, which reads as follows:

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

75. The applicant submitted that at the time of the allegedly unlawful retention of the child in Russia there had been no operative international treaty between Russia and Italy allowing him to seek the child’s return or assistance in exercising his access rights. The only remaining remedy for him to obtain protection of his right to respect for his family life had been the application for recognition and enforcement of the judgment of the Monza District Court, which yielded no result.

76. The Government argued that the applicant could seek the child’s return from Russia to Italy or assistance in exercising his rights of access in Russia in accordance with the Jurisdiction and Applicable Law Convention.

77. The Court notes that the relevant general principles were summarised in its judgment in *Hasan and Chaush v. Bulgaria* [GC] (no. 30985/96, § 96, ECHR 2000-XI), and *Kudła v. Poland* [GC] (no. 30210/96, § 157, ECHR 2000-XI).

78. It has not been disputed between the parties that the applicant had an arguable claim under Article 8 within the meaning of the Court’s case-law, and was thus entitled to a remedy satisfying the requirements of Article 13.

79. The Court has already examined – in the context of an objection of non-exhaustion of domestic remedies – the remedy relied on by the Government in paragraph 76 above and found that it was not available to the applicant until a year after the allegedly unlawful retention of the child in Russia took place (see paragraph 65 above). At the same time, the Court observes that the applicant actively participated in the child residence proceedings initiated by the child’s mother in Russia and subsequently, when they resulted in favour of the latter, he sought recognition and enforcement of the judgment of the Monza District Court granting the child residence order to him. In both proceedings the applicant was able to present his arguments, and the judicial authorities examined them. It is undisputed that the courts had the power to deal with the substance of the applicant’s complaint and to grant him appropriate relief. In such circumstances the Court considers that those proceedings combined satisfied the requirements of an effective remedy. The fact that the outcome of those proceedings was unfavourable to the applicant does not indicate, as such, that the remedy in question was ineffective.

80. In view of the above, the Court finds that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 8 of the Convention concerning the failure of the domestic authorities to assist the applicant in being reunited with his son admissible and the remainder of the application inadmissible;
2. *Joins to the merits*, unanimously, the Government's objection as to the exhaustion of domestic remedies and *rejects* it;
3. *Holds*, by six votes to one, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 19 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško  
Registrar

Georges Ravarani  
President