



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

FIRST SECTION

CASE OF KUPÁS v. HUNGARY

(Application no. 24720/17)

JUDGMENT

Art 8 • Family life • Positive obligations • Proportionate domestic court decisions dismissing applicant's request for his son's summary return under the Hague Convention

STRASBOURG

28 October 2021

FINAL

28/01/2022

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

In the case of Kupás v. Hungary,

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

Ksenija Turković, *President*,

Krzysztof Wojtyczek,

Alena Poláčeková,

Péter Paczolay,

Gilberto Felici,

Raffaele Sabato,

Lorraine Schembri Orland, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 24720/17) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian and Romanian national, Mr Levente András Kupás (“the applicant”), on 23 March 2017;

the decision to give notice of the complaints concerning Article 8 of the Convention to the Hungarian Government (“the Government”) and to declare inadmissible the remainder of the application;

the decision of the Government of Romania not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties’ observations;

Having deliberated in private on 28 September 2021,

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

INTRODUCTION

1. The case concerns the procedure for the return of a child to Switzerland, his habitual country of residence, which he left with his mother, in application of the Hague Convention on the Civil Aspects of International Child Abduction, and the applicant’s complaint that the Hungarian courts’ decision rejecting that return had breached his right to respect for his family life within the meaning of Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1981 and lives in Basle (Switzerland). He was represented by Mr D.A. Karsai, a lawyer practising in Budapest.

3. The Government were represented by their Agent at the Ministry of Justice, Mr Z. Tallódi.

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

5. The applicant married Sz.I. on 31 May 2014. The couple had already been living together in Switzerland for two months before the wedding. On 9 January 2015 their son, Z.A., was born.

6. On 8 May 2015 the family travelled to Budapest to visit family. To this end, they requested a temporary passport for Z.A., which was issued for the period 6 to 11 May 2015.

7. The applicant returned to Basle after spending a week in Hungary, in the belief that Sz.I. and Z.A. would follow once the child's documents and passport had been issued.

8. Z.A.'s documents were issued on 26 May 2015. However, instead of returning to Switzerland, Sz.I. initiated divorce proceedings before the Pest Central District Court (see paragraph 12 below) and informed the applicant of her decision.

9. The applicant had no contact with Z.A. between May and October 2015, although he returned to Hungary every second week for that purpose.

10. On 20 July 2015 the Basle Residents' Registration Office (*Einwohneramt*) informed the applicant that Z.A. had been deregistered from the Registry at the mother's request on 5 June 2015. According to the letter, the mother had stated that the applicant had consented to the deregistration.

11. The applicant initiated proceedings to place the child under protection (*védelembe vétel*) before the Pilisvörösvár Guardianship Authority. The child welfare services conducted a case study and concluded that the child was being brought up in a healthy environment and was developing well. The proceedings were thus discontinued on 10 August 2015.

I. DIVORCE AND CUSTODY PROCEEDINGS INSTITUTED UNDER HUNGARIAN LAW

12. Following her return to Hungary, Sz.I. filed a petition for divorce, custody of the child and maintenance with the Pest Central District Court. Her petition was dismissed by the court, which found that it did not have jurisdiction for the proceedings in so far as the child's residence was in Switzerland. On an appeal by Sz.I., the Budapest High Court quashed the decision and remitted the case to the first-instance court. It found that under section 59(1) of Law-Decree no. 13 of 1979 on private international law (as in force at the material time), Hungarian courts or administrative authorities had jurisdiction in child-custody, contact and parental-rights cases if the child's home or habitual residence was in Hungary. Under section 59(3), the courts also had jurisdiction in those matters when they were adjudicated in proceedings concerning personal status and the courts and administrative authorities had jurisdiction for the personal-status proceedings. The High Court found that the Hungarian courts had jurisdiction in the divorce

proceedings and, since the action concerning child custody and contact had been lodged in the course of the divorce proceedings, the courts also had jurisdiction in those matters.

13. On 6 October 2015 the Pest Central District Court held a hearing at which it heard the parties' submissions concerning the arrangements regarding the applicant's contact with Z.A. In his oral submissions, the applicant's representative made the following statement: "[The applicant] would like to reach a friendly settlement; he has not initiated proceedings under the Hague Convention for the return of the child and does not intend to remove the child from the mother's custody." She explained that the applicant was in Hungary every second weekend and intended to see his child at those times, but preferably not at Sz.I.'s home. Sz.I. consented to this arrangement provided that she could be present at the meetings. On the same day the court issued an interim measure granting the applicant contact with Z.A. every second Saturday and Sunday between 11 a.m. and 4.30 p.m. at the flat of the applicant's sibling in Hungary and in the presence of the child's mother.

14. Subsequently, both parents requested to modify the arrangements concerning the applicant's contact rights. Sz.I. sought to have the applicant's contact reduced to every second Saturday for two hours on the premises of the child welfare services, while the applicant requested the meetings to take place at his own flat in Hungary and without the mother being present. Further to the court's decision of 26 February 2016, the applicant was allowed to have contact with Z.A. at his own flat in Budapest, without the mother being present, every second Saturday and Sunday from 11 a.m. to 5 p.m.

II. PROCEEDINGS UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

15. In April 2016 the applicant lodged an application for the return of his child under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention") with the Pest Central District Court. The applicant submitted that his wife was wrongfully retaining their child in Hungary, without his consent. The court held its first hearing on 22 April 2016, at which Sz.I. conceded that at the time of their return to Hungary, the place of residence of the child had been in Switzerland and that she had misled the applicant concerning her return to Hungary, since her intention had always been to initiate divorce proceedings and to remain there with Z.A. However, she maintained that the child's return to Switzerland should be denied under Article 13 of the Hague Convention, since the applicant had agreed that Z.A. could remain in Hungary and the return of the child would expose her to physical or

psychological harm. She also maintained that she had been physically abused by the applicant.

16. On 6 and 12 May 2016 the court held further hearings at which the parents of both parties were heard as witnesses.

17. On 9 June 2016 the Pest Central District Court issued a decision ordering Sz.I. to return the child to Switzerland by 20 June 2016 or otherwise hand the child over to the applicant on 21 June 2016. The court saw no force in the argument that the applicant's statement during the divorce proceedings, namely that he did not intend to remove the child from the mother's custody, could be interpreted as consent to the child's remaining in Hungary. The court further explained that the applicant's request for an interim measure to have contact with his child could not be interpreted as his consent either.

18. Both parties appealed against that decision.

19. On 6 September 2016 the Budapest High Court overturned the first-instance decision and refused to grant the applicant's application for the child's return to Switzerland under Article 13 (a) of the Hague Convention. The court found it established that the child's residence had been in Switzerland and that Sz.I. had wrongfully retained him in Hungary on 26 May 2015. Nonetheless, the court referred to the applicant's statement in the divorce proceedings (see paragraph 13 above) and explained that, although this statement had not amounted to explicit consent to the child's retention in Hungary, it was still clear that, by expressing his willingness to exercise his contact rights in Hungary, the applicant had acquiesced in the child living in Hungary with his mother. The court further found it relevant that in the course of the divorce proceedings, the applicant had been granted contact with his child in two interim measures and he had even made his flat in Hungary available to meet his son there, and that these arrangements had been based on the consent of both parties.

20. The applicant submitted a petition for review to the *Kúria*. By a decision of 10 January 2017, the court dismissed the applicant's petition, endorsing the conclusion of the second-instance court. It also found relevant that although Sz.I. had moved to Hungary with the child and had initiated divorce proceedings as early as May 2015, the applicant had only lodged his application for return in April 2016 when Sz.I. had sought to restrict the applicant's contact rights. The relevant parts of the *Kúria*'s decision read as follows:

“ ...

It is not disputed that the habitual residence of the child before his retention was in Switzerland. The respondent did not return the child to his habitual residence but retained him in Hungary without the knowledge and consent of and misleading the petitioner, with whom she jointly exercised custody rights. The conduct of the respondent was wrongful within the meaning of Article 3 of the Hague Convention. The consequence of such conduct under the general rule set out in Article 12 of the

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Hague Convention is the return of the child, in the absence of reasons to refuse his return under Articles 13 and 20.

...

In the review proceedings the court must assess whether the statement of the petitioner included in an official document – the minutes of the court hearing – can be considered a statement [of consent] as claimed by the respondent ...

Legal statements are to be interpreted in accordance with the rules of the Civil Code.

...

The second-instance court correctly found that the statement of the petitioner was to be characterised as subsequent acquiescence in the child's retention in Hungary.

The *Kúria* emphasises that a statement must be interpreted if it is unclear, contradictory, vague or unprofessional, and if it is therefore disputed what the person making the statement intended to express. The Civil Code gives guidance on how to recognise the intent of the person making the statement. The starting-point is the generally accepted meaning of the words, their grammatical sense, and other circumstances that reveal the intent of the person making the statement.

In the present case the statement of the petitioner does not contain explicit subsequent acquiescence in the child's retention in Hungary. However, it is beyond doubt that the petitioner did not intend to initiate proceedings under the Hague Convention for the child's return; thus, his intention was not the immediate return of the child to Switzerland. He did not lodge an application to that effect for an extended period. On the contrary, the petitioner – as appears from the factual circumstances – acquiesced in the change of the child's habitual residence, that is, that the child would live at the mother's home in Hungary. He requested regular access to his child in Hungary during the time it took the court conducting the divorce proceedings to decide on the permanent custody and residence of the child. The petitioner's statement must thus be interpreted as subsequent acquiescence in the child's retention in Hungary within the meaning of Article 13 (a) of the Hague Convention and in line with the international practice invoked by the petitioner.

This interpretation is further reinforced by the fact that – as correctly reasoned by the second-instance court – in the course of the divorce proceedings the court regulated the contact between father and son upon the request of the petitioner and subsequently authorised contact rights with the child at the petitioner's home. Thus, the second-instance court rightly concluded that the petitioner's priority had been – with regard to the right to contact with his child – the custody proceedings in which he made the disputed statement.

The *Kúria* finds it relevant that the child has been living [with the respondent at her home] since May 2015 and that the respondent informed the petitioner of her intention to divorce at the time of the child's retention. The petitioner was not prevented from initiating proceedings under the Hague Convention for the immediate return of the child. However, he only did so in April 2016 when – according to his own statement – the respondent requested that the petitioner's contact with the child be restricted and supervised.

...”

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE HAGUE CONVENTION

21. The relevant Articles of the Hague Convention (ratified by Hungary on 1 July 1986) are set out in *X v. Latvia* ([GC], no. 27853/09, § 34, ECHR 2013).

22. In addition, the relevant parts of the Explanatory Report on the 1980 Hague Convention, known as the Pérez-Vera Report and published by The Hague Conference on Private International Law (HCCH) in 1982, read as follows:

C Importance attached to the interest of the child

“24 [The preamble reflects] quite clearly the philosophy of the Convention in this regard. It 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. Now, 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. ...”

D Exceptions to the duty to secure the prompt return of children

“28 On the one hand, article 13a accepts that the judicial or administrative authorities of the requested State are not bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented to the act which he now seeks to attack. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more difficult for him to challenge.

29 On the other hand, paragraphs 1b and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child. Now, as we pointed out above, the Convention invests this notion with definite content. Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

...

34 ... it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so 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. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. ...”

Article 3 – The unlawful nature of a removal or retention

“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.”

Articles 13 and 20 – Possible exceptions to the return of the child

“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, be he a physical person, an institution or an organization, that person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum.

115 The exceptions contained in a arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention, has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Convention includes no definition of ‘actual exercise’ of custody, but this provision expressly refers to the care of the child. Thus, if the text of this provision is compared with that of article 5 which contains a definition of custody rights, it can be seen that custody is exercised effectively when the custodian is concerned with the care of the child’s person, even if, for perfectly valid reasons (illness, education, etc.) in a particular case, the child and its guardian do not live together. It follows from this that the question of whether custody is actually exercised or not must be determined by the individual judge, according to the circumstances of each particular case. Moreover, by relating this paragraph to the definition of wrongful removal or retention in article 3, one must conclude that proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights precisely because of the action of the abductor. In fact, the categorization of protected situations, contained in article 3, governs the whole Convention, and cannot be contradicted by a contrary interpretation of any of the other articles. On the other hand, the guardian’s conduct can also alter the characterization of the abductor’s action, in cases where he has agreed to, or thereafter acquiesced in the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights ‘in good faith’, and at the same time prevented the Convention from being used as a vehicle for possible ‘bargaining’ between the parties.

...”

II. RELEVANT CASE-LAW REGARDING “ACQUIESCENCE”

23. In case no. 11/01437 of 1 December 2011 the Court of Appeal of Agen (France) found that the fact that the father of a child who had been removed from Australia and retained in France had visited the child in France, had not opposed to his enrolment in a school in France, had agreed to help the mother in “every possible way”, including furnishing a house for her, and had stated that he would respect the decision of the courts as their priority would be the child’s best interests could not be interpreted as acquiescence.

24. In case no. 2008/JR/177 the Court of Appeal of Brussels (Belgium) observed that the mother had taken the child to Poland with the father’s consent. In the latter’s view, this had been a temporary stay and the mother and child would return to live in Belgium, so he had not applied for the child’s return. When he had asked the mother in August 2007 for the date of their return to Belgium and realised that the mother did not wish to return, he had initiated proceedings in Belgium for maintenance of shared parental authority and the establishment of a detailed right of access and accommodation. The Court of Appeal observed that in 2008 the father had drafted two attestations giving his consent for the child to reside in Poland. These documents, according to the court, had indisputably been drafted at the mother’s request, possibly pursuant to some pressure. Nevertheless, the Court of Appeal noted that at no point had the father applied for the child’s return to Belgium, but that he had on the contrary offered to travel to Poland to care for the child. It deduced that this constituted acquiescence.

25. In *K. v. K., Re M.-N.K. and A.K.*, 3 December 1996 the High Court of Northern Ireland held that acquiescence was primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. The court held that father had acquiesced in the retention of the children in Northern Ireland based on his conduct and words which were inconsistent with him seeking any summary return of the children to Greece. The court found that father’s subsequent decision to invoke the Hague Convention could not resurrect his right to seek their summary return once he had acquiesced in the children remaining in Northern Ireland.

26. In case no. 5 Ob 17/08y, the Supreme Court of Austria held as follows:

“...

As far as can be seen, there is only second-instance case-law on the question raised here, according to which it is required that consent within the meaning of Article 13 § 1 of the Hague Convention must be clear and mandatory. However, this was stated in the context of a tacit declaration of intent. Supreme court jurisprudence only exists to the effect that consent can also be given tacitly, but not what qualifies as express consent. In the literature, the view is taken that the reasons for refusing to return an abducted child (Articles 13 and 20 of the Convention) are to be applied extremely

restrictively. It is also required that a declaration of consent within the meaning of Article 13 must be clear and unambiguous. In the German literature and the jurisprudence reproduced therein it is argued that the requirements for acquiescence should be checked particularly strictly. In order to remedy the unlawfulness, it is not sufficient if acquiescence is promised only under certain conditions, or if consent has only been given for the child to remain temporarily with the abducting parent while attempts are made to settle the matter amicably. A mere temporary acceptance of the stay with the abducting parent is also not sufficient if it emerges that this was done in ignorance of the possibilities provided by the Hague Convention. The legal situation can therefore be summarised by saying that the unlawfulness of the abduction is not remedied if consent to the temporary stay of the child with the abducting parent is established, because only where consent to a permanent change of residence by the (co-)custodian is established by way of a declaration or as a result of the circumstances, is the consent requirement of Article 13 § 1 of the Hague Convention fulfilled.

...”

27. In *re H and Others* [1997] UKHL 12, the House of Lords stated as follows:

“... It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted. Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust.

...

My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged parent show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged parent’s desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs.”(references omitted).

...”

28. In case no. 40274 of 6 November 2013 of the Court of Appeal of Luxembourg, the mother pleaded that the disputed removal had not been unlawful, the father having given his written consent. The court noted that, although the father had given his consent for the removal of his children to Luxembourg, it was clear at the hearing that this agreement concerned only a temporary move and that he “had not agreed to a permanent change of residence but only a temporary removal of the children and that he had even said that he would come to pick them up personally if necessary”. The Court of Appeal therefore held that the conditions of the exception to return

contained in Article 13 § 1 (a) of the Hague Convention had not been met in that case.

29. In *re F.* [1992] 1 FLR 548, the United Kingdom Court of Appeal held as follows:

“... ”

Acquiescence is a combination of a sufficient period of time coupled with inactivity by the parent without the child to demonstrate an implied acceptance of the changed position. The circumstances of the parting of the couple, the reluctance of the father to accept the breakdown of the marriage, together with the view of the mother expressed in her affidavit as to some prospect of reconsideration of the future of the marriage, are not, in the written evidence alone, sufficient, in my view, to show acquiescence. I would not myself wish, in our modern way of life, to lay down any rules as to a period of time which may or may not demonstrate acquiescence. It has to be a matter of the facts and circumstances of each case. But where there is a shortish period and the parting of the parents is not yet final and reconciliation is a possibility, the absence of any legal action taken by the non-custodial parent ought not to be taken as the equivalent of an implied agreement to the actions of the other parent.

“... ”

30. In *re W. v. W.* [1993] 2 FLR 211, the High Court found that the fact that for a period of ten months the father had not taken any measures to be reunited with his child amounted to acquiescence. It held as follows:

“... ”

The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.

“... ”

31. In *Re B* [1999] 2 FLR 818 the court found that the purpose of the Hague Convention was the desirability for prompt action and a speedy return of the child to his / her home, which purpose was substantially frustrated by the passage of many month in the child's young life.

32. In the leading case of *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996), the United States Court of Appeals set out the following test:

“[A]cquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.

“... ”

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that there had been a breach of his right to respect for his family life in that the domestic courts had failed to correctly apply the Hague Convention criteria when deciding on his application for a return order. He relied on Article 8 of the Convention, which reads as follows:

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

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

A. Admissibility

34. The Court notes that the application 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

35. The applicant submitted that the retention of his son by Sz.I. had been wrongful, as confirmed by the domestic courts. Despite this fact, the Hungarian authorities had not fulfilled their positive obligations under Article 8 of the Convention to ensure that his child was returned to Switzerland, his habitual place of residence. In particular, the domestic courts had failed to apply the Hague Convention criteria when deciding on his application for the return of his son and had erroneously interpreted the statements he had made in the divorce proceedings.

36. He further argued that when deciding on the child's return to Switzerland the Hungarian courts had failed to assess the child's best interests.

37. The Government submitted that the question whether Z.A. should be returned to Switzerland fell under judicial discretion and that when deciding on the matter, the Hungarian courts had taken due account of the Hague Convention. Furthermore, the applicant's contact with his son had been assured through the interim measures issued in the course of the divorce proceedings and corresponding to the particular situation of the applicant.

2. *The Court's assessment*

(a) General principles

38. The Court reiterates that the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life and is protected under Article 8 of the Convention (see *K. and T. v. Finland* [GC], no. 25702/94, § 151, ECHR 2001-VII, and *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

39. While the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by the public authorities, there are in addition positive obligations inherent in effective "respect" for family life (see, for example, *Chabrowski v. Ukraine*, no. 61680/10, § 104, 17 January 2013, with further references). Positive obligations under Article 8 of the Convention may involve the adoption of measures designed to secure respect for rights guaranteed by this provision even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see *Hämäläinen v. Finland* [GC], no. 37359/09, §§ 62-63, ECHR 2014). The Court has held in the past that Article 8 includes a right for parents to measures that will enable them to be reunited with their children and an obligation on the national authorities to take such measures (see *Edina Tóth v. Hungary*, no. 51323/14, § 51, 30 January 2018).

40. Moreover, in the area of international child abduction, the obligations imposed on the Contracting States by Article 8 of the Convention must be interpreted in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child, and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (see *X v. Latvia* [GC], no. 27853/09, § 93, ECHR 2013, with further references). Thus, the Court finds it necessary to refer to the summary of the general principles applicable in any assessment under the Convention of complaints concerning proceedings under the Hague Convention, as set out in *X v. Latvia* (*ibid.*, §§ 99-108).

41. 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 (*ibid.*, § 34).

42. Finally, the Court cannot question the assessment of the domestic authorities, unless there is clear evidence of arbitrariness (see, among others, *Perlala v. Greece*, no. 17721/04, § 25, 22 February 2007, and *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 89, ECHR 2007-II).

(b) Application of the general principles to the present case

43. The Court notes, firstly, that it is common ground that the relationship between the applicant and his child falls within the sphere of family life under Article 8 of the Convention.

44. In the present case, the Court further observes that the primary interference with the applicant's right to respect for his family life cannot be attributed to an action or omission by the respondent State but rather to the actions of Z.A.'s mother, a private party, who retained the child in Hungary (see *López Guió v. Slovakia*, no. 10280/12, § 85, 3 June 2014).

45. It therefore remains to be ascertained whether the State has complied with its positive obligation to secure the applicant's right to respect for his family life.

46. The Court observes that in the present case the Hungarian courts established, and it was not disputed by the parties in the course of the domestic proceedings, that the child's habitual residence was in Switzerland (see paragraphs 19-20 above). Indeed, the applicant and Sz.I. jointly exercised parental responsibility and rights of custody over their child in Switzerland, which should thus be regarded as the child's "habitual residence" for the purposes of the Hague Convention.

47. On 8 May 2015 the applicant, the child's mother and Z.A. left Switzerland to go to Hungary for a family event. Thus, the Court finds, and it has not been disputed by the parties, that the applicant had agreed to Sz.I. and the child leaving Switzerland for Hungary and had consented to the dates of travel.

48. As regards the subsequent retention of the child in Hungary, the Court notes that to the applicant's knowledge, the mother was supposed to return to Switzerland with the child, once the child's official documents had been issued. Sz.I. did not inform the applicant of her intention to stay in Hungary. Furthermore – according to the evidence adduced in the case file in the proceedings for the return of Z.A. lodged under the Hague Convention – prior to leaving Switzerland on 5 May 2015, the child's mother had already intended to file a petition for divorce and was returning to Hungary to initiate divorce proceedings. It is indeed clear that Sz.I. unilaterally, deliberately and in secret changed Z.A.'s habitual residence during the time-limited arrangement when the child was in Hungary with the father's consent for a particular purpose, and that the child's retention in Hungary extended beyond the limits of the consent given by the applicant (see paragraph 20 above). Her actions were in direct violation of the applicant's custodial rights since there had been no shared parental intention to change the child's residence. Thus – as held by the domestic courts – Sz.I. had wrongfully retained the child in Hungary after his documents had been issued.

49. The Court reiterates that 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 his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13, first paragraph, (b)). The Court further notes that the European Union subscribes to the same philosophy, in the framework of a system involving only European Union member States and based on a principle of mutual trust. The Brussels II *bis* Regulation, whose rules on child abduction supplement those already laid down in the Hague Convention, likewise refers in its Preamble to the best interests of the child, while Article 24 § 2 of the Charter of Fundamental Rights emphasises that in all actions relating to children the child's best interests must be a primary consideration exceptions (see *X v. Latvia*, cited above, § 97).

50. Therefore, there is no automatic or mechanical application of a child's return once the Hague Convention has been invoked, as indicated by the recognition in that instrument of a number of exceptions to the member States' obligation to return the child (see in particular Articles 12, 13 and 20), based on objective considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to each case (see *Maumousseau and Washington v. France*, no. 39388/05, § 72, 6 December 2007).

51. For the Court, the same considerations as those set out in the judgment of *X v. Latvia* (cited above, §§ 93-108) should be applicable when the refusal to secure the return of a child is based on the exception that the wronged parent consented to or acquiesced in the retention of the child within the meaning of Article 13 (a) of the Hague Convention.

52. In particular, exceptions under Article 13 (a) of the Hague Convention must be interpreted strictly (see, to this effect, the Explanatory Report on the Hague Convention, paragraph 34, cited in paragraph 22 above, and *X v. Latvia*, cited above, § 107). The aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition, through the passage of time, of a *de facto* situation that he or she unilaterally created (see *Maumousseau and Washington*, cited above, § 73). The Court is further of the view, that since "acquiescence" in the retention of the child entails the wronged parent waiving the immediate return of the child to his or her habitual residence, it must be clear and unequivocal, even if not necessarily by an explicit statement.

53. In the present case it is exactly this exception – the applicant's acquiescence – that the appellate court and the *Kúria* relied on when they

examined the applicant's application for the child's return under the Hague Convention in 2016: they refused to grant the application as they considered that although the applicant had not explicitly consented, he had acquiesced in the retention of the child in Hungary, which rendered Article 3 of the Hague Convention inapplicable.

54. They reached this conclusion referring to the following interrelated factors: first, the statement the applicant made during the hearing in the divorce proceedings (see paragraph 13 above) to the effect that he had not previously initiated proceedings under the Hague Convention because he hoped to be able to reach a friendly settlement (see paragraph 19 above). Second, the interim measure regulating the applicant's contact rights during the divorce proceedings and granting him contact with his child in Hungary had been based on the mutual agreement of the parents and corresponded to the applicant's request. Third, the applicant had only initiated return proceedings in April 2016, while the custody and divorce proceedings were already ongoing (see paragraphs 20 above).

55. On the basis of these above factors and the evidence freely adduced in the domestic case file, both the second-instance court and the *Kúria* found it to be proved that the applicant had given his acquiescence to the child's retention in Hungary.

56. In the present case, the Court first observes that the appellate court and the *Kúria* evaluated the factual circumstances of the case relying on the documents submitted by the parties and taking into consideration the parties' arguments concerning the acquiescence given by the father to the retention, and they also provided reasoning for their interpretation of the provisions of Article 13 § 1 (b) of the Hague Convention.

57. The Court agrees with the approach of the domestic courts adopted in respect of the provisions of the Hague Convention to the extent that acquiescence can be evidenced by clear and unambiguous statements and inferred from conduct (see paragraph 20 above). In this sense, the starting point of the domestic court's assessment was the statement of the applicant's representative given in the course of the divorce and custody proceedings that the applicant had not initiated proceedings under the Hague Convention for the return of his child and had not intended to remove the child from the mother's custody. In the Court's view such statement could reasonably be interpreted as the wronged parent not insisting on the summary return of the child.

58. Besides, the *Kúria* was not merely looking at the expressed words of the applicant and his representative but also paid attention to the applicant's outward conduct.

59. When assessing whether the applicant's conduct constituted consistent attitude of acquiescence, the domestic courts attached weight to the fact that the ruling on the applicant's contact visiting rights in respect of his son in Hungary had been based on the mutual agreement of the applicant

and Sz.I. While it is true that courts should be cautious not to infer an intention to acquiesce from attempts of the wronged parent to effect a reconciliation or a voluntary return, the fact remains that in the present case the applicant did not insist on the return of his child but took steps for the purpose of exercising his contact rights in Hungary. For instance, he made his flat available in Hungary. It does not appear from the case file that the applicant made those arrangements conditional to the child's return.

60. Besides the applicant's actions, the *Kúria* relied on the inference drawn from his omissions. It was influenced by the fact that while nothing had prevented the applicant to apply for the return of his child, he had only initiated proceedings for the return of his son eleven months after the child's retention and at the time his contact with the child had been restricted in the custody and divorce proceedings. For the Court, the *Kúria* cannot be criticised for interpreting this delay as acquiescence on the applicant's part. Furthermore, as demonstrated by the case study conducted by the Guardianship Authority, the child was developing well in his new environment (see paragraph 11 above). Thus, the effect of a summary return at this stage had necessarily to be borne in mind by the domestic courts.

61. Against the above backdrop the Court finds that the domestic court based their decisions on objective evidence and adopted a cautious approach when dismissing the applicant's request for the summary return of his son. Being no clear indication of arbitrariness in the present case, the Court finds no imperative reason to depart from the domestic courts' findings (see *Raban v. Romania*, no. 25437/08, § 38, 26 October 2010).

62. The Court concludes, having particular regard to the State's margin of appreciation in the matter and to the *in concreto* approach required for the handling of cases involving child-related matters, that the Hungarian courts' assessment of the case in the light of the Hague Convention requirements did not amount to a violation of Article 8 of the Convention, as it was proportionate to the legitimate aim pursued.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention;

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Done in English, and notified in writing on 28 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Ksenija Turković
President

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

K.T.U.
R.D.

JOINT DISSENTING OPINION OF JUDGES PACZOLAY AND SCHEMBRI ORLAND

1. We regret that we cannot share the majority’s opinion in the present case that there has been no violation of Article 8 of the Convention. The applicant complained that there had been a breach of his right to respect for his family life in that the domestic courts had failed to correctly apply the Hague Convention on the Civil Aspects of International Child Abduction (the *Hague Convention*) when deciding on his application for an order to return the child to his country of habitual residence in Switzerland.

2. The Court has on many occasions pronounced on matters of child abduction within the context of the Hague Convention. The particular circumstances of this case, however, involve the application of the exception of *consent/acquiescence* by the requested courts set forth in Article 13(a) of the Hague Convention.¹ This case therefore presented an opportunity to review the compatibility of the application of the Hague Convention by the national courts with Article 8 of the ECHR with reference to the exception to the mandated return of the child provided for in Article 13(1)(a) of the Hague Convention.

3. The general principles concerning the harmonious interpretation of the European Convention and the Hague Convention are set out clearly in the judgment. 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 (see *Maumousseau and Washington*, cited above, § 62), taking into account, however, that the best interests of the child must be the primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of “the best interests of the child” (*X v Latvia* § 95).

4. In the specific 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 in the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the 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)².

¹ “Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

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

² *Ibid.*, § 101.

5. The exception envisaged in Article 13(a) of the Hague Convention constitutes elements for the application of that Convention to the case and relates to the jurisdiction of the requested court to determine custody issues. If the parent left behind is deemed to have consented or acquiesced, then the Courts will not order the return of the child because the retention of the latter by the abducted parent can no longer be considered unlawful. Custodial issues will then fall under the jurisdiction of the requested State in ordinary proceedings. This simple premise links the obligation of prompt return to the consent/acquiescence of the “wronged” parent unless there are circumstances which warrant the *grave risk* exception.

6. The actual philosophy underpinning the Hague Convention hinges on the concept of the prompt return of an abducted child, which in and of itself safeguards the child’s best interests (in the absence of a grave risk to the child). Inherent in that concept is the right for a minor not to be removed from one of his or her parents and retained by the other, that is to say by a parent who considers, rightly or wrongly, that he or she has equal or greater rights in respect of the minor.³ It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of wrongfully occasioned *de facto* situations, and of leaving the issues of custody and parental authority to be determined by the courts which have jurisdiction in the place of the child’s habitual residence.⁴ It also follows that an arbitrary or broad interpretation and application of the *acquiescence* exception would be in breach of the applicant’s right to protection of his family life as a parent, and would undermine the purpose of the Hague Convention such as to render it ineffective.

7. It is true that the task of interpreting the exceptions of the Hague Convention 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, whereby the Court reviews under the Convention the decisions taken by those authorities in the exercise of the said power (see, *mutatis mutandis*, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299 A, and also *Maumousseau and Washington*, cited above, § 62, and *Neulinger and Shuruk*, cited above, § 141). Thus the Court is competent to review the procedure followed by the domestic courts, particularly in order to ascertain whether the domestic courts, when applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention, especially those of Article 8.

³ *Maumousseau and Washington v France*, § 68.

⁴ *Ibid.*, § 69.

8. Basically, the following two conditions must be observed by the domestic courts of the respondent State in honouring the State's positive obligations to ensure respect for the applicant's private and family life. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must be genuinely taken into account by the requested court. That court must then give a decision which is sufficiently reasoned on that point, so that the Court can ascertain whether those questions were effectively examined. Secondly, those factors must be evaluated in the light of Article 8 of the Convention.⁵

9. Turning to the case at hand, there is no dispute that the child was wrongfully taken by his mother from the country of his habitual residence, Switzerland, to Hungary. The domestic courts considered in no uncertain terms that her conduct was unlawful within the meaning of Article 3 of the Hague Convention. Nor was there a *grave risk* issue which, though raised by the mother, was discarded without further ado by the domestic courts. It is also undisputed that the applicant did not institute return proceedings until the lapse of some eleven months. During that period the applicant had had no contact with his child for several months (May – October 2015) and had participated in proceedings for interim contact arrangements, which arrangements were put in place.

10. It was during these proceedings that the applicant's representative made the following statement: “[*The applicant*] would like to reach a friendly settlement; he has not initiated proceedings under the Hague Convention for the return of the child and does not intend to remove the child from the mother's custody.”

11. The domestic courts concluded that the applicant had acquiesced to the child's stay in Hungary on the basis of the following considerations. Firstly, the applicant's statement was characterised by the second-instance court as a subsequent acquiescence to the child's retention in Hungary. The *Kúria* found this to be correct, even though it was not tantamount to an explicit acquiescence (see para. 20 of the judgment). Secondly, the court derived evidence of tacit acquiescence from the following : (i) the delay in lodging the (return) application; (ii) the fact that the applicant requested regular access to the child in Hungary; (iii) the fact that contact was regulated in the course of the divorce proceedings at his request; and (iv) the fact that he initiated return proceedings after the respondent requested that the petitioner's contact with the child be restricted and supervised.

12. We will address these points below, ultimately reaching the conclusion that the exception set out in Article 13 (a) was not interpreted strictly by the domestic courts, which, moreover, relied on irrelevant factors

⁵ *Ushakov v Russia*, § 82

which did not take full account of the dynamics of cross-border child abduction. We are mindful that such an exercise can easily risk being characterised as a fourth-instance review. This is not our intention. Nonetheless, a broad interpretation of the *acquiescence* limb of Article 13(a) which falls short of the standards set by the Hague Convention for the actual protection of the child, as well as for the guarantees of Article 8 of the Convention, would justify review by the Courts. None of the factors considered by the court, individually or cumulatively, were, for the reasons mentioned below, sufficiently weighty to evidence a clear and unequivocal waiver by the applicant of his intention to seek the return of the child or to counterbalance the interference to his parental rights.

The applicant's statement

13. The *Kúria* considered that this statement was not tantamount to an express acquiescence by the father, but it nonetheless gave weight to it in reaching its conclusions against the applicant. It should be remembered that this statement was made during proceedings for interim contact between the applicant and his child, although at the time the father had not seen his child for several months, and where the applicant's explicit aim was to reach a friendly settlement. This aim underpinned that statement and circumscribed its purpose and intent. A strict interpretation should have excluded this statement from the court's analysis. In any event, the statement in question was made in the context of an interim measure for the temporary regulation of custody and access until the final decision on parental rights in the divorce proceedings. Consequently, it was necessarily related to this interim period rather than to the final settlement of the child's residence, especially since the possibility of the child permanently remaining in Hungary was not discussed. Moreover, in these circumstances, it cannot be held that the applicant could reasonably have foreseen that his statement would subsequently be understood in the return proceedings as an intention concerning the permanent change of the child's residence and a waiver of his right to have the child returned. Thus, we cannot find that the applicant's statement clearly and unequivocally showed that he had actually acquiesced in the child's remaining in Hungary and, furthermore, that it was a relevant factor for the assessment required by the two Conventions.

Tacit acquiescence

14. Given that there was no express, clear and unambiguous declaration of consent to the child's permanent change of residence, the domestic courts' attention should have turned to a scrupulous scrutiny of the existence or non-existence of sufficient evidence, in terms of words and

actions, which would clearly amount to agreement to the child's remaining in Hungary.

15. As regards the question whether the applicant's conduct was a consistent attitude of acquiescence, it is true that the ruling on the applicant's contact rights to the effect that he could visit his son in Hungary was based on the mutual agreement of the applicant and Sz. I. Furthermore, the applicant took action to that end and, *inter alia*, made his flat available in Hungary.

16. As to the reliance of the domestic courts on an interim measure on custody and access rights, we might usefully have regard to the commentary on Article 17 of the Hague Convention in the Explanatory Report (see paragraph 22 above), which emphasises that the sole fact that a decision on custody exists would not of itself prevent the child's return. However, in the present case, when dismissing the applicant's request for the return of his child, instead of taking into consideration the reasons for the custody decision, the courts relied heavily on the fact that the applicant had been in agreement with the interim arrangements.

17. It is true that Hague proceedings were initiated some eleven months after the abduction. This was nonetheless within the one-year time limit prescribed by Article 12 of the Hague Convention which provides for the summary return of the child if a period of less than a year has elapsed from the date of the wrongful retention until the commencement of the proceedings before a judicial authority. In our view, the lapse of time until the application to a court for the child's return does not necessarily imply acquiescence, nor should it otherwise be held against the applicant since during the intervening period he was attempting to reach an agreed settlement of parental rights by other means, namely the custody and divorce proceedings.

18. Having regard to the foregoing circumstances, we conclude the exception to the child's return under the Hague Convention was applied by the domestic courts in such a way as to render meaningless the applicant's lack of consent to his child's permanent stay in Hungary. In the present case, therefore, the objective result of the proceedings before the domestic courts was that the legitimate interests of the applicant, as the father of the child, were not taken into account in an adequate or fair manner in the judicial decision-making process in Hungary. Moreover, if the interpretation of the domestic courts of the exceptions set out in Article 13 of the Hague Convention were to be accepted, both the substance and primary purpose of the Hague Convention, an international legal instrument in the light of which the Court applies Article 8 of the Convention, would be voided of any relevance, thus implying that the above-mentioned exceptions must be interpreted strictly.

19. Finally, we are not satisfied that the child's "best interests", which consisted in his prompt return to his habitual environment, were sufficiently

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taken into account by the domestic court when they examined the request for his return under the Hague Convention.