



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

FOURTH SECTION

**CASE OF IGLESIAS GIL AND A.U.I. v. SPAIN**

*(Application no. 56673/00)*

**FINAL**

***29/07/2003***

JUDGMENT

STRASBOURG

29 April 2003



**In the case of Iglesias Gil and A.U.I. v. Spain,**

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mr A. PASTOR RIDRUEJO,

Mrs E. PALM,

Mr M. FISCHBACH,

Mr J. CASADEVALL,

Mr S. PAVLOVSKI, *judges*,

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

Having deliberated in private on 10 December 2002 and 1 April 2003,

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

**PROCEDURE**

1. The case originated in an application (no. 56673/00) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Spanish nationals, Mrs María Iglesias Gil and A.U.I. ("the applicants"), on 22 December 1999.

2. The applicants were represented before the Court by Mr J. Thomas Mulet, of the Palma de Mallorca Bar. The Spanish Government ("the Government") were represented by their Agent, Mr J. Borrego Borrego, Head of the Legal Department for Human Rights at the Ministry of Justice.

3. The first applicant, acting in her own name and in her capacity as the legal representative of her son (the second applicant), complained under Article 8 of the Convention of a lack of diligence on the part of the judicial authorities in dealing with her complaint of child abduction. She alleged, in particular, that the public prosecutor, who was under a legal duty to protect minors, had at no stage acted in the child's interest or requested any investigative steps to be taken. The various judicial authorities to which the case was referred (the investigating judge, the Pontevedra *Audiencia Provincial* and the Constitutional Court) had likewise displayed a lack of interest.

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

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

6. By a decision of 5 March 2002 the Chamber declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 10 December 2002 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. BORREGO BORREGO, Head of the Legal Department  
for Human Rights, Ministry of Justice, *Agent;*

(b) *for the applicants*

Mr J. THOMAS MULET, of the Palma de Mallorca Bar, *Counsel.*

The Court heard addresses by the above-mentioned representatives.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, María Iglesias Gil, was born in 1961 and lives in Vigo. She is the mother of the second applicant, A.U.I., who was born in 1995.

10. On 8 September 1989 the first applicant married A.U.A. On 3 June 1994 the couple divorced. Their son A.U.I. was born on 7 December 1995 and A.U.A. acknowledged paternity. In a decision of 20 December 1996, the Vigo Family Court awarded the first applicant custody of A.U.I., and the father access. On 1 February 1997 A.U.A. abducted his son during an access visit and left Spain with him. After passing through France and Belgium, he travelled with the child by air to the United States.

## A. Domestic court proceedings

### *1. The first applicant's criminal complaint of unlawful abduction*

11. The first applicant lodged a criminal complaint with Vigo investigating judge no. 5 alleging child abduction and applied to be joined to the proceedings as a civil party. On 4 February 1997 the investigating judge made orders for a nationwide search to be made for A.U.A. and for the child's immediate return to its mother. Subsequently, the first applicant also made criminal complaints against various members of A.U.A.'s family who, she said, had assisted in her son's abduction.

12. During the investigation, the first applicant requested Vigo investigating judge no. 5 to monitor calls on A.U.A.'s mobile telephone and to interview members of A.U.A.'s family. In a decision of 19 February 1997, the investigating judge turned down both requests, the former on the ground that there was no evidence that the mobile telephone number that had been given was A.U.A.'s and the latter because the first applicant had not given precise details of the questions she wished to be put to her former husband's relatives. The first applicant also asked the investigating judge for a search to be carried out at the registered office of a company belonging to A.U.A. that was responsible for administering his property in his absence, and for the examination of a vehicle he had used to leave Spain. The judge again refused.

13. The first applicant asked the judge to issue an international search and arrest warrant against A.U.A., but in an order of 29 May 1997, he declined, stating:

“... ”

2. As regards the international search and arrest warrant, the offences of coercion and extortion have not been made out. It is debatable whether there has been an offence of criminal contempt, since it has not been proved that the person concerned was ordered to comply with the judgment of the family court and warned that he was liable to commit this offence. In addition, since this offence (Article 556 of the Criminal Code) only carries a prison sentence of between six months and one year, an international search and arrest warrant is not justified, [especially] as the conduct complained of appears to come within Article 622 of the Criminal Code, which characterises it as a minor offence.

...

4. Furthermore, it should be noted that the requested procedural steps are neither lawful, nor adapted to the aim pursued, and must therefore be refused pursuant to Article 311 of the Code of Criminal Procedure.”

14. In a decision of 5 June 1997, investigating judge no. 5 turned down further requests by the first applicant for investigative steps to be taken as a result of her former husband's contempt and failure to comply with the judgment of the family court on the following grounds:

“... ”

2. Investigative steps are taken in order to establish whether an offence has been committed. The investigation is brought to an end by a judicial decision, not at the request of a party (Article 785 Code of Criminal Procedure).

3. The inquiries made to date do not prove that A.U.A. failed to return his son to his mother at the end of the period for which he was entitled to have him to stay.

...

6. A wanted notice has been issued for A.U.A. nationally. As soon as he has been traced, final provision 19 of Institutional Law no. 1/1996 of 15 January 1996 on the legal protection of minors can be applied.”

15. In an order of 25 May 1998, the investigating judge also examined whether a person could be prosecuted for the abduction of a minor for whom he had joint parental responsibility. He found that this was not possible under the case-law, as the only offences that could be committed in such circumstances were criminal contempt and extortion. In a further order dated 1 July 1998 the investigating judge reiterated that no international search and arrest warrant could be issued for the suspected offence of criminal contempt, for the following reasons:

“... As regards an international search and arrest warrant against A.U.A., this issue was resolved by the Pontevedra *Audiencia* in its decision of 23 September 1997. No new facts have emerged since then that would justify reclassifying the offence. Under no circumstances can it amount to ‘false imprisonment’, as the judgment of 5 July 1993 on the abduction of minors makes clear. In that judgment, the court held: ‘The fact that a father has taken his minor child with him solely in order to enjoy its company cannot amount to the offence of child abduction’ ... ”

Lastly, as to the suspected offence of criminal contempt, no international search and arrest warrant can be issued as it is not an offence that comes within the extradition treaties. Consequently, Interpol would not act on such a warrant, as it would not be valid in law.”

16. An appeal by the first applicant was dismissed by the Pontevedra *Audiencia Provincial* on 17 November 1998.

## 2. *The first applicant's first amparo appeal*

17. The first applicant sought *amparo* relief under Articles 24 (right to a fair hearing), 15 (right to life and mental and physical integrity) and 17 (right to liberty and security) of the Constitution, and the United Nations Convention on the Rights of the Child of 1989. In a decision of 2 June 1999,

the Constitutional Court dismissed her appeal as manifestly ill-founded, holding that she had not stated why she disagreed with the reasoned decisions of the lower courts.

*3. Provisional discharge order by investigating judge no. 5*

18. At the end of the investigation, on 3 July 1998, Vigo investigating judge no. 5 issued a provisional discharge order dismissing the charges against A.U.A. However, he renewed the orders for a nationwide search for A.U.A. and the order freezing his assets. He also made a final order dismissing the charges against the members of A.U.A.'s family who had been implicated by the first applicant. The reason given by the judge for making the provisional discharge order in respect of A.U.A. was that the latter's absence from Spain had prevented his being questioned or formally charged in accordance with Article 791 § 4 of the Code of Criminal Procedure. An appeal by the first applicant was dismissed by the Pontevedra *Audiencia Provincial* on 9 November 1998.

*4. The first applicant's second amparo appeal*

19. The first applicant lodged an *amparo* appeal against those decisions with the Constitutional Court, in which she alleged violations of Article 17 (right to liberty and security), taken together with Articles 18 (rights to private life and family privacy), 24 (right to a fair hearing) and 39 (social, economic and legal protection of the family and children) of the Constitution. She also relied on Articles 5 and 8 of the Convention. In her appeal, she complained in particular of the investigating judge's systematic refusal to issue an international search warrant for her child, a refusal which, she said, was in breach of the positive duty to protect children and families. She also alleged a violation of Article 11 § 1 of the Convention on the Rights of the Child of 1989, which requires States to take measures to combat the illicit transfer and non-return of children abroad. In her submission, by refusing to take any investigative steps, the investigating judge had directly infringed both her and her son's right to private and family life, and her right to judicial protection, as guaranteed by Article 24 the Constitution and Article 6 of the Convention.

20. In a decision of 17 June 1999, the Constitutional Court dismissed the *amparo* appeal as unfounded, holding that the first applicant had confined herself to contesting the decisions of the criminal courts which, in reasoned and well-founded decisions, had decided to make a provisional discharge order in respect of her criminal complaint of child abduction, while renewing certain preventive measures.

### *5. Other decisions in the criminal proceedings*

21. In connection with an appeal by the first applicant to the Pontevedra *Audiencia Provincial* against one of his decisions, investigating judge no. 5 said in a report to the *Audiencia Provincial* on 5 September 1997:

“... The purpose of criminal proceedings is to prosecute the offence and, if appropriate, to punish the perpetrators. However, an investigating judge cannot, under any circumstances, allow himself to be manipulated by a woman driven by jealousy or hatred against her former husband’s family and take a series of procedural measures that serve no purpose other than to inconvenience third parties uninvolved in the proceedings. In the present case, all that has been proved so far is that A.U.A. did not return his son A.U.I. to his mother at the end of the period he was allowed by the family court.”

22. An application for an order requiring investigating judge no. 5 to stand down was dismissed in a decision of 20 November 1997. In a decision of 22 February 1999, an application for the proceedings to be declared null and void was likewise dismissed.

### *6. Award of full parental responsibility to the first applicant*

23. In a judgment of 12 February 1999, the Vigo Family Court withdrew parental responsibility from A.U.A. and awarded the first applicant full parental responsibility. It gave the following reasons for its decision:

“... Having considered the evidence, the Court has decided to grant the applicant’s application. ... the case file shows that, after continually failing to comply with the access arrangements (see this Court’s decision of 20 December 1996), the respondent did not return the child to its mother at the end of the period stipulated in the decision of 20 December 1996. Furthermore, since 1 February 1997, the whereabouts of both father and child have been unknown, which means that the child has been removed from the applicant’s custody in breach of a court order. Such conduct can only be described as very serious, as it has entailed the cruel and abrupt removal of the child from the family background in which it was being happily brought up, thereby depriving it both now and then of its mother’s love and protection ... at the most tender of ages, with the serious harm which that entails ... Thus, by putting his own interests before those of his child, [A.U.A.] has acted in a manner that is seriously detrimental to the child’s welfare ...”

### *7. Renewal of contact between the first applicant and her son, the return of the child and further criminal complaints*

24. According to a psychologist’s report produced by the first applicant in April 2000, A.U.A. first made contact with her through a telephone call in which he imposed various conditions for the child’s return, threatened her and used the prospect of her not seeing her son again as blackmail. On 12 June 2000 the first applicant lodged a criminal complaint against A.U.A. alleging threatening behaviour and coercion. On 30 September 2000 Vigo investigating judge no. 6 made a provisional discharge order. On an appeal

by the first applicant, that order was quashed by the Pontevedra *Audiencia Provincial* in a decision of 15 May 2001.

25. On 18 April 2000 the first applicant saw her son for the first time since his abduction in February 1997. On 12 May 2000 A.U.A. voluntarily appeared before the investigating judge, who, after hearing his representations, decided not to order his detention pending trial. Finally, on 18 June 2000 the first applicant was able to recover her child with police assistance on A.U.A.'s return to Vigo with the child. She said that for a time she was forced to go into hiding with her son in a shelter for women.

26. On 14 July 2000 the Family Court granted A.U.A. access. As he was prevented from exercising that right, A.U.A. lodged a criminal complaint with the Vigo investigating judge against the first applicant and her parents alleging aggravated contempt.

## II. RELEVANT LAW AND PRACTICE

### A. The Constitution

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

#### Article 10 § 2

“Provisions relating to the fundamental rights and the freedoms recognised by the Constitution shall be construed in accordance with the Universal Declaration of Human Rights and international treaties and agreements on human rights that have been ratified by Spain.”

#### Article 18

“1. Everyone's right to honour and to private and family life ... shall be protected.

...”

#### Article 24

“1. Everyone shall have the right to effective protection by the judges and courts in the exercise of his or her rights and legitimate interests; in no circumstances may there be any denial of defence rights.

...”

#### Article 39 § 4

“Children shall enjoy the protection provided for in the international agreements safeguarding their rights.”

**Article 96 § 1**

“Once officially published in Spain, international treaties that have been validly concluded shall be part of the domestic legal order. ...”

**B. The United Nations Convention on the Rights of the Child of 20 November 1989**

28. The relevant provisions of the Convention on the Rights of the Child [Spain ratified this instrument on 6 December 1990. The United States signed it on 16 February 1995, but have not yet ratified it] provide as follows:

**Article 11**

“1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.”

**C. The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980**

29. The relevant provisions of this convention [Spain ratified this instrument on 16 June 1987 and the United States on 29 April 1988] provide as follows:

**Article 1**

“The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”

**Article 2**

“Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.”

**Article 3**

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

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

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

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

#### **Article 6**

“A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

...”

#### **Article 7**

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

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

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.”

#### **Article 8**

“Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

...”

#### **Article 11**

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

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

#### **Article 12**

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

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

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

#### **Article 13**

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

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

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

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

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

**D. Institutional Law no. 1/1996 of 15 January 1996 on the legal protection of minors, amending the Civil Code and Code of Civil Procedure (published in the Official Gazette of 17 January 1996)**

30. The relevant provisions of this Law provide:

**Section 3**

"Minors shall enjoy the rights afforded them by the Constitution and international treaties ratified by Spain, in particular, the United Nations Convention on the Rights of the Child, and the other rights guaranteed by domestic legislation ...

This law, its implementing provisions and other statutory provisions concerning minors shall be construed in accordance with the international treaties ratified by Spain and, in particular, the Convention on the Rights of the Child of 20 November 1989.

The public authorities shall guarantee compliance with the rights of minors and shall ensure their decisions comply with this law and the aforementioned international instrument."

31. Pursuant to final provision 13 of the aforementioned Law on the legal protection of minors, a second paragraph was added to Article 216 of the Civil Code, which provides as follows:

**Article 216**

"The functions of guardianship constitute a duty. They shall be performed for the benefit of the person for whom the guardian has been appointed and subject to the protection of the judicial authorities.

The measures and action contemplated by Article 158 of this Code may also be ordered by the court, on its own initiative or on the application of any interested party, in all cases of *de facto* or *de jure* guardianship or custody of minors, ... if their interest so requires."

Article 158 of the Civil Code provides as follows:

**Article 158**

“The court shall, on its own initiative, or on an application by the child, a parent or the public prosecutor, order the following measures:

...

(2) appropriate action on a transfer of custody to avoid the unsettling the child in a way that is harmful;

(3) in general, any other action it considers expedient to remove the child from danger or prevent it coming to harm.

All such measures may be ordered in any civil or criminal proceedings ...”

**E. Provisions of the Civil Code on the legal representation of minor children**

32. The provisions read as follows:

**Article 154**

“Responsibility for dependent minors shall be vested in their mother and father.

Parental responsibility shall always be exercised in the child’s interest and in accordance with its personality; it shall include the following powers and duties:

(1) to provide the child with protection, company, food, an upbringing and proper guidance;

(2) to represent the child and administer its property;

...

Parents may seek judicial assistance when exercising their parental responsibility. ...”

**Article 162**

“Parents in whom parental responsibility is vested shall represent their dependent minor children in legal matters.

...”

## **F. Domestic practice in criminal proceedings on the abduction of a minor child by one of its parents**

33. In general, the Spanish courts have refused to characterise a failure by a person with parental responsibility for a minor to return the child as false imprisonment or kidnapping, offences under Articles 163 to 165 of the Criminal Code carrying between four and ten years' imprisonment. Under the case-law, a person guilty of such conduct may only be prosecuted for criminal contempt or extortion under Article 556 of the Criminal Code, for which the punishment is six months' to one year's imprisonment.

34. Institutional Law no. 9/2002 of 10 December 2002 amended the provisions of the Criminal and Civil Codes dealing with the abduction of minors.

35. As regards the position under the criminal law, the explanatory memorandum to the Law indicated that a clearly worded provision, creating a separate offence from the generic offence of criminal contempt, had become necessary when the person guilty of removing or failing to return the minor was one of the parents and custody of the minor had been lawfully granted to the other parent or to another person or institution in the child's interest.

36. The Law inserted a new Article 225 *bis* in the Criminal Code, worded as follows:

“1. A parent who, without any justification, abducts his or her minor child shall be liable on conviction to between two and four years' imprisonment and shall forfeit his or her parental responsibility for between four and ten years.

2. For the purposes of this Article, the following acts shall be deemed to constitute abduction:

(i) transferring a minor from his place of residence without the consent of the parent with whom he or she habitually resides or the persons to whom or institutions to which custody of the minor has been granted;

(ii) failing to return a minor in material breach of an obligation arising under a judicial or administrative decision.

3. If the minor is removed from Spain or a condition is imposed for its return, the sentence shall be in the upper half of the range set out in paragraph 1.

...

5. The penalties stated in this Article shall also apply to any person from whom the minor is descended or any relative of the parent by blood or marriage up to the second degree who has committed the aforementioned acts.”

## THE LAW

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

37. The first applicant, acting in her own name and as her child's legal representative, alleged that the Spanish authorities had failed to take effective measures to ensure the prompt execution of the court orders that had been made and to help secure her son's return. The applicant claimed that they had thus violated Article 8 of the Convention, which provides:

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

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

38. She complained, in particular, of a lack of diligence on the part of the judicial authorities in dealing with her complaint of child abduction.

#### A. Submissions of the parties

##### *1. The applicants*

39. The first applicant submitted that the respondent State had failed to discharge its obligations under both the Convention and other provisions of domestic and international law. In particular, she said that the domestic authorities had infringed Article 3 and final provision 13 of the Institutional Law on the legal protection of minors and Article 216 of the Civil Code, which placed a duty on the public prosecutor to afford abducted minors protection. As regards the provisions of international law, the first applicant referred to Article 11 § 1 of the Convention on the Rights of the Child of 20 November 1989, which imposed a duty on Contracting States to take appropriate measures to combat the illicit non-return of children abroad, and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. Neither the public prosecutor nor the domestic courts had applied that provision, even though it was directly applicable in domestic law. In that connection, she pointed out that, in accordance with Articles 10 § 2 and 96 § 1 of the Constitution, international treaties that had been ratified by Spain formed part of the domestic legal order. By failing to take the necessary measures under domestic and international law, the national authorities were in breach of their implied positive obligations under Article 8 of the Convention.

40. The first applicant stressed the judicial authorities' failure to act. Thus for instance, the Vigo investigating judge had dismissed all her applications on the ground that he could not disturb people who were not directly implicated in the case, as he was under a duty to protect their private lives. As for the public prosecutor, not only had he declined to take any measures on his own initiative, he had also opposed the measures that had been requested. On learning that her child's kidnapper had taken a flight to the United States, she had asked the investigating judge to issue an international arrest warrant, but he had refused to do so, on the ground that the alleged facts amounted only to the minor offence of criminal contempt. The public prosecutor had opposed that application. Following the investigating judge's refusal to issue an international arrest warrant, the first applicant had appealed and the investigating judge had sent a report to the *Audiencia Provincial* in which he had humiliatingly accused her of suffering from "a bout of jealousy" of her former husband's family. Faced with that obstructive attitude, she had applied for – and obtained – an order requiring the investigating judge to stand down, on the ground that he was "on very friendly terms" with the kidnapper's family.

41. The first applicant stressed that she had done all she could to persuade the Spanish judicial authorities to take action to secure her son's return. Unfortunately, all her requests had been turned down by the courts dealing with the case. Neither the investigating judge, nor the *Audiencia Provincial*, nor the Constitutional Court had acceded to her requests. Her efforts had all been in vain.

42. Referring to the Court's case-law on the subject, the first applicant submitted that the domestic authorities had, through their conduct, infringed their positive obligations under Article 8 of the Convention, riding roughshod over her right to respect for her family life by failing to take adequate and effective measures to afford her redress.

## 2. The Government

43. The Government said at the outset that the primary objective in the case had to be the protection of the child's interest. After explaining the background to the dispute between the child's parents, the Government said that ultimately, as a result of the action taken by the Spanish judicial authorities, the father had returned to Spain and the child had been reunited with its mother. In that connection, they noted that the first applicant had at that point decided not to take any civil or criminal proceedings against the father. However, after less than three months' respite, the first applicant had decided to proceed with the charges and had requested the father's imprisonment. Furthermore, she had gone on to follow the father's example in failing to comply with the access arrangements which the family court had put in place for the father. That had led to a complaint by the latter of child abduction against the first applicant. While initially it had been the

father who had prevented the first applicant from seeing her son for three years, it was now she who had denied him all contact with the child for two years. The Government stressed that the child should not be caught up in the dispute between the parents.

44. The Government noted that the proceedings in the Vigo Criminal Court had not ended. The first applicant was seeking a term of twelve years' imprisonment for the child's father and substantial compensation for the damage sustained. It was clear that the only issue in the proceedings before the Court was whether the measures taken by the domestic authorities had been adequate and effective to enable the first applicant to secure her son's return. Contrary to what she had alleged, the public prosecutor had taken immediate action by requesting the commencement of criminal proceedings in connection with the first applicant's complaint and had instructed the police to trace the child's father. It had also been the public prosecutor who had applied for access to be suspended in view of the father's failure to comply with the court orders.

45. The Government pointed out the neither the Convention on the Rights of the Child, nor the Hague Convention of 1980 imposed a duty to treat the taking of a child by its father as an offence of abduction. More particularly, the Hague Convention was concerned only with the civil, not the criminal, aspects of international child abduction. Indeed, it would not make sense for a convention dealing with the civil aspects of a case to provide for a person's detention. As to the comments of investigating judge no. 5 on the first applicant's conduct, the Government pointed out that they had been made in an internal report from a lower court to a higher court, not in a decision in criminal proceedings. Although they accepted that the judge's remarks might be considered unfortunate, they said that they could under no circumstances constitute a breach of the first applicant's right to family life.

46. The Government explained that the first applicant's requests for investigative measures to be taken, such as forensic examination of fingerprints taken from the father's car, were rejected by the judge in reasoned decisions that had been upheld on appeal. The investigating judge had interviewed the child's grandparents and paternal uncles and had decided not to issue an international arrest warrant, as it had not been shown that the child's father was implicated in an offence of extortion. Without evidence of the commission of a serious offence, no international warrant could be issued. The Government stressed that, following the father's failure to return the child, the judge had taken a series of measures to protect the first applicant's right to family life. Those many and varied measures had been adequate and effective, as demonstrated by the fact that the child had been returned to the first applicant a year before the present application was communicated to the Government. The measures ordered by the judge were as follows:

- (a) border checks;
- (b) a check on purchases made with the father's credit card, which had led to the discovery on the third day after the child's removal that a car had been hired in New York and returned in Texas;
- (c) inquiries into the father's and child's movements after their departure from Brussels;
- (d) tapping the father's telephones;
- (e) inquiries regarding the father's means, which had led to the freezing of his assets. The father had applied to have that order set aside, but the judge had dismissed his application.

Ultimately, it was those measures as a whole that had forced the father to return to Spain and hand over the child. Moreover, there had been no requests at that stage for his detention or imprisonment. The first applicant had withdrawn her criminal and civil complaints.

## **B. The Court's assessment**

47. The Court notes, firstly, that it is common ground that the relationship between the first applicant and her son came within the sphere of family life under Article 8 of the Convention.

48. It must accordingly determine whether there has been a breach of the right of the first applicant and her son to respect for their family life. The Court reiterates that, although the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, there are in addition positive obligations inherent in an effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

49. As to the State's obligation to take positive measures, the Court has repeatedly held 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, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I, and *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII).

50. However, the national authorities' obligation to take measures to facilitate reunion is not absolute. The nature and extent of such measures will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her

rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see *Ignaccolo-Zenide*, cited above, § 94).

51. Lastly, the Court reiterates that the Convention must be applied in accordance with the rules of international law, in particular, those concerning the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). With specific regard to the positive obligations that Article 8 of the Convention imposes on the Contracting States with respect to reuniting parents with their children, they must be interpreted in the light of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see *Ignaccolo-Zenide*, cited above, § 95).

52. The decisive issue in the present case, therefore, is whether the national authorities took all the measures that could reasonably be demanded of them to facilitate the execution of the orders of the domestic courts awarding the first applicant custody of and sole parental responsibility for the child (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 22, § 58).

53. As to the position under domestic law, the Court notes that the national courts were called upon to make decisions, primarily of a civil nature.

54. In that regard, the Spanish courts initially granted the first applicant custody and joint parental responsibility. Subsequently, in a decision of 12 February 1999, the Vigo Family Court awarded the first applicant sole parental responsibility, as it took the view that A.U.A.'s repeated failure to comply with court orders regarding access and the child's removal were very serious and detrimental to the child's well-being and proper development. In the light of the circumstances of the case, the Court considers that those decisions were consistent with both the first applicant's and the child's interests.

55. Thus, it is indisputable that under domestic law the courts before which the matter came took various measures that were in accordance with the legislation in force.

56. The Court notes, however, that the main issue in the present case is the transfer overseas and illicit non-return of the first applicant's child. The Court must accordingly examine whether, in the light of their international obligations arising in particular under the Hague Convention, the domestic authorities made adequate and effective efforts to secure compliance with the first applicant's right to the return of her child and the child's right to be reunited with its mother (see *Ignaccolo-Zenide*, cited above, § 95). In that connection, the Court notes that, under Article 96 § 1 of the Constitution,

international treaties that have been validly ratified form part of the domestic legal order. Spain has been a Contracting Party to the Hague Convention since 16 June 1987. The United States, the country to which the child was taken by his father, have also ratified it. Furthermore, by virtue of Institutional Law no. 1/1996 of 15 January 1996 on the legal protection of minors, the national authorities are under a duty to guarantee compliance with the rights of minors in accordance with international treaties that have been ratified by Spain.

57. The Court notes that right from 4 February 1997, that is to say just a few days after the first applicant's son was taken by his father, the investigating judge ordered a nationwide search and the child's immediate return to the first applicant. Furthermore, according to submissions made by the Government at the hearing, as a result of the initial inquiries, it was very quickly established that father and child were in the United States. Articles 3, 7, 12 and 13 of the Hague Convention contain a series of measures designed to secure the immediate return of children who have been wrongfully removed to or retained in another Contracting State. In that connection, the Court notes that under Article 3 of the Hague Convention, the removal or retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before the removal or retention. On that point, it is not disputed that the first applicant's son was taken to the United States and wrongfully retained there by the father. His situation was without doubt covered by that provision of the Hague Convention. Furthermore, Articles 6 and 7 of the Hague Convention require Central Authorities to cooperate with each other and to promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children. In particular, either directly or through any intermediary, they must take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained and secure the return of the child to the parent with custody. To that end, Article 11 of the Hague Convention requires the judicial or administrative authorities of Contracting States to act expeditiously in proceedings for the return of children.

58. The Court notes that these measures may be taken by the relevant domestic authorities on their own initiative. Furthermore, Article 158 of the Civil Code as amended by Institutional Law no. 1/1996 of 15 January 1996 on the legal protection of minors gives the courts power to take of their own motion, *inter alia*, all appropriate measures to remove the child from danger and to prevent it from coming to harm.

59. Once the Spanish judicial authorities had established that the child had been wrongfully removed, the Court considers that the national authorities concerned should have taken appropriate measures as set out in the relevant provisions of the Hague Convention to secure his return to its

mother. The authorities did not take any of the measures prescribed in the Hague Convention to facilitate the enforcement of the court orders in favour of the first applicant and her child.

60. In view of these findings, the Court considers that the criminal aspect of the proceedings no longer has a significant bearing on the case. In that regard, it observes that some of the first applicant's requests for various investigative measures to be taken in respect of her former husband and members of his family were refused in decisions that were reasoned and not arbitrary. That being so, and contrary to what has been alleged by the first applicant, the domestic criminal courts cannot be accused of having been totally inactive. In that connection, the Court notes that on 4 February 1997 the investigating judge ordered a nationwide search for A.U.A. and the child's immediate return to his mother; he also made an interim order freezing A.U.A.'s assets.

61. This leaves the question of the domestic courts' refusal to issue an international search and arrest warrant against A.U.A. In that connection, the Court notes that the reason given by the domestic courts for refusing to issue the warrant was that the act A.U.A. was alleged to have committed, namely leaving with the child, could be classified as criminal contempt, an offence carrying a prison sentence of between six months and one year, and could not form the basis for the issue of an international arrest warrant. In reaching that decision, the domestic courts examined various factual and legal elements they considered relevant to the question. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among other authorities, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 20, § 46). In the present case, however, the Court considers that the problem relates not only to the domestic courts' interpretation of the relevant statutory provisions in force – indeed, there was nothing to show that their interpretation was unreasonable – but, above all, to the inadequacy of the legislation concerned. On this point, the Court notes that the Spanish legislature found it necessary to reinforce the provisions designed to combat child abduction, particularly as regards the criminal law. In that connection, it observes that the provisions of the Criminal Code governing this area were amended by Institutional Law no. 9/2002 of 10 December 2002, which increased the penalties that could be imposed when the person guilty of taking or refusing to return the minor was one of the parents and custody of the minor had been lawfully granted to the other parent or another person or institution in the child's interest (see paragraphs 33-36 above).

62. Having regard to the foregoing, and notwithstanding the respondent State's margin of appreciation in the matter, the Court concludes that the Spanish authorities failed to make adequate and effective efforts to enforce the first applicant's right to the return of her child and to the child's right to

be reunited with its mother and thereby breached their right to respect for their family life, as guaranteed by Article 8 of the Convention.

63. There has, accordingly, been a violation of that provision.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

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

### A. Damage

#### 1. *Non-pecuniary damage*

65. The first applicant sought 250,000 euros (EUR) in compensation for the non-pecuniary damage due to the anxiety and distress she said she and her son had experienced on account of the failure to enforce her parental rights.

66. The Government argued that that claim was unjustified and that a finding of a violation would suffice to redress the damage.

67. The Court finds that the first applicant has sustained non-pecuniary damage in the light of the circumstances of the case and, ruling on an equitable basis in accordance with Article 41, awards her EUR 20,000 under this head.

#### 2. *Pecuniary damage*

68. The first applicant claimed the sum of EUR 18,000 for pecuniary damage. She said that she had suffered a loss of revenue as she had taken a year off from her secondary-school teaching post in order to find her son.

69. The Government maintained that the first applicant's claim was not justified.

70. The Court finds that the causal link between the violation it has found and the alleged pecuniary damage is too remote to justify an award of compensation under this head.

### B. Costs and expenses

71. The first applicant sought EUR 17,770 for the costs and expenses incurred in the proceedings before the Court.

72. The Government considered that amount excessive and left the issue to the Court's discretion.

73. Like the Government, the Court finds the sum claimed excessive. Having regard to the circumstances of the case, it considers it reasonable to award the first applicant EUR 14,000.

### **C. Default interest**

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

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Holds* that there has been a breach of Article 8 of the Convention;
2. *Holds*
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
    - (ii) EUR 14,000 (fourteen thousand euros) in respect of costs and expenses;
    - (iii) any tax that may be payable on the above sums;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the claims for just satisfaction.

Done in French, and notified in writing on 29 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE  
Registrar

Nicolas BRATZA  
President