



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

THIRD SECTION

CASE OF MAIRE v. PORTUGAL

(Application no. 48206/99)

JUDGMENT

STRASBOURG

26 June 2003

FINAL

26/09/2003

In the case of Maire v. Portugal,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEK,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs H.S. GREVE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 27 September 2001 and 5 June 2003,

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

PROCEDURE

1. The case originated in an application (no. 48206/99) against the Portuguese Republic lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Paul Maire (“the applicant”), on 15 October 1998.

2. The applicant was represented by Mr J.-P. Degeneve, a lawyer practising in Besançon. The Portuguese Government (“the Government”) were represented by their Agent, Mr J. Miguel, Deputy State Prosecutor.

3. The applicant alleged, in particular, that failure to act and negligence on the part of the Portuguese authorities in enforcing judicial decisions granting him custody of his child had interfered with his right to respect for his family life.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. 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.

6. By a decision of 27 September 2001, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the applicant, but not the Government, replied in writing to the opposing party’s

observations. The applicant also submitted certain documents, copies of which were sent to the Government.

8. The French Government did not indicate whether they intended to intervene in the proceedings, not having been informed of the Court's decision to declare the application admissible¹.

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1967 and lives in Larnod (France).

11. On 4 September 1993 the applicant married S.C., a Portuguese national. The couple had a child, Julien, born in 1995.

A. Proceedings in the French courts

12. By a judgment of 19 February 1998, the Besançon *tribunal de grande instance* granted the couple a divorce based on S.C.'s fault and ordered that the child reside at the applicant's home, with the mother to have rights of access. Earlier, on 6 August 1996, the applicant had already been granted interim custody of Julien by a decision of the same court.

13. On 3 June 1997 S.C. abducted Julien from his paternal grandmother's home and took him with her to Portugal. The applicant filed a complaint against S.C. for child abduction and assault. By a judgment of the Besançon *tribunal de grande instance* of 12 June 1998, S.C. was found guilty and sentenced *in absentia* to one year's imprisonment. A warrant was issued for her arrest.

B. Proceedings in the Portuguese courts

1. Application for the child's return

14. On 5 June 1997, relying on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and on the

1. Sentence rectified on 6 November 2003 in accordance with Rule 81 of the Rules of Court. The initial text read: "The French Government did not express the intention of intervening in the proceedings."

Convention on Judicial Cooperation between France and Portugal for the Protection of Minors of 20 July 1983, the applicant lodged an application for the child's return with the French Ministry of Justice, which was the French "Central Authority" within the meaning of both instruments. On the same day, the French Central Authority requested the Institute for Social Reinsertion ("the IRS"), which forms part of the Portuguese Ministry of Justice and is the Portuguese Central Authority, to secure the child's return pursuant to the provisions of the Franco-Portuguese convention.

15. On 18 June 1997 the IRS referred the application to the prosecution service of the Oeiras judicial district, where the applicant had indicated that S.C. was living. On 16 July 1997 the prosecution service applied to that court for the judicial return (*entrega judicial*) of the child pursuant to section 191 et seq. of the Minors Act (*Organização Tutelar de Menores*) and relying on the above-mentioned Franco-Portuguese cooperation convention.

16. On 17 July 1997 the judge of the Third Civil Division of the Oeiras District Court, to which the case had been allocated, summoned the child's mother to appear before the court to make submissions concerning the prosecution's application. Registered letters with acknowledgment of receipt were sent on 17 and 22 July 1997 to the address given by the applicant. However, both letters were returned to the court with the acknowledgments of receipt unsigned and unclaimed. On 27 August 1997 the judge, at the prosecution's request, asked the police to find out where Julien's mother was living. On 10 September and 6 October 1997 respectively the security police and the republican national guard informed the court that S.C. was not living at the stated address.

17. On 23 September 1997 the IRS asked the Oeiras District Court for information about the progress of the proceedings. The judge replied on 6 October 1997 to the effect that the child's mother had not yet been found.

18. On 21 October 1997 the prosecution service asked the judge to write to the Lisbon social security office to request information concerning S.C.'s address and workplace. On 27 October 1997 the judge ordered the registry to send the letter in question, which was sent on 7 November 1997. On 27 November 1997 the social security office replied that it had no record of S.C. on file.

19. On 5 December 1997 the judge asked the IRS to find out S.C.'s current address. When it was reported that she might be in the Oporto area, the relevant social security office was contacted but indicated in a letter of 12 January 1998 that it had no record of her.

20. On 10 March 1998 the Second Civil Division sent the Third Civil Division a copy of the decision taken on that day as part of proceedings for the award of parental responsibility (see paragraph 47 below). On 26 March 1998 the judge sent a copy of the decision to the prosecution service,

pointing out that the address from which S.C. had been summoned to appear in those proceedings was the same as that originally given by the applicant.

21. On 27 March 1998 the prosecution service asked the judge to seek information from Portugal Electricity and Portugal Telecom. On 13 and 20 May 1998 those companies replied that they did not have any contracts in S.C.'s name.

22. On 25 May 1998 the judge insisted that S.C. be summoned from the address in question. The registered letter sent for that purpose was however returned to sender.

23. On 2 July 1998 S.C. informed the court that she had applied to the Oeiras District Court (First Civil Division) for a transfer of parental responsibility for Julien.

24. On 6 July 1998 the judge ordered a court bailiff to compel S.C. to appear. The bailiff went to the address in question on 1 September 1998 to be told, by one of S.C.'s aunts, that S.C. did not live there. S.C.'s aunt also said that she did not know her niece's current address.

25. On 2 September 1998 the judge asked the civil identification services of the Ministry of Justice for information about S.C.'s whereabouts.

26. By a letter of 2 September 1998 the IRS informed the court that they had asked the police to discover S.C.'s whereabouts. They observed that the police had since told them that the child's mother had brought proceedings for a transfer of parental responsibility for Julien and pointed out that it was now possible to locate S.C. by the address she had given when she brought those proceedings.

27. By an order of 28 September 1998 the judge decided to ask the police again for S.C.'s current address. He also asked the registry to inform the First Civil Division of the existence of the application for the child's return with a view to securing a stay of the proceedings for the transfer of parental responsibility then pending before that division.

28. On 11 November 1998 the applicant, through his representative, filed an *ad litem* power of attorney and a request to be kept informed of the steps in the proceedings. He also indicated that he had lodged a criminal complaint against S.C. By a decision of 16 November 1998, the judge rejected the applicant's request on the ground that he was not a party to the proceedings.

29. On 27 November 1998 the security police indicated that the address in question was that of S.C.'s parents, who claimed that they did not know her current address. On 11 December 1998 the judge again decided to seek information from Portugal Electricity and Portugal Telecom and from the social security offices of Lisbon, Oporto, Coimbra and Faro. Between January and March 1999 all these organisations replied that they had no record of S.C. on their files. On 18 March 1999 the judge again asked the police for information about S.C.'s current address. On 9 April 1999 the security police indicated that the address was unknown.

30. On 19 April 1999 the IRS sent the court a copy of a police report according to which Julien might be found in a flat recently purchased by one of S.C.'s sisters in Algueirão (Sintra district).

31. Acting on information supplied by the IRS the applicant travelled to Portugal, where he claimed to have seen his son and a third party in the apartment in question on 25 April 1999. He informed the French consulate general in Lisbon, which asked the Portuguese Ministry of Justice to contact the police and the Oeiras District Court as a matter of urgency in order to secure the child's return. On 26 April 1999 the IRS informed the court and asked it to take all necessary steps to secure the child's return. On 27 April 1999 the judge ordered that Julien be immediately handed over to the IRS and issued a warrant to that effect. On 30 April 1999 the IRS advised the court that the republican national guard had been to the address in question on the previous day. However, the warrant did not give it the power to force entry into the flat and, since Julien's mother had refused to open the door, it had not been possible to return the child.

32. The judge subsequently asked the republican national guard why the warrant had not been executed. On 1 June 1999 the national guard stated that officers had been to the address in question several times but no one had answered the door.

33. In the meantime, on 17 May 1999, S.C. applied for the proceedings to be discontinued, relying on Article 20 of the Franco-Portuguese cooperation convention and submitting that Julien was fully integrated in his new environment.

34. The judge delivered his judgment on 15 June 1999. First he found that S.C. should be regarded as having been properly summoned to appear because she had already intervened in the proceedings. He then rejected her application for a discontinuation and ruled that Julien should be handed over immediately to the IRS. Lastly, he ruled that if she failed to comply with the decision S.C. was liable to be prosecuted under section 191(4) of the Minors Act for non-compliance with a legal order (*desobediência*).

35. On 25 June 1999 S.C. appealed against that judgment to the Lisbon Court of Appeal (*Tribunal da Relação*). On 29 June 1999 the judge found the appeal admissible and ordered that it should be referred, without suspensive effect, to the Court of Appeal. The Court of Appeal dismissed the appeal by a ruling of 20 January 2000.

36. On 7 February 2000 S.C. appealed on points of law to the Supreme Court (*Supremo Tribunal de Justiça*), but on 7 April 2000 her appeal was ruled to have lapsed (*deserto*) for want of pleadings having been filed.

37. On 29 May 2000 the Oeiras District Court judge asked a bailiff to warn S.C. that if she failed to hand Julien over to the IRS she would be prosecuted for non-compliance. On 9 June 2000 the bailiff reported that no one seemed to be living at the address indicated. On 20 June 2000 the judge again asked the police for information about S.C.'s current address.

38. On 14 December 2001 the police found Julien and S.C. On the same day the judge ordered Julien to be placed in a children's home under the IRS's supervision. S.C. was permitted to remain with Julien in the children's home. The principal of the children's home then refused to hand Julien over to the applicant, without a "court order to that effect". On that day S.C. lodged a summary application with the Oeiras District Court seeking to prevent Julien being handed over to the applicant. The applicant claimed that he was not told of the outcome of that application. On 21 December 2001 Julien was handed over to S.C. in accordance with the decision of the Cascais Family Court on the same day (see paragraph 50 below).

39. On 19 December 2001 the prosecution service asked the judge to suspend the 15 June 1999 judgment, on the ground that, after so much time had elapsed, Julien ought to be examined by child psychiatrists before being handed over to the applicant.

40. By a decision of the same day the judge dismissed that request, on the ground that the disputed judgment had already become *res judicata*.

41. On 21 December 2001 the prosecution service appealed to the Lisbon Court of Appeal. By a judgment of 9 April 2002, the Court of Appeal quashed the disputed decision. It considered, among other things, that Julien already seemed well settled in his new environment and that the examinations in question were entirely appropriate.

42. On 11 July 2002 the Oeiras District Court judge asked the Lisbon Institute of Forensic Medicine to proceed with the examinations.

43. On 4 December 2002 the applicant was advised that Julien would be undergoing a medical examination on 14 February 2003. The applicant has not been informed of the results of those examinations. The proceedings are still pending.

2. The applications for determination of parental responsibility

(a) In the Oeiras District Court

44. In April 1997 the prosecution service applied to the Oeiras District Court for the terms of parental responsibility for Julien to be fixed. The case was allocated to the Second Civil Division of that court.

45. S.C. was summoned to appear from the address given by the applicant when he lodged his application for the child's return, which was pending before the Third Civil Division of the Oeiras District Court.

46. On an unspecified date the prosecution service asked the judge to stay the proceedings in view of the fact that the application for the child's return had not yet been decided.

47. By an order of 10 March 1998 the judge stayed the proceedings.

48. Further to the 15 June 1999 ruling by the Oeiras District Court, the judge issued a decision on 5 November 2000 to discontinue the proceedings.

(b) In the Cascais Family Court

49. On 21 December 2001 the prosecution service lodged a further application for determination of the terms of parental responsibility for Julien at the Cascais Family Court. It sought a variation of the Besançon *tribunal de grande instance*'s judgment of 19 February 1998 on the ground that the child had settled in his new environment. It also asked the court to grant interim custody of Julien to S.C.

50. By a decision of the same day the court granted S.C. interim custody of Julien.

51. On 15 May 2002 a meeting (*conferência*) was arranged between the parents. Following that meeting, the court decided that the applicant could be granted rights of access. The applicant was thus able to visit Julien at S.C.'s home on 17, 18 and 19 May 2002 for a few hours.

52. The proceedings are still pending.

3. Contact between the French and Portuguese authorities

53. The French Central Authority had remained in contact with the IRS throughout all the above-mentioned proceedings. The French embassy in Lisbon and the French consulate general in Lisbon sent several requests to the Portuguese authorities for information on the progress of the case.

54. Thus, on 28 March 2000 the French embassy in Lisbon asked the Portuguese Foreign Ministry to intervene in order to "expedite enforcement of the Oeiras District Court's decision of 15 June 1999 requiring Mrs [S.C.] to hand over the child Julien Maire to his father immediately ... pursuant to the Convention on Judicial Cooperation between Portugal and France ... The police must ... now be formally required actively to search for the child ... whose mother's family in Oeiras seem to know where he is because last year he was located in a flat belonging to his aunt in Algueirão".

55. By a letter of 11 June 2001 the consul general informed the applicant as follows:

"... the Ambassador discussed your case with the director of the [Portuguese] Minister of Justice's private office and with the public prosecutor. What emerged from those discussions is that recognition by the Portuguese courts of the French court decision to convict your former wife of a criminal offence is a complex issue and may not be satisfactorily resolved. However, ... the decision of the Portuguese civil courts that the child should be returned to you is final. The Oeiras prosecutor has asked the IRS and the security [police] to carry out a search. This search ... has not so far been successful, which is why the Portuguese authorities fear that mother and child may have left Portugal. Our Ambassador was nonetheless advised that the search would continue for as long as there was no proof that they had left the country ..."

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. International law

56. Article 11 of the Convention on the Rights of the Child of 20 November 1989, which was ratified by France on 7 August 1990 and by Portugal on 21 September 1990, requires States Parties to “take measures to combat the illicit transfer and non-return of children abroad”. For that purpose, States “shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements”.

57. The relevant provisions of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which was ratified by Portugal on 29 September 1983 and by France on 16 September 1982, provide:

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 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 ... and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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

...”

Article 13

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

(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.”

58. The relevant provisions of the Convention on Judicial Cooperation between France and Portugal for the Protection of Minors of 20 July 1983 provide:

Article 18 – Right of action

“1. Where the voluntary return of the child is refused, Central Authorities shall refer the case without delay, through the intermediary of the court prosecution service, to the appropriate judicial authorities to secure either the enforcement in the requested State of the enforceable decisions taken in the requesting State, or a ruling on the application for the child’s return.

2. The case may also be referred to the judicial authorities by the interested party.

3. Enforcement of decisions shall be sought from the court within whose jurisdiction the minor is located or presumed to be located.”

Article 19 – Protective procedure for restoring the status quo

“1. The court of the State to or in which the child has been removed or wrongfully retained shall order, as a protective measure, the child’s immediate return unless the person who removed or retained the child establishes that:

(a) more than one year has elapsed between the removal or retention and the making of an application to the judicial authorities of the State where the child is located; or

(b) at the time of the alleged violation the person to whom custody had been awarded before such removal was not exercising his right of custody of the child either effectively or in good faith; or

(c) the child’s return would seriously jeopardise its health or safety owing to the occurrence of an exceptional event since the award of custody.

2. In assessing the circumstances listed above, the judicial authorities of the requested State shall take direct account of the law and judicial decisions of the State where the child is habitually resident. They shall take into consideration the information provided by the Central Authority of the State where the child is habitually resident concerning the legislation on custody in that State and concerning the child’s social background.

3. A decision on the child’s return shall not affect the merits of the custody issue.

...”

Article 20 – Variation of custody rights

“Where a court in the State to or in which the child has been removed or wrongfully retained finds that one of the exceptions listed in paragraphs 1 (b) or (c) of the preceding Article applies, it may rule on the merits of custody on the expiry of a period of one year after the child’s removal or retention provided that the child has settled in its new environment.”

B. Domestic law

59. Section 191 of the Minors Act adopted by Legislative Decree no. 314/78 of 27 October 1978 provides, *inter alia*:

“(1) If the minor has left his parents’ house or the house provided for him by his parents or if he has been removed from it or if he is not in the custody of the person or institution to which legal custody has been awarded, an application for his return shall be made to the court with jurisdiction over the area where the minor is located.

(2) If proceedings are brought, the guardian and the person who cared for or retained the minor shall be summoned to make submissions in reply within a period of five days.

...

(4) If there are no submissions in reply, or if such submissions are manifestly ill-founded, the court shall order the child's return and indicate where it is to take place; the court shall order such return only where it considers it necessary; the person concerned shall be served with the order so as to be able to effect the return in accordance with its terms, on penalty of being prosecuted for non-compliance with a legal order.

..."

60. Under Article 348 of the Criminal Code, non-compliance with a legal order is punishable by a term of imprisonment of up to one year or by a fine not exceeding 120 day-fines.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained of failure to act and negligence on the part of the Portuguese authorities in enforcing the judicial decisions awarding him custody of his child.

62. The Court considers that this case must be examined under 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."

A. Submissions of the parties

63. The applicant submitted that the Portuguese authorities had not done all that they could to enforce the decisions of the French courts. He stressed that he had provided all the necessary information at the appropriate time for Julien and his mother to be located, and that they had not been found because of inexplicable negligence on the part of the Oeiras District Court.

64. The applicant considered that this situation had detrimentally affected his private life and had been particularly harmful to the child himself who, according to the information on file, had remained for a long time without social security cover and without going to school.

65. The Government did not deny that Article 8 applied to the circumstances of the case but considered that there had not been any violation. They submitted that States enjoyed a margin of appreciation which allowed them to select on a case-by-case basis the course of action best designed to meet their positive obligations. The Government maintained that the Portuguese authorities had taken every possible step to ensure compliance with the decisions of the French courts regarding the custody of the child.

66. The Government considered that the course of the proceedings showed that the Portuguese authorities – the prosecution service, the courts, and the IRS as the Central Authority – had conducted themselves properly throughout. The difficulties encountered in locating the minor had been due to the mother's lack of cooperation.

67. With regard to the events of April 1999, the Government submitted that it would not have been possible for the 27 April 1999 warrant to allow forced entry into the home in question. They observed that such a power could have been conferred only as part of criminal, rather than civil, proceedings. The Government submitted that, in circumstances such as those prevailing at the time, a forced entry by the authorities into the home in question would have surely entitled the owners to counter-allege that their rights under Article 8 of the Convention had been violated.

B. The Court's assessment

68. The Court notes that it is accepted that the tie between the applicant and his son comes within the scope of family life within the meaning of Article 8 of the Convention. That Article is therefore applicable to the situation of which the applicant complained.

69. That being so, what must be determined is whether there has been a failure to respect the applicant's and his son Julien's family life. The Court reiterates that 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 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).

70. In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his child 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).

71. However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. While 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. In a situation where contact between parent and child might jeopardise such interests or infringe such rights, the national authorities are under a duty to ensure that a fair balance is struck between them (see *Ignaccolo-Zenide*, cited above, § 94).

72. Lastly, the Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to 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). The Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (see *Ignaccolo-Zenide*, cited above, § 95) and the Convention on the Rights of the Child of 20 November 1989.

73. What is decisive in this case is whether the Portuguese authorities took all the necessary steps that could reasonably be demanded of them to facilitate the enforcement of the decision of the French courts granting the applicant sole custody of and parental responsibility for his child (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 22, § 58).

74. It must be reiterated that in a case of this kind the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with it. The Hague Convention recognises this fact because it provides for a whole series of measures to ensure the immediate return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention requires the judicial or

administrative authorities concerned to act expeditiously in proceedings for the return of children and any failure to act for more than six weeks may give rise to a request for a statement of reasons for the delay.

75. On the date of the request transmitted by the French Central Authority to its Portuguese counterpart, 5 June 1997, there is no doubt that Julien had been wrongfully removed. The prosecution service subsequently, about forty days after that date, lodged an application for his judicial return with the Oeiras District Court. That court then made several attempts to discover S.C.'s whereabouts, but without success. While no significant delay due to failure to act can be attributed to the authorities in charge of the case during this initial stage in the proceedings, the Court finds it difficult to understand why those authorities were unable to compel S.C. to appear, particularly since she had been located at the address given by the applicant (see paragraphs 20 and 45 above) in different proceedings brought before another division of the same court. Lastly, the Court notes that the Oeiras District Court finally decided on 15 June 1999 that S.C. had to be regarded as having been properly summoned to appear because she had already intervened in the proceedings on 2 July 1998. An explanation may be in order as to why one whole year had to elapse after the latter date before such a decision was taken. The Government have not given one. Julien was finally located by the police only on 14 December 2001, in other words four years and six months after the request sent by the French Central Authority to the IRS.

76. The Court acknowledges that these difficulties are, as submitted by the Government, essentially due to the mother's behaviour. It stresses however that the appropriate authorities should then have imposed adequate sanctions in respect of the mother's lack of cooperation. Although coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the children live. Even if the domestic legal order did not allow for the imposition of effective sanctions, the Court considers that each Contracting State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by Article 8 of the Convention and the other international agreements it has chosen to ratify.

77. It should not be forgotten that the interests of the child are paramount in such a case, which is why the Portuguese authorities may be right in considering that parental responsibility must now be granted to the mother. In its request of 21 December 2001, the prosecution service gave the integration of the child into his new environment as its reason for seeking a variation of the 19 February 1998 judgment of the *Besançon tribunal de grande instance*. However, the fact remains that the considerable length of time it took for Julien to be located placed the applicant in an unfavourable position, particularly with the child being so young.

78. Having regard to the foregoing, and notwithstanding the respondent State's margin of appreciation in the matter, the Court concludes that the Portuguese authorities failed to make adequate and effective efforts to enforce the applicant's right to the return of his child and thereby breached his right to respect for his family life as guaranteed by Article 8 of the Convention.

79. There has accordingly been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicant claimed 45,734.71 euros (EUR) for non-pecuniary damage. The Government considered that amount excessive.

82. The Court considers that the applicant effectively sustained non-pecuniary damage which calls for pecuniary compensation. Having regard to the circumstances of the case and making its assessment on an equitable basis as required by Article 41, it awards him EUR 20,000 under this head.

B. Costs and expenses

83. The applicant also claimed the reimbursement of an amount of EUR 14,353.17 which he broke down as follows:

(a) EUR 3,728.90 for expenses incurred by the applicant himself on travel to Portugal;

(b) EUR 10,624.27 for legal fees, including EUR 2,370 in respect of the lawyer who represented him in Strasbourg.

84. The Government submitted that only the costs and expenses incurred in the proceedings before the Court could be reimbursed. As to quantum, it left it to the discretion of the Court.

85. The Court notes that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction), [GC], no. 31107/96, § 54, ECHR 2000-XI). Moreover, legal costs are only recoverable in so far as they relate to the violation found (see *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 21, § 66).

86. The Court considers that the expenses incurred both in Portugal and in Strasbourg to prevent or remedy the situation which the Court has found to be contrary to Article 8 of the Convention were necessarily incurred and should be reimbursed up to a reasonable level. However, the costs incurred in the proceedings in the French courts do not relate directly to the violation found and should not therefore be reimbursed.

The Court considers it reasonable to award the applicant EUR 6,100 under this head.

C. Default interest

87. 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 violation of Article 8 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 6,100 (six thousand one hundred euros) for costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 26 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President