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## ***Povse v. Austria (dec.) - 3890/11***

Decision 18.6.2013 [Section I]

### **Article 8**

#### **Article 8-1**

##### **Respect for family life**

Order for return of child made pursuant to Brussels IIa Regulation without any examination of the merits in the requested State: *inadmissible*

*Facts* – The case concerned the enforcement under the Brussels IIa Regulation of an Italian court order for the return of a child who had been taken to Austria by its mother. [Council Regulation \(EC\) No. 2201/2003](#) of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa Regulation") simplifies the procedure for the return of children who have been victims of wrongful removal or retention. It provides for judgments on return that have been certified in the State of origin to be recognised and enforceable in all other European Union Member States without any further procedure being required.

In the instant case, the second applicant returned to her native Austria with her daughter (the first applicant) after leaving the child's father with whom she had been living in Italy on account of his allegedly violent behaviour. Following a lengthy court battle in Austria and Italy, the father was awarded sole custody by an Italian court, which also ordered the child's return to Italy. In the enforcement proceedings in Austria, the Austrian Supreme Court upheld an order for the child's return after noting that at an earlier stage of the proceedings the Court of Justice of the European Union (CJEU) had clarified in a [preliminary ruling](#) that where a certificate of enforceability had been issued under Article 42(1) of the Brussels IIa Regulation, the requested court was required to proceed to enforcement and that any questions relating to the merits of the return decision, in particular the question whether the requirements for ordering a return were met, had to be raised before the courts of the requesting State. According to the Supreme Court, the second applicant's argument that the first applicant's return would lead to serious harm for the child and entail a violation of Article 8 of the Convention was therefore not relevant in the proceedings before the Austrian courts but had to be raised before the competent Italian courts.

*Law* – Article 8: It was undisputed that the Austrian courts' decisions ordering the enforcement of the Italian courts' return orders had interfered with the applicants' right to respect for their family life within the meaning of Article 8. The interference was "in accordance with the law" as the Austrian courts' decisions were based on Article 42 of the Brussels IIa Regulation, which was directly applicable in Austrian law, and it pursued the legitimate aim of protecting the rights of others and the general-interest objective of securing European Union law compliance by a Contracting Party.

As to the necessity for the interference, the Court reiterated that a State will be presumed not to have departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of an international organisation which provides equivalent protection to that afforded by the Convention. The Court had already found in previous cases that the protection of fundamental rights afforded by the European Union is in principle equivalent to that of the Convention system as regards both the substantive guarantees offered and the mechanisms controlling their observance. Nevertheless, a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion, and the presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.

In the instant case, the Austrian courts had not been exercising any discretion when they ordered the enforcement of the return orders (contrast the position in *M.S.S. v. Belgium and Greece*). Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in European Union law by asking the CJEU for a preliminary ruling (contrast the position in *Michaud v. France*). That ruling had made it clear that where the courts of the State of origin of a wrongfully removed child had ordered the child's return and had issued a certificate of enforceability, the courts of the requested State could not review the merits of the return order, or refuse enforcement on the ground that the return would entail a grave risk for the child owing to a change in circumstances since the delivery of the certified judgment. Any such change had to be brought before the courts of the State of origin, which were also competent to decide on a possible request for a stay of enforcement. It was thus clear from the CJEU's ruling that within the framework of the Brussels IIa Regulation it was for the Italian courts to protect the fundamental rights of the parties. The Italian Government had indicated that it was still open to the applicants to request a review of the return order before the Italian courts and that legal aid was in principle available. Further, should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy. In sum, the Court could not find any dysfunction in the control mechanisms for the observance of the applicants' Convention rights. Consequently, the presumption that simply by fulfilling its obligations as an EU member State under the Brussels IIa Regulation Austria had complied with the Convention had not been rebutted.

*Conclusion:* inadmissible (manifestly ill-founded).

(See also *M.S.S. v. Belgium and Greece* [GC], [30696/09](#), 21 January 2011, Information Note 137; and *Michaud v. France*, [12323/11](#), 6 December 2012, Information Note 158)