

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

FOURTH SECTION

DECISION

Application no. 59164/09
C.
against Romania and Austria

The European Court of Human Rights (Fourth Section), sitting on 9 February 2016 as a Chamber composed of:

András Sajó, *President,*
Boštjan M. Zupančič,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 31 October 2009,

Having regard to the observations submitted by the respondent Governments and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms C., is a Romanian national, who was born in 1981 and lives in Gloucester, the United Kingdom of Great Britain and Northern Ireland. On 10 February 2014 the President of the Third Section granted the applicant's request for her identity not to be disclosed to the public (Rule 47 § 4).

2. The Romanian and Austrian Governments ("the Governments") were represented by their Agents, Ms C. Brumar and Mr H. Tichy, from the Romanian Ministry of Foreign Affairs and the Austrian Ministry for European and International Affairs, respectively.

A. The circumstances of the case

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

1. Background of the case

4. Between 1999 and 2007 the applicant was in a relationship with V.I.P. On 1 June 2003 their son S.I.P. was born. From July 2003 to February 2007 they all lived together in the same apartment in Romania.

5. In March 2007 the applicant took the decision to move to Italy to work there. According to the applicant it was a joint decision, taken because of financial difficulties of the family, and after she moved she kept in touch by telephone with V.I.P. and her son on an almost daily basis and sent her son money and clothes.

2. Proceedings before the Romanian authorities

(a) Custody proceedings

6. On 25 September 2007 V.I.P. brought proceedings against the applicant and the Bistriţa-Năsăud mayor's office, acting as Guardianship Authority (*Autoritate Tutelară*), seeking *inter alia* custody of S.I.P. He claimed that the applicant's decision to move to Italy was taken without consulting him and once she had moved he was unaware of her whereabouts although he had tried to find her. In contrast, according to the applicant, V.I.P. had been aware of her address in Italy but had not informed the court. In result, the proceedings were held in the applicant's absence. The summons issued by the court in the applicant's name did not reach her, and she remained unaware of the proceedings.

7. On 9 January 2008 the Bistriţa-Năsăud District Court allowed V.I.P.'s application and awarded him custody of the child. Relying on witness statements and the Guardianship Authority's social investigation and recommendation, the court held that V.I.P. had been the child's main caregiver since birth and provided the child with the emotional support he required for his development.

8. According to the applicant she had become aware of the judgment of 9 January 2008 on 23 January and only by chance. Following a request lodged by the applicant's lawyer, the Bistriţa-Năsăud District Court communicated a copy of the judgment to the applicant by fax on 9 February 2008. The applicant did not appeal and she did not request the statutory time-limit for lodging an appeal to be reinstated.

(b) Contact proceedings

9. On 18 February 2008 the applicant applied to the same court for contact with her son.

10. On an unspecified day in February 2008 V.I.P. left Romania together with the applicant's son and they both settled permanently in Austria. According to the applicant she learned about this fact on 24 February 2008.

11. On 22 July 2008, in the course of the contact proceedings in Romania, the applicant requested the court to reschedule a hearing set for 2 October 2008 to an earlier date, given the circumstances of the relationship between her and V.I.P. and the urgency of the matter being examined by the court.

12. By a final interlocutory judgment of 24 July 2008 the court allowed the applicant's request for an earlier hearing and set a new date of 11 September 2008.

13. On 11 September 2008 the court allowed the applicant's application in part and ordered that she be allowed contact every other weekend, two weeks during the summer holidays in July or August and every second Easter and Christmas Day. Taking into account the best interests of the child, the court held that the full contact schedule requested by the applicant was excessive, given the young age of the child and his daily routine. It also dismissed V.I.P.'s request that she only be allowed supervised contact in his presence. The applicant appealed, arguing that the contact schedule established by the court was restrictive, and that the court had failed to consider that the child was entitled to know his mother's relatives as well.

14. On 4 December 2008 the Bistriţa-Năsăud County Court allowed the applicant's appeal in part, taking into account the best interests of the child and the parents' needs, and the fact that they were living in two different States, namely Austria and Italy. It ordered that she be allowed contact for the second week of the Christmas holidays, the first week of the Easter holidays and from 15 July to 15 August. It also allowed her to take the child away from his father's home, and upheld the judgment of the lower court in respect of the contact every other weekend. The applicant appealed on points of law (*recurs*).

15. By a final judgment of 4 March 2009 the Cluj Court of Appeal dismissed the applicant's appeal on points of law on the grounds that the full contact requested by the applicant was unjustified and did not consider the best interests of the child, given his age and daily routine.

16. On 18 August 2009, at the request of the applicant, the Bistriţa-Năsăud District Court issued a certificate of enforceability under the Brussels II *bis* Regulation (see Relevant Domestic and International Law and Practice below), attesting that the judgments of 11 September and 4 December 2008 were enforceable. It also noted that all parties had the opportunity to be heard, except for the child on account of his age.

(c) Return proceedings

17. On 12 October 2009 the applicant brought proceedings against V.I.P., seeking the immediate return of the child to Romania, custody,

psychological counselling for her and the child in a specialist State-run centre, child allowance, contact rights for V.I.P and rules for the child travelling abroad accompanied by either parent. She argued, *inter alia,* that the child's father was denying her contact with her son, and relied on Article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). In addition, she asked for legal aid on account of her limited financial resources and international judicial cooperation.

18. On 27 January 2010 the Bistriţa-Năsăud District Court dismissed the proceedings and decided to examine its competence *ratione loci* of its own motion. It held that V.I.P. had been granted sole custody of the child by the Romanian courts and had moved to Austria, taking his son with him. Under the relevant Romanian legislation, a parent entrusted with sole custody of a child had the right to take the child out of the country, even without the other parent's consent. Consequently, the child's departure to Austria had been, in principle, lawful. Moreover, after Romania joined the European Union, the courts' jurisdiction in matters of recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility was regulated by the Brussels II *bis* Regulation. Under Article 8 of the Regulation, matters of parental responsibility came under the jurisdiction of the courts of the child's European Union country of habitual residence. Under Article 10 of the Regulation, the courts of the Member State where the child was habitually resident prior to a wrongful removal retained jurisdiction until the child acquired habitual residence in another Member State. From February 2008 the applicant's son's habitual residence was in Austria, therefore, regardless of whether his removal from the country had been lawful or not, competence *ratione loci* for examining the applicant's application belonged to the Austrian courts. The applicant appealed. She argued, *inter alia,* that the Romanian courts had jurisdiction to examine the merits of her case as the parties to the proceedings were Romanian nationals, the child had close connections to Romania, and V.I.P. had implicitly accepted their jurisdiction by taking part in the proceedings and submitting observations.

19. By a final judgment of 17 June 2010 the Bistriţa-Năsăud County Court dismissed the applicant's appeal. It held that V.I.P. had been granted sole custody and had therefore been entitled to lawfully decide on his son's residence without her consent. In addition, the child's habitual residence was in Austria, and the Austrian courts therefore retained competence in respect of the proceedings. The Romanian courts had previously examined the applicant's application for contact because in February 2008 V.I.P. and the child had still been living in Romania. The exception provided for by Article 15 of the Brussels II *bis* Regulation invoked by the applicant required, however, that the proceedings should have been opened before the

competent Austrian courts and to concern the administration of the child's property and not the child himself.

(d) Criminal proceedings opened by the applicant against V.I.P.

(i) First set of criminal proceedings

20. On 9 April 2008 the applicant's legal representative opened criminal proceedings against V.I.P. for obstructing the applicant's contact with her son and for his unlawful removal within the meaning of Article 3 of the Hague Convention on account of him being domiciled in Austria by V.I.P. without the applicant's consent.

21. By an order of 28 January 2009 the Bistriţa-Năsăud prosecutor's office dismissed the criminal complaint. It held that from the moment of her departure, the applicant had contacted her son only by telephone and there was no evidence that V.I.P. had obstructed their conversations. It was noted that V.I.P. and two other witnesses on his behalf had been questioned. The applicant had not been questioned because she lived abroad and had informed the authorities that her financial situation prevented her from travelling to Romania.

22. On 27 November 2009 the applicant challenged the prosecutor's office order of 28 January 2009 to the hierarchically superior prosecutor. She argued, *inter alia,* that her chosen legal representative had failed to notify her of the order prior to 17 November 2009 and requested that her appeal be considered as having been lodged in due time and allowed. Also, she argued that the prosecutor's office had wrongly assessed the evidence and had misinterpreted the applicable law. Moreover, she could have been interviewed by one of the Romanian police officers working in Italy through international judicial cooperation proceedings, but such proceedings had not been initiated in her case.

23. By a final order of 14 December 2009 the hierarchically superior prosecutor attached to the Bistriţa-Năsăud prosecutor's office dismissed the applicant's challenge as time-barred. It held, *inter alia,* that the relevant rules of criminal procedure did not provide for the possibility of a party's appeal being reinstated once the time-limit for a challenge against a prosecutor's order had expired. Moreover, the applicant could lodge a new criminal complaint against the child's father. It does not appear that the applicant appealed against that order.

(ii) Second set of criminal proceedings

24. On 28 September 2009 the applicant brought criminal proceedings against V.I.P. and other third parties for fraud, obstruction of justice, perjury and destruction of evidence committed during the custody proceedings. She stated that although the child's father was aware of her whereabouts, he had failed to inform the court of her correspondence address. Moreover, he and

other third parties had committed perjury by declaring to the Romanian authorities that she had abandoned her son and family home and that the father was the only parent raising and supporting him. Furthermore, she was being prevented by V.I.P. and his new wife from enforcing the judgment recognising her contact rights.

25. On 17 November 2009 the applicant was interviewed by the Bistriţa-Năsăud police as part of the criminal investigation opened following her complaint of 28 September 2009. She insisted that the Romanian authorities question V.I.P.; however, her request to have him questioned in Austria was allegedly refused.

26. By a judgment of 8 November 2010 the Cluj Court of Appeal dismissed part of the criminal proceedings opened on 28 September 2009 on the grounds that no unlawful act had been committed. The court referred the remaining complaints to the Bistriţa-Năsăud prosecutor's office. The proceedings still appear to be pending.

(e) Contact with other relevant authorities

27. On 12 May 2009 the applicant asked the Romanian Ministry of Justice for legal aid in respect of all the proceedings required for the final resolution of her predicament, and informed them that she was unable to enforce her contact rights. Moreover, relying on the Hague Convention, she requested the Romanian Ministry of Justice to take all the necessary steps to have the Austrian authorities acknowledge and enforce the judgment. She also asked the Romanian authorities to ensure that her son was returned to Romania urgently and to provide them both with counselling so that they could rebuild their relationship.

28. On 4 June 2009 the Romanian Ministry of Justice replied to the applicant, informing her that after Romania joined the European Union, the courts' jurisdiction in matters of recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility between Member States was regulated by the Brussels II *bis* Regulation. Under the Regulation, matters of parental responsibility, including contact rights, came under the jurisdiction of the courts of the child's European Union country of habitual residence. The Romanian courts had retained their jurisdiction for changing contact rights from a national to an international level for only three months from the date the applicant's son had moved to Austria lawfully. After the three months had expired, the courts of the Member State where the child was habitually resident retained jurisdiction for applications concerning cross-border contact. In S.I.P.'s case, jurisdiction was therefore retained by the Austrian courts. Moreover, the applicant's son had left Romania lawfully, as under the relevant legislation in force at the time, a child accompanied by a parent granted full custody by a final court order could leave the country without the other parent's consent. In order to change her son's legal status, the applicant had to therefore lodge an

application with the court which retained jurisdiction in order to be able to change her contact rights or to gain custody of the child. The Romanian Ministry of Justice was unable to represent the applicant or to intervene in the proceedings on her behalf. It was for the applicant and her potential legal representative to litigate the case. In addition, they stated that the Austrian court which retained jurisdiction in the applicant's case was the Knittelfeld District Court. Lastly, they informed the applicant that given that she was living in Italy, she could notify the Italian Ministry of Justice in order to organise and secure contact between Italy and Austria under the Hague Convention.

29. On 29 September 2009 the applicant asked the Bucharest National Authority for the Protection of Child Rights to inform her about the status of an application lodged with the Child Protection and Social Assistance General Directorate attached to the Bistriţa-Năsăud County Council on 9 April 2008. Also, she asked for free legal assistance and support in order to overcome the challenges she had been facing. Moreover, she requested information on whether her son had been living lawfully in Austria, copies of the relevant documents granting V.I.P. custody and the conclusions of any potential social investigation reports carried out at her son's home. Lastly, she stated, *inter alia*, that although she had been granted contact rights by the domestic courts, V.I.P. had refused to allow her access to her son.

30. On 5 November 2009 the Bucharest National Authority for Protection of Child Rights informed the applicant through the Child Protection and Social Assistance General Directorate attached to the Bistriţa-Năsăud County Council that, according to an investigation carried out by the Romanian Embassy in Vienna and a social investigation carried out by the Austrian authorities, her son was residing legally in Austria with his father and his new family. The home they all lived in was large and clean. The child was attending kindergarten. His father's family was very attached to the child and he was able to develop well. Also, all of that information had been sent to the applicant's legal representative on 30 January 2009.

3. Proceedings before the Austrian authorities

31. On 28 February 2008 the Knittelfeld Administrative Authority issued a certificate attesting that the applicant's son had his main registered domicile in Austria, in the town of Knittelfeld.

32. On 12 November 2008 the Knittelfeld prefect's office produced a social investigation report in respect of the child's living arrangements at his home in Austria. The social workers who produced the report interviewed the child, his father and his stepmother. According to the report, the child arrived in Austria with his father in February 2008. In March of that year the child's father married another Romanian national living in Austria. They

all lived in a large and clean home. The child attended kindergarten and was well looked after by the family. According to V.I.P.'s statements, the child's mother left them in February 2007 and they had not had contact with her for more than a year, although V.I.P. had tried to find her. He raised the child on his own, and on 9 January 2008 was granted full custody by the Romanian courts. Afterwards, V.I.P. left Romania with his son and settled in Austria. He remarried, and the child's mother contacted him soon afterwards because she wanted to see the child. She was allowed to see him on his birthday and spent the day with him, but he no longer recognised her. She then did not contact them for some time, but in 2008 she was granted contact twice a month at the child's home. She never took advantage of that opportunity, instead contacting her son by telephone weekly. She never expressed the desire to take the child to her home. The report concluded that the child was well integrated into his family and was being well looked after. He had the opportunity to develop well. Although his mother could contact him, there was no real bond between them because of their past relationship. As far as the child was concerned, his father was the main caregiver.

(a) Proceedings regarding the applicant's contact rights

33. On 11 March 2009 V.I.P. came to the Knittelfeld District Court and informed the Court that the mother had been granted contact rights by the Romanian courts and that she had informed V.I.P that between 21 and 22 March 2009 she would take the child away to Italy for the weekend. In the past years she had only seen the child once for two hours in his presence. The child did not know the applicant as his mother anymore and did not want to be away from his family. V.I.P. therefore requested the Knittelfeld District Court to allow the applicant only supervised contact at a child protection centre on a day to be determined. Until a stronger mother-child bond was established the mother should not be allowed to take the child away. The minutes of V.I.P.'s statement made before the Knittelfeld District Court as well as his request were sent to the applicant.

34. The applicant misinterpreted the documents received as a court order prohibiting her from contacting her son.

35. On 21 March 2009 the applicant came to Austria. She saw her son at V.I.P.'s home. According to the applicant, V.I.P. and his wife used force and harmed her bodily to end the visit of her son. After this day the applicant did not see her son anymore.

36. On 23 March 2009 the applicant came to the Knittelfeld District Court and was heard by judge E.W. The judge informed the applicant that V.I.P. had asked for her to only be allowed to see her son at a child protection centre, in his and an interpretor's presence. According to the applicant, the judge refused to accept any of the evidence she had had translated into German and notarised in respect of the contact rights she had

been granted by the Romanian courts. During the discussion with judge E.W. the applicant said that she would reach an agreement with V.I.P. and she agreed to contact the child first via the Knittelfeld Child Protection Centre. The applicant was asked to turn to the child protection centre for any visiting arrangements and an information brochure was handed out to her.

37. According to the applicant, she telephoned the Knittelfeld Child Protection Centre the same day and was informed that a meeting could be set up between her and her son within a month.

38. The applicant claims that she contacted the Centre again on 7 May 2009 to enquire about the first meeting with her son. She stated that it was explained to her that she would have to bear the costs of a Romanian-speaking social worker and that meetings had to be approved by judge E.W.

39. According to the Government, the Knittelfeld Child Protection Centre would have been able to organise a Romanian-speaking assistant, but the applicant and V.I.P. would have had to bear the costs jointly.

40. According to the Government, V.I.P. withdrew his application for a decision on the applicant's contact rights on 30 June 2009. However, they did not submit any documents to this effect.

41. The applicant submitted that she had had a meeting with the President of the Knittelfeld District Court on 14 September 2009, at which she had attempted to lodge an application for custody and contact with her son. She stated that she had tried to give the President an application for enforcement of the Romanian judgments, and the certificate of enforceability dated 18 August 2009 issued under the Brussels II *bis* Regulation regarding the Romanian judgments of 11 September and 4 December 2008. According to the applicant, the President refused to accept the documents and referred her to E.W., the judge in charge. However, according to the applicant, E.W. also refused to accept these documents and referred the applicant to the Knittelfeld District Administrative Authority (*Bezirkshauptmannschaft)*. According to the applicant, E.W. explained to her that she had no contact rights on the territory of Austria and that she would have to be represented by counsel in order to lodge a new application for contact. Furthermore, the applicant submitted that E.W. had informed her that she would have to accept V.I.P.'s refusal to allow her contact.

42. On 26 May 2010, the applicant sent a request with a number of documents to the President of the Leoben Regional Court for the enforcement of her contact rights. On 11 June 2010 the President of that court informed the applicant that as an administrative judicial body, it had no jurisdiction in the matter and had thus forwarded her written request and documents to the Knittelfeld District Court as the court with jurisdiction.

43. On 30 June 2010 the applicant submitted a request to the Knittelfeld District Court to have the Romanian judgments regarding her contact rights enforced. She enclosed the certificate of enforceability dated 18 August 2009 issued under the Brussels II *bis* Regulation.

44. On 5 July 2010 the applicant applied for legal aid.

45. In early July the applicant applied to the Knittelfeld District Court for additional contact. In addition, she asked for counselling sessions for her and her son and cross-border cooperation between Austria and Italy in order to enforce the contact rights granted by the Romanian judgments. In addition, she requested legal aid and the presence of a translator in case she had to give evidence.

46. On 12 July 2010 the court awarded the applicant legal aid in respect of any court fees or translation costs. However, she did not receive legal aid for a lawyer and, legal representation not being obligatory, was unrepresented in the course of the proceedings. The court also summoned the applicant and V.I.P. to a hearing on 22 September 2010.

47. On 22 September 2010 the hearing took place, at which V.I.P. and an interpreter for the applicant were present. The applicant was not present.

48. Subsequently, on 23 September 2010, the same court dismissed the applicant's application for contact, inter alia because S.I.P. had been living in Austria for several years.

49. On 9 December 2010 the applicant appealed against that decision, stating that she had never received a summons. She objected to judge E.W. and stated that she was seeking enforcement of the Romanian decisions and was not requesting a new decision on her contact rights in Austria. She further stated that the child's father had taken an active part in the proceedings in Romania, and had been represented by a lawyer.

50. On 29 March 2011 the Leoben Regional Court stayed the appeal proceedings while waiting for a decision on the objection.

51. On 13 April 2011 the Knittelfeld District Court dismissed the applicant's objection to Judge E.W. as unfounded. Judge E.W. had stated that she had seen no reason to exclude herself from the proceedings. She had only met the applicant once and had stated in that meeting that she mediated with parents to find an out-of-court solution for contact with the child. She also had no personal relationship with the child's father. The court found that the applicant had not given any specific reasons for her objection to the judge. The applicant did not appeal.

52. On 17 June 2011 the Leoben Regional Court allowed the applicant's appeal and quashed the decision of 23 September 2010. It found that the summons to the applicant had been sent to the wrong address in Romania. The proceedings had to be continued at the same level of jurisdiction with a hearing with the applicant to establish whether she was requesting enforcement of the Romanian judgments in accordance with Article 21 of the Brussels II *bis* Regulation or a declaration of enforceability of these

judgments in accordance with Section 112 of the Non-Contentious Proceedings Act, or whether she wanted to apply for contact in Austria considering the current circumstances. The Leoben Regional Court held that the latter was reasonable as S.I.P was living in Austria.

53. On 9 November 2011 the applicant was summoned to the Knittelfeld District Court. An interpreter was present at this hearing. The applicant informed the court of an address in Italy to which any court documents could be sent. The transcript of the hearing indicates that the applicant stated that she did not want to speak on her contact rights, because she did not recognise the jurisdiction of the Austrian courts, and that in her opinion there was nothing to clarify before the Austrian courts. She only wanted the court to confirm the enforceability of the Romanian documents that conceded her custody of her son and she only wanted the Austrian courts to enable her to enjoy her existing rights. According to a file note, in the course of this hearing the applicant explicitly stated that although her last contact with her son had been in June 2009 she wanted to have the custody of her son, to live in Italy with him and the Romanian courts had enabled her to do so. Judge E.W. informed the applicant that this would not be correct because in the present situation international and Austrian law was applicable and that the Knittelfeld District Court had jurisdiction in the case. She informed the applicant several times that as the competent Austrian judge she could decide on her contact rights, but only after having requested an expert opinion of a child psychologist. The applicant, after having first been happy about this possibility, then changed her mind and reiterated that she did not recognize the jurisdiction of the Austrian courts.

54. The Government submitted that because the applicant had declared that she did not recognise the jurisdiction of Austria, the Knittelfeld District Court had interpreted this as a withdrawal of her application for contact and closed the file without any further decision. In any case the applicant did not take further actions to clarify the case, to obtain a decision on the execution of the Romanian judgment in Austria or to get in contact with her son.

(b) Proceedings regarding child support

55. On 13 May 2009 V.I.P. brought proceedings against the applicant before the Knittelfeld District Court, seeking child support starting from 1 August 2008 until the child became financially independent.

56. On 20 May 2009 the Knittelfeld District Court issued a temporary injunction against the applicant, ordering her to pay child support of EUR 105 pending the outcome of the child support proceedings. This decision was served on the applicant on 16 August 2009. The applicant appealed on points of law (*Rekurs*).

57. On 11 December 2009 the Leoben District Court rejected the applicant's appeal on points of law as lodged out of time.

58. On an unspecified date the applicant contested the proceedings brought against her by V.I.P. on 13 May 2009. She argued, *inter alia,* that the Austrian courts did not have jurisdiction to decide on child support pending the outcome of the proceedings opened by her before the Romanian courts. She also contested the lawfulness of the evidence obtained by the Austrian authorities through the Italian courts in respect of her case and the lawfulness of her son being domiciled in Austria.

59. By a decision of 8 January 2010 the Knittelfeld District Court allowed V.I.P.'s child support claim. It ordered the applicant to pay monthly child support of EUR 50 from 1 August 2008 until the child became financially independent, on the grounds that the applicant had sufficient income to pay that amount. It also lifted the temporary injunction delivered by the same court on 20 May 2009 pursuant to which the applicant had had to pay EUR 105 in monthly child allowance. It also held that under Article 1 of the Hague Convention, Austrian law applied to the present case, because the child's habitual permanent residence was in Austria. The applicant appealed on points of law on the grounds that the court had assessed the evidence incorrectly and she had fulfilled her obligations under the Bistriţa-Năsăud District Court's judgment of 9 January 2008 to pay child support, so she could only be ordered to pay child support from the date of the court's judgment. Moreover, the applicant alleged that the court had failed to consider the best interests of the child, as he did not have contact with her; the court had also failed to take into account the parties' nationality when determining the lawful domicile of the child and the time-limit for the appeal on points of law.

60. On 28 September 2010 the Leoben Regional Court rejected the applicant's appeal on points of law as lodged out of time.

(c) Other proceedings

61. On an unspecified date the applicant lodged a criminal complaint against V.I.P. with the Graz Police Department for unlawful residence in Austria. She argued that V.I.P. was living and working unlawfully in Austria, had removed her son from Romania without her consent, and in spite of all the sets of proceedings she had brought before the Romanian authorities to have her son returned to Romania, they had failed to assist her. In addition, relying on the provisions of the Hague Convention, she urged the Austrian authorities to help her and take the measures required by law to protect her son.

62. According to the Government, the Leoben public prosecutor's office discontinued the preliminary investigation against V.I.P on 18 December 2008. The applicant did not lodge a request to reopen these proceedings (*Fortführungsantrag)* with the Leoben Regional Court.

63. On an unspecified date, relying on most of the above-mentioned arguments, the applicant also asked the Child Protection Agency attached to

Graz mayor's office to assist her with a social investigation in her son's case.

64. By a letter of 26 April 2010 the applicant informed the Court that she was still unable to see her son.

B. Relevant domestic and international law and practice

65. The relevant legal provisions of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, ratified by Romania and Austria, namely Articles 1 and 7, are to be found in *Iosub Caras v. Romania*, no. 7198/04, 27 July 2006 and *Blaga v. Romania*, no. 54443/10, § 51, 1 July 2014.

66. The relevant provisions of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (known as "the Brussels II *bis* Regulation") read as follows:

Article 1

"1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

...

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

..."

Article 10

"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

...

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."

Article 21

"A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

Article 23

"A judgment relating to parental responsibility shall not be recognised:

...

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally ..."

Article 40

"1. This Section shall apply to:

(a) rights of access;

..."

Article 41

"1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;

and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity....”

...”

Article 45

“1. A party seeking enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) the certificate referred to in Article 41(1) ...”

Article 47

“1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) [...] shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) [...] cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.”

Article 48

“1. The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.

2. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter.”

Article 60

“In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.”

67. The relevant Romanian law is set out in the cases of *Lafargue v. Romania* (no. 37284/02, §§ 64-69, 13 July 2006), and *Costreie v. Romania* (no. 31703/05, §§ 55-58, 13 October 2009). The role and responsibilities of the Romanian local public authorities in respect of social assistance and child protection, as well as the relevant provisions of

the Child Protection Act (no. 272/2004), are described in the case of *Amanalachioai v. Romania*, (no. 4023/04, §§ 56 and 59, 26 May 2009).

68. As regards the relevant Austrian law, it is noted that the applicant was not represented by counsel before the Austrian courts. The court was therefore obliged to give her guidance on conduct and instruction on the law (*Anleitungs- und Belehrungspflicht*). Under Section 14 of the Non-Contentious Proceedings Act (*Außerstreitgesetz)* the courts have to inform the parties about possible contentions and applications and guide them to take the appropriate steps. The courts have to inform parties not represented by counsel about possible actions and applications and the legal consequences of each step. They have to be instructed about the actions which are favourable to them. The instruction and guidance has to be noted in the transcript of the hearing (*Fucik/Kloiber,* AußStrG § 14 [Rz 3ff]).

69. According to the Austrian practice concerning Article 41 of the Brussels II *bis* Regulation, in the Member State of enforcement there is no examination under the *ordre public*, there being no proceedings through which the decision is recognised and declared enforceable (*Klauser/Kodek,* ZPO (2012) Art 41 EuEheVO, Anm3).

70. The enforcement of decisions on contact rights is based on section 110 of the Non-Contentious Proceedings Act (*Außerstreitgesetz*). This provision also applies to the enforcement of decisions on contact rights under Article 41(1) of the Brussels II *bis* Regulation. Section 110(2), taken in conjunction with section 79(2), provides for the imposition of fines or imprisonment as coercive measures for contempt of court. As a more lenient measure, the court may also reprimand a party or threaten to take coercive measures.

Section 110(3) provides that the court may refrain from continuing with the enforcement if and so long as it constitutes a risk for the well-being of the child.

COMPLAINTS

71. Relying on Articles 6, 8, 17 and 18 of the Convention, the applicant complained that the Romanian authorities had failed to protect her right to family life and to prevent a limitation of her rights, even though they had examined the matters concerning custody of her son and her contact rights. They had ignored and failed to help enforce her parental rights and the child's best interests and had protected V.I.P.'s freedom of movement. They had failed to cooperate with the Austrian State and had failed to notify her of the change of her son's habitual residence to Austria. In addition, she complained that the Austrian authorities had unlawfully interfered with her right to family life. They had supported V.I.P. in limiting her contact rights

in respect of her son, had denied her access to court and had prevented her from having contact with her son for more than two hours in a two-year period. They had also failed to cooperate with the Romanian authorities in respect of the proceedings and notifications lodged by her. Lastly, she had been denied the opportunity to re-establish normal contact with her son.

72. In respect of Romania, the applicant also complained of a breach of her rights guaranteed by Article 1 of the Convention without providing additional details. Under Article 6 of the Convention, she complained that her right to a fair trial had been breached in respect of the proceedings which ended on 9 January 2008 in so far as the domestic court had awarded custody of her son to V.I.P. on the basis of unverified witness statements, by summoning her at her Romanian address, and without carrying out an investigation to determine the true circumstances of her and her son's relationship. Moreover, the proceedings which ended on 17 June 2010 had been excessively lengthy. Under Article 17 of the Convention, the applicant argued that the child had been domiciled in Austria without her being heard.

73. In respect of Austria, the applicant also complained of a breach of her rights guaranteed by Article 1 of the Convention without providing additional details. Under Article 6 of the Convention, she complained that the Knittelfeld District Court had disregarded her rights and those of her child, had heard only V.I.P. and had failed to provide additional evidence in the proceedings initiated by V.I.P. against her on 11 March 2009. Moreover, the court had disregarded her right to take part in the proceedings, had failed to notify her of the procedural steps taken in the course of the proceedings, and had acted outside its jurisdiction, as if it were an appellate court, in proceedings concerning her contact rights that had been attended by both parents. Under Article 13 of the Convention, the applicant complained of a breach of her right to an effective remedy in so far as the President of the Knittelfeld District Court had referred her case to Judge E.W., even though that judge had mishandled her case. Moreover, she had been unable to appeal against the "injunction" issued [this was a misinterpretation, see paragraph 33] by the Knittelfeld District Court on 11 March 2009, because she had never been notified of the decision in writing. Under Article 14 and Article 1 of Protocol No.12 to the Convention, the applicant complained that she had been discriminated against by the authorities in comparison with V.I.P., and that they had breached her right of access to court on account of her nationality, place of residence, financial situation and inability to speak German. For the reasons previously stated, they had failed to hear her, to accept the notarised German translations of the relevant documents presented by her, and to address her with respect when informing her that she did not have contact rights under Austrian law. Furthermore, they had failed to help her have contact with her son on his first day at school. Lastly, the Knittelfeld police had refused to accept a

criminal complaint lodged against V.I.P. and to record incidents she had reported.

THE LAW

A. Complaint under Article 8 of the Convention

74. Relying on Articles 6, 8, 17 and 18 of the Convention, the applicant complained that the Romanian and Austrian authorities had breached her right to respect for family life on account of their failure to ensure and assist her in enforcing contact rights granted to her, as recognised by the Cluj Court of Appeal on 4 March 2009.

75. The Court reiterates that since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the applicant (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions 1998-I*). In this context, it notes that Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. In addition, it observes that the complaint raised by the applicant under other Articles of the Convention is closely linked to her complaint under Article 8. It considers, therefore, that the applicant's complaint may be examined only under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. In respect of Romania

(a) The parties' submissions

(i) The Government

76. The Government submitted that the applicant lacked victim status in respect of her complaint that the Romanian authorities had failed to assist her in enforcing the final judgment recognising her contact rights. They contended that, under the relevant domestic and international legislation, the Austrian authorities were responsible for enforcing the judgment.

77. The Government argued that, under the relevant international instruments, the "central authorities" had no competence and could not intervene in the enforcement of court judgments delivered on the territory of

their own State which had to be enforced on the territory of another State. In addition, there were no legal grounds for the Romanian authorities to initiate Hague Convention proceedings seeking the return of an unlawfully removed child, given that V.I.P. had sole custody of his son by virtue of a final court judgment.

78. The Government contended that the proceedings opened by the applicant before the Romanian courts seeking the immediate return of her son under the Hague Convention had fallen outside the scope of that Convention and had been an ineffective call for the Romanian authorities to act, given that applications for return had to be lodged directly with the courts of the State of habitual residence. In addition, the fact that the domestic courts lacked jurisdiction to examine the applicant's application had not amounted to a restriction of her contact rights.

79. The Government considered that the applicant's complaint was in any event manifestly ill-founded, because the Romanian authorities had fulfilled, speedily and within the limits of their competence, all the obligations flowing from the applicant's situation.

80. The Government acknowledged that the applicant's contact rights recognised under the final judgment of 4 March 2009 had not been fully enforced, but emphasised that the situation could not be blamed on any interference or lack of diligence on the part of the Romanian authorities.

81. The Government argued that the Romanian authorities had taken all reasonable measures to assist the applicant in enforcing the judgment, given that they were unable to take any punitive measures against the father as long as the child was not living in Romania. Enforcement of the judgment also depended on the applicant's resources, and the ultimate responsibility for the enforcement lay with the Austrian authorities.

(ii) The applicant

82. The applicant disagreed. She contended that although the Romanian authorities had been competent and had a duty to assist her in enforcing the judgment recognising her contact rights, they had chosen to transfer their responsibilities to the authorities of other States. In addition, except for the information provided to her, they had failed to undertake any other measures of assistance.

83. The applicant contended that in spite of the final court judgment recognising her contact rights and the numerous sets of civil and criminal proceedings she had opened involving V.I.P., the Romanian authorities had neglected their duties and her repeated calls for them to assist her in her attempts to be reunited with or to have contact with her son.

(b) The Court's assessment

(i) The relevant principles

84. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, *inter alia*, *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 125, 1 December 2009; and *Răileanu v. Romania* (dec.), no. 67304/12, § 41, 2 June 2015).

85. Even though the primary object of Article 8 is to protect the individual against unjustified interference by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, amongst other authorities, *Maumousseau and Washington v. France*, no. 39388/05, § 83, 6 December 2007; and *Daricіuc v. Romania* (dec.), no. 47873/13, § 83, 7 July 2015). In both contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the community as a whole; in both contexts the State enjoys a certain margin of appreciation (see, amongst other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; and *Qama v. Albania and Italy*, no. 4604/09, § 80, 8 January 2013).

86. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, for example, *Sommerfeld v. Germany* [GC], no. 31871/96, § 64, ECHR 2003-VII; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 134, ECHR 2010; and *Hromadka and Hromadkova v. Russia*, no. 22909/10, § 160, 11 December 2014).

(ii) The application of these principles to the present case

87. Turning to the facts of the present case, the Court finds it unnecessary to examine all of the Government's preliminary objections, because it considers that the applicant's complaint is in any event inadmissible for the following reasons.

88. The Court notes that on 4 March 2009 the Romanian last-instance court recognised the contact rights granted to her by the lower courts based on a clearly defined schedule (see paragraph 15 above). While the decisions took into account that the applicant and V.I.P. were living in two foreign states other than Romania at the time, and tried to set up an appropriate schedule for the applicant to have meaningful contact with her son, their effects are to be understood to apply solely within the jurisdiction of Romania within the meaning of Article 1 of the Convention.

89. It has not been disputed by the parties that subsequent to the delivery of the Romanian judgments the applicant had not seen her child in accordance with the schedule ordered. In fact, it appears from the evidence available that from the moment of her son's departure to Austria in 2008, the applicant had almost no physical contact with him whatsoever. The issue in the present case, therefore, is the scope of the Romanian authorities' positive obligations, if any, to enforce the applicant's right to contact in respect of her child.

90. In this connection, the Court notes that custody was awarded to the child's father by virtue of a Romanian court decision in January 2008 that she did not contest (see paragraph 8 above). While in October 2009 the applicant applied to the Romanian courts for custody (see paragraph 17 above), her application was dismissed because the courts were no longer competent to examine her son's case (see paragraphs 18 and 19 above). In addition, the domestic authorities provided the applicant with information concerning jurisdictional issues and the steps she needed to take to have her contact rights enforced. Moreover, in August 2009 the domestic authorities provided her upon her request with the certificate of enforceability issued under the Brussels II *bis* Regulation (see paragraph 16 above).

91. Furthermore, the Court notes that even if the applicant alleged that the child had been abducted and unlawfully retained in Austria, at the time of his departure from Romania, V.I.P. had been granted sole custody of the child and therefore had a right to decide on the child's removal and new country of residence himself. The Court's observation is confirmed by the Romanian judicial and non-judicial authorities' assessment of the applicant's son's case following the applicant's repeated applications to have her son returned to Romania and her contact rights enforced (see paragraphs 18 and 28 above).

92. Moreover, the Court reiterates that in cases where an applicant's child is no longer within a respondent State's jurisdiction and, irrespective of whether proceedings under the Hague Convention have been instituted by the applicant and whether custody rights had been awarded, it has found that such applicants are required to bring proceedings for the exercise of their access or contact rights in the respondent State within whose jurisdiction the child is to be found (see *Stenzel v. Poland* (dec.), no. 63896/00, 28 February 2006, *Deak v. Romania and the United Kingdom*, no. 19055/05, 3 June 2008, and *Qama*, cited above, § 86).

93. In this context, and having regard to the circumstances of the present case, Article 8 cannot be understood as extending to an obligation for a respondent State to secure an applicant contact when the child has moved to another jurisdiction and is outside that State's jurisdiction (see, for example, *Qama*, cited above, § 87). Moreover, Article 8 of the Convention, read in the light of the Hague Convention, does not impose on national authorities positive obligations to secure the return of a child if the applicant holds only

contact rights (see *R.R. v. Romania (no. 1)*, no. 1188/05, § 164, 10 November 2009; contrast *Eberhard and M.*, cited above, and *Semianowski v. Poland*, no. 45972/99, 6 September 2005).

94. The Court therefore concludes that, in so far as the applicant's son travelled and remained in Austria on the strength of a lawful judgment given by a Romanian court, which the applicant did not appeal against (see paragraph 8 above) and which did not award her custody, there was no positive obligation on Romania to take steps to secure enforcement of the applicant's contact rights as recognised by the Romanian courts. The applicant should, and it appears that she already has, lodged proceedings with the Austrian authorities to obtain enforcement of her contact rights in respect of her child.

95. It follows that the applicant's complaint in respect of Romania is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore must be declared inadmissible.

2. In respect of Austria

(a) The parties' submissions

(i) The Government

96. The Government argued that when the applicant lodged her complaint with the Court on 31 October 2009, there were no proceedings regarding her contact rights and no proceedings for the enforcement of the Romanian judgments concerning her contact rights pending before the Austrian courts. There was never a temporary injunction imposed by the Austrian courts in the proceedings concerning the applicant's contact rights.

97. The Government submitted that V.I.P. had withdrawn his application on 30 June 2009. Although the applicant had applied for contact in early July 2010, her conduct had been interpreted as a withdrawal of the application on 9 November 2011 (see paragraph 54). Since there was no application pending before the Austrian courts, there was no obligation on the courts to decide on the merits. The Government concluded that the applicant was not a victim in respect of her contact rights and therefore the complaint was to be declared inadmissible.

98. The Government, however, noted that the proceedings for maintenance were still pending before the Austrian courts.

(ii) The applicant

99. The applicant contested the Government's submissions. In her complaint to the Court on 31 October 2009, she claimed that she had attempted to lodge an application for enforcement of the Romanian judgments concerning her contact rights with the Knittelfeld District Court on 14 September 2009, but the people responsible had refused to accept her

documents. Moreover, the applicant submitted that the domestic courts had denied her contact with her son.

(b) The Court's assessment

100. The Court notes that the facts are not entirely clear and are in dispute between the parties, both as regards the applicant's attempt to initiate proceedings on 14 September 2009 (see paragraph 41) and their closure on 9 November 2011 (see paragraph 53). Furthermore, the Court notes that the essence of the applicant's complaint is that because of the way the Austrian courts had handled her case, they had denied her contact with her son.

101. The Court reiterates that on the one hand in order to be able to lodge an application in accordance with Article 34, an applicant must be able to show that he or she was "directly affected" by the measure complained of (*Tănase v. Moldova* [GC], no. 7/08, ECHR 2010 §104 and *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008). Even if this criterion is not to be applied in a rigid, mechanical and inflexible way throughout proceedings (*Micallef v. Malta* [GC], no. 17056/06, § 45, ECHR 2009) the Convention lays a certain burden of proof upon the applicant. On the other hand, applicants must comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 (for many *Gäfgen v. Germany* (dec.), no. 22978/05, 10 April 2007).

102. The Court notes that the enforcement of a judgment under the Council Regulation No. 2201/2003 needs a request by a party. In the present case it is in dispute which sort of requests the applicant wanted to make in her several contacts with the Austrian courts. In particular it remains unclear, if in the hearing of 9 November 2011, her request to have enforced the Romanian judgment was upheld in the light of the relevant international and Austrian law that granted authority to the competent Austrian court. According to the protocol the submissions of the applicant were very inconsistent in this respect (see above paragraph 53). However the parties agree that after 9 November 2011 the applicant did not take any measures within the Austrian courts system to clarify this question. Neither has she requested visiting rights to her son or was she in contact with him. The applicant would still be able to request a decision of the Knittelfeld District Court on the enforcement of the Romanian judgment in the light of the Brussels II *bis* Regulation and the Austrian law in this respect (see above paragraph 65) at any time.

103. This being so, the Court concludes that the applicant did not fulfill the burden of proof as regards all criterions enlisted in Article 34 and 35 of the Convention are met. Therefore, the complaint under Article 8 is inadmissible.

B. Other complaints

104. Insofar as the applicant's remaining complaints are concerned (see paragraphs 72 and 73 above), the Court considers that there is nothing in the file to suggest that the provision invoked by the applicant has been violated. Accordingly, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 3 March 2016.

Fatoş Aracı
Deputy Registrar

András Sajó
President