

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

THIRD SECTION

CASE OF BLAGA v. ROMANIA

(Application no. 54443/10)

JUDGMENT

STRASBOURG

1 July 2014

FINAL

01/10/2014

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



In the case of Blaga v. Romania,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Dragoljub Popović,
Luis López Guerra,
Johannes Silvis,
Iulia Antoanella Motoc, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 3 June 2014,

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

PROCEDURE

1. The case originated in an application (no. 54443/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian and American national, Mr Octavian Blaga ("the applicant"), on 20 September 2010.

2. The applicant was represented by Mr A.O. Krebelder, a lawyer practising in Remseck, Germany. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

3. The applicant complained, in particular, that the unfolding, outcome and the *de facto* consequences of the proceedings under Article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention") had breached his rights guaranteed, *inter alia,* by Article 8 of the Convention. In addition, he alleged that the length of the divorce-and-custody proceedings instituted against him by his wife had breached his rights guaranteed by Article 6 of the Convention.

4. On 13 September 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Suwanee, the United States of America ("the U.S.").

6. In 1993 the applicant married D.B. in the U.S. state of Georgia. The couple both had American and Romanian citizenship. They had three children: A.H.B who was born on 25 March 1998, and twins, N.A.B. and P.N.B., who were born on 19 October 2000. The parents had joint custody of the children under U.S. law. They all lived in the U.S.

7. On 1 May 2007 the Superior Court of Forsyth County in the U.S. issued an injunction forbidding the applicant and his wife from removing their children or settling outside the jurisdiction of the said court without its express permission.

8. On 14 August 2008 the applicant signed a notarised form authorising his wife to leave the U.S. with their three children on 5 September 2008 for a short holiday to Romania on condition that she returned the children to the U.S. at the end of the holiday period.

9. The applicant's wife failed to return the children to the U.S. and on 14 October 2008 she instituted divorce-and-custody proceedings against the applicant before the Braşov District Court in Romania.

A. Proceedings conducted before the U.S. courts

10. On 19 December 2008 the applicant filed for divorce and custody of his children with the Superior Court of Forsyth County.

11. On 13 January 2011 the Superior Court of Forsyth County dismissed the applicant's action for insufficient notice of the trial and lack of jurisdiction. It held that the divorce proceedings instituted by the applicant's wife on 14 October 2008 were regulated under Romanian legislation. In addition, the Romanian jurisdiction applied to the two spouses because they were both Romanian citizens, held Romanian nationality and their children lived in Romania. The applicant appealed against the judgment.

12. On 14 December 2011 the Georgia Court of Appeal dismissed the applicant's appeal against the judgment of 13 January 2011.

B. Proceedings under the Hague Convention conducted in Romania

13. On an unspecified date the applicant submitted a request for the return of his three under-age children to the U.S., under Article 3 of the Hague Convention, to the U.S. Central Authority responsible for the obligations established by the Hague Convention. On 11 December 2008,

the U.S. authority submitted the request to the Romanian Ministry of Justice. The applicant argued that his children had been unlawfully removed from U.S. territory by his wife, in breach of the joint-custody agreement between the spouses at the time of the removal.

14. On 12 December 2008 the Romanian Ministry of Justice contacted the applicant's wife, informed her about the Hague Convention request lodged by her husband and asked her to express her position on a potential friendly settlement of the case and voluntary return of the children to the U.S.

15. On 14 January 2009 a private psychologist's practice produced a psychological evaluation report concerning the applicant's children. The report concluded based on tests and a psychological interview with the children that they were extremely affectionate; had a maternal fixation; had a need for safety, security and stability; they feared authority and unknown circumstances; felt anxiety in respect of the troubled family situation; wished to reject or quash any threat and had a defensive attitude. The report also noted that at the time of the examination the children were well balanced emotionally, were willing to communicate and cooperate, were expressive, adapted to the situation and willing to integrate and did not show any discordant behavior.

16. On 4 February 2009, the Romanian Ministry of Justice, acting as the Central Authority responsible for the obligations established by the Hague Convention, instituted proceedings on behalf of the applicant, who was represented by a lawyer of his choosing, before the Bucharest County Court.

17. By an interlocutory judgment of 2 March 2009 the Bucharest County Court adjourned the proceedings so that the applicant's wife could prepare her defence, the children could receive psychological counselling prior to being heard by the court and the Braşov Guardianship Authority could prepare a social inquiry report on the children's living conditions, family situation and adjustment to the new conditions in Romania. The applicant was present at the hearing and submitted documentary evidence and requests before the court through his legal representative.

18. On an unspecified date the Braşov Guardianship Authority produced the social inquiry report ordered by the court. It concluded that the mother knew best and was most responsive to the children's development needs. She had decided jointly with the children to leave the marital home and the children refused to return to the former family environment which they considered hostile as a result of the father's abusive behavior. It noted inter alia that according to the children they had not perceived their father as a model and disapproved his abusive behavior. They referred to restrictions and physical punishments which they had considered unfair. They had witnessed their parents' disputes and they had perceived their mother as a victim. Consequently, they empathised with her. In the case of divorce they wished to live with their mother because they felt close to her and because

she had constantly supported them both morally and affectively. They wished to remain in the mother's custody and from the beginning they had been happy with the idea of moving to Braşov. They had been familiar with the new environment because they had often visited their maternal grandparents during the holidays and had contact with the mother's extended family. They had been enrolled in school and they were adapting gradually to the new situation. They had made friends and the language barrier problem had almost disappeared.

19. By interlocutory judgments of 13 and 15 April 2009 the Bucharest County Court adjourned the proceedings after allowing the parties to submit oral and written submissions and pending deliberation.

20. On 16 April 2009 the Bucharest County Court dismissed the applicant's action on the basis of testimonial and documentary evidence, the social inquiry report produced by the Braşov Guardianship Authority, and the children's testimonies heard by the court after they had attended counselling sessions organised by the Bucharest Social Assistance and Child Protection Agency. It held that after the children had arrived in Romania they had settled in Braşov together with their mother and had been enrolled in school. The social inquiry had shown that the children had been familiar with the new environment because they had often spent their holidays there with their maternal grandparents and with their mother's wider family. However, according to the decision of the U.S. courts and the available evidence, the applicant enjoyed joint custody of the children and had a right to decide where they should live. Moreover, while the applicant had agreed that the children could leave the U.S., his wife's failure to return them to the U.S., the country of their habitual residence, was unlawful. Although, the applicant and his wife had discussed the option to leave the U.S. and to return to Romania, a final decision had not been taken in that regard prior to her departure. Furthermore, her argument that the applicant's strict social and religious upbringing of the children posed a serious risk if they were to return to the U.S. and would expose them to physical and psychological harm, within the meaning of Article 13 § 1 (b) of the Hague Convention, was unfounded. However, citing the Elisa Perez-Vera Explanatory Report and Article 13 § 2 of the Hague Convention, and taking into account the available evidence, the court held that the children's views concerning the essential question of whether they should return to the U.S. or remain in Romania could be decisive, because they had attained an age and degree of maturity sufficient for their views to be taken into account. This was the only reason the court refused to order their return to the U.S. In this context, it acknowledged that the twins were less than ten years old at the time, an age considered by Romanian law to be the minimum age for the views of a child to be taken into account. However, A.H.B. was eleven years old and she had stated freely and unequivocally that she wished to stay in Romania, where the children were integrated in their new school and

extra-curricular environment. Consequently, the opinion of the twins could not be ignored by the court, given that it was not in the best interests of the children to be separated and that their potential return to the U.S. would generate new and potentially traumatic circumstances affecting their psychological development.

21. The applicant, represented by his lawyer, and the Romanian Ministry of Justice appealed on points of law (*recurat*) against the judgment. He argued that the County Court had misinterpreted the provisions of the Hague Convention and that its decision interfered with the jurisdiction held by the U.S. courts in respect of custody matters. Also, the court had failed to provide any reasons why it considered all his children sufficiently mature in order to rely on their opinion. He argued that allowing A.H.B. to make decisions also for her siblings was unacceptable. The Romanian Ministry of Justice argued on behalf of the applicant that the court had incorrectly assessed the evidence in the file and had considered the opinion of an eleven year-old sufficient for its decision. Since there was no evidence in the file to suggest that the children's return to the U.S. would expose them to serious harm, the Romanian authorities had a duty to return them to their State of habitual residence.

22. By an interlocutory judgment of 3 June 2009 the Bucharest Court of Appeal adjourned the proceedings pending the receipt of procedural information it had requested from the Bucharest County Court and in order to allow the applicant's wife to prepare her defence.

23. On 24 June 2009 the Bucharest Court of Appeal allowed the applicant's appeal on points of law, quashed the judgment of 16 April 2009 and ordered a retrial. It noted of its own motion that the interlocutory judgment of 13 April 2009 postponing the date of the decision was missing from the file. Therefore, the appellate court was unable to determine whether the applicant's right to a fair trial and of access to court had been observed by the judicial authorities.

24. On 28 July 2009 the case file was re-registered on the Bucharest County Court's docket.

25. By interlocutory judgments of 14 September, 7 October and 4 November 2009 the Bucharest County Court adjourned the proceedings in order to examine a request by one of the judges to abstain; to allow the parties to submit written observations and evidence, including documents obtained by the applicant from the U.S. State Department attesting that the unlawful failure to return children to the U.S. was a federal offence; and to deliberate.

26. By a judgment of 24 November 2009, following a second set of proceedings, the Bucharest County Court dismissed the applicant's action. It acknowledged, by referring also to the decision of the U.S. court of 1 May 2007, that the applicant shared the custody of his children, that their removal from the U.S. had been unlawful and that their return to that

country in spite of the applicant's wife's claims of *inter alia* physical corrections applied to the children, would not expose them to physical and psychological harm within the meaning of Article 13 § 1 (b) of the Hague Convention. However, by relying on the Elisa Perez-Vera Explanatory Report, the children's views had been considered decisive for the court's decision to dismiss the applicant's action.

27. The applicant, through his legal representative, and the Romanian Ministry of Justice appealed on points of law against the judgment. They argued, *inter alia,* that the County Court had failed to acknowledge that by unlawfully removing the children from the U.S., their mother had breached U.S. laws. Moreover, the court had ignored the U.S. legislation and the decisions of the U.S. courts. They were wrong to have considered as conclusive the views of children who had not attained an age and a degree of maturity sufficient for their views to be taken into account. Furthermore, the courts had misinterpreted the provisions of the Hague Convention and of the domestic legislation. Lastly, by dismissing his action, the Romanian courts had transferred the jurisdiction of the U.S. courts concerning divorce and custody matters to the Braşov District Court.

28. On 12 February 2010, relying on Article 11 of the Hague Convention, the applicant submitted a request for a statement on the delay in the proceedings instituted by him for the return of his children with the Bucharest County Court. He argued that the repeated delays caused by the Romanian authorities in examining his case, including by not respecting the statutory ten-day time-limit for the reasoning of the judgment, had breached his right to a trial within a reasonable time guaranteed by Article 6 of the European Convention on Human Rights.

29. On 25 February 2010 the Bucharest County Court acknowledged the applicant's request of 12 February 2010 and informed him that the judgment it had delivered on 24 November 2009 had been reasoned and communicated to the parties and the case file had been archived on 23 February 2010.

30. By interlocutory judgments of 18, 25 and 29 March 2010 the Bucharest Court of Appeal adjourned the proceedings for deliberations and in order to allow the applicant's wife to submit written observations.

31. By a final judgment of 25 March 2010 the Bucharest Court of Appeal dismissed the applicant's appeal on points of law. It held that, although the children had dual nationality, they had been born and had resided in the U.S. In addition, there was no evidence in the file that the applicant had not had custody rights over them or that he had not exercised them immediately prior to their departure. Consequently, their retention in Romania by their mother against the applicant's will had been unlawful. However, it noted that the provisions of the Hague Convention, as interpreted also by the Elisa Perez-Vera Explanatory Report, suggested that the best interests of the children were at the heart of the unlawful removal

principles regulated by the said Convention and the exceptions thereto. Consequently, the lower court's decision to refuse the return of the children to the U.S. by relying on Article 13 § 2 of the Hague Convention – after examining both parties' submissions and the particular schooling and extra-curricular circumstances of the children, and declaring the mother's refusal to return them unlawful – was not contradictory and did not amount to a misinterpretation of the Hague Convention.

32. The court further noted that according to the available evidence that the parties had wished for their children to maintain strong ties with Romania. However, it dismissed the applicant's wife's argument that through his actions and behavior at the moment of their departure from the U.S., the applicant had agreed to settle the children's residence in Romania and that therefore the retention had been lawful within the meaning of Article 13 § 1(a) of the Hague Convention. At the same time, the refusal to order the return of the children was based on Article 13 § 2 of the Hague Convention; it did not amount to a transfer of jurisdiction to the Romanian courts in respect of custody matters because the Hague Convention itself provided for the refusal to return in exceptional circumstances and gave precedent to the child's best interest. The decision of the lower court could not change the fact that the parties and their children were also Romanian nationals, a factor that may be considered relevant by a court when determining its competence to examining the custody proceedings; something that this court was not lawfully allowed to do.

33. Moreover, the children, the eldest of whom was approximately twelve years old, had been heard by the first-instance court in the presence of a psychologist and after counselling sessions. They had all freely and unequivocal stated, in the absence of any parents or relatives, that they did not wish to return to the U.S. The children had shown a sufficient degree of maturity in expressing their opinions. They understood their situation and made logical assessments which were not plagued by contradictions concerning their relationship with their parents, their future perspectives in the two countries and their views on family life. In this context, the argument that the twins were under ten years old at the time and that therefore their opinions could not be considered relevant for the case was unfounded. In addition, the lower court's reliance on Article 13 § 2 of the Hague Convention was also justified by A.H.B.'s clear refusal to return to the U.S. Her refusal was compelling and had been expressed at an age and maturity which fulfilled the requirements set out in Article 13 § 2 of the Hague Convention. According to the evidence and the psychological evaluation reports available in the case file, the connection between the three siblings was very strong. Consequently, an assessment that the twins did not show a sufficient degree of maturity in expressing their opinions would not serve the best interests of the children. A separation of the siblings would be traumatic and would have a detrimental impact on their

future psychological development. Also, according to the conclusions of the psychological evaluation reports the children's separation from the current environment would result in a serious risk for them. Furthermore, there was no evidence in the file to support the applicant's argument that his wife had denied him personal relations with his children and had deprived him of his family life. In addition, the present case did not concern custody rights; consequently, the court dismissed the applicant's argument that under the domestic legislation it should not attach more weight to the children's statements than to those of the parent exercising his parental rights or that by doing so it had discriminated against him in relation to his wife.

34. By attaching more weight to the children's best interest, the court further held that the return of the children to the U.S. against their will could have only destabilized them and subjected them to new pressure, which could have negatively influenced their future development, given that the relationship between their parents had radically changed since they had left the U.S. Lastly, the Court of Appeal considered that the first-instance court had correctly interpreted the provisions of the Hague Convention. It had not misinterpreted the provisions of Article 12 §§ 1 and 2 of the Hague Convention, given that its decision had been based on the best interests of the children, as required by Article 13 § 2. In addition, it considered that the first-instance court would have been forced to order the return of the children only if after it had examined the circumstances of the new environment the children enjoyed, it would have found that their health and future development had been endangered.

C. Divorce-and-custody proceedings conducted in Romania

35. By an interlocutory judgment of 20 February 2009 the Braşov District Court allowed the parties' request seeking the suspension of the custody and divorce proceedings pending the outcome of the Hague Convention proceedings, and ordered the postponement of the trial.

36. By an interlocutory judgment of 18 June 2010 the Braşov District Court reopened the divorce-and-custody proceedings at the parties' request and allowed them to submit documentary and testimonial evidence. In addition, it ordered a social inquiry report on the applicant's living conditions in the U.S. through an international rogatory commission.

37. On 30 September 2010 the Romanian Ministry of Justice informed the Braşov District Court that it had forwarded the court's request for a social inquiry at the applicant's home in the U.S. to the relevant American authorities with the aid of the U.S. State Department. At the same time the Ministry of Justice informed the court that the international rogatory commission proceedings would take between six months and a year.

38. By interlocutory judgments of 13 December 2010, and 18 March and 10 June 2011, the Braşov District Court adjourned the proceedings

repeatedly in order to allow the parties to submit evidence and for procedural reasons. In addition, it dismissed the applicant's request to reiterate its request for a social inquiry at his home through the international rogatory commission proceedings on account of the information note of 30 September 2010. At the same time it allowed the applicant's request to adjourn the proceedings for a longer period of time pending the receipt of documents requested from the U.S.

39. At the hearing of 2 September 2011 the applicant raised a preliminary objection, arguing that under the Hague Convention and Council Regulation no. 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial and parental responsibility matters ("the Council Regulation"), the Romanian courts did not retain jurisdiction in respect of divorce-and-custody proceedings as a similar action was pending before the U.S. courts. In addition, the children's habitual residence prior to their unlawful removal was in the U.S. Consequently, the courts in the U.S. retained jurisdiction in respect of child-custody matters. Lastly, the U.S. courts had issued an injunction forbidding the removal of the children from their jurisdiction.

40. By an interlocutory judgment delivered the same day, the Braşov District Court dismissed the applicant's preliminary objection. It held that under the relevant domestic legislation the Romanian courts had jurisdiction in respect of proceedings concerning divorce and custody matters instituted by Romanian citizens living abroad. The applicant, his wife and their children were Romanian citizens and their civil-status papers had been registered in Romania. In addition, the Romanian courts had dismissed the applicant's action seeking the return of his children to the U.S. The children had been residing in Romania with their mother since September 2008 and were well adapted to their new living conditions. Consequently, under the Hague Convention the jurisdiction of the U.S. courts had ceased from the time the children had been settled in Romania, that is after the Romanian courts had dismissed the applicant's request for the return of his children. Moreover, the Council Regulation could not be applied to the present case because it concerned only situations where both parties were European residents. The court adjourned the proceedings for procedural reasons.

41. By interlocutory judgments of 30 September and 11 November 2011 the Braşov District Court ordered that the separate set of proceedings which D.B. had instituted against the applicant seeking an injunction for his agreement to the children being issued a Romanian passport and to their travelling abroad be joined to the divorce-and-custody proceedings. In addition, the court allowed the parties' request for evidence, including testimonial evidence. It adjourned the proceedings pending the submission of evidence and for procedural reasons.

42. By an interlocutory judgment of 21 November 2011 the Braşov District Court dismissed the applicant's preliminary objection concerning

the Romanian courts' lack of jurisdiction in respect of the proceedings regarding the injunction requested by his wife. It held that the proceedings were subsidiary to the divorce-and-custody proceedings and that the court had already ruled that the Romanian courts had jurisdiction in matrimonial and custody matters. The court reiterated the arguments it had relied on in the interlocutory judgment of 2 September 2011. It dismissed the application for the suspension of the proceedings before the Romanian courts pending the outcome of the divorce proceedings instituted by the applicant against his wife before the U.S. courts. It held that the suspension request was unfounded given the provisions of the Council Regulation. Also, it had already been ruled that the Romanian courts held jurisdiction in respect of the proceedings to which the applicant was party, and the Superior Court of Forsyth County in the U.S. had acknowledged that decision. The court adjourned the proceedings pending the submission of evidence by the parties.

43. By interlocutory judgments of 23 January, 5 March, 14 May, 30 July and 24 September 2012 the Braşov District Court adjourned the proceedings pending the submission of evidence by the parties, the receipt of information about the applicant's income from his employer and the outcome of the international rogatory commission proceedings conducted by the Ministry of Justice in order to hear the foreign nationals chosen by the applicant to testify on his behalf.

44. By an interlocutory judgment of 27 May 2013 the Braşov District Court adjourned the proceedings in order to allow the applicant to submit a written declaration stating his intention or refusal to pay for the travel expenses of the witnesses he had asked for and who were living abroad.

45. By an interlocutory judgment of 10 June 2013 the Braşov District Court dismissed the applicant's request that the court order the Ministries of Justice and Foreign Affairs to contact the U.S. authorities in order to hear the American witnesses selected by the applicant. It held that since the proceedings had started, it had repeatedly issued such orders without any results for the case. In addition, Article 1 of the Hague Convention acknowledged that the civil-procedure rules applied to the administration of evidence before the first-instance court. Consequently, it turned down the applicant's request to have American witnesses heard because he had refused to pay their travel expenses to Romania in order to appear before the court. Lastly, it allowed the applicant's request to adjourn the proceedings pending the submission by his wife of documentary evidence regarding her income.

46. By an interlocutory judgment of 20 June 2013 the Braşov District Court dismissed a request submitted by the applicant to replace the foreign witnesses who could not be heard, on the ground that the lawful requirements for witness replacement had not been met. It adjourned the proceedings for deliberations.

47. By a judgment of 26 June 2013 the Braşov District Court allowed in part an action lodged by the applicant's wife. It took into account the children's best interests and relied on the children's testimonies of 14 December 2012, other documentary and testimonial evidence and a social inquiry report produced by the Braşov Guardianship Authority in respect of the children's living conditions, their social and educational development, and their relationship with their father and his family since their departure from the U.S. It held that both spouses were responsible for the divorce. Also, it considered that a request by D.B. to maintain her married name even after the divorce had been finalised was in her best interests and those of the children. In awarding sole custody of the children to their mother, it ordered that the children live with their mother and that their father pay monthly maintenance. Moreover, it ordered the applicant to agree to passports being issued in his children's names and to their occasional travel abroad accompanied by their mother. It granted the applicant visiting rights at their mother's home. The applicant appealed against the judgment.

48. By a judgment of 13 December 2013 the Braşov County Court allowed in part the applicant's appeal and amended the judgment of the first-instance court. In particular, it awarded the applicant joint custody of the children and yearly visiting rights for a month during the summer holiday and for a week during the winter holiday. It also granted the applicant the right to take the children to his home in Romania or the U.S. or to leave the country with them during the periods they were allowed to spend time together. The applicant's wife appealed on points of law against the judgment.

49. By a final judgment of 12 March 2014 the Braşov Court of Appeal allowed his wife's appeal on points of law against the judgment of 13 December 2013, quashed the said judgment and upheld the judgment delivered by the first-instance court on 26 June 2013.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND DOCUMETS

50. The relevant provisions of Law no. 369/2004 on the enforcement of the Hague Convention, in so far as relevant, read as follows:

...

Article 6

The proceedings under Article 3 of the Convention seeking the return of the child living in Romania shall be examined urgently.

...

Article 9

...

The hearing of the child who is ten years old is mandatory. The child who is not ten years old may be heard by the court if it considers that it is necessary.

A psychologist attached to the Bucharest social assistance and child protection agencies shall attend the hearing of a child and shall produce a psychological report if requested by the court.

...

Article 12

The judgment shall be reasoned within ten days from the date it was delivered on.

The judgment is subject to appeal on points of law before the Bucharest Court of Appeal within ten days from the date it was communicated to the parties."

51. The relevant provisions of the Hague Convention, which entered into force in respect of Romania on 30 September 1992, read, in so far as relevant, as follows.

"The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

...

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 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 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

...

Article 11

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

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

Article 12

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

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

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

Article 13

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

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

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

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

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

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

...

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

...

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

..."

52. The Explanatory Report on the 1980 Hague Child Abduction Convention, prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982, seeks to throw into relief the principles which form the basis of the 1980 Convention and to supply to those who must apply the Convention a detailed commentary on its provisions. It appears from this report that, in order to discourage the possibility for the abducting parent to have his or her action recognised as lawful in the State to which the child has been taken, the Convention enshrines, in addition to its preventive aspect, the restoration of the *status quo*, by an order for immediate return of the child, which would make it possible to restore the situation that had been unilaterally and wrongfully changed. Compliance with custody rights is almost entirely absent from the scope of this Convention, as this matter is to be discussed before the relevant courts in the State of the child's habitual residence prior to removal. The philosophy of the Hague Convention is to fight against the multiplication of international abductions, based always on a wish to protect children by acting as interpreter of their real interests. Accordingly, the objective of prevention and immediate return corresponds to a specific conception of "the child's best interests". However, as the child's removal may be justified for objective reasons which have to do either with his or her person, or with the environment with which he or she is most closely connected, the Convention allows for certain exceptions to the general obligations on the States to ensure an immediate return (§ 25). Since the return of the child is the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty, and it is possible to distinguish exceptions which derive their justification from three different principles (§ 27). Firstly, the authorities of the requested State are not bound to order the return of the child if the person requesting the return was not actually exercising custody rights or where his or her behaviour shows acceptance of the new situation (§ 28). Secondly, paragraphs 1b and 2 of Article 13 contain exceptions which clearly derive from a consideration of the interests of the child, to which the Convention gives a definite content. Thus, the interest of the child in not being removed from his or her habitual residence without sufficient guarantees of stability in the new environment gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation (§ 29). Lastly, there is no obligation to return a child when, in terms of Article 20, his or her return "would not be permitted by the fundamental principles of the requested

State relating to the protection of human rights and fundamental freedoms" (§ 31). The explanatory report, which sets out those exceptions, also emphasises the margin of appreciation inherent in the judicial function.

53. In 2003 the HCCH published Part II of the "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction". Although primarily intended for the new Contracting States and without binding effect, especially in respect of the judicial authorities, this document seeks to facilitate the Convention's implementation by proposing numerous recommendations and clarifications. The Guide repeatedly emphasises the importance of the Explanatory Report to the 1980 Convention, known as the Pérez-Vera Report, in helping to interpret coherently and understand the 1980 Convention (see, for example, points 3.3.2 "Implications of the transformation approach" and 8.1 "Explanatory Report on the Convention: the Pérez-Vera Report"). In particular, it emphasises that the judicial and administrative authorities are under an obligation, *inter alia*, to process return applications expeditiously, including on appeal (point 1.5 "Expeditious procedures"). Expeditious procedures should be viewed as procedures which are both fast and efficient: prompt decision-making under the Convention serves the best interests of children (point 6.4 "Case management").

54. 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, in so far as relevant reads as follows:

Preamble

(17)"In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. [...]"

Article 11

"1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention [..], in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

[...]

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged [...]"

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

55. The applicant complained, under Articles 6, 8, 14, 17 and 18 of the Convention, Article 1 of Protocol No. 12 and Article 5 of Protocol No. 7, that the Romanian courts had misinterpreted the provisions of the Hague Convention and relied exclusively on the opinion of his children to deny him their return to the U.S., and had failed to provide sufficient reasons for ignoring the injunctions delivered by the U.S. courts and the documents submitted by the U.S. authorities. He also complained that the courts had failed to expedite the proceedings, which had prevented him from exercising his parental rights as the children had remained under their mother's control. He had therefore incurred much higher legal costs than the children's mother. Also by unlawfully transferring the *de facto* jurisdiction on custody matters to the courts in the State of refuge, the Romanian courts had discriminated against him and placed him at a substantial disadvantage *vis-à-vis* his wife.

56. 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. Also, it observes that the complaint raised by the applicant under other Articles of the Convention is closely linked to his complaint under Article 8. Therefore, it considers 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."

A. Admissibility

57. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

58. The applicant submitted that at the time of the Hague Convention proceedings he had had joint custody of his children with his wife. However, the Romanian authorities failed to ensure the speedy return of his children to the U.S. in breach of his rights guaranteed by the European Convention on Human Rights ("the Convention"), even though they had acknowledged the unlawfulness of his children's retention in Romania.

59. The applicant further contended that the relationship he enjoyed with his children belonged to the sphere of family life protected by Article 8 of the Convention. In addition, he contested the Government's argument that the interference with his family life had been lawful under Article 13 § 2 of the Hague Convention. Moreover, by refusing to return his children to the U.S., the Romanian courts had forced him to become a party to divorce-and-custody proceedings in two different countries and had ignored the proceedings pending before the American courts. Furthermore, he had been unable to exercise his parental rights because of the geographical distance.

60. The applicant also submitted that the Hague Convention proceedings had been excessively lengthy, had been plagued by errors and amounted to a failure of the Romanian authorities to take any measures, including extra-judicial ones, to help reunite him with his children. In addition, the domestic courts had refused to order the return of his children by relying exclusively on their opinion, even though the children did not have the required maturity to make such a decision. Moreover, the courts had negated the effect of the Hague Convention by misinterpreting its provisions and failing to strike a fair balance between the competing interests of the parties.

61. The Government submitted that the decision rendered by the domestic courts did not constitute an interference with the applicant's right to respect for family life. In any event, even if the Hague Convention proceedings did amount to an interference with the applicant's family life, that interference had a legal basis, namely Article 13 § 2 of the Hague Convention. It had also served the legitimate aim of protecting the children's best interests.

62. The Government stressed that the domestic non-judicial bodies, in particular the Romanian Ministry of Justice, had represented the applicant actively and appropriately before the domestic authorities. The applicant had been involved in the decision-making process, had been represented throughout the proceedings by a legal representative of his choosing, had been informed about all the relevant procedural steps and had been given the opportunity to submit oral and written observations. In addition, the domestic courts had a wide margin of appreciation in respect of the factual circumstances of the case and were better placed to decide them. The courts relied on all the evidence adduced in the case, including witnesses' testimonies, a social inquiry report produced by the relevant authorities in respect of the children's living conditions and the children's statement. The wording of the domestic judgments clearly showed that the judges had had the children's best interests at heart, as well as the need to ensure their psychological development, and that they had struck a fair balance between the parties' conflicting interests.

63. The Government also submitted that the Hague Convention proceedings had unfolded without unreasonable delays. The domestic courts had administered an extensive amount of evidence without periods of inactivity and although the case file had been remitted for retrial once, the judgments delivered by the courts had been promptly communicated to the parties.

2. The Court's assessment

64. The Court reiterates that the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life and is protected under Article 8 of the Convention (see *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005, and *Iosub Caras v. Romania*, no. 7198/04, §§ 28-29, 27 July 2006).

65. In the sensitive area of family relations, the State is not only bound to refrain from taking measures that would hinder the effective enjoyment of family life, but, depending on the circumstances of each case, should take positive action in order to ensure the effective exercise of such rights. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France,* no. 39388/05, § 62, 6 December 2007), bearing in mind, however, that the child's best interests must be the primary consideration (see *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX) and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child" (see *X v. Latvia [GC]*, no. 27853/09, § 95, 26 November 2013).

66. The Court recalls that it has already held that within the legal framework set up by the Hague Convention and the Council Regulation, if

the children's opinions must be taken into account, their opposition is not necessarily an obstacle to their return (see *Raw v. France*, no. 10131/11, § 94, 7 March 2013).

67. Notwithstanding the State's margin of appreciation, the Court is called upon to examine whether the decision-making process leading to an interference was fair and afforded those concerned to present their case fully, and that the best interests of the child were defended (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 99, ECHR 2000-I, with further references, and *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

68. Moreover, the States' obligations under Article 8 of the Convention are to be interpreted in harmony with the general principles of international law, and, in the context of international child abduction, particular account must be given to the provisions of the Hague Convention (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18, and *Ignaccolo-Zenide*, cited above, § 95).

69. To that end, the Court considers that a harmonious interpretation of the European Convention and the Hague Convention can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention (see *Neulinger and Shuruk v. Switzerland [GC],* no. 41615/07*,* § 133, ECHR 2010).

70. In consequence, the Court considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable objection to the child's return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing or accepting such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see *Maumousseau and Washington*, cited above, § 73), is necessary. This will also enable the Court, whose task is not

to take the place of the national courts, to carry out the European supervision entrusted to it (see *X v. Latvia [GC]*, cited above, § 107).

71. Furthermore, as the Preamble to the Hague Convention provides for children's return "to the State of their habitual residence", the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place.

72. The Court also reiterates that in matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see *Iosub Caras*, cited above, § 38). The delays in the procedure alone enable the Court to conclude that the authorities had not complied with their positive obligations under the Convention (see *Shaw v. Hungary*, no. 6457/09, § 72, 26 July 2011).

73. In the instant case, while they acknowledged that their mother's refusal to return them to their habitual residence in the U.S. had been unlawful within the meaning of Article 3 of the Hague Convention, the domestic courts dismissed the applicant's request for the return of his children. The Court finds that, in spite of the Government's submission to the contrary, such a measure constituted an interference with the applicant's right to respect for family life (see *Iosub Caras,* cited above*,* § 30, and *Karrer v. Romania*, no. 16965/10, § 42, 21 February 2012).

74. Notwithstanding the applicant's arguments, the Court accepts, however, the Government's submissions that the interference was provided for by law, namely Article 13 § 2 of the Hague Convention, which entered into force for Romania in September 1992 and forms part of its domestic law, and that it pursued the legitimate aim of protecting the children's best interests.

75. The Court must therefore determine whether the interference in question was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, interpreted in the light of the above-mentioned international instruments, and whether, when striking a balance between the competing interests at stake, the authorities acted swiftly and appropriate consideration was given to the children's best interests, within the margin of appreciation afforded to the State in such matters.

76. The Court notes that the domestic courts examined whether the children's retention to Romania had been justified and whether there existed any exceptions under the Hague Convention precluding their return to the U.S. In doing so, the courts examined the evidence submitted by the parties and found that the children's father, who enjoyed joint custody of the children and had exercised it prior to their departure from the U.S., had not

agreed to their retention in Romania. In addition, there was no grave risk that their return would expose them to physical or psychological harm or to an intolerable situation, in spite of the strict social and religious upbringings as well as the physical punishments argument the applicant's wife had raised before the domestic courts (see paragraphs 26 and 32, above).

77. The Court also notes that the domestic court's decision to refuse the children's return to their State of habitual residence had been based on their objection to return. In this connection, the Court notes that the first-instance court had heard the children directly in the absence of any of their parents or relatives and after they had received psychological counselling. All the three children had freely stated that they objected to their return to the U.S. In addition, the domestic courts provided reasons why they considered that the children had attained a sufficient degree of maturity for their opinions to be taken into consideration and for refusing to distinguish between the situations of the three children on the basis of their age (see paragraph 33, above).

78. While, the Court would like to underline its concern with the fact that only one of the children had been over ten years old at the time, namely almost eleven, and met the minimum lawful age requirement for her opinion to be heard by the domestic courts, it is prepared to accept that the conditions for the domestic courts to be able to rely on the exception provided by Article 13 § 2 of the Hague Convention had been met. In particular, the children had objected to their return and they had been considered by the judicial authorities to be sufficiently mature for their statements to be taken into account. In addition, given the wording of the aforementioned Article of the Hague Convention, the Court can also accept that the opinion of the children can be an independent exception under the Hague Convention which, on its own, may support the exercise of discretion to refuse to order a return.

79. In terms of the weight the domestic courts gave to the children's objections, the Court notes that according to the reasoning of the domestic courts they were decisive for their decision to refuse their return to the State of their habitual residence.

80. In this connection, the Court observes, however, that Article 13 § 2 of the Hague Convention or its interpretation by the Elisa Pérez-Vera Explanatory Report does not require a judge to automatically accede to the child's stated wishes even if the said judge finds that the child has attained a sufficient degree of maturity (see paragraphs 51 and 52, above). Therefore, the Court considers that while the Convention recognizes that the objecting child should have a voice, it does not consider that voice to amount to a veto in the process of deciding whether he or she will be returned. Consequently, it appears that the domestic courts may be called to examine also other aspects of the child's circumstances before exercising the discretion to refuse to order a return.

81. In this context the Court notes that the domestic courts also examined other aspects of the children's circumstances. However, it is not entirely convinced that the domestic courts had sufficiently balanced the applicant's interest of a right to family life against the competing interest of the other parties in the case and therefore had sufficiently protected the best interest of the children as defined in the light of the Hague Convention principles. In particular, the Court notes that when assessing the risks entailed by a potential separation of the children from their current environment, the last-instance court concluded that it amounted to a serious risk for them (see paragraph 33, above). Although, it is uncontested that in reaching its conclusion the last-instance court mentioned, without going into detail, the conclusions of the psychological evaluation reports available to the domestic case file, the Court notes that the said court gave no express consideration to the issue of whether the children could quickly re-adapt to a return in the U.S. Moreover, it does not appear that the courts attempted to examine if it would have been possible for the children to return to the U.S. accompanied by their mother and whether arrangements could have been made within the legal framework of the State of habitual residence or following agreements with the father for them to live together, separately from their father, pending the outcome of divorce and custody proceedings, and consequently whether such arrangements would have alleviated the serious risks mentioned by the court.

82. Such express considerations appear even more relevant given that according to the psychological evaluation report and the social investigation report submitted by the parties before the Court the opinion of the psychologist was confined to the harm to the child which would flow from an immediate separation from their mother (see paragraphs 15 and 18, above). The reports did not directly address the question of the children's return or stated that it would be in any way harmful if they were to return to the U.S. accompanied by their mother and lived separately from their father. The fact that the applicant's wife appeared to have refused the amiable settlement of the case prior to the initiation of the Hague Convention proceeding, does not amount in the Court's view to a justification for a failure to clearly and duly consider the aforementioned aspect.

83. In addition, the Court notes from the outset that Article 11 of the Hague Convention imposes a six-week time-limit for a return decision, failing which the decision body may be requested to give reasons for the delay. The Court further notes that the European Union subscribes to the same philosophy, accepting delays in respect of the afore-mentioned time-limit only in exceptional circumstances, in the framework of a system involving only EU Member States and based on a principle of mutual trust. Despite this recognised urgency, in the instant case a period of more than thirteen months elapsed from the date on which the applicant lodged his

request for the return of the children to that on which the final decision was taken (see paragraphs 16 and 31, above).

84. The Court notes in this connection that the appellate court had quashed the judgment of the first-instance court on account of procedural flaws which had been independent of the applicant's actions. Also the domestic authorities had allowed for a month and several days to lapse before they had re-registered the case on the fist-instance court's docket. In addition, the first-instance court held the first re-hearing of the case only one month and several weeks after the file had been re-registered on its docket (see paragraphs 23-26, above).

85. The Court also observes that the Bucharest County Court failed to provide any explanation to the applicant for the length of the proceedings following his request of 12 February 2010 for a statement on the delay in the proceedings (see paragraph 29, above). In addition, no satisfactory explanation was put forward by the Government to justify the delays.

86. Consequently, the Court considers that the domestic authorities failed to act expeditiously in the proceedings to return the children, manifestly in breach of the applicable law.

87. In this connection, the Court notes that the domestic courts considered that a potential return of the children to the U.S. against their will would have destabilized them and would have subjected them to pressures which would have negatively affected their future development, particularly since the relationship between their parents had radically changed since they had left the U.S. (see paragraph 34, above).

88. The Court recalls that the interests of the child are paramount in such cases. Thus it may well have been justified, more than thirteen months after the removal from the U.S. of the applicant's children, for the domestic courts to hold that the family situation they had been familiar with at the time of the departure had changed and that it was in their best interests to remain in Romania with their mother although, at that time, no final decision had established her residence there. However, where the Court accepts that a change in the relevant facts may exceptionally justify such a decision, it must be satisfied that the change was not brought about by the State's actions or inactions (see, *mutatis mutandis, Sylvester v. Austria*, applications no. 36812/97 and 40104/98, § 59, 23 April 2003).

89. Having found that the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation, the Court considers that the change in the children's circumstances was also considerably influenced by the slow reaction of the authorities.

90. In the light of the foregoing, the Court considers that the applicant suffered a disproportionate interference with his right to respect for his family life, in that the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 of the Convention.

91. It follows that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

92. The applicant complained that the divorce-and-custody proceedings instituted against him by his wife had been unreasonably lengthy. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal ..."

A. Admissibility

93. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

94. The applicant submitted that the divorce-and-custody proceedings instituted against him by his wife had been excessively lengthy. While he acknowledged that the proceedings had been complex and unusual, he argued that the complexity of the case was not sufficient to justify the delays. He further submitted that, unlike the authorities, he had not been responsible for any of the repeated procedural delays and could not be held responsible for using the available means to present his case.

95. The Government submitted that the present case was particularly complex considering the exceptional character of both the factual and the legal questions involved. In addition, the proceedings were not plagued by long periods of inactivity on the part of the authorities. The divorce-and-custody proceedings had been suspended for more than thirteen months Therefore, that thirteen-month period should not be taken into account when assessing the total length of the proceedings.

96. The Government contended that numerous procedural steps had been undertaken during the proceedings following requests by the applicant, including attempts to hear witnesses residing in the U.S. by means of international rogatory commission proceedings and examination of preliminary objections raised by him concerning the alleged lack of jurisdiction of the Romanian courts. Therefore, the applicant had substantially contributed to the length of the proceedings.

97. The Government further submitted that the length of the proceedings had not been excessive and had not had a negative impact on the applicant.

2. The Court' s assessment

98. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case; the conduct of the applicant and the relevant authorities; and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

99. While it is not the Court's task to determine whether the proceedings in which the applicant was involved were properly stayed (see, *mutatis mutandis*, *Broka v. Latvia*, no. 70926/01, § 24, 28 June 2007), delays caused by the adjournment or suspension of proceedings pending the outcome of another case can be attributable to the State (see, *mutatis mutandis*, *König v. Germany*, 28 June 1978, §§ 104-05, Series A no. 27). Furthermore, when assessing the relevance and reasonableness of an adjournment of a case pending the outcome of another case, the Court must take into account what is at stake for the persons involved (see, *mutatis mutandis*, *Tibbling v. Sweden*, no. 59129/00, § 32, 11 October 2005).

100. The Court notes that the divorce-and-custody proceedings instituted against the applicant by his wife lasted from 14 October 2008 to 12 March 2014. Consequently, the period to be taken into consideration is five years and five months for three levels of jurisdiction.

101. The Court considers that there have been repeated procedural delays over the entire course of the proceedings. It can accept that the case against the applicant could be regarded as complex and that the applicant was also responsible for some of the delays. That being said, it cannot but note that the proceedings, including the period in which they were adjourned pending the outcome of the Hague Convention proceedings, have lasted for more than four years and eight months only before the first-instance court. Given what was at stake for the applicant and the fact that it has already found that the Hague Convention proceedings were excessively lengthy, the Court considers that the length of this period and the overall length of the proceedings cannot be justified by the complexity of the case and the adjournments caused by the applicant alone. In the Court's opinion, the length of the proceedings can only be explained by the failure of the domestic authorities to deal with the case diligently (see *Gümüşten v. Turkey*, no. 47116/99, §§ 24-26, 30 November 2004).

102. Having regard to all the evidence before it, the Court finds that the length of the divorce-and-custody proceedings at issue does not satisfy the "reasonable time" requirement.

103. There has accordingly been a breach of Article 6 § 1 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

104. The applicant complained, under Article 6 of the Convention, of the unfairness of the Hague Convention proceedings, in particular that the interlocutory judgment of 13 April 2009 had been missing from the domestic case file and that the domestic authorities had failed to send him a copy of the final judgment of 25 March 2010. In respect of the divorce-and-custody proceedings instituted against him by his wife, after the case had been communicated to the Romanian Government he complained under the same Article that the domestic courts' refusal to hear foreign witnesses on his behalf through the international rogatory commission proceedings or to expedite the said proceedings, and the fact that he had had to incur high financial costs in order to submit the relevant testimonial and documentary evidence, had amounted to a breach of his right to a fair trial and prevented him from defending his rights.

105. The Court has examined the complaints as submitted by the applicant. However, having regard to all the material in its possession, and in so far as they fall within its jurisdiction, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46

106. Article 46 of the Convention provides, in so far as relevant:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ..."

107. Given the special circumstances of the present case, in particular, the subsequent developments in the children's and their family's situation, the Court does not consider that its judgment should imply the return of the applicant's children to the U.S. (see *mutatis mutandis Pontes v. Portugal*, no. 19554/09, § 110, 10 April 2012).

B. Article 41

108. 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."

1. Damage

109. The applicant claimed 22,559 United States dollars (USD) (approximately 16,500 euros (EUR)) in respect of pecuniary damage and USD 180,000 (approximately EUR 131,600) in respect of non-pecuniary damage. He argued that the pecuniary damages claimed were for costs incurred for legal representation and transportation related to the parallel divorce-and-custody proceedings which he had had to institute before the U.S. courts. In addition, he contended that he had suffered non-pecuniary damage owing to the anxiety and distress he had experienced as a result of the excessively lengthy proceedings before the Romanian courts and the separation from his children.

110. The Government submitted that the pecuniary damages claimed by the applicant actually represented costs and expenses incurred by him and should be examined accordingly. They contended that the finding of a violation would provide sufficient just satisfaction with regard to non-pecuniary damage.

111. The Court shares the Government's view that the pecuniary damages claimed by the applicant represent costs and expenses incurred by him and considers that the claim should be examined accordingly. Consequently, it finds no reason to award the applicant any sum under this head.

112. The Court considers that the applicant must have suffered distress as a result of the Hague Convention and the divorce-and-custody proceedings in which he was involved. It considers that sufficient just satisfaction would not be provided solely by a finding of a violation. Consequently, making an assessment on an equitable basis, the Court awards the applicant EUR 9,750 in respect of non-pecuniary damage, plus any tax that may be chargeable.

2. Costs and expenses

113. The applicant also claimed a total of EUR 27,497, including the aforementioned EUR 16,500, for the costs and expenses incurred before the domestic Romanian and American courts, and EUR 2,365 for those incurred before the Court. He submitted copies of invoices and court judgments supporting part of his claims.

114. The Government submitted that the amount claimed by the applicant was excessive and was not fully supported by the documents submitted by him.

115. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to the above criteria, the supporting documents submitted by the applicant, the fact that part of the expenses concerned proceedings in countries outside the Court's jurisdiction and the nature of the issues dealt with, the Court considers it reasonable to award the sum of EUR 8,000 to cover the applicant's costs and expenses.

3. Default interest

116. The Court considers it appropriate that the default interest rate 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

1. *Declares* unanimously the complaint under Article 8 concerning the Hague Convention proceedings and the complaint under Article 6 of the Convention concerning the length of the divorce-and-custody proceedings instituted against the applicant by his wife admissible and the remainder of the application inadmissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention on account of the Hague Convention proceedings;

3. *Holds* unanimously that there has been a violation of Article 6 of the Convention on account of the length of the divorce-and-custody proceedings instituted against the applicant by his wife;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 9,750 (nine thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of 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;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

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

J.C.M.
S.Q.

PARTLY DISSENTING OPINION OF JUDGE LÓPEZ GUERRA JOINED BY JUDGE MOTOC

I agree with the Chamber's finding concerning the violation of Article 6 § 1 of the Convention based on the excessive length of the divorce and custody proceedings instituted against the applicant by his wife (point 3 of the operative provisions). However, I do not share the Chamber's opinion concerning a violation of Article 8 of the Convention on the basis of the provisions of the Hague Convention (point 2). As I see it, the Chamber's reasoning and final decision on the issue deal with matters which should be left to the consideration of the domestic courts, which were in a much better position to assess directly the individual characteristics of this case.

Indeed, from a substantive point of view this Court is not in a position to criticize the Romanian courts' interpretation and application of Article 13 § 2 of the Hague Convention in this case. Accepting that there was an interference in the applicant's right to family life, it is clear that such interference was based on law, since the Hague Convention, which entered into force in Romania in September 1992 (see paragraph 72 of the judgment), must be considered as a part of that country's domestic law. The Romanian courts applied that law, taking the evidence that they examined into account in an immediate and direct way. They relied on different types of evidence: a private report (paragraph 15), an official report prepared by the Brasov Guardianship Authority (paragraph 17) and testimony by the applicant's children (paragraph 20). As a result, the Romanian courts (the Bucharest County Court initially, and the Bucharest Appeals Court in a final decision) ruled that the best interests of the children would be better protected if the applicant's action were dismissed, and the children were allowed to remain in Romania. The reasoning of both the County Court and the Court of Appeal was extended and detailed (see paragraphs 20 and 31), and explicitly assessed the credibility and reliability of the children's testimony, given their youth (nine-year old twins and an eleven-year old sister). Furthermore, it must be stated that this is also the approach followed by Council Regulation (EC) 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibilities, Article 11 of which states that "When applying Articles 12 and 13 of the Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity".

Based on that evidence, the Romanian Courts concluded that Article 13 § 2 of the Hague Convention, which provides that children should not be returned to a requesting State if the competent authorities find "that the child objects to being returned and has attained the age and degree of maturity at which it is appropriate to take account of his views", and as

interpreted in Elisa Pérez Vera's Explanatory Report, was applicable in this case. They concluded that the return of the children would be detrimental to their psychological equilibrium, and would have subjected them to pressures which could have affected negatively their future development (see paragraph 34).

In such a delicate matter I do not see how this Court, without having any direct means to assess the circumstances and testimonies of the children and parties, can substitute its own opinion for the decisions of the courts which examined the case, furthermore declaring that this Court "is not entirely convinced that the domestic courts had sufficiently balanced the applicant's interests of a right to family life against the competing interests of the other parties [to] the case" (see paragraph 81). On the contrary, the facts of the case show that the Romanian courts did indeed carefully assess the balance of interests at stake. It is always possible to propose or suggest additional and alternative elements to those present in the domestic courts' rulings. But the question here was whether those courts took the relevant facts of the case into account (such as the psychological reports and the testimonies of the children) and whether, in view of those facts, they reached a decision and explained it in a rational and non-arbitrary way. Since they did, and since this Court lacks any means for directly assessing those elements, I do not believe that this Court can deem the Romanian courts' determination of what constituted the best interest of the children as "unsatisfactory".

The second reason given in the Chamber's judgment to support its finding of a violation of Article 8 is the time which elapsed from the date on which the applicant lodged his request for the return of the children to the date on which the final decision was adopted (see paragraph 83). But here, once again, I do not find that the duration of the proceedings violated that Convention provision. The entire proceedings lasted eleven months. Yet the initial judgment of the Bucharest County Court was given less than two months after the Romanian Minister of Justice instituted proceedings on behalf of the applicant. Moreover, the substantive content of that judgment, dismissing the applicant's petition, was ultimately upheld by the Bucharest Court of Appeal after the applicant's two appeals. Given this circumstance and the importance of the matter, the length of the proceedings was not excessively long. Furthermore, the proceedings were further extended by the fact that the Romanian legal system allowed the applicant to resort to internal remedies to defend his position against the initial decision denying his petition.

Since the task of this Court is to apply and interpret the provisions of the European Convention on Human Rights (Article 32 § 1), it has repeatedly stated that States' obligations are to be interpreted in harmony with the general principles of international law and that, in connection with Article 8, particular weight must be attached to the provisions of the Hague Convention. In view of Article 11 of the Hague Convention, a provision

which states that "the judicial and administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children", and for the reasons set out above, the Chamber ought to have ruled that the Romanian Courts acted with the required rigour and expedience, and thus fulfilled their obligations under Article 8 of the Convention.