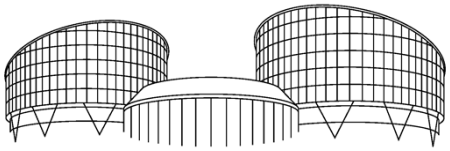

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF O.C.I. AND OTHERS v. ROMANIA

(Application no. 49450/17)

JUDGMENT

STRASBOURG

21 May 2019

This judgment is final but it may be subject to editorial revision.

In the case of O.C.I. and Others v. Romania,

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

Paulo Pinto de Albuquerque, *President,*
Egidijus Kūris,
Iulia Antoanella Motoc, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 30 April 2019,

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

PROCEDURE

1. The case originated in an application (no. 49450/17) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 23 June 2017, by Ms O.C.I., who is also acting on behalf of her children, N.A.R. and P.A.R. ("the applicants"). They are all Romanian nationals. In addition, the children also hold Italian nationality. The President of the Section decided to grant the applicants anonymity pursuant to Rule 47 § 4 of the Rules of Court.

2. The applicants were represented by Mr A. Amuza, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, most recently Mr V. Mocanu, of the Ministry of Foreign Affairs.

3. The Italian Government were notified under Article 36 § 1 of the Convention and Rule 44 § 1 (a) of the Rules of Court of their right to intervene in the present case, but did not state the wish to do so.

4. On 13 February 2018 notice of the application was given to the Government.

5. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background of the case

6. The first applicant, Ms O.C.I., was born in 1978 and lives in Tulcea. In 2005 she married P.L.R., an Italian national. The couple lived together in Italy, where O.C.I. gave birth to their children: the second applicant, P.A.R., in 2008, and the third applicant, N.A.R., in 2010.

7. On 12 June 2015 the family went to Romania for the summer holidays. A few days later P.L.R. returned to Italy, expecting to go back to collect the applicants at the end of summer. On 25 June 2015 the first applicant informed her husband that she and the children would no longer return to Italy. She said that she saw no future for them there. Moreover, she told P.L.R. that he was a bad father who mistreated his children.

8. On 14 September 2015 P.L.R. lodged a criminal complaint against the first applicant in Italy for child abduction in a foreign country.

B. Proceedings for the return of the children to Italy

9. On 29 September 2015 P.L.R. applied to the Bucharest County Court for the return of the second and third applicants to Italy, the place of their habitual residence. He relied on the provisions of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") and those of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("the Brussels II *bis* Regulation"). He contended that he had not agreed that the second and third applicants would remain permanently in Romania. In his view, the mother had unilaterally changed the children's residence which, he argued, constituted wrongful retention.

10. The first applicant opposed the action. She alleged that P.L.R. was a violent father who often got angry with is children when they did not obey him. According to the first applicant, P.L.R. would beat up the children, bruising their faces and giving them nose bleeds. He would pull them by the ears, slap their faces and hit their bottoms. Sometimes he would undress them and beat their bodies with hard objects. He would also call them names and humiliate them. The violence had worsened in recent years and the first applicant had become a target as well. She had tried to intervene but to no avail. She had encouraged her husband to seek medical help for his behaviour, but he had refused. Eventually, the first applicant had decided to find refuge with the children in Romania. She submitted as evidence several

recordings of discussions between the applicants and P.L.R. during their common life in Italy, showing episodes similar to those described above.

11. The first applicant further explained that the children had become integrated in their new environment. They attended school in Romania and had made friends. They participated in after-school activities that they had always wanted to try but had in the past been denied by their father. She also explained that the children refused to speak with their father. They feared going back to Italy and being again subject to abuse.

12. The County Court heard evidence from the parents (hearing of 27 September 2015) and interviewed the children in the presence of a psychologist (on 16 November 2015).

13. In a judgment of 18 January 2016 the Bucharest County Court allowed the application for the return of the children to their habitual residence in Italy. It found that there was nothing to oppose the children's return to Italy. The court concluded that the mother had influenced the children against their father. It also considered that her decision to leave Italy had been made because of marital problems and because of her own dissatisfaction. As for the allegations that the children ran a grave risk of being exposed to physical or psychological harm at their father's hands, it found as follows:

> "The evidence in the file proves without doubt that the father used physical force and a raised voice to discipline his children. [P.L.R.] confirmed this in his statement before the court.
>
> The child has the right to respect for his dignity, which entails prohibition under any circumstances of any act of physical or psychological violence against the child. It is therefore evident that nothing can justify a departure from this norm."

14. The first applicant appealed, and in a final decision of 30 March 2017 the Bucharest Court of Appeal upheld the order to return the children. The Court of Appeal considered that the existence of criminal proceedings against the first applicant in Italy did not constitute grounds for refusing the return. In fact, the Court reasoned, in accordance with the European arrest warrant procedure, a criminal sentence would have the same effect regardless of whether the first applicant lived in Romania or Italy.

The Court of Appeal reassessed the allegations of grave risk for the children in Italy and concluded as follows:

> "... it cannot be inferred that occasional acts of violence such as those which were proved by the recordings adduced in the file, would reoccur often enough to pose a grave risk ... under Article 13 § 1 (b) of the Hague Convention ...
>
> ... it is reasonable to expect that the Italian authorities would give the assurance that they would take the measures required by the [Brussels II *bis* Regulation], so that the aim of the Hague Convention would be observed, namely that a child is not removed or retained in the name of rights linked to his person which are to a larger or lesser extent debatable. It is also reasonable to suppose that if after the decision is rendered

the children are exposed to a risk, [the Italian authorities] would take such requisite measures, if the risk was brought to their attention and supported by evidence."

C. Enforcement of the return order

15. On 11 July 2017 P.L.R. started enforcement proceedings through the offices of a bailiff in Romania.

16. On 28 September 2017 the bailiff together with P.L.R. and a psychologist from the Bucharest Directorate General for Social Welfare and Child Protection ("the child-protection authority") spoke with the children, with their mother's permission. It was noted that the children refused to go back to Italy with their father. Consequently, the child-protection authority sought a court order for a three-month psychological counselling programme for the children. On 7 December 2017 the Tulcea District Court granted the request. The enforcement proceedings were stayed during that period.

17. A report of 29 May 2018 on the results of the counselling stated that the children refused contact with their father despite the first applicant's efforts to encourage that relationship. Therapy for the children was recommended.

18. On 29 March 2018 P.L.R. sought enforcement in Romania of a Parma District Court order granting him sole parental authority. On 10 July 2018 the first applicant lodged an objection to the enforcement. On 13 July 2018 the court stayed the enforcement proceedings, at the first applicant's request, on the grounds that the children's refusal to go back to Italy with their father had already been established.

19. It appears from the parties' observations that at least on 26 September 2018 (the date of the most recent relevant information) the applicants were still living in Romania.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

20. The relevant provisions of the domestic law concerning implementation of the Hague Convention are presented in *Ferrari v. Romania* (no. 1714/10, §§ 25-28, 28 April 2015).

21. The relevant domestic law concerning prohibition of corporal punishment and the child-protection authority's duties in the matter are described in *D.M.D. v. Romania* (no. 23022/13, §§ 21-22, 3 October 2017). In the same judgment, the relevant international standards concerning domestic abuse against children are also summarised (ibid, §§ 25-35).

22. The relevant provisions of the international instruments applicable in the present case are presented in *X v. Latvia* ([GC] no. 27853/09, §§ 34-42, ECHR 2013), notably: the relevant articles of the Hague Convention; excerpts of the Explanatory Report on the Hague Convention prepared by

Elisa Pérez-Vera and of the Guide to Good Practice under the Hague Convention; the relevant provisions of the United Nations Convention on the Rights of the Child and General Comment No. 7 (2005) on implementing child rights in early childhood; those of the Charter of Fundamental Rights of the European Union; and those of the Brussels II *bis* Regulation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

23. The applicants complained that their right to respect for their family life, protected by Article 8 of the Convention, had been infringed, in so far as the courts ordering the return of the second and third applicants to Italy had failed to take into account the grave risk that they would be subject to physical or psychological harm at the hands of their father. For the same reasons, the applicants considered that, in failing to protect the children against the risk of abuse, the authorities had breached their positive obligations enshrined in Article 3 of the Convention.

24. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

25. Article 8 of the Convention 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

26. The Court notes that the application 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' observations

(a) The applicants

27. The applicants argued that the Government had a positive obligation to secure a safe environment for the children, free from domestic violence and corporal punishment. They further contended that the best interests of the children to grow up in a safe environment should override that of the father to be with his children.

28. The applicants considered that the domestic courts had not examined in depth the family situation, and consequently had not interpreted correctly the best interests of the children. In particular, the domestic courts had condoned abuse of "average intensity" and transferred all responsibility for the children's well-being to the Italian authorities.

29. The applicants argued that the domestic authorities had failed to take into account that the children would suffer additional psychological trauma if returned to their tormentor. They explained that having spent three years in Romania, they had become integrated in their new environment. Moreover, the first applicant faced criminal investigations in Italy which constituted additional stress for the applicants.

(b) The Government

30. The Government reiterated that the proceedings for the return of the children, which were at the heart of the applicants' complaint, were restricted to solely verifying the admissibility of the request, the illicit nature of the retention and the existence of any of the exceptions provided for by the Hague Convention. They were not meant to replace the proceedings concerning attribution of parental authority and custody of the children.

31. The Government admitted that there had been an interference with the applicants' right to respect for their family life but considered that that interference was provided for by law, pursued a legitimate aim and was proportionate to that aim. They argued that the first applicant had had the opportunity to participate fully in the proceedings, which had been adversarial. Moreover, she had had the opportunity both to present evidence and to express her position on the evidence produced by the other party.

32. The Government further averred that the domestic courts had examined the allegations of a "grave risk" as defined by the Hague Convention. Those courts had neither tolerated nor accepted domestic violence and had moreover reiterated in their decisions that emotional abuse of children was prohibited. Their decision to return the children to their father had been based on the assumption that the Italian system was equally capable of protecting the children's rights.

33. Lastly, the Government pointed out that the enforcement of the return order had been stayed by the domestic courts, in order to allow the children to undergo psychological counselling in Romania.

2. The Court's assessment

(a) General principles

34. The relevant principles regarding the interference with the right to respect for family life, as well as the State's positive obligations under Article 8 of the Convention in cases concerning the return of a child under the Hague Convention, are summarised in *X v. Latvia* ([GC], no. 27853/09, §§ 92-108, ECHR 2013).

35. In particular, the Court reiterates that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see *Anghel v. Italy*, no. 5968/09, § 79, 25 June 2013). The factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the Hague 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. These factors must be evaluated in the light of Article 8 of the Convention (see *X v. Latvia*, § 106). Moreover, the best interests of the child must be of primary consideration (ibid., §§ 95-96). Lastly on this point the Court reiterates that the Hague Convention has to be interpreted and applied in the context of the Brussels II *bis* Regulation, when both States are parties to this instruments (see, *mutatis mutandis*, *K.J. v. Poland*, no. 30813/14, § 58, 1 March 2016)

36. In addition, the Court reiterates its finding in *D.M.D. v. Romania* (no. 23022/13, § 51, 3 October 2017) that respect for children's dignity cannot be ensured if the domestic courts were to accept any form of justification of acts of ill-treatment, including corporal punishment. The Court considered that Member States should strive to expressly and comprehensively protect children's dignity which in turn requires in practice an adequate legal framework affording protection of children against domestic violence, including, *inter alia*, reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge (ibid.).

(b) Application of those principles to the present case

37. The Court notes that the Government expressly admitted in their submissions that there had been an interference with the applicants' right to respect for their family life (see paragraph 31 above). The Court further

observes that the interference was provided for by law, namely Article 12 of the Hague Convention, and that it pursued the legitimate aim of protecting the children's best interests (see, *mutatis mutandis*, *Blaga v. Romania*, no. 54443/10, § 74, 1 July 2014).

38. The Court must therefore determine whether the interference in question was also "necessary in a democratic society" within the meaning of the second paragraph of Article 8 of the Convention, interpreted in the light of the applicable 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 (see paragraph 22 above, as well as *X v. Latvia*, cited above, § 54, and *Blaga*, cited above, § 75).

39. In this connection, the Court notes that the applicants complained about the manner in which the domestic authorities had interpreted the notion of "grave risk" enshrined in Article 13 (b) of the Hague Convention as grounds for an exception to the principle of returning children to the place of their habitual residence.

40. The Court reiterates that in the context of an application for return, which is distinct from custody proceedings, it is primarily for the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties, to establish the best interests of the child and evaluate the case in the light of the exceptions provided for by the Hague Convention (see *Ferrari v. Romania*, no. 1714/10, § 46, 28 April 2015, and *Anghel*, cited above, § 80). Nevertheless, the Court must satisfy itself that the decision-making process leading to the adoption of the impugned measures by the domestic courts was fair and allowed those concerned to present their case fully, and that the best interests of the child were defended (for details, see *X v. Latvia*, cited above, § 102, with further references). This means, in the circumstances of the present case, that the Court must assess whether the allegations of "grave risk" raised by the first applicant before the domestic courts were genuinely taken into account by those courts (ibid., §§ 106, 107 and 115, with further references).

41. In this context, the Court notes that the first applicant substantiated the allegations of violence against the children by submitting recordings of past episodes of abuse (see paragraph 10 above *in fine*). The father also admitted in court that he had used physical force to discipline his children (see paragraph 13 above). The domestic courts established that the second and third applicants had been subject to use of physical force at the hands of their father (see paragraph 13 above). The Court will now look at how the domestic courts assessed that information and how they weighed it in the children's best interests.

42. The domestic courts, while condemning in general terms abuse against children and reaffirming their right to respect for their dignity, were

nevertheless satisfied that what the second and third applicants had suffered at the hands of their father had only been occasional acts of violence and would not reoccur "often enough to pose a grave risk" (see paragraphs 13 and 14 above). Moreover, the Court of Appeal seems to have considered that the children's right not to be subject to domestic abuse was "to a larger or lesser extent debatable" (see paragraph 14 above). The Court fails to see how those statements fit in with the relevant provisions of domestic law prohibiting in absolute terms domestic corporal punishment (see, *mutatis mutandis*, *D.M.D. v. Romania*, cited above, § 49). In fact, such assessments of the children's rights run counter to the very prohibition of domestic abuse against children and cast doubt on the decision-making process.

43. The Court must reiterate that the best interests of the children, which unquestionably include respect for their rights and dignity, are the cornerstone of the protection afforded to children from corporal punishment (ibid.). Corporal punishment against children cannot be tolerated and States should strive to expressly and comprehensively prohibit it in law and practice (see *D.M.D. v. Romania*, cited above, §§ 50-51). In this context, the risk of domestic violence against children cannot pass as a mere inconvenience necessarily linked to the experience of return, but concerns a situation which goes beyond what a child might reasonably bear (see, *mutatis mutandis, X v. Latvia,* cited above, § 116).

44. Furthermore, there is nothing in the domestic courts' decisions that leads the Court to believe that they considered that the children were no longer at risk of being violently disciplined by their father if returned to his care. In fact, it can be inferred from the reasoning of the Bucharest Court of Appeal that that court accepted that if such a risk reoccurred, the Italian authorities would be able to react and to protect the children from any abuse of their rights, but only "if the risk was brought to their attention and supported by evidence" (see paragraph 14 above).

45. On this point, the Court notes that as member States of the European Union ("the EU"), both States are parties to the Brussels II *bis* Regulation, which is thus applicable in the case (see *K.J. v. Poland*, cited above, § 58). That Regulation, which builds on the Hague Convention, is based on the principle of mutual trust between EU member States (see *Royer v. Hungary*, no. 9114/16, § 50, 6 March 2018). However, in the Court's view, the existence of mutual trust between child-protection authorities does not mean that the State to which children have been wrongfully removed is obliged to send them back to an environment where they will incur a grave risk of domestic violence solely because the authorities in the State in which the child had its habitual residence are capable of dealing with cases of domestic child abuse. Nothing in the Hague Convention or in the Brussels II *bis* Regulation allows the Court to reach a different conclusion.

46. In this connection, and bearing in mind that a child's return cannot be ordered automatically or mechanically when the Hague Convention is

applicable (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 138, ECHR 2010, and *M.K. v. Greece*, no. 51312/16, § 75, 1 February 2018), the Court considers that the domestic courts should have given more consideration to the potential risk of ill-treatment for the children if they were returned to Italy. They should have at least ensured that specific arrangements were made in order to safeguard the children.

47. In the light of the above, and notwithstanding the principle of subsidiarity, the Court concludes that the domestic courts failed to examine the allegations of "grave risk" in a manner consistent with the children's best interests within the scope of the procedural framework of the Hague Convention.

48. There has accordingly been a violation of Article 8 of the Convention.

49. Bearing in mind the conclusion it has reached in the paragraph above, the Court considers that no separate issue arises under Article 3 of the Convention, as the facts which form the object of the applicants' allegations of risk of submission to inhuman and degrading treatment have already been examined under Article 8 (see, *mutatis mutandis*, *A, B and C v. Ireland* [GC], no. 25579/05, § 274, ECHR 2010).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

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

A. Damage

51. The applicants claimed the following amounts in respect of non-pecuniary damage:

- 5,000 euros (EUR) for the first applicant,
- EUR 10,000 for the second applicant, and
- EUR 10,000 for the third applicant.

52. Making reference to previous cases concerning similar matters (see *Ferrari*, § 62, and *Blaga*, § 115; judgments cited above, as well as *Monory v. Romania and Hungary*, no. 71099/01, § 96, 5 April 2005; *Karrer v. Romania*, no. 16965/10, § 62, 21 February 2012; and *Raw and Others v. France*, no. 10131/11, § 101, 7 March 2013), the Government argued that the amounts requested by the applicants in the present case were excessive. They considered that the finding of a violation constituted sufficient compensation for the non-pecuniary damage allegedly sustained by the applicants.

53. The Court considers that the applicants must have sustained non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Having regard to the nature of the violation found and making its assessment on an equitable basis, the Court awards jointly to the applicants EUR 12,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

54. The first applicant also claimed EUR 8,400 for the costs and expenses incurred before the domestic courts and for those incurred before the Court, representing lawyers' fees and costs for translation and transmission of documents. She sent documents attesting notably to the payment of: 100 Romanian Lei (RON – approximately EUR 20) for the lawyer who had represented the applicants in the domestic proceedings; RON 14,325.40 (approximately EUR 3,000) for the lawyer in the proceedings before the Court; and RON 2,975 (approximately EUR 625) representing translation costs for the period from 17 September 2015 to 24 September 2018.

55. The Government contested the relevance of the costs allegedly incurred by the applicants. They also pointed out that most of the alleged expenses were not accompanied by supporting documents.

56. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the first applicant the sum of EUR 3,645 covering costs under all heads.

C. Default interest

57. 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that no separate issue arises under Article 3 of the Convention;

4. *Holds*

(a) that the respondent State is to pay, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 12,500 (twelve thousand five hundred euros) jointly to the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,645 (three thousand six hundred and forty-five euros) to the first applicant, plus any tax that may be chargeable to her, 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* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 May 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Deputy Registrar

Paulo Pinto de Albuquerque
President