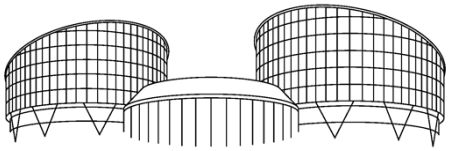

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MICHNEA v. ROMANIA

(Application no. 10395/19)

JUDGMENT

Art 8 • Respect for family life • Domestic court's dismissal of the request for the return of the infant to Italy • Custody exercised jointly by both parents prior to removal • Child integrated in a social and family environment in Italy prior to her removal • No explanation concerning the domestic court precedence to the parents' Romanian domicile over the clear factual elements indicating family life in Italy • Relying on the CJEU findings in another case without undertaking any assessment of the contextual difference between that case and the applicant's case • Domestic court refusal not sitting well with the facts or with the purpose of the Hague Convention to safeguard the child's best interests by restoring the status quo and ensuring her immediate return to their country of habitual residence in the event of unlawful abduction • Finding of the habitual residence in Italy and existence of shared custody normally sufficient to conclude child's removal from Italy without the applicant's consent wrongful in terms of Hague Convention • Hague Convention found not to be applicable at domestic level • No identification of the best interests of the child and not taking them into account in assessing the family situation • Interpretation and application of the Hague Convention and of the Brussels II bis Regulation failing to secure the guarantees of Art 8

STRASBOURG

7 July 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Michnea v. Romania,

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

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Jolien Schukking, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 10395/19) 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 national, Mr Gheorghe Michnea ("the applicant"), on 1 February 2019;

the decision to give notice of the application to the Romanian Government ("the Government");

the decision to give priority to the application (Rule 41 of the Rules of Court);

the parties' observations;

Having deliberated in private on 9 June 2020,

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

INTRODUCTION

1. The application concerns an alleged infringement of the applicant's right to respect for his family life, in so far as a court decision dismissed his request for the return of his infant child to Italy, where the applicant resides and where he and his wife lived when the child was born in March 2017. The Bucharest Court of Appeal refused to order the return on the grounds that the child could not be considered to have her habitual residence in that country.

THE FACTS

2. The applicant was born in 1974 and lives in Bresso, Italy. He was represented by Mr A. Grigoriu, a lawyer practising in Bucharest.

3. The Government were represented by their Agent, most recently Ms O.F. Ezer, of the Ministry of Foreign Affairs.

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

5. The applicant, who had been living and working in Italy since 2006, met X on social networks. At that time, X, who is a Romanian national, was

living in Romania. They married in December 2016 and in February 2017 X moved to Italy to live with the applicant. In March 2017 their daughter Y was born in Italy. In accordance with the relevant legal provisions, the parents exercised jointly the parental authority over Y from her birth (Article 483 of the Romanian Civil Code). X and Y were issued residence cards by the Italian authorities. Y benefited from Italian medical insurance from birth.

6. X wanted to return to Romania with the child, but the applicant was opposed to the idea. The matter was a source of frequent conflict between the couple. The applicant warned X that he would rather give up the child for adoption in Italy than have her raised in her grandparents' home in Romania.

7. On 22 May 2017 the applicant made an offer to buy a flat in Italy and paid a deposit of 1,000 euros (EUR) to secure the transaction.

8. On 9 August 2017, X took Y to Romania without the applicant's consent. They travelled by car, with the help of an acquaintance who had come specifically from Romania to pick them up.

9. On the same day, the applicant contacted the Italian police, because he feared that X had unlawfully removed the child to Romania. On 8 September 2017, relying on the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention" – see paragraph 24 below), the police forwarded the applicant's complaint to the Italian Ministry of Justice, which contacted the Romanian Ministry of Justice in order to enquire about the child's whereabouts.

10. On 18 January 2018 the Romanian Ministry of Justice located X and Y in Romania and informed X about the applicant's request for the return of the child.

11. On 17 November 2017 the applicant lodged a criminal complaint with the prosecutor's office attached to the Reghin District Court against X, whom he accused of unlawful deprivation of liberty. On 12 February 2018 the prosecutor decided not to bring a criminal prosecution in the case (*clasarea*) on the grounds that, on the one hand, X had no intention to harm the child – the alleged victim of the crime – and, on the other hand, she had not prohibited the applicant from visiting the child in her home.

I. PROCEDURE UNDER THE HAGUE CONVENTION

12. On 8 February 2018 the applicant lodged an action with the Bucharest County Court under the provisions of the Hague Convention, seeking the return of his child to Italy.

13. On 3 April 2018 the County Court allowed the request. It found that the child's habitual residence was in Italy and that X had decided unilaterally to change that, in violation of the applicant's parental rights. The court found no indication that the return of the child to Italy would

cause her irreparable harm in the sense of Article 13 of the Hague Convention. It also dismissed as unfounded X's allegations that the applicant would have neglected his parental responsibilities.

14. X and the public prosecutor appealed and on 14 June 2018 the Bucharest Court of Appeal quashed the decision and dismissed the applicant's request for the return of the child to Italy.

15. The Court of Appeal considered that the County Court had wrongly applied the provisions of Article 3 of the Hague Convention to the facts of the case. Relying on the findings of the Court of Justice of the European Union (hereinafter, "the CJEU") in the *Barbara Mercredi* judgment (see paragraph 28 below), the court found that at the relevant time the child's habitual residence had not been in Italy, but in Romania. In this connection, it observed that the couple had had their permanent residence in Romania both when the child had been conceived and when they had married. The court noted that at the time when the marriage had been concluded and Y had been born, the applicant and his wife had been living in a flat rented temporarily in Italy, their lawful residence being still in Romania at that time.

16. Furthermore, the parents had not been in agreement about changing their residence permanently to Italy. In the court's view, the mere fact that the applicant worked in Italy (since January 2016, according to the evidence submitted to the file), lived in Italy (with X and Y also registered as living with him) and had expressed the intention to buy property there (which eventually he had not done), could not change that fact.

17. The appellate court further observed that X did not speak Italian and had not worked in Italy. In addition, when she had taken Y, who had been only five months old, to Romania, she had still been breastfeeding her. The court was not persuaded that the mere fact that Y had been born in Italy changed her place of residence.

II. DIVORCE PROCEEDINGS

18. On 30 August 2017 X lodged an action with the Sighetul Marmaţiei District Court, seeking a divorce and custody of the child.

19. The case was heard by the Sighetul Marmaţiei District Court. The applicant, through his lawyer, announced that his permanent residence was within the geographical jurisdiction of that court. His father's family lived in that area.

20. On 7 May 2018 the court pronounced the couple's divorce, awarded X sole parental responsibility for the child and set Y's place of residence with her mother. The court found as follows:

> "The exchange of messages [between the parties] shows that [the applicant] exhibited an attitude of hatred [towards X], as he threatened that he would first bring

the girl back to Italy and [had said] then 'I will deal with [X's family] and [I] promise you will never see the girl again'.

...

The evidence administered in the present case shows that only the mother is invested in raising the child, who has lived with her since birth ... [The applicant] affirmed repeatedly that he would rather give the child up for adoption than allow her to be raised by her mother and did not contribute in any way to her upbringing; for these reasons the court grants exclusive parental authority to the mother."

21. On 8 May 2019 the Maramureş County Court rendered the final decision in the case. It upheld the County Court's ruling in respect of the parental authority and the child's residence.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

22. The relevant provisions of Law no. 369/2004 on the enforcement of the Hague Convention are presented in *Ferrari v. Romania* (no. 1714/10, §§ 25-28, 28 April 2015, and *Blaga v. Romania*, no. 54443/10, § 50, 1 July 2014).

II. INTERNATIONAL MATERIAL

23. 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).

A. The Hague Convention

24. The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention") was ratified by Romania by Law no. 100/1992. The relevant parts of that Convention read as follows:

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 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."

25. The Explanatory Report on the Hague Convention prepared by Elisa Pérez-Vera ("the Explanatory Report") defines as follows the notion of "the best interests of the child":

"21. ... the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard.

24. ... [the philosophy of the Hague Convention] can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. ... the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child.

... the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.

25. It is thus legitimate to assert that the two objects of the Convention – the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment – both correspond to a specific idea of what constitutes the 'best interests of the child'. However ... it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained."

26. The Explanatory Report defines as follows the notion of the child's "habitual residence" and "wrongful removal":

"64. ... the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the status quo to be regarded as wrongful, [this Article] indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal. Let us examine more closely the import of these conditions.

...

66. ... the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile.

...

68. The first source referred to in Article 3 is law, where it is stated that custody 'may arise ... by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child.

...

71. ... from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

B. Brussels II *bis* Regulation

27. 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 (known as "the Brussels II *bis* Regulation") reads, in particular, as follows:

Article 3 General jurisdiction

"1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, insofar as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses."

Article 10 Jurisdiction in cases of child abduction

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

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

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

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

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

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

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

Article 11 Return of the child

"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 of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 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."

C. Case-law of the Court of Justice of the European Union

28. In the *Barbara Mercredi* judgment (22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829)[1] the Court of Justice of the European Union (hereinafter "the CJEU"), interpreted the concept of "habitual residence" as follows:

"21. That relationship [between Ms. Mercredi and Mr Chaffe] produced a daughter named Chloé, a French national, who was born on 11 August 2009. In the week following the birth of that child, Ms Mercredi and Mr Chaffe, whose relationship had not been stable for some time and who were no longer living together after Mr Chaffe had left the family home, separated.

22. On 7 October 2009, when Chloé was two months old, Ms Mercredi and her daughter left England for the island of Réunion, where they arrived on the following day. The child's father was not told beforehand of the departure of the mother and the child but he received a letter, on 10 October 2009, in which Ms Mercredi set out the reasons for that departure.

[1] Full text of the judgment here.

...

41. By its first question, the referring court seeks clarification, in essence, on how properly to interpret the concept of 'habitual residence' for the purposes of Articles 8 and 10 of the Regulation, in order to determine which court has jurisdiction to make orders on matters relating to rights of custody, in particular where, as in the case in the main proceedings, the dispute concerns an infant who is lawfully removed by her mother to a Member State other than that of her habitual residence and has been staying there only a few days when the court in the State of departure is seised.

...

56. It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

57. If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 13 of the Regulation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that the refusal of the Romanian courts to order the return of his child to Italy had breached his right to respect for his family life, protected by 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

30. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

31. The applicant reiterated that Y had been born in Italy and had lived in that country continuously until X had unlawfully taken her to Romania. She had an Italian residence permit and was covered by the Italian medical insurance scheme. Moreover, at that time, the couple's intention had been to make a life together in Italy. He and X, as Y's parents, had been married and living in Italy where he had been a resident and gainfully employed.

32. Although at that time the parents had been exercising joint parental authority, X had decided unilaterally, without the applicant's consent, to return with the child to Romania. She had made the trip by car in order to elude the border controls and thus the legal requirements for crossing a border with an infant.

33. The applicant further argued that in its final decision of 14 June 2018, the Court of Appeal had not taken into account the child's best interests.

(b) The Government

34. The Government argued that the Court of Appeal had made a correct interpretation of the Hague Convention, balancing the different interests at stake and deciding what was best for the child. They reiterated that it was for the domestic authorities to establish the child's habitual residence. In the present case they had done so in full compliance with the CJEU's ruling on the matter. They argued that neither X nor Y had been integrated in Italian society when they had left that country, in August 2017: X had spent very little time in Italy and Y had been only four months old at the time.

2. The Court's assessment

(a) General principles

35. 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) and have been recently reiterated in *Vladimir Ushakov v. Russia* (no. 15122/17, §§ 76-83, 18 June 2019).

36. The Court has held in particular that in the area of international child abduction, the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child of 20 November 1989, and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (ibid., § 93, with further references; as to fundamental rights and the principle of mutual trust within the EU, see *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 46-49, ECHR 2016).

37. In all decisions concerning children, their best interests must be paramount (ibid., § 96, as well as *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 204, 10 September 2019). The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of 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 (Article 13, first paragraph, (b)). The Court further notes that the European Union subscribes to the same philosophy, in the framework of a system involving only European Union member States and based on a principle of mutual trust. The Brussels II *bis* Regulation, whose rules on child abduction supplement those already laid down in the Hague Convention, likewise refers in its Preamble to the best interests of the child (see paragraph 42 above), while Article 24 § 2 of the Charter of Fundamental Rights emphasises that in all actions relating to children the child's best interests must be a primary consideration (see *X v. Latvia*, § 97, cited above).

38. In the specific context of this case, the Court reiterates that it does not propose to substitute its own assessment for that of the domestic courts. That said, notwithstanding the State's margin of appreciation, 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 (ibid., § 102 with further references, and *Blaga v. Romania*, no. 54443/10, § 67, 1 July 2014).

39. In particular, the Court reiterates 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 make a ruling giving specific reasons in the light of the circumstances

of the case. This will 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 *Vladimir Ushakov*, cited above, § 83).

(b) The application of those principles to the facts of the present case

40. At the outset, the Court considers that the Bucharest Court of Appeal's decision of 14 June 2018 denying the return of the applicant's child to Italy constituted interference with the applicant's right to respect for his family life. At that time the applicant and X were married and thus enjoyed common custody of their child. The Court reiterates that it has found that the requirements of the Hague Convention also apply to married couples exercising joint custody of their children without any judicial decision being needed in this respect (see *Monory v. Romania and Hungary*, no. 71099/01, § 76, 5 April 2005, as well as paragraph 26 above). Consequently, and despite X's allegations to the contrary (see paragraph 13 *in fine*), the Court has no reason to doubt that custody was effectively exercised jointly by both parents prior to removal.

41. It then remains to be determined whether the interference was "in accordance with the law", pursued one or more legitimate aims and was "necessary in a democratic society" (see *Andersena v. Latvia*, no. 79441/17, § 133, 19 September 2019).

42. The Court firstly observes that the interference was provided for by law, namely Article 3 of the Hague Convention ratified by the respondent State through Law no. 100/1992 (see paragraph 24 above). On this point, the Court also 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*, no. 30813/14, § 58, 1 March 2016).

43. Secondly the Court observes, that the Bucharest Court of Appeal acted in what it considered to be pursuit of the legitimate aim of protecting the rights and freedoms of the child (see, *mutatis mutandis*, *Vladimir Ushakov*, cited above, § 87, and *Blaga*, cited above, § 74), which is coherent with the protection of the rights and freedoms of others, provided for by Article 8 § 2 of the Convention.

44. Lastly, the Court must 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 relevant international instruments, and whether when striking a balance between the competing interests at stake, appropriate weight was given to the child's best interests, within the margin of appreciation afforded to the State in such matters (see paragraph 38 above as well as *X v. Latvia*, cited above, § 54, and *Vladimir Ushakov*, cited above, § 88). In order to do so, the Court will have regard to the reasoning advanced by the Court of Appeal for its decision (see paragraphs 15 to 17 above).

45. The Court notes that the following circumstances led the Court of Appeal to conclude that Italy had not been the State of Y's habitual residence: the parents had married and conceived the child in Romania and were registered as resident in that State (see paragraph 15 above); they had not agreed to change their place of residence to Italy (see paragraph 16 above); Y had been a mere infant at the time of her removal (see paragraph 17 above); and the mother did not speak Italian or work in Italy at that time (ibid.).

46. The Court will ascertain whether the above interpretation and application of the provisions of the Hague Convention and of the Brussels II *bis* Regulation by the Court of Appeal secured the applicant's rights guaranteed under Article 8 of the Convention (see paragraph 36 above, as well as *Vladimir Ushakov*, cited above, § 92).

47. The Court notes that the applicant's daughter was born in March 2017 in Italy, where she had lived all her life prior to her removal to Romania in August 2017. She was registered in Italy at birth and benefited from Italian health insurance (see paragraph 5 above). Prior to August 2017, the applicant, X and Y had been living together in Italy as a family, a fact recognised by the Court of Appeal in its decision. It can thus be inferred that Italy was the only home the child had known at that time. The Court also draws inspiration from the principles of the Brussels II *bis* Regulation as interpreted by the CJEU in its case-law and cannot but note that prior to her removal from Italy, the child had been, at least to a certain degree, integrated in a social and family environment in that country (see paragraph 28 above).

48. The Court observes that during the divorce proceedings the applicant, through his lawyer, announced that his permanent residence was within the geographical jurisdiction of the Sighetul Marmaţiei District Court in Romania (see paragraph 19 above). That said, the Court must reiterate that, for the purpose of the Hague Convention, the concept of "habitual residence" is a question of pure fact, differing from domicile (see the Explanatory report cited in paragraph 26 above). It is, however, unclear from the decision of the Court of Appeal whether such a distinction was made in the present case and, if it was, on what grounds. The Court of Appeal's decision does not explain why that court gave precedence to what appears to be the parents' Romanian domicile over the clear factual elements before it indicating that the family had been living in Italy at the time of the child's birth and until her removal and had made all the arrangements upon her birth to register her in Italy and to allow her to benefit from the Italian welfare system (see paragraphs 5 and 15 above).

49. Moreover, it appears that the Court of Appeal relied on the CJEU findings in the *Barbara Mercredi* judgment without making any assessment of the contextual difference between that case and the case brought before it by the applicant. In fact, none of the outstanding factual differences between

the two cases seems to have featured in the Court of Appeal's decision, such as: the fact that in the *Barbara Mercredi* judgment the mother had sole custody over the child and the parents were not living together. The Court considers that the particular circumstances of that case, which were significantly different than those of the case currently under examination, did call for a more in depth examination of the scope of the custodian parent's rights.

50. For those reasons, and notwithstanding the principle of subsidiarity, the Court must conclude that the domestic court's refusal to acknowledge Italy as the country of Y's habitual residence does not sit well with the facts (compare, *Vladimir Ushakov*, cited above, § 92) of the present case or with the purpose of the Hague Convention which is primarily to safeguard the children's best interests by restoring the status quo and ensuring their immediate return to their country of habitual residence in the event of unlawful abduction (see *X v. Latvia*, cited above, § 97, and paragraph 25 of the Explanatory Report to the Hague Convention, cited at paragraph 25 above). The domestic court did not attach any weight to the fact that Y had been removed from Italy without the applicant's consent, which breached his rights protected by law and interfered with their normal exercise. Therefore, it appears that the provisions of the applicable law were in the present case interpreted and applied in such a way as to render meaningless the applicant's lack of consent for Y's departure to Romania and subsequent stay there.

51. The above factual elements, notably the finding that the habitual residence had been in Italy (see paragraph 50 above) and the existence of shared custody (see paragraph 40 above *in fine)* would normally have been sufficient to reach the conclusion that the Hague Convention was applicable and that Y's removal from Italy without the applicant's consent had been wrongful in terms of that Convention. This would then have triggered the duty to return Y to Italy, under Article 12 of the Hague Convention (see paragraph 24 above) unless one of the exceptions provided for by Article 13 of that Convention was met (see, *mutatis mutandis*, *Vladimir Ushakov*, cited above, § 94). No such assessment was made by the Court of Appeal, insofar as the Hague Convention was found not to be applicable in the case. Equally important, the Court finds no indication in the Court of Appeal's decision that that court identified the best interests of the child and appropriately took them into account in making its assessment of the family situation, as required by Article 8 of the Convention (see the case-law quoted in paragraph 37 above). It must be observed, however, that the only court which examined the family situation in the light of the Hague Convention, the County Court, considered that there was no reason to oppose the return of the child to Italy (see paragraph 13 above).

52. Having regard to the circumstances of the case seen as a whole, the Court concludes that the interpretation and application of the provisions of

the Hague Convention and of the Brussels II *bis* Regulation by the Court of Appeal failed to secure the guarantees of Article 8 of the Convention and that the interference with the applicant's right to respect for his family life had not been "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

56. The Government argued that the applicant had failed to specify the basis for his claim for damages and the connection between the violation alleged and the amount sought.

57. The Court considers that the applicant 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 the applicant EUR 7,500 in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant also claimed EUR 6,225 for costs and expenses, representing his lawyer's fees, as follows:

- EUR 1,525 for those incurred before the domestic courts in the proceedings for the return of the child; and
- EUR 4,700 for those incurred before the Court, notably EUR 1,200 for the proceedings before the case had been notified to the Government, EUR 1,500 for the representation after notification, and EUR 2,000 representing a success fee to be paid directly to the lawyer's account;

59. The applicant provided the Court with invoices attesting to the payment of the sums indicated above to the lawyer's office that had represented him in the proceedings for the return of the child and to the lawyer's office that had represented him in the proceedings before the Court, except for the success fee.

60. The Government argued that it could not be ascertained from the invoices submitted by the applicant whether the costs had been incurred for the proceedings for the return of his child or for the divorce proceedings. They further averred that the claim for the costs of legal representation before the Court was exaggerated, in light of the object of the case.

61. 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 were actually and necessarily incurred and are reasonable as to quantum. Moreover, the Court reiterates that a representative's fees are actually incurred if the applicant has paid them or is liable to pay them (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI, and *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017, with further references).

62. The Court observes that the agreements concluded by the applicant with his representatives – giving rise to obligations solely between lawyer and client – cannot bind the Court, which must assess the level of costs and expenses to be awarded with reference not only to whether the costs are actually incurred but also to whether they have been reasonably incurred (see, *mutatis mutandis*, *Iatridis*, cited above, § 55). Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 1,525 for costs and expenses in the domestic proceedings and the sum of EUR 2,700 for the proceedings before the Court, thus making a total award of EUR 4,225, plus any tax that may be chargeable to the applicant.

C. Default interest

63. 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*
   (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:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,225 (four thousand two hundred and twenty-five euros), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 7 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President