EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF SYLVESTER v. AUSTRIA

(Applications nos. 36812/97 and 40104/98

JUDGMENT

STRASBOURG

24 April 2003

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 Sylvester v. Austria,
The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. Rozakis, *President*,

Mrs F. Tulkens,

Mr G. Bonello

Mr P. Lorenzen,

Mrs N. Vajic,

Mrs S. Botoucharova,

Mrs E. Steiner, *judges*,

and Mr S. Nielsen, *Deputy Section Registrar*,
Having deliberated in private on 3 April 2003,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 36812/97 and 40104/98) against the Republic of **Austria** lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Thomas Richard **Sylvester**, a national of the United States of America, and Ms Carina Maria **Sylvester**, a national of **Austria** and of the United States of America ("the applicants"), on 26 May 1997 and 26 February 1998 respectively.
2. The applicants were represented by Mr S. Moser, a lawyer practising in Graz. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.
3. The applicants alleged that the non-enforcement of the final return order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction had violated their rights under Articles 6 and 8 of the Convention.
4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).
5. The applications were allocated to the former Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
6. By a decision of 24 October 2000 the Court decided to join the applications and to communicate them to the respondent Government.
7. The applicant and the Government each filed written observations on the admissibility and merits. In addition, third-party comments were received from Mrs Monika **Sylvester**, the second applicant's mother, Mrs Jan Rewers McMillan, attorney at law, and the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, non-governmental organisations concerned with the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which had each been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).
8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).
9. By a decision of 26 September 2002 the Court declared the applications admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants were born in 1953 and 1994 respectively. The first applicant lives in West Bloomfield (Michigan) and the second applicant lives in Graz.

11. The first applicant married an Austrian citizen in April 1994. The marriage was concluded in the United States of America, where the couple set up their common residence. On 11 September 1994 their daughter, the second applicant, was born. The family's last common residence was in Michigan. Under the law of the State of Michigan the parents had joint custody over the second applicant.
12. On 30 October 1995 the first applicant's wife, without obtaining his consent, left the United States with the second applicant and took her to **Austria**.
13. On 31 October 1995 the first applicant, relying on the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), requested the Austrian courts to order the second applicant's return. In these and the subsequent proceedings the first applicant was represented by counsel.
14. On 3 November 1995 the second applicant's mother filed an application with the Graz District Civil Court (*Bezirksgericht für Zivilrechtssachen*) for the award of sole custody over the second applicant.
15. On 20 December 1995 the Graz District Civil Court, after having heard evidence from the first applicant and his wife and the oral statement of an expert in child psychology, Dr. K., ordered that the second applicant be returned to the first applicant at her former place of residence in Michigan.
16. The court, noting that under Michigan law the first applicant and his wife had joint custody of their daughter, found that the first applicant's wife had wrongfully removed the child within the meaning of Article 3 of the Hague Convention. Moreover, it dismissed the mother's claim that the child's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention. It considered that the second applicant's return could not be hindered by the fact that the mother was her main person of reference and that returning could cause a massive trauma affecting her development. Otherwise, mothers of small children could easily circumvent the aim of the Hague Convention. As to the mother's allegation that the first applicant regularly masturbated in the presence of the child, the court referred to the expert's statement that such conduct would, in view of the child's tender age, not cause immediate harm. The fact that such conduct, if proved, could in the long run be harmful to the child would have to be assessed in the custody proceedings. Finally, it held that the mother could be expected to return with the second applicant to the United States.
17. On 19 January 1996 the Graz Regional Civil Court (*Landesgericht für Zivilrechtssachen*) dismissed an appeal by the second applicant's mother.
18. The Regional Court confirmed the District Court's assessment as regards the question whether the second applicant's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention. It noted that the onus of proof was on the person opposing the return, i.e. the second applicant's mother. Further, it noted that the statement of the expert in child psychology had denied that there was any such risk. That statement had been made on the assumption that the mother's allegations were true. However, the Regional Court emphasised that the truth of these allegations had not been proved and that the District Court had had the benefit of hearing the first applicant and, thus, of forming a personal impression of him.
19. On 27 February 1996 the Supreme Court (*Oberster Gerichtshof*) dismissed a further appeal by the second applicant's mother.
20. On 27 February 1996 the first applicant filed an application for enforcement of the return order of 20 December 1995.
21. Meanwhile, the first applicant had started divorce proceedings before the Oakland Circuit Court (Michigan). By a decision of 16 April 1996, the court pronounced a default judgment of divorce. Further, it awarded the first applicant sole custody of the second applicant and ordered that the second applicant should reside with the first applicant in the event of her return.
22. On 7 May 1996 the file arrived again at the Graz District Civil Court.
23. On 8 May 1996 the Graz District Civil Court ordered the enforcement of the return order under section 19 (1) of the Non-Contentious Proceedings Act (*Ausserstreitgesetz*). It noted that it was necessary to order coercive measures as there were indications that the mother was obstructing the child's return. She had given an interview to a local newspaper according to which she frequently changed her whereabouts and was determined not to let the child be taken away from her.
24. In the early hours of 10 May 1996, an attempt to enforce the return order was made in accordance with the terms set out in the order of 8 May. A bailiff, assisted by a police officer, a locksmith and a representative of the Youth Welfare Office, appeared at the house where the second applicant and her mother were living. The first applicant was also present. A search carried out in the house, necessitating the use of force against the second applicant's mother and the forceful opening of several doors, remained unsuccessful. On the occasion of the enforcement attempt the Supreme Court's decision of 27 February 1996 and the enforcement order of 8 May 1996 were served on the second applicant's mother.

25. On 15 May 1996 the second applicant's mother appealed against the decision of 8 May 1996 and again filed an application for the award of sole custody of the second applicant.
26. On 29 May 1996 the United States District Court, Eastern District of Michigan, issued an arrest warrant against the second applicant's mother on suspicion of international parental kidnapping.
27. On 18 June 1996 the first applicant made a further application for enforcement of the return order.
28. By a decision of 25 June 1996 the Graz District Civil Court, at the request of the second applicant's mother, transferred jurisdiction to the Leibnitz District Court, in the judicial district of which the second applicant had purportedly established her residence.
29. On 29 August 1996 the Graz Regional Civil Court granted an appeal by the first applicant against the transfer of jurisdiction and, on the mother's appeal, quashed the Graz District Civil Court's enforcement order of 8 May 1996 and referred the case back to it.
30. Referring to section 19 (1) of the Non-Contentious Proceedings Act, the court found that, in the enforcement proceedings, the child's well-being had to be taken into account in so far as a change in the situation had occurred since the issue of the return order and the taking of coercive measures. However, under Article 13 of the Hague Convention, this question was not to be examined by the court of its own motion but only upon an application by the person opposing the return. Following the service of the enforcement order of 8 May 1996 the mother had submitted, in particular, that she was the second applicant's main person of reference. Because of the lapse of time, the second applicant no longer recognised her father when she was shown his picture. By being taken away from her mother the child would suffer irreparable harm. The court therefore ordered the District Court to examine whether the situation had changed since the return order of 20 December 1995. It also ordered the District Court to obtain the opinion of an expert child psychologist on the question whether the child's return would entail a grave risk of physical or psychological harm and whether coercive measures were compatible with the interests of the child's well-being.
31. Between May and December 1996 numerous letters were exchanged between the United States Department of State and the Austrian Ministry of Justice, acting as their respective States' Central Authorities under the Hague Convention. The United States Department of State repeatedly requested information as to which steps had been taken to locate the second applicant and to enforce the return order of 20 December 1995. The Austrian Ministry of Justice replied that the first applicant was represented by counsel in the Austrian proceedings and that it was up to him to take all necessary steps to obtain the enforcement of the return order. It also pointed out that there were only rather limited possibilities to locate a child who had disappeared after a return order had been made.
32. On 15 October 1996 the Supreme Court dismissed an appeal by the first applicant and set aside the enforcement order of 8 May 1996. It noted in particular that the notion of the child's well-being was central to the entire proceedings. When ordering coercive measures under section 19 (1) of the Non-Contentious Proceedings Act, the court had to take the interests of the child's well-being into account, despite the fact that the return order was final, if the relevant situation had changed in the meantime. Having regard to the aims of the Hague Convention, a refusal of coercive measures was only justified if the child's return would entail a grave risk of physical or psychological harm for the child within the meaning of Article 13 (b) of the Hague Convention.
33. The Supreme Court acknowledged that particularly difficult problems arose in cases in which the abductor had created the situation in which the return represented a serious danger to the child's well-being. Where the abductor of a small child was the latter's main person of reference and refused to return with the child, a serious threat to the child's well-being might arise. Nevertheless, Article 13 (b) of the Hague Convention made clear that the child's well-being took priority over the Convention's general aim of preventing child abduction. Reasons of general deterrence or, in other words, the aim of showing that child abduction was not worthwhile could not justify exposing a child to a grave risk of physical or psychological harm.
34. In the present case, the mother had claimed that the child, who was now more than two years old, had become alienated from the father. The child's abrupt removal from her main person of reference and her return to the United States would cause her irreparable harm. The Supreme Court emphasised that the particularity of the case lay in the fact that, in the main proceedings, the courts had denied that there was any risk of psychological harm (as a result of the alleged sexual behaviour of the first applicant) exclusively on account of the child's tender age. In these circumstances, it could not be excluded that the child, who was now more than two years old and had been living solely with her mother for more than a year, would suffer grave psychological harm in the event of a return to her father. Thus, the Regional Court had rightly found that the question whether the return order could be enforced by coercive measures needed further examination, including an opinion by an expert in child psychology. It might also prove necessary to assess whether or not the mother's allegations were at all true.
35. In accordance with the Supreme Court's decision, the case was referred back to the Graz District Civil Court.

36. On 23 April 1997 the Oakland Circuit Court issued a "safe harbour" order, valid until 21 October 1997, which provided, *inter alia*, that pending determination of custody in expedited proceedings, the first applicant would not exercise his right to sole custody of the child; the second applicant would live with her mother away from the first applicant, who would undertake to cover their living expenses; and the arrest warrant against the mother would be set aside as soon as she and the second applicant boarded a direct flight to Michigan.
37. On 29 April 1997 the Graz District Civil Court dismissed an application by the first applicant for enforcement of the return order.
38. In the continued proceedings, the expert on child psychology, Dr. K., had submitted his opinion on 26 March 1997 and the first applicant had been given an opportunity to comment. On the basis of the expert opinion, the court found that since the second applicant's birth her mother had been her main person of reference. However, the first applicant had had regular contact with her until 30 October 1995, the date of her abduction. Thereafter they had had no contact at all. Since the return order had been made, a year and four months had elapsed and the first applicant had become a complete stranger to the second applicant. Given that a young child needed a stable relationship with the main person of reference at least until the age of six, the second applicant's removal from her main person of reference, namely her mother, would expose her to serious psychological harm. Having regard to the considerable lapse of time since the return order had been made on 20 December 1995, the District Court found that there had been a change in the relevant circumstances, in that the second applicant had lost all contact with the first applicant while her ties with her mother and her maternal grandparents had become ever closer. Consequently, her return would expose her to serious psychological harm.
39. The court noted the first applicant's statement of 28 April 1997 and his offer within the meaning of the "safe harbour" case-law but considered that this offer did not guarantee that the second applicant's relationship with her main person of reference would be preserved in the long run. As this relationship was indispensable for her well-being, the application for enforcement of the return order had to be dismissed.
40. On 28 May 1997 the Graz Regional Civil Court dismissed an appeal by the first applicant. It shared the District Court's view that the situation had changed fundamentally since the issuing of the return order. At that time the second applicant had been much younger and, given the short time which had elapsed between her abduction and the issuing of the return order, had not yet lost contact with the first applicant. A return of the second applicant accompanied by her mother could not be envisaged either. Apart from the reasons adduced by the District Court, the mother would face criminal prosecution in the United States and the child would, accordingly, be taken away from her.
41. On 2, 3 and 4 June 1997 the first applicant was granted a couple of hours of supervised access to the second applicant.
42. On 9 September 1997 the Supreme Court dismissed a further appeal by the first applicant on the ground that it did not raise any important legal issues.
43. On 29 December 1997 the second applicant's mother was awarded sole custody of the second applicant by the Graz District Civil Court. It noted that Article 16 of the Hague Convention, which prohibited the State to which the child has been abducted from taking a decision on custody while proceedings for the child's return were pending, no longer applied, as the decision not to enforce the return order had become final. Following appeal proceedings the judgment became final on 31 March 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

44. The preamble of the Convention, which has been incorporated into Austrian law, includes the following statement as to its purpose:
" ...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, ..."
45. The object of such a return is that, following the restoration of the status quo, the conflict between the custodian and the person who has removed or retained the child can be resolved in the State where the child is habitually resident. This principle is based on the consideration that the courts of the State of habitual residence are usually best placed to take custody decisions.

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 the retention; and
(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. ..."

Article 7

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
In particular, either directly or through any intermediary, they shall take all appropriate measures
(a) To discover the whereabouts of a child who has been wrongfully removed or retained;
(b) To prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
(c) To secure the voluntary return of the child or to bring about an amicable resolution of the issues;
(d) To exchange, where desirable, information relating to the social background of the child;
(e) To provide information of a general character as to the law of their State in connection with the application of the Convention;
(f) To initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
(g) Where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
(h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
(i) To keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

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 ..., the authority concerned shall order the return of the child forthwith."

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
...
(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. ..."

B. The Non-Contentious Proceedings Act

46. Section 19 (1) provides that adequate coercive measures are to be taken without any further proceedings against a party refusing to comply with court orders.
47. According to the Supreme Court's case-law the courts have, in any proceedings relating to the removal of a child, the courts have to take the interests of the child's well-being into account when assessing whether coercive measures are to be ordered and, if so, which ones are to be applied.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The applicants complained that the Supreme Court, in its decision of 15 October 1996 in the enforcement proceedings, had ordered a review of questions which had already been dealt with in the final return order under the Hague Convention and that this review had eventually led to the non-enforcement of the return order. They alleged a violation of Article 8 of the Convention which, as far as material, reads as follows:

“1. Everyone has the right to respect for his private and family life, ...

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. The Parties' Submissions

1. The applicants

49. The applicants contended that the interference with their right to respect for their family life was not justified under the second paragraph of Article 8. They submitted, in particular, that the Supreme Court's decision had been based on an erroneous interpretation of the Hague Convention and had not served a legitimate aim. The interference occasioned by the non-enforcement of the final return order had not been necessary. Rather, as in the *Ignaccolo-Zenide v. Romania* case ([GC], no. 31679/96, ECHR 2000-I), the courts had failed to take all reasonable measures to enforce the return order and the delays caused by them had eventually made the enforcement of the return order impossible. In particular, two and a half months had passed between the Supreme Court's decision of 27 February 1996 and the return of the file to the Graz District Civil Court on 7 May 1996. The applicants also contested that no further enforcement measures could be taken after the mother had appealed against the enforcement order. Moreover, the interference complained of had not corresponded to a pressing social need as the second applicant's mother could have participated in the custody proceedings before the Oakland Circuit Court.

2. The Government

50. The Government conceded that the Supreme Court's decision had constituted an interference with the applicants' right to respect for their family life. However, it had its legal basis in section 19 (1) of the Non-Contentious Proceedings Act and Article 13 (b) of the Hague Convention and served a legitimate aim, namely the child's well-being. As to the necessity of the interference, the Government emphasised that the Hague Convention did not grant an absolute right to obtain the return of an abducted child but gave priority to the child's well-being. Referring to *Nuutinen v. Finland* (no. 32842/96, ECHR 2000-VIII), they pointed out that a State could be obliged at the enforcement stage to review whether a given decision was still in the best interests of the child. Consequently, a review of whether the child's return entailed a grave risk of harm for her within the meaning of Article 13 (b) of the Hague Convention was not to be excluded at that stage. The Government contended that at the time of the Regional Court's decision of 29 August 1996 and the Supreme Court's decision of 15 October 1996, the Oakland Circuit Court had already awarded the first applicant sole custody without hearing the child's mother and without examining the first applicant's ability to take care of the child. Thus, contrary to the situation obtaining when the return order had been made, it could no longer be expected that the mother's accusations raised against the first applicant would be examined in custody proceedings before the United States' courts.

51. As to the procedural requirements inherent in Article 8, the Government asserted that the first applicant had been sufficiently involved in the decision-making process. He had been represented by counsel throughout the proceedings and had been informed about all the relevant procedural steps and given the opportunity to comment on them. Moreover, there had not been any unnecessary delays in the proceedings. Unlike in the case of *Ignaccolo-Zenide v. Romania*, the return of the child had not been delayed by the inactivity of the courts. The Graz District Civil Court had issued an enforcement order on 8 May 1996, one day after it had received the file with the Supreme Court's final decision on the return order, and an unsuccessful attempt to enforce the order had been made on 10 May 1996. No further attempts could be made as the mother had appealed against the enforcement order. Thereafter, no further enforcement attempts had been made in view of the Graz Regional Court's decision of 29 August 1996 to review the question whether the second applicant's return would entail a grave risk of harm for her. The decisions in the appeal proceedings had followed at reasonable intervals. Finally, the enforcement of the return order had been rejected on the basis of comprehensively considered judicial decisions which had weighed all the interests involved and had given priority to the child's well-being. In so doing, the courts had not exceeded the margin of appreciation afforded to them by Article 8 § 2 of the Convention.

3. The third parties

52. The third parties, Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, argued that the present case was similar to the *Ignaccolo-Zenide* ***v***. *Romania* case. The main question therefore was whether **Austria** had complied with its positive obligations under Article 8. Consequently, the "all reasonable measures" standard developed in *Ignaccolo-Zenide*, which referred in turn to the standards laid down in the Hague Convention, in particular in its Articles 7 and 11, had to be applied. In their view, the main point in issue in the case was the Austrian courts' failure to enforce the return order in a timely manner. The review of the return order in the enforcement proceedings - which, in their submission, had been contrary to the Hague Convention and the contracting State's positive obligations under Article 8 - was merely a consequence of this failure and not a justified interference with the applicants' rights under Article 8. In addition, they emphasised that the enforcement of final court orders was generally required by respect for the rule of law.

53. The mother of the second applicant, Mrs **Sylvester**, also as a third party, agreed with the Government that there was no indication of a violation of Article 8, as the Austrian courts had refused to enforce the return order on the ground that it would entail a grave risk for the child's well-being. Thus, their decisions were in line with the Court's case-law, according to which the State's obligation to reunite a parent with his child is not an absolute one, as the interests of the child's well-being may override the parent's interest in reunion.

B. The Court's Assessment

54. The Court notes, firstly, that it was common ground that the tie between the two applicants was one of family life for the purposes of Article 8 of the Convention.

55. That being so, it must be determined whether there has been a failure to respect the applicants' family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Ignaccolo-Zenide*, cited above, § 94; *Nuutinen*, cited above, § 127; *Hokkanen* ***v***. *Finland*, judgment of 23 September 1994, Series A no. 299, p. 20, § 55).

56. The Court notes at the outset that the present case concerns the non-enforcement of a final return order under the Hague Convention.

57. It is comparable to the above-cited *Ignaccolo-Zenide* ***v***. *Romania* case, in which the Court found that the positive obligations that Article 8 lays on the Contracting States in the matter of reuniting a parent with his or her child must be interpreted in the light of the Hague Convention, all the more so where the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children (ibid., § 95).

58. More generally, a Contracting State's positive obligations under Article 8 include a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action. However, the national authorities' obligation to take such measures is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. Any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (ibid., § 94; see also *Hokkanen*, cited above, § 58; and *Olsson* ***v***. *Sweden* (no.2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90).

59. In cases concerning the enforcement of decisions in the realm of family law, the Court has repeatedly found that what is decisive is whether the national authorities have taken all the necessary steps to facilitate execution as can reasonably be demanded in the special circumstances of each case (see *Hokkanen*, cited above, § 58; *Ignaccolo-Zenide*, cited avove, § 96; *Nuutinen*, cited above, § 128). In examining whether non-enforcement of a court order amounted to a lack of respect for the applicants' family life the Court must strike a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law (see *Nuutinen*, cited above, § 129).

60. In cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her. In proceedings under the Hague Convention this is all the more so, as Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay (see *Ignaccolo-Zenide*, cited above, § 102).
61. The Court notes the Government's argument that there was a change in circumstances after the Supreme Court's decision of 27 February 1996 by which the return order became final, justifying a review in the enforcement proceedings of whether the second applicant's return entailed a grave risk of harm within the meaning of Article 13 (b) of the Hague Convention. They submitted, in particular, that, on 16 April 1996, the Oakland Circuit Court had issued a default judgment of divorce, awarding the first applicant sole custody of the second applicant. In contrast to the situation obtaining when the return order had been made, it could no longer be expected that an examination of the mother's accusations regarding the first applicant's harmful behaviour, namely his allegedly masturbating in the presence of the child, would take place in custody proceedings before the United States' courts.
62. For their part, the third parties Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, considered that to conduct a review under Article 13 (b) of the Hague Convention in the enforcement proceedings was in conflict not only with the aims of the Hague Convention, but also with a Contracting State's positive obligations under Article 8. They emphasised that the enforcement of final court orders was generally required by respect for the rule of law.
63. The Court accepts that a change in the relevant facts may exceptionally justify the non-enforcement of a final return order. However, having regard to the State's positive obligations under Article 8 and the general requirement of respect for the rule of law, the Court must be satisfied that the change of relevant facts was not brought about by the State's failure to take all measures that could reasonably be expected to facilitate execution of the return order.
64. The Court observes that the Graz Regional Civil Court's decision of 29 August 1996 (see paragraphs 29-30 above), setting aside the enforcement order, and the Supreme Court's decision of 15 October 1996 (see paragraphs 32-34 above) do not even mention the change of circumstances now relied on by the Government. That argument cannot, therefore, serve to justify the non-enforcement of the return order.
65. However, the Supreme Court advanced another argument, namely that the courts, when issuing the return order, had denied that there was any risk of psychological harm being caused by the alleged sexual behaviour of the first applicant, exclusively on account of the child's tender age at the time. Therefore, a review of the question whether the second applicant would suffer grave harm in the event of her return required further examination, including the taking of an expert opinion. However, the child psychology expert apparently did not deal with this issue in his opinion prepared in the continued proceedings; nor did the issue play any role in the subsequent decisions. Accordingly, that consideration equally cannot serve to justify the non-enforcement of the return order.
66. The fact remains that the decisions of 29 August and 15 October 1996 relied rather heavily on the lapse of time and the ensuing alienation between the first and second applicants. The Court will therefore examine whether or not this lapse of time was caused by the authorities' failure to take adequate and effective measures for the enforcement of the return order.
67. The Court observes that, while the main proceedings relating to the issuing of the return order were conducted with exemplary speed, as the case came before three instances in just four months, ending with the Supreme Court's decision of 27 February 1996, there is no explanation for the delay of more than two months which occurred before the file was returned from the Supreme Court to the Graz District Court on 7 May 1996. Moreover, such a delay has to be viewed as an important one, given that under Article 11 of the Hague Convention any inaction of more than six weeks may give rise to a request for a statement of reasons.
68. Admittedly, the District Court immediately ordered the enforcement of the return order. But after the first unsuccessful enforcement attempt on 10 May 1996 no further steps towards enforcement were taken despite the first applicant's request of 18 June 1996. The Government argued that no further enforcement attempts could be made as long as the mother's appeal of 15 May 1996 was pending, while the applicants contested this. The Court is not required to examine which was the position under domestic law, as it is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention (see *Ignaccolo-Zenide*, cited above, § 108). At the very least, the courts were under a particular duty to give an expeditious decision on the appeal in question. Nevertheless, it took three and a half months for the Graz Regional Civil Court to decide, on 29 August 1996, to quash the enforcement order of 8 May and to refer the case back to the District Court.

69. After the Supreme Court's decision of 15 October 1996, which confirmed the setting aside of the enforcement order, it took the District Court more than five months to obtain an opinion from the expert in child psychology, although he was already familiar with the case, as he had participated in the main proceedings. Relying on this expert's opinion, the District Court found on 29 April 1997 that, given the considerable lapse of time, the removal of the second applicant from her main person of reference, namely her mother, would expose her to serious psychological harm, as her father, the first applicant, had in the meantime become a complete stranger to her. The District Court's decision, which was upheld by the Graz Regional Court and, on 9 September 1997, by the Supreme Court, shows that the case was ultimately decided by the time that had elapsed. Without overlooking the difficulties created by the resistance of the second applicant's mother, the Court finds, nevertheless, that the lapse of time was to a large extent caused by the authorities' own handling of the case. In this connection, the Court reiterates that effective respect for family life requires that future relations between parent and child not be determined by the mere effluxion of time (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 65).
70. Moreover, the Court observes that the authorities did not take any measures to create the necessary conditions for executing the return order while the lengthy enforcement proceedings were pending.
71. The Court notes in particular that following the first unsuccessful enforcement attempt of 10 May 1996, the mother of the second applicant apparently changed her whereabouts with the aim of defying the execution of the return order. However, the authorities did not take any steps to locate the second applicant with a view to facilitating contact with the first applicant. On the contrary, it transpires from the correspondence exchanged from May to December 1996 between the Austrian Ministry of Justice and the United States Department of State that, in the Austrian authorities' view, it fell to the first applicant's counsel to take all necessary steps to obtain the enforcement of the return order. In this connection, the Court points out that it has refuted such a line of argument in *Ignaccolo-Zenide v. Romania*, finding that an applicant's omission cannot absolve the authorities from their obligations in the matter of execution, since it is they who exercise public authority (ibid., § 111).
72. Having regard to the foregoing, the Court concludes that the Austrian authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the return order, and thereby breached the applicants' right to respect for their family life, as guaranteed by Article 8.
Consequently, there has been a violation of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION
73. The applicants maintained that the Supreme Court's decision of 15 October 1996 ordering a review of questions which had already been dealt with in the final return order had eventually led to the non-enforcement of the return order. They alleged a violation of Article 6 of the Convention, which, as far as material, reads as follows:
"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."
74. The Government asserted that the courts were obliged in the enforcement proceedings to take the child's well-being into account in accordance with section 19 (1) of the Non-Contentious Proceedings Act. However, Article 6 did not prevent a review of a final court order if there had been a change in the relevant facts.
75. The third parties, Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, asserted that the failure to enforce the return order and its reconsideration in the enforcement proceedings raised an issue under Article 6. They referred to *Hornsby v. Greece* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-II), in which the Court had held that the execution of a judgment had to be regarded as an integral part of the "trial" for the purposes of Article 6 (ibid., p. 510, § 40).
76. The Court reiterates the difference in the nature of the interests protected by Articles 6 and 8 of the Convention. While Article 6 affords a procedural safeguard, namely the "right to a court" in the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see for instance *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91).
77. In the instant case, the Court finds that the lack of respect for the applicants' family life resulting from the non-enforcement of the final return order is at the heart of their complaint. Having regard to its above findings under Article 8, which focus on the non-enforcement of a final court order, the Court considers that it is not necessary to examine the facts also under Article 6.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The first applicant requested a total amount of 276,461.58 United States dollars (USD) equivalent to 278,021 euros (EUR).[*Nota*: On 2 December 2002, the date on which the claims were submitted.] in respect of pecuniary damage, broken down as follows:

(i) USD 31,033.54 for travel costs and related car rental, taxi and hotel costs for sixteen trips between Michigan and Graz from December 1995 to September 2002 in connection with the enforcement proceedings and subsequently for the purpose of obtaining contact with or access to the second applicant.

This sum includes USD 4,228.92 for travel and subsistence costs relating to a trip to Graz between 17 and 30 December 1995, USD 3,310.74 for travel and subsistence costs relating to a trip to Graz between 8 and 11 May 1996 and USD 2,667.56 for travel and subsistence costs relating to a trip to Graz between 31 May and 8 June 1997. The remainder relates to thirteen trips to Graz undertaken after the termination of the enforcement proceedings in September 1997.

(ii) USD 500 for the costs of assistance from an interpreter in an interview with a court-appointed expert in June 1999 in the context of access proceedings;

(iii) USD 181,901.04 for lost wages following the loss of his job in June 2001 allegedly as a result of the time and attention spent pursuing the Hague Convention proceedings and the ensuing custody and access proceedings in **Austria**;

(iv) USD 2,000 for the costs of supervision of access visits to the second applicant in June and December 1997;

(**v**) USD 41,328 for payments made to Mrs **Sylvester** allegedly to obtain her agreement to supervised access visits since July 1999;

(vi) USD 19,699 for the costs of psychological counselling and medical treatment relating to emotional and physical difficulties allegedly suffered as a result of the Austrian authorities' failure to enforce the return order.

The first applicant conceded that some or all of the above losses could also be examined under the head of costs and expenses.

80. As to non-pecuniary damages the first applicant requested an award of USD 1 million on his own behalf as compensation for the anger, anxiety, humiliation and frustration suffered as a result of the non-enforcement of the return order. He emphasised that the loss of having a life with his daughter was priceless. However, he suffered - to an extent affecting his physical and emotional health - as a result of the fact that he had effectively been prevented, by the second applicant's mother and the Austrian authorities, from playing any significant role in his daughter's life. Further, he claimed USD 2 million on behalf of the second applicant for her being deprived of her father and of any family life with her paternal family in the United States.

81. The Government contended that the first applicant's claims for pecuniary damage were excessive. In any case, as far as they related to the exercise of his access rights (travel costs, alleged payments to Mrs **Sylvester**, costs for supervision, interpreters' costs), the alleged damage did not have any causal link with the breach of the Convention at issue. The same applied to other items, such as lost wages and costs of medical treatment. As far as the travel and subsistence costs related to the Hague Convention proceedings, which was only the case for a minor part of them, their necessity had not always been convincingly established (for instance the need to use a taxi instead of public transport).

82. As to non-pecuniary damage, the Government also contended that the sums claimed were excessive and disregarded the Court's case-law in comparable cases. As regards non-pecuniary damage claimed on behalf of the second applicant, the Government contested that there was any causal link with the breach of the Convention at issue. Had the violation of the Convention not taken place, the second applicant would equally suffer by being separated from her mother and her maternal family.

83. As to pecuniary damage, the Court finds that there is no causal link between the damage claimed and the violation found, with the exception of travel and subsistence costs related to the enforcement of the return order under the Hague Convention. As regards the said travel and subsistence costs, the Court considers it appropriate to deal with them under the head of costs and expenses.

84. As to non-pecuniary damage, the Court sees no reason to doubt that the first applicant suffered distress as a result of the non-enforcement of the return order and that sufficient just satisfaction would not be provided solely by the finding of a violation. Having regard to the sums awarded in comparable cases (see, for instance, *Ignaccolo-*

Zenide, cited above, §117, *Hokkanen*, cited above, p. 27, § 77; see also, *mutatis mutandis*, *Elsholz* ***v****. Germany* [GC], no. 25735/94, § 71, ECHR 2000-VIII and *Kutzner* ***v****. Germany*, no. 46544/99, § 87, ECHR 2002-I) and making an assessment on an equitable basis as required by Article 41, the Court awards the first applicant EUR 20,000. As to the second applicant, the Court considers that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the non-enforcement of the return order.
85. In sum, the Court therefore awards the first applicant EUR 20,000 under the head of non-pecuniary damage.

B. Costs and Expenses
86. The first applicant requested a total amount of EUR 288,419.72 under the head of costs and expenses broken down as follows
(i) USD 146,689.14, equivalent to EUR 147,517, for legal expenses paid to two United States law firms which advised him on matters relating to the Hague Convention proceedings and subsequent proceedings;
(ii) EUR 127,553.13 for costs of the Hague Convention proceedings and subsequent proceedings in **Austria** and of the Convention proceedings;
(iii) USD 3,556.37 equivalent to EUR 3,576.43 for telephone and postal costs;
(iv) USD 9,718.33 equivalent to EUR 9,773.16 for costs of a hearing in the United States Congress concerning the workings of the Hague Convention.
87. As to the costs of the domestic proceedings, the Government asserted, firstly, that the basis for their assessment was not in accordance with the Lawyers' Fees Act (*Rechtsanwaltstarifgesetz*). Secondly, they submitted that the bill of fees contained a number of unspecified items and numerous costs incurred after the termination, in September 1997, of the Hague Convention proceedings at stake in the instant case, costs which had probably been incurred in other sets of proceedings relating to access, custody or maintenance issues. Thirdly, the first applicant had failed to show to what extent the costs had been necessarily incurred to prevent the breach of the Convention at issue.
88. According to the Court's consistent case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, for instance, *Venema* ***v****. the Netherlands*, no. 35731/97, § 117, to be published in ECHR 2002).
89. The Court considers that the costs and expenses relating to the domestic proceedings, as far as they concern the enforcement proceedings found to cause a violation of the Convention (see paragraph 72 above) and the costs of the Strasbourg proceedings were incurred necessarily. They must, accordingly, be reimbursed in so far as they do not exceed a reasonable level (see *Ignaccolo-Zenide* ***v****. Romania*, cited above, § 121).
90. The Court finds that the costs claimed are excessive. Making an assessment on an equitable basis and considering, in particular, that the case was indisputably complex, it awards the first applicant EUR 20,000 for legal costs and expenses.
91. The Court now turns to travel and subsistence costs related to the enforcement of the return order under the Hague Convention. It notes that only two of the sixteen trips listed by the first applicant were undertaken during the enforcement proceedings. The first one from 8 to 10 May 1996 and the second one from 31 May to 8 June 1997. The Court finds that only the costs relating to the latter can be regarded as having been incurred in order to seek prevention or rectification of the violation of the Convention found, as the first one was apparently related to the one and only enforcement attempt, which would also have taken place had the violation of the Convention not occurred. The Court, therefore, grants compensation for the costs of this trip, which amount to USD 2,667.56, equivalent to EUR 2,682.61.
92. In sum, the Court awards the first applicant EUR 22,682.61 under the head of costs and expenses.

C. Default Interest
93. The Court considers it appropriate that the default interest 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. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that there is no need to rule on the complaint under Article 6 of the Convention;

3. *Holds* unanimously
(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 22,682.61 (twenty-two thousand six hundred and eighty-two euros sixty-one cents) 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. *Holds* by 4 votes to 3 that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the second applicant;

5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.
Done in English, and notified in writing on 24 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Christos Rozakis

Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint partly dissenting opinion of Mr Bonello, Mrs Tulkens and Mrs Vajic;
(b) separate opinion of Mr Bonello.

C. R.
S. N.

JOINT PARTLY DISSENTING OPINION OF JUDGES BONELLO, TULKENS AND VAJIC

(Translation)

As regards the non-pecuniary damage sustained by the second applicant, the Court holds: "The finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the non-enforcement of the return order" (see paragraph 84, *in fine*, of the judgment). However, in like circumstances, it awards the first applicant 20,000 euros for non-pecuniary damage (*ibid*.). The imbalance between the two awards does not appear to us to be justified, especially as the fundamental aim of the Hague Convention with which the present case is concerned is to protect children (see paragraph 44 of the judgment). Although a finding of a violation may in certain cases take on a symbolic value, in the present instance it amounts to reparation at its most frugal.
Personally, we do not share the view that, owing to its tender age, the child has not suffered or may not in the future suffer any non-pecuniary damage (such as stress or anxiety) of its own, warranting an award of compensation for the violation of Article 8 of the Convention which the Court has found as a result of the Austrian authorities' failure to take, without delay, the measures they could reasonably have been expected to take in order to enforce the return order, in breach of the second applicant's right to respect for her family life (see paragraph 72 of the judgment).
We consider that, as in the *Scozzari and Giunta v. Italy* judgment of 13 July 2000, in which the Court held that it had to take into account the non-pecuniary damage sustained by the children in view of their position as applicants (§ 253), the Court should have granted the second applicant, whose conduct cannot be criticised in any way, compensation reflecting the level of damage she sustained.

SEPARATE OPINION OF JUDGE BONELLO

1. The majority's ruling as to what just satisfaction to award the applicant and his minor daughter Carina Maria, to redress the ascertained violation of their fundamental right to the enjoyment of family life, finds me in radical disagreement. I am participating in the joint dissent disputing the majority's decision to award nothing to Carina Maria in so far as, in their view, the mere finding of a violation constitutes in itself sufficient just satisfaction for moral damages suffered by her. I have now to clarify my views concerning the damages and costs awarded to the applicant personally.

2. I voted with the Court on the amounts liquidated in favour of the applicant as material and moral damages and as costs and expenses. I did so not because I endorse the majority's reasoning and its mathematical outcome, but lest my negative vote be read as implying that, according to me, no damages or costs at all were due. On the contrary, I consider the amounts granted in favour of the applicant as mean and beggarly. I believe that the compensation awarded conspicuously fails the test of proportionality between the harm inflicted and the redress afforded.

3. The applicant's existence was skilfully and organically disrupted by the Austrian authorities' defiance of their responsibilities under Article 8 of the Convention - which, as the majority agreed, in the present case imposed on them a duty to ensure the enforcement of the final return order issued in his favour in terms of the Hague Convention on the Civil Aspects of International Child Abduction. The applicant and his wife had established the matrimonial residence in Michigan, USA. The wife's relocation to **Austria**, together with the illicitly appropriated child, coerced the applicant into instituting legal proceedings in **Austria**, which necessitated his presence there to ensure their diligent and successful prosecution.

4. The Court has identified two main sources of violation of the guarantees of Article 8 by the Austrian tribunals: some 'unexplainable delays' in the progress of the proceedings (para. 67) and the fact that they negated the final return order previously issued in favour of the applicant. I believe that, in accordance with the Court's case law, all the losses, costs and expenses “actually and necessarily” incurred by the applicant for the prevention or rectification of a violation of the Convention, ought to have been reimbursed to the victim of that infringement.

5. I would, of course, exclude from the liquidation of damages, costs and expenses, those the applicant incurred to counteract the actions of his wife at a time when the liability of the Austrian state had not yet been engaged. Before that instant, nothing is due by **Austria**. But, as from then on, the unreasonable delays and the resistance to the enforcement of the final return order (for both of which the majority found the Austrian courts responsible) played a determining conjoint role in infringing the applicant's Convention rights. This cut-off point, after which the applicant was no longer battling his wife but was contending with the failures of the Austrian system, occurred in April 1996. It is my view that, from this moment when the state's responsibility was fully engaged, all losses, damages costs and expenses incurred by the applicant to redress the ongoing state of infringement, clearly became the liability of the respondent state.

6. If, in June 2001 the applicant lost his job in the USA, as the diligent prosecution of the proceedings in **Austria** prevented the diligent prosecution of his work responsibilities in the USA, then this loss too falls to be compensated. The Court considered that there is no causal link between the material damages claimed and the violation found (para. 83). In my view, the bond of causality between the efforts put in by the applicant to obtain redress for the infringement suffered, on the one hand, and the loss of his job (and various other substantial damages), on the other, is as compelling as it is overwhelming. To believe otherwise is also to believe that the applicant could have carried on working industriously in the USA, while engaging in a full-time legal affray in **Austria**, continually crossing the globe to attend court sittings and conferences with his lawyers thousands of kilometres away. Not one euro's worth of material damages was recognised and awarded to the applicant by the majority, under any head whatsoever.

7. The liquidation of 20,000 euros to the applicant as moral damages for pain and suffering, I consider paltry and uncaring. To a person who has had the core of his existence irretrievably gutted by the violation of fundamental rights, to a father who has been irrevocably barred from the covenant with his only daughter, to a victim of atrocity born of the distressed use of the law against him, the majority responded with the award of what, in my view, amounts to an almost offensive trifle. That is hardly the most eloquent idiom to underscore how hallowed the sanctity of fundamental rights is in the eyes of the Court. If neutralizing the Convention comes so cheap, states may well find it foolish not to have a brave try.