CONSEIL DE L'EUROPE

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

FOURTH SECTION

CASE OF P.P. v. POLAND

(Application no. 8677/03)

JUDGMENT

STRASBOURG

8 January 2008

FINAL

08/04/2008

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 P.P. v. Poland,

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

Nicolas Bratza, *President*,
Joseph Casadevall,
Giovanni Bonello,
Kristaq Traja,
Javier Borrego Borrego,
Lech Garlicki,
Ljiljana Mijović, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 4 December 2007,

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

PROCEDURE

1. The case originated in an application (no. 8677/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr P.P. ("the applicant"), on 24 February 2003. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr D. Mascia, a lawyer practising in Verona, Italy. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs. The Italian Government who participated in the proceedings as a third party (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), were represented by their Agent, Mr Ivo Maria Braguglia.

3. The applicant alleged in particular violation of Articles 6 § 1 and 8 of the Convention on account of the non-enforcement of the decisions relating to return of his daughters who had been abducted by their mother to Poland.

4. By a decision of 24 January 2006 the Court declared the application admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant lives in Torri di Quartesolo, Italy.

7. In 1991 the applicant married a Polish national K.P. In 1992 K.P. gave birth to their first daughter A. In 1996 the second daughter, B, was born. The family lived in Italy.

A. The abduction of the applicant's children

8. In summer 1999 K.P. took A and B on holiday to Poland. Subsequently, she failed to return to Italy with the children and they remained in Poland.

9. In September 1999 K.P. filed with the Poznań Regional Court an application for divorce.

10. On 6 September 1999 the applicant applied to the Polish Ministry of Justice – designated as a central authority under the Hague Convention on the Civil Aspects of the International Child Abduction ("the Hague Convention") – for assistance in securing the return of the children.

11. On 11 October 1999 the Venice Court for Minors allowed an application submitted by the applicant and made an interim order granting him custody of A and B.

12. On 9 November 1999 the Poznań District Court made an interim order requiring A and B to remain in Poland during the proceedings concerning the application for their return.

B. The granting of visiting rights

13. On 14 November 1999 the applicant asked the Poznań District Court to grant him visiting rights.

14. On 17 November 1999 the Poznań District Court allowed the application and granted the applicant visiting rights. In particular, the court granted him the right to visit his children four times a month and to take them outside the flat in which they lived. K.P. appealed against this decision but her appeal was dismissed on 14 December 1999. However, she interfered with the applicant's visiting rights and in the course of the next three months he had to be assisted on three occasions by police officers in order to enforce his visiting rights.

15. On 19 November 1999 the Poznań District Court dismissed K.P.'s request that the case concerning the return of the children be either joined to the divorce case or stayed. The court gave the following reasons for its decision:

> "Pursuant to Article 16 of the Hague Convention after receiving notice of a wrongful removal or retention of a child within the meaning of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention. That is why the court has informed the Regional Court that it is necessary to stay proceedings in the divorce case."

C. The proceedings concerning the return of the children

16. At the hearing held on 26 November 1999 the court decided to order an expert opinion.

17. On 11 January 2000 the Poznań Family Consultation Centre (*Rodzinny Ośrodek Diagnostyczno-Konsultacyjny*) submitted to the Poznań District Court an expert opinion in reply to the court's inquiry whether the well-being of A and B would be threatened by their return to their father in Italy. The opinion ended with the following conclusions:

> "1. The well-being of [A and B] will not be threatened if they are returned to Italy together with their mother. Reuniting the children only with their father would result in repeating an abnormal situation prevailing at the moment. Moreover, in view of the age of the children, and in particular the age of [B], depriving them of the permanent presence of their mother would lead to the inability to fulfil their development needs concerning the mother;
>
> 2. the possibility of leaving the children in the custody of their mother in Poland should only be considered if their father could be guaranteed more significant participation in their lives, including contact without the participation of other persons. However, the attitude of the mother does not guarantee that such a right and the needs of the children would be secured."

18. On 7 February 2000 the Poznań District Court allowed an application for the return of the children lodged by the applicant and ordered K.P. to return them to the applicant. The court considered that the removal of A and B had been wrongful under Article 3 of the Hague Convention.

K.P. appealed against this decision to the Poznań Regional Court.

19. On 15 May 2000 the Venice Court for Minors granted the applicant the custody of A and B and ordered that they be returned to Italy.

20. On 2 and 16 June 2000 the Poznań Regional Court held hearings. On the latter date it allowed an appeal lodged by K.P., quashed the decision of 7 February 2000 and remitted the case to the District Court.

21. On 21 October 2000 the court held a hearing at which it ordered that a new expert opinion be prepared.

22. On 20 November 2000 the Poznań Family Consultation Centre submitted to the Poznań District Court the expert opinion, which ended with the following conclusions:

> 1. The return of the children to Italy without the mother will be difficult for them as it will be damaging. However, we should point out that such damage is experienced by children who grow up separated from one of their parents. That is why in our previous opinion we suggested as the best solution the return of the girls to Italy together with their mother (...).
>
> 2. As to the scope of damage caused to the minors by their return to Italy without their mother, we are of the view that:
>
> - there is no danger of physical damage because the living conditions in Italy guaranteed by their father are proper (...);
>
> - the minors have emotional bonds with their mother and they will suffer because of her absence – it will be impossible for them to fulfil their development needs related to the mother, and this will cause them psychological damage.
>
> 3. The assessment of all the problems of the children caused by their return to Italy without the mother leads us to the conclusion that it will not expose them to irreparable damage because:
>
> - they are going back to their father with whom they have emotional bonds;
>
> - they have a feeling of belonging to him and he used to play an important role as a parent. (...);
>
> - they are going back to the environment which is familiar to them as they grew up in it and this will facilitate their adaptation;
>
> - [B] is reaching the age in which contacts with peers become important and her needs can no longer be fulfilled only in the family; the role of the father also becomes more important at that age;
>
> - the possibility of adaptation of [A] is even greater than her younger sister's as she concentrates on problems related to her school life. (...);
>
> - both minors' psychological and physical development is good and they do not require special conditions for their development.
>
> 4. Both minors are of a young age and have not reached a degree of maturity which would allow their opinions to be taken into account concerning the choice of the parent with whom they would like to live. In addition to the lack of maturity of the minors, the value of such opinions would be doubtful because of the influence to which they are presently subjected (...).

23. On 10 December 2000 the Poznan Family Centre submitted an additional expert opinion. The experts were heard on 4 and 5 January 2001.

24. On 5 January 2001 the Poznań District Court again allowed an application for the return of the children lodged by the applicant and ordered K.P. to return them to the applicant. The court considered that K.P. had unlawfully abducted the children. It also observed that:

> "the court also draws the attention to the fact that [K.P.] does not obey the law in Poland as she does not comply with a final court decision concerning the father's contacts with the children (she does not allow the father to take the children away from their place of residence). Therefore, the children cannot stay with their father and he cannot participate in their education."
>
> (...)
>
> The court would also point out that the applicant's behaviour does not disclose contempt of court. His bitter words directed at the justice system were caused by the despair and bitterness of a father and were justified since the proceedings in the present case have already lasted a year and a half and [K.P.] still does not comply with the court decision granting him visiting rights."

25. K.P. appealed against the decision of 5 January 2001 but on 1 June 2001 the Poznań Regional Court dismissed her appeal. On 8 June 2001 the court declared that the decision was enforceable (*klauzula wykonalnosci*).

26. K.P. lodged a cassation appeal against the decision of 1 June 2001. However, it was rejected on the basis that it was not provided for by the law.

D. The first attempt to enforce the court order

27. On 19 July 2001 the applicant requested the enforcement of the final decision of 5 January 2001. On 10 September 2001 the court's bailiff requested K.P. to return the children to the applicant within one week. On 27 December 2001 the court ordered the bailiff to enforce the court's decision. Since K.P. failed to comply, on 31 December 2001, the bailiff discontinued the proceedings.

28. On 29 October 2001 the Poznań District Court dismissed K.P.'s application in which she requested that the final decision should not be enforced.

29. On 8 January 2002 the Poznań District Court ordered a court guardian (*kurator sądowy*) to forcibly remove A and B from K.P. under Article 598^6 of the Code of Civil Proceedings.

30. On 8 January 2002 two guardians, assisted by police officers and accompanied by a representative of the Italian embassy, visited three different houses looking for A and B. The applicant was also present. The children were not found at any of those locations. Despite some indications that the children could have been in the second house visited, the police officers refused the guardians' request to enter the house since they did not have a search warrant.

31. On 16 January 2002 K.P. appealed against the enforcement order of 8 January 2002 but on 1 February 2002 her appeal was rejected as it was not provided for by the law. Her appeal against the latter decision was dismissed on 27 May 2002.

32. On 17 January 2002 the court guardian requested the Poznań Regional Prosecutor to institute criminal proceedings against K.P. on charges of abduction according to Article 211 of the Criminal Code.

33. K.P. filed with the Poznań District Court an application challenging judge B.B. but it was finally dismissed on 6 August 2002.

E. Other attempts to enforce the court order

34. On 31 January 2002 two guardians assisted by police officers and accompanied by a representative of the Italian embassy attempted to enforce the court's order. K.P. and the children were not found in the house they visited.

35. On 10 July and 30 September 2002 the guardian informed the court that her attempts to obtain information about the children were still unsuccessful. On 19 September 2002 the guardian asked whether A had been attending a particular school. On 7 October 2002 the Director of the school confirmed that K.P. had paid for tuition, however due to illness A had not been attending classes.

36. On 18 October 2002 the police informed the court of the address where A and B were staying with their mother. The court guardian went to this address on 21 October 2002 but the children were not there.

37. Apparently, on 7 January 2003 K.P. proposed a friendly settlement with the applicant. He refused.

38. On 27 January 2003 the court guardian attempted to remove the children from the last known address but there was no sign of them again.

39. On 28 January 2003 the Poznań District Court ordered that the children be taken by the court guardian at any time. On 29 January 2003 the guardian unsuccessfully tried to enforce the order.

40. In February 2003 the District Court requested several institutions to submit information about the whereabouts of K.P. and the children.

41. On 13 February 2003 the Poznań District Prosecutor discontinued the criminal proceedings against K.P. on charges of abducting and hiding A and B because she considered that the abduction and hiding were of "minimal social harm" (*społeczna szkodliwość czynu jest znikoma*).

On 25 September 2003 the Poznań District Court dismissed an appeal by the applicant against the prosecution service's decision of 13 February 2003 to discontinue the criminal proceedings against K.P. on charges of abduction and hiding of A and B.

F. The last attempt to enforce the court order

42. On 6 April 2003 two guardians, assisted by police officers and accompanied by a representative of the Italian embassy, went to a property situated in B. M. in order to enforce the court order. The property consisted of a house and a plot of land located in a forest and belonging to the local forest warden. It was surrounded by police officers. K.P., her sister and A and B were inside the house. When guardians entered the house A said that she did not want to be reunited with her father and K.P. used insulting language with respect to the applicant and the court which had ordered the return of the children. Subsequently, the guardians called an ambulance. After a doctor had examined A and B, the guardians decided that they would not enforce the court order. The guardians, the police officers and the representative of the Italian embassy left the property.

43. Immediately after the attempt to remove the children, K.P. left with A and B and remained in hiding at least until September 2003. Since then they have been living in K.P.'s father's house in P., where the children attend schools.

G. The staying of the enforcement proceedings and the proceedings to change the order to return the children

44. On 25 July 2003 the Poznań District Court suspended the enforcement proceedings concerning the return of the children to the applicant. The court gave the following reasons for its decision:

> "On 5 January 2001 the Poznań District Court (...) made an order in a case IX Nsm 469/00 ordering [K.P.] to return the minors [A and B] to their father [P.P.] who lives in Italy. The order was made on the basis of the Hague Convention on the Civil Aspects of International Child Abduction.
>
> The order was appealed. On 1 June 2001 the Regional Court dismissed appeals lodged by [K.P.] and the District Prosecutor. The order is final and enforceable.
>
> [K.P.] has been in hiding with the children for more than two years and she makes it impossible to enforce the order. She has recently returned to her original place of residence and she has lodged an application under Article 577 of the Code of Civil Procedure to reject [P.P.'s] request to return the children.
>
> The court has doubts whether it is possible to change an order made under the Hague Convention and to give a contradictory decision under Article 577 of the Code of Civil Procedure. In view of these doubts the court has decided to submit the case (...) to the Regional Court as it raises serious doubts.
>
> At the same time, the court has stayed the enforcement until the final ruling in the case."

45. On 2 September 2003 the Poznań Regional Court dismissed an appeal by the applicant against the decision of 25 July 2003.

46. On 19 September 2003 the Poznań Regional Court refused the District Court's request of 25 July 2003 and returned the case to the District Court. The court considered that it was possible to change the court's order to return minors but such proceedings must be based on the Hague Convention and decided in the light of the principles embodied in the European Convention on Human Rights. In particular, the change of the order could not be a consequence of the authorities' failure to take all the measures that could reasonably be expected to enforce the order.

47. On 14 October 2003 the Poznań District Court decided that the enforcement proceedings would be stayed until the date of the final ruling on K.P.'s application to change the court order requiring her to return the children to the applicant.

48. On 5 January 2004 the Poznań District Court held a hearing in the proceedings concerning K.P.'s application to change the court order concerning the return of the children. At this hearing the court heard evidence from K.P.

49. On 7 March 2004 the applicant asked the court to determine his contact with the children. At the hearing held on 25 October 2004 the parties agreed that the applicant would have a right to two phone calls per month with A and B. This order was amended on 15 April 2005 by the Poznan District Court, which decided that the applicant could visit his daughters every time he came to Poland and that he could take them outside their place of residence.

50. On 27 March 2005 the applicant met his daughters for the first time since 2001. The visit took place in the house of K.P.'s father. The applicant was allowed to speak with his older daughter A but the grandfather, assisted by private security guards, stopped him from entering the second floor of the house to see his younger daughter.

51. On 7 June 2005 the Poznan District Court quashed the decision of 5 January 2001 and decided not to return the children to the applicant. The court justified the review of the final decisions ordering the return of children to Italy, under Article 13 of the Hague Convention, by reference to a risk that their return would expose the children to psychological harm or would otherwise place them in an intolerable situation. It based its assessment on the visits that had been carried out in the place of residence of the children, in September and October 2003, and on the opinion of the Poznań Family Consultation Centre of 27 October 2003. The court established that during their six-year stay in Poland the girls had fully assimilated in the country, spoke Polish, and had forgotten their life in Italy. Their emotional bond with their mother was very strong. The emotional tie between A and her father was distorted as she rejected him, disapproved of him and wished to stay with her mother in Poland. The bond between the

younger B and the applicant was considered by the experts as suppressed. In those circumstances the court found that the best interest of the children required quashing the decisions ordering their return to Italy, as separating A and B from their mother could be dangerous for their mental state and could place them in an intolerable situation.

52. On 8 July 2005 the applicant, represented by his lawyer, lodged an appeal against the decision.

53. On 11 October 2005 the Poznan Regional Court dismissed the appeal. The decision is final.

54. On 28 November 2005 the Poznan District Court resumed the enforcement proceedings and decided that in the light of the decision of 7 June 2005 the enforcement of the order to return the children should be finally discontinued.

55. Simultaneously, the Italian courts were dealing with the applicant's case. On 24 February 2005 the Venice court granted the applicant sole custody of A and B. On 28 November 2005 the Venice court gave a decision in which it deprived K.P. of her parental authority over A and B. The decision is final.

H. The order to detain the applicant

56. On 1 December 1999, in the course of the divorce proceedings instituted by K.P., the Poznań Regional Court ordered the applicant to pay 1,000 Polish zlotys (PLN) monthly in child support. The applicant submitted that he had been notified of the reasons for this decision in December 2000.

57. As the applicant was not paying child support the Poznań District Prosecutor instituted criminal proceedings against him, on a request made by K.P. On 25 January 2002 the Poznań District Court ordered the pre-trial detention of the applicant for a period of one month. Subsequently, the prosecutor issued an arrest warrant against him.

58. On 14 October 2002 the Poznań Regional Court *ex officio* quashed its decision of 1 December 1999.

59. On 20 July 2004 the applicant's lawyer applied to change the preventive measure imposed on the applicant.

60. On 22 July 2004 the Poznan District Prosecutor dismissed his request as it found that bail would not secure the applicant's appearance at his trial. That decision was upheld by the Poznan District Court on 19 October 2004.

61. Another request to quash the decision ordering the applicant's detention was dismissed by the Poznan District Prosecutor on 15 January 2005. The applicant's lawyer appealed against this decision.

62. On 9 March 2005 the Poznan District Court allowed the appeal and quashed the applicant's detention order. The court established that the

reason for which the detention had been imposed, the impossibility of establishing the applicant's address in Poland, was no longer a valid ground as he had appointed a representative in the case. Moreover, it had not been substantiated that the applicant would avoid his trial.

I. The proceedings concerning child support and divorce

63. On 17 May 2004 the Poznan Regional Court during the divorce proceedings decided to dismiss K.P.'s request for child support from the applicant. The court found that since K.P. has been keeping the children illegally and has not allowed the enforcement of final decisions, supporting the children should remain her sole responsibility.

64. On 7 September 2004 the Poznan Court of Appeal dismissed an appeal by K.P. against this decision.

65. On 11 January 2005 the Poznan Regional Court dismissed another request lodged by K.P. to grant her child support from the applicant. Her appeal against this decision was dismissed on 15 February 2005 by the Poznan Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

66. The Hague Convention was published in the Polish Official Journal on 25 September 1995. Article 7 of the Hague Convention reads, in so far as relevant:

> "Central Authorities shall cooperate with each other and promote cooperation 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 organising 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."

67. Pursuant to 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 of 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. ..."

68. Article 13 provides as follows:

"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."

B. The Polish Code of Civil Proceedings

69. The 1964 Code of Civil Proceedings *(Kodeks Postępowania Cywilnego)* in Article 577 provides as follows:

> "The custody court can change its decision if the best interests of the person it concerns so require."

70. The amendment to the Code introduced on 19 July 2001, which entered into force on 27 September 2001, deals with the proceedings concerning the return of children under the Hague Convention.

71. Article 598^{6} provides, that if a person who is ordered to return a child does not comply with the court's order, the court will instruct the guardian to remove the persons concerned forcibly (*przymusowe odebranie osoby*).

According to Article 598^{10}:

> "Upon a request of a court guardian, the police are obliged to help him in carrying out the forcible removal of [a minor]."

Article 598^{11} § 1 provides as follows:

> "If forcible removal of [a minor] is hindered because that person is hidden or because other action is taken with the aim to stop the enforcement of the order, the court guardian shall inform a prosecutor."

Pursuant to 598^{12}:

> "§ 1 The court guardian, in carrying out the removal of [a minor], shall be especially careful and shall do everything to ensure that the well-being of that person is not disturbed and that [he or she] does not sustain physical or moral harm. If necessary, the guardian shall request the assistance of the social services or another institution tasked with this function.
>
> § 2 If the well-being of [a minor] would be in danger as result of the removal, the guardian shall stop the enforcement of the order until the danger is over, unless the stopping of the enforcement would cause greater danger to the person."

72. As regards visiting rights, according to the Supreme Court's resolution, if a parent who has been obliged by a court decision to respect the other parent's access rights refuses to comply therewith, decisions on access rights are liable to enforcement proceedings. The provisions of the Code of Civil Procedure on enforcement of non-pecuniary obligations are applicable to the enforcement of court decisions on parental rights or access rights (resolution of the Supreme Court of 30 January 1976, III CZP 94/75, OSNCP 1976 7-8).

73. If a court obliges a parent exercising custody rights to ensure access to a child to the other parent, Article 1050 of the Code of Civil Proceedings is applicable to the enforcement of this obligation. This article provides:

> "1. If the debtor is obliged to take measures which cannot be taken by any other person, the court in whose district the enforcement proceedings were instituted, on the

motion of a creditor and after hearing the parties, shall fix the time-limit within which the debtor shall comply with his obligation, on pain of a fine (...).

2. If the debtor fails to comply with this obligation, further time-limits may be fixed and further fines may be imposed by a court."

74. Article 1092 of the Code provided as follows:

"When taking away a person who is the subject of parental authority or who is in care, the bailiff shall be especially careful, and shall do everything to protect such a person from physical or moral harm. The bailiff shall request the assistance of social services, or another institution tasked with this, or a court expert."

C. The Polish Criminal Code

75. Article 211 of the 1997 Criminal Code (*Kodeks Karny*) provides as follows:

"Whoever, contrary to the will of the person appointed to take care of or supervise, abducts or detains a minor person under fifteen years of age or a person who is helpless by reason of his mental or physical condition shall be liable to a penalty of deprivation of liberty for up to three years."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

76. The applicant complained under Article 8 of the Convention about the failure of the domestic authorities to enforce the Polish courts' decisions concerning his visiting rights and the return of his daughters to Italy. Article 8 of the Convention, in so far as relevant, provides:

"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

77. The applicant submitted that the authorities had taken no serious action to enforce the decisions granting him the right to visit his daughters and ordering the return of the children to Italy. He further argued that

nothing had been done to trace his daughters, who had been hidden by the mother and her relatives every time a visit by the Polish authorities was expected. The applicant also stated that the criminal proceedings against him had *de facto* deprived him of exercising his visiting rights as he could not come to Poland for fear of being arrested.

78. As regards the visiting rights the Government submitted that the domestic courts had granted the applicant access to his children. However, they acknowledged that the enforcement of those visits had been hindered by K.P. The Government further argued that the applicant had contributed to some extent to the fact that his right to visit his daughters had not been exercised. They referred to the criminal proceedings instituted against the applicant, for not paying child benefit for a period of almost three years between 1999 and 2002, in the course of which an arrest warrant had been issued against him. The fear of being arrested, in the Government's opinion, had prevented the applicant from coming to Poland to exercise his visiting rights.

B. The Italian Government's submissions

79. The Italian Government expressed their concern that the passage of time could have irreversible consequences for the relationship between the applicant and his children, not only from the perspective of the applicant's rights under Article 8 of the Convention, but also considering the negative consequences of the loss of one parent for the children's development. They also deplored the fact that the authorities had not tried other indirect measures which could have brought positive results in order to facilitate the applicant's reunion with his daughters, such as psychological assistance to the child and the parent or, in more serious cases, placing the children in public care.

C. The Court's assessment

1. The general principles

80. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are in addition positive obligations inherent in effective "respect" for family life. 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 *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

81. In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his child and an obligation on the national authorities to facilitate such reunion (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII; and *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR 2003-V).

82. In cases concerning the enforcement of decisions in the sphere of family law, the Court has repeatedly held that what is decisive is whether the national authorities have taken all necessary steps to facilitate the execution as can reasonably be demanded in the special circumstances of each case (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, § 53; *Ignaccolo-Zenide*, cited above, §96; *Nuutinen*, cited above, §128; and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003).

83. 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 of 25 October 1980 on the Civil Aspects of International Child Abduction this is all the more so, as its Article 11 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, and *H.N. v. Poland*, no. 77710/01, §§ 78 and 83, 13 September 2005).

84. The Court also held that although coercive measures against the children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live (see *Ignaccolo-Zenide*, cited above, § 106).

85. Lastly, the Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those

relating to the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). Consequently, the Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children 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 (see *Ignaccolo-Zenide*, cited above, § 95).

2. The application of the general principles to the above case

86. The Court firstly notes that it was common ground that the tie between the applicant and A and B came within the scope of family life within the meaning of Article 8 of the Convention.

87. The Court observes that the core of the application is the non-enforcement of the decisions ordering the children's return to Italy. In the light of the above principles, what is decisive in this case is to determine whether the Polish authorities took all the necessary adequate steps to facilitate the enforcement of those decisions. Moreover, the Court reiterates that the swiftness of the implementation of the return of children was essential, as the applicant had made an urgent application to the courts, the purpose of which was to protect the individual against any damage that might result from the lapse of time (see *H.N.*, cited above, §§ 77 and 78).

88. The Court notes that the domestic authorities had firstly decided to return children to the applicant, the decision became final on 8 June 2001, and they subsequently attempted to enforce the return order. However, the order was never enforced and on 7 June 2005 the domestic court had established that there had been a change in circumstances and had decided that the return of the children entailed a grave risk of harm within the meaning of Article 13 (b) of the Hague Convention. In this connection the Court reiterates 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 (see *Sylvester*, cited above, § 63).

89. The Court observes that in the proceedings dealing with the applicant's request for the return of the children, the case lay dormant on several occasions and that the periods of inactivity lasted several months each. In particular it took the appellate court from 2 February to 3 June 2000 to reach a decision, and similarly no hearing was held between 16 June and 21 October 2000 before the District Court and between 5 January and

1 June 2001 before the Poznań Regional Court. The Court considers that no satisfactory explanation has been put forward to justify those delays.

90. As regards the subsequent enforcement proceedings conducted by the court's bailiff, the Court also observes that the applicant applied to enforce the court's order on 19 July 2001, however, the bailiff requested K.P. to return the children only on 10 September 2001. Given her refusal to comply, he discontinued the proceedings after three months, on 31 December 2001. These periods of inactivity must be attributed to the domestic authorities.

91. The court also considers that after the guardians' attempts to find A and B made in January 2002, they remained practically inactive until another attempt to locate the children was made on 21 October 2002 (see paragraphs 34 and 36 above).

The Court notes that, in the event, when the authorities did finally find the children on 3 April 2003, the circumstances were such that they could not remove them.

92. The Court acknowledges that the difficulty of the present case resulted from the fact that K.P. had been hiding A and B and that on 3 April 2003 she refused to hand over the children to the court guardian and the police. While the use of coercive measures against the children is not desirable, the Court reiterates that the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live. In this connection the Court observes that while there was no doubt that the children were wrongfully removed by K.P. and that she was avoiding enforcement of a final decision ordering removal of A and B, the domestic authorities discontinued criminal proceedings against her, judging that the abduction and hiding of the children were of "minimal social harm" (see paragraphs 18 and 41 above).

93. Without overlooking the difficulties created by the resistance of the children's mother, the Court finds, thus, 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, and *Sylvester*, cited above, § 69).

94. Finally, the Court notes that it is not called in the present case to examine the issue of lawfulness or arbitrariness of the decision ordering the applicant's pre-trial detention given in January 2002. The Court also notes that the criminal proceedings against the applicant were instituted due to his failure to pay child support for his daughters ordered by the court on 1 December 1999. Nevertheless, that decision was in force until 14 October 2002, while the authorities maintained the detention order until March 2005. During this time the domestic courts considered unjustified other claims for child support benefit made by K.P. (see paragraphs 63 to 65 above). The

Court thus considers that in the particular circumstances of the case, the upholding for a period of over three years of the detention order against the applicant, although it originated in his own decision not to pay child support for his children, made it more difficult for him to come to Poland to see his children and to help in the enforcement of the decision to remove them.

95. Having regard to the foregoing, the Court concludes that the Polish authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the return order and consequently to secure his visiting rights, and thereby breached the applicant's right to respect for his family life, as guaranteed by Article 8.

Consequently, there has been a violation of Article 8.

96. Bearing in mind the violation of Article 8 already found, the Court considers that it is not necessary to examine separately the other aspect of the complaint raised by the applicant, namely the non-enforcement of the visiting rights, mainly between 2001 and 2005. The Court notes that lack of contact between the applicant and his children during this time was primarily caused by the authorities' failure to find the children, as K.P. was hiding them in order to avoid the enforcement of the return order issued under the Hague Convention, and by the arrest order which had been issued against the applicant, which had made it more difficult for him to come to Poland. Those circumstances were taken into consideration by the Court in the above assessment, which resulted in the finding that the domestic authorities had failed to secure respect for the applicant's family life.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

97. The applicant complained that the final courts' decisions had not been enforced concerning his visiting rights and ordering the return of his daughters to Italy under Article 6 § 1 of the Convention, the relevant part of which provides:

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

A. The parties' submissions

98. The applicant submitted that although the authorities had recognised his right to be reunited with his children and had granted his application under the Hague Convention, they were incapable of enforcing those decisions. The applicant underlined that it should not have been very difficult to find a woman with two children who maintained stable relations with her family and friends. He considered that his right to enforcement of

the final domestic decisions, which is a part of the right of access to a court, was not respected by the Polish authorities.

99. The respondent Government rejected these arguments. They submitted that the authorities had acted diligently and had tried on several occasions to enforce the decisions. These attempts were unsuccessful because K.P. was in hiding with the children. The respondent Government underlined that the case was particularly difficult as it concerned delicate family matters regarding two minors.

B. The Italian Government's submissions

100. The Italian Government argued that by non-enforcement of the final court orders the respondent State had deprived those decisions of all useful effect and that it raised a serious issue of the right of access to a court under Article 6 § 1 of the Convention.

C. The Court's assessment

101. 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).

102. In the instant case, the Court finds that the lack of respect for the applicant's family life resulting from the non-enforcement of the final return order is at the heart of his 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 (see *Sylvester v. Austria*, cited above, § 76). Regard being had to the above conclusion, the Court does not consider it necessary to examine separately the applicant's complaint about the alleged non-enforcement of visiting rights.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. 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

104. The applicant claimed 39,100 euros (EUR) in respect of pecuniary damage, for travel costs of forty-six trips he made between Italy and Poland in connection with the enforcement proceedings and for the purpose of visiting his children in Poland. The applicant stated that he had made eight trips in 1999, twenty-four in 2000 and twelve in 2001. He made one trip in 2002 and one in 2005.

As to non-pecuniary damage, the applicant claimed EUR 50,000 by way of compensation for suffering endured by him and his children.

105. The Government submitted that the applicant's claim in relation to pecuniary damage had no causal casual link with the alleged violations of the Convention. With regard to non-pecuniary damage, the Government argued that the sum claimed by the applicant was excessive and unjustified.

106. As regards the travel and subsistence costs related to visiting his children and the enforcement of the return order under the Hague Convention, claimed by the applicant under the head of the pecuniary damage, the Court considers it appropriate to deal with them under the head of costs and expenses.

107. As to non-pecuniary damage, the Court sees no reason to doubt that the 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, and *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 *Sylvester, cited above,* § 84) and making an assessment on an equitable basis as required by Article 41, the Court awards the applicant EUR 7,000.

B. Costs and expenses

108. The applicant claimed a total amount of EUR 17,683 by way of costs and expenses broken down as follows:

(i) EUR 9,700 for legal expenses paid to four lawyers who represented him at different stages of the domestic proceedings in Poland;

(ii) EUR 6,000 for legal expenses paid to his lawyer who represented him in the Court proceedings;

(iii) EUR 1,600 for costs of interpretation in the domestic proceedings;

(iv) PLN 1,500, equivalent to EUR 383 at the material time, for court fees for enforcement of the domestic court's judgment.

109. The Government submitted that the costs and expenses claimed by the applicant were exorbitant and in part irrelevant as there was no indication that they had been incurred with the purpose of preventing, or obtaining redress for the violation complained of.

110. 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, ECHR 2002-X).

111. 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 95 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*, cited above, § 121).

112. However, the Court notes that the applicant's claims relating to costs and expenses allegedly incurred before the Polish authorities have not been accompanied by any invoices or other justifications. The Court thus considers that the applicant failed to substantiate that he had incurred the claimed costs, with an exception of the costs of his representation before the Court, which had been documented by invoices. Turning to travel and subsistence costs related to the forty-six trips allegedly made by the applicant to Poland, the Court notes that the claim was also not supported by any justifications. The applicant failed also to specify the exact dates on which he had made those trips. The Court considers, however, on the basis of the facts of the case, that the applicant must have incurred travel and subsistence costs related to one trip he made in 2002 in connection with an attempt to enforce the return order under the Hague Convention.

113. Making an assessment on an equitable basis and considering, in particular, that the case was indisputably complex, it awards the applicant EUR 7,000 under the head of costs and expenses.

C. Default interest

114. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention on account of the non-enforcement of the order requiring the return of the children to the applicant;

2. *Holds* that there is no need to examine the applicant's other complaints under Articles 6 § 1 and 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 according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 7,000 (seven thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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 8 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Nicolas Bratza President