CONSEIL DE L'EUROPE

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

THIRD SECTION

CASE OF MAUMOUSSEAU AND WASHINGTON v. FRANCE

(Application no. 39388/05)

JUDGMENT

STRASBOURG

6 December 2007

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

In the case of Maumousseau and Washington v. France,

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

Boštjan M. Zupančič, *President,*
Corneliu Bîrsan,
Jean-Paul Costa,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Egbert Myjer,
Isabelle Berro-Lefèvre, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 15 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 39388/05) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Ms Sophie Maumousseau and her daughter Charlotte Washington, on 26 October 2005.

2. The applicants were represented before the Court by Jean de Salve de Bruneton, a member of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that there had been a violation of Articles 6 and 8 of the Convention.

4. On 2 May 2006 the President of the Court's Second Section decided to give notice of the application to the Government. In accordance with Article 29 § 3 of the Convention, the Chamber decided that the admissibility and the merits of the case would be examined at the same time. It was also decided to grant the application priority treatment under Rule 41 of the Rules of Court.

5. On 19 January 2007 the Court changed the composition of its Sections (Rule 25 § 4). This application was allocated to the newly composed Third Section (Rule 52 § 1).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 June 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms Anne-Françoise Tissier, Head of the Human Rights Section, Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,
Ms Marie-Gabrielle Merloz, Drafting Secretary, Human Rights Section Department of Legal Affairs, Ministry of Foreign Affairs, *Counsel*,
Mr François Thomas, Deputy Head of Bureau for International Legal Assistance in civil and commercial matters, Department of Civil Affairs, Ministry of Justice, *Counsel*;

(b) *for the applicants*
Mr Jean de Salve de Bruneton, member of the *Conseil d'Etat* and Court of Cassation Bar, *Counsel*,
Ms Solange Vigand, lawyer, *Adviser*.

The Court heard addresses by Mr de Salve de Bruneton and Ms Tissier and their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Ms Sophie Maumousseau, is a French national who was born in 1967 and lives in Les Adrets de l'Estérel. She lodged the application in her own name and on behalf of her daughter, Charlotte Washington, the second applicant, who was born on 14 August 2000 in Newburgh, New York State (United States of America), and who has dual French and US nationality.

1. Background to the case

8. In May 2000 the first applicant married Mr Washington, a United States national, in the State of New York. Their daughter Charlotte was born on 14 August 2000.

9. Following a serious marital crisis, on an unknown date Ms Maumousseau initiated divorce proceedings in the USA, but she was unable to pursue them because, according to her, she could not afford to.

10. On 17 March 2003, together with the second applicant, she went to stay with her parents in France for the holidays with her husband's consent. She finally decided to remain there and did not return to the USA, despite her husband's repeated requests.

11. On a petition from Mr Washington dated 19 June 2003, the Family Court of the State of New York, Dutchess County, in an order of 15 September 2003, awarded temporary custody of Charlotte to her father, decided that she should live with him, and ordered the mother to return Charlotte immediately, requesting all competent bodies in France to assist the petitioner in repatriating the child to the State of New York. A hearing was scheduled for 14 November 2003 for the purposes of examining the father's petition for sole custody of his daughter and of hearing the mother's reasons for her opposition to such a decision.

2. Proceedings under the Hague Convention on the Civil Aspects of International Child Abduction and the proceedings concerning Charlotte's placement in specialist care

12. On 26 September 2003 Charlotte's father applied to the United States Central Authority in order to secure the return of his child. In accordance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the US Central Authority, on 14 October 2003, transmitted to the French Central Authority, the Bureau for International Legal Assistance in civil and commercial matters, a request for Charlotte's return to the United States.

13. On 15 October 2003 that request was forwarded to the Principal Public Prosecutor at the Aix-en-Provence Court of Appeal, on whose initiative the mother was summoned for interview by the gendarmerie. She stated that she refused to return the child to the father.

14. The public prosecutor at the Draguignan *tribunal de grande instance*, having been authorised by an order of 7 November 2003 on his *ex parte* application, brought proceedings against the first applicant for the purposes of obtaining an order that the child be returned to her father on the basis of Articles 3 and 12 of the Hague Convention. Mr Washington intervened on a voluntary basis in those proceedings.

(a) Judgment of the Draguignan tribunal de grande instance

15. In a judgment of 15 January 2004 the court dismissed the claims of the public prosecutor and Mr Washington. It took the view that whilst Charlotte's removal had not been in any way wrongful, since it was not disputed by Mr Washington that he had agreed to the child's temporary removal to France, the fact that the child had been prevented from returning to her place of habitual residence, where Mr Washington exercised his rights of custody, was to be considered wrongful within the meaning of Article 3 of the Hague Convention, regardless of the reasons for which the applicant was opposed to her return. As to the risk for Charlotte in the event of her return, the court found as follows:

"In the present case, in the light of the various attestations produced in the proceedings, both by Mr Washington and by [the applicant], there is no evidence of harmful conduct [on the part of the father] towards the child ... .

However, it has been established and is not disputed by Mr Washington that the child Charlotte, who was born on 14 August 2003 [*sic*] and who is therefore aged only three years and a few months, has lived throughout her infancy mainly in the company of her mother, especially as the latter was not employed while in the United States. Dr P., who was Charlotte's doctor from her birth until 10 March 2003, has moreover certified that the applicant herself brought the child to most of the consultations and did not miss any appointments.

The attestations produced in the proceedings in respect of Charlotte's life in France show that the mother/daughter relationship is extremely sound, as pointed out by Dr T., who reports that the child is not suffering from any psychological disturbance and has adapted well, particularly in her school life, as indicated by the attestation from the headmistress of the nursery school that [she] attends.

The applicant arranged for the child to undergo a psychological examination by Dr V. Concerning the relations that the child had developed emotionally with her parental figures, this clinical psychologist noted the very strong predominance of the mother figure:

- The child's psychological, psycho-affective and cognitive development is healthy, and there is an excellent relationship, with sound emotional ties, between Charlotte and her mother, and also between the child and her maternal grandparents. It also appears that she refers to the father figure, that she may mention when prompted by the therapist, without expressing any affect.

- Charlotte seems to be developing harmoniously, having found a balanced life with her mother and maternal grandparents, and does not seem to have been affected mentally by her separation from her father or her departure from the United States of America, where she was born. It would thus be harmful for this child if her points of reference were changed and she was placed in a situation where she became separated from her mother and her mother's family out of a concern for effective restoration of the father's role.

It transpires from the foregoing that, in view of Charlotte's infancy and her close relationship with her mother, in whose company she has always lived, both in the United States of America and since her arrival in France, her return would place her in an intolerable situation on account of the resulting separation from her mother, but also because of her removal from the environment to which she has adapted and her transfer to a new environment with her father in the State of her habitual residence, no concrete information having been forthcoming in this connection.

In these circumstances, and in accordance with Article 13 (b) of the Hague Convention, it is not appropriate to order Charlotte's return to the United States of America ... on account of a grave risk that she would be placed in an intolerable situation."

16. On 30 January 2004 the public prosecutor appealed against the decision of the Draguignan *tribunal de grande instance*.

17. In parallel to the French proceedings, by an order of 24 February 2004 delivered on 8 March 2004, the Family Court of the State of New York, ruling on the merits of the father's petition, in the absence of the mother – who had failed to appear despite having been served notice of the hearing –, awarded the father sole custody of the child, ordered that the child be returned and held that the court retained jurisdiction to reconsider the child's best interests as well as the court's directions in the case if requested by either party.

(b) Judgment of the Aix-en-Provence Court of Appeal

18. In a judgment of 13 May 2004, served on 1 June 2004, the Aix-en-Provence Court of Appeal set aside the judgment of 15 January 2004 and ordered Charlotte's prompt return to the place of her habitual residence in the United States of America. The judgment gave the following reasons:

> "... [the first applicant] requested the benefit of the exception provided for in Article 13 (b) of the Hague Convention ...
>
> It is not for the Court to assess the educative and affective capacities of each parent but to ascertain whether the parent who retains the child has adduced evidence to show that if returned the child would be exposed to real and immediate physical or psychological harm and would be placed in an intolerable situation before a decision on the merits is taken by the court of the place of habitual residence, it being understood that, in accordance with Article 19 of the Hague Convention, a decision under that Convention concerning the return of the child will not be a determination on the merits of any custody issue.
>
> Ms Maumousseau has argued that the child should not be returned to the United States of America on child protection grounds, on account of the violent and alcoholic behaviour of Mr Washington who, she has also alleged, took drugs.
>
> The attestations produced by Ms Maumousseau, issued by her parents, Mr and Mrs Louis, Mrs Musard, Mrs Bernard, Mrs Degeneve and Mrs Buckley, mainly relate to her own allegations, which she had imparted to them, about her husband's behaviour towards her. None of them provide evidence of any harmful attitude on the part of Mr Washington towards his daughter. He has himself produced various affidavits from work colleagues, friends of the couple and neighbours, testifying that he is a caring father, is not an alcoholic and does not take drugs. He has also produced the results of tests dated 9 March 2004 showing the absence of any trace of drugs.
>
> The domestic incident report of 4 September 2002 from New York State, the medical certificates of 18 March 2003 and 20 November 2003 issued by Dr Broglio, that of 3 December 2003 by Dr Page, and the complaint for violence filed on 4 December 2003, do not relate to Charlotte Washington at all.
>
> The only document concerning Charlotte is a child protection report filed on 2 October 2001 by the social services of Dutchess County, which noted a lack of supervision imputable to the child's mother following a fall by the child in the fire-escape stairwell. This incident shows that the New York State services are protective of the child's interests.

Ms Maumousseau has not shown that the child's return would be harmful for her on account of the father's behaviour. In fact, she had herself written to him on 4 May 2003 requesting that he send various belongings and objects for Charlotte and adding: “we hope you will come and see us soon and live with us”.

Ms Maumousseau argues that the child's return would place her daughter in an intolerable psychological situation on account of being separated from her mother after having adapted to her new life.

Charlotte, now three and a half years old, has been living with her mother and maternal grandparents for the past year. She has settled well in the village life, has been attending nursery school since 3 September 2003 and takes gymnastics lessons.

The headmistress of the nursery school describes her as a well-behaved child who works well, plays with all her classmates, speaks fluent French, understands everything she is told and makes herself understood, has adapted perfectly to school, and shows much self-fulfilment and contentment.

Dr Torres Chavanier, a psychiatrist, certified on 9 December 2003 that she was a smiling and lively child with a very satisfactory psychomotor and intellectual development for her age and that she showed no signs of psychological disorder. He also pointed out that the mother-child relationship was very sound.

Mr Veschi, a clinical psychologist, certified that he had seen the child at the request of Ms Maumousseau and had drawn up an examination report dated 10 December 2003.

He noted the child's very strong emotional relationship with her mother and maternal grandparents, a very strong predominance of the mother figure reflected in her imaginative creations and in symbolic games, and her reference to the father figure without expressing any affect.

He concluded his report by stating that the child was in good psychological, psycho-affective and cognitive health, which was apparently developing harmoniously, that she seemed to have found a balanced life with her mother and maternal grandparents, and did not seem to have been affected mentally by her separation from her father or her departure from the United States of America, where she was born. He added that '[i]t would thus be harmful for this child if her points of reference were changed and she was placed in a situation where she became separated from her mother and her mother's family out of a concern for effective restoration of the father's role'.

The harm referred to in Article 13 (b) of the Hague Convention cannot be constituted solely by separation from the parent who acted unlawfully and created the risk.

The observations of the psychiatrist, psychologist and headmistress show that the child has the capacity to adapt to new circumstances.

Mr Washington has been employed by the company Verizon Communications, as a consultant since 1988, and as a video specialist since December 1999. In 2002 his monthly salary amount to 4,500 euros.

He has been a tenant in the same residence since June 2000, i.e. before Charlotte was born, renting a two-room apartment for a monthly rent of 1,009 dollars that he pays regularly.

His employer wrote to him on 18 February 2004 that he agreed to adapt his working hours so that he could work only two days a week when necessary, as the nature of his work allowed him to work outside the company's premises, whether at home or elsewhere.

Ms Maria Nagy, a graduate of a nursing school and a neighbour of Mr Washington, informed him in a letter of 6 February 2004 that she agreed to look after Charlotte, day or night, as required.

The head of the nursery section of a children's day care and learning centre in Wappingers Falls confirmed by a letter of 20 February 2004 that Charlotte had been admitted to it.

The affidavits and photographs produced by Mr Washington further show that he has the support of his family and friends.

The environment that Mr Washington would provide on his daughter's return, being the environment in which she lived from 14 August 2000 until her removal on 17 March 2003, does not indicate a risk of any harm that would place the child in an intolerable situation.

Ms Maumousseau alleged that there was a risk that she would no longer be allowed to travel freely to the United States.

She produced the form for entry into the United States that has to be filled in by non-immigrant visitors without a visa, showing that entry into the country may be refused to a person who has prevented a US citizen from exercising his or her custody rights.

A permanent resident card, valid from 21 June 2003 to 10 October 2013, was granted to Mrs Washington née Maumousseau on 3 October 2003, further to her application of 21 August 2000.

As a result, the US authorities cannot prevent her from returning to the United States where the family's habitual residence is located and where she will be able to assert her rights in the context of adversarial proceedings. The decisions concerning the exercise of parental authority are essentially temporary and may be modified to take the child's interest into account. The judge of the Dutchess County Family Court, New York State, moreover stipulates in his order of 24 February 2004 that 'the court reserves the right and retains jurisdiction to decide on the child's interest and will consider any new measures that may be taken by the two parties in accordance with this decree [*sic*]'.

Having regard to all of the foregoing elements, which are sufficient for adjudication without it being necessary to order any investigation, Mrs Washington née Maumousseau has not shown that there is a grave risk that Charlotte's return would expose her to physical or psychological harm or place her in an intolerable situation.

> Consequently, it is appropriate to set aside the judgment appealed against and to order the child's prompt return to the place of her habitual residence, in accordance with Article 12 of the Hague Convention of 25 October 1980."

19. The first applicant appealed against this judgment to the Court of Cassation claiming a violation of Article 13 (b) of the Hague Convention and of Article 8 of the European Convention on Human Rights, and a failure to take into account the child's "best interests" as guaranteed by Article 3 § 1 of the New York Convention on the Rights of the Child (the "New York Convention").

20. On 8 June 2004 the first applicant was interviewed by the police with a view to the voluntary return of the child, who had been taken into hiding. On 2 and 9 July 2004 the mother was questioned by the public prosecutor for the same purpose. On those latter occasions she took note of the fact that she was committing a criminal offence by keeping her daughter in the current situation and refused to enforce the judgment of 13 May 2004.

21. On 23 September 2004 the public prosecutor of Draguignan, assisted by four police officers, entered Charlotte's nursery school seeking to enforce the judgment of the Court of Appeal. It can be seen from the various press articles in the file that the first applicant, the child's grandparents and school staff physically opposed the police intervention by forming a protective barrier around the child, helped by the prompt arrival of several villagers and the village mayor himself. Faced with this resistance, in the course of which blows and insults were apparently exchanged, the public prosecutor provisionally discontinued the enforcement of the decision. The operation attracted widespread media attention, nationally as well as locally. The then Minister of Justice announced that he would request the General Inspectorate of Judicial Services to study the means of intervention best adapted to this type of dispute; however, no such report has ever been filed or published.

(c) Charlotte's placement in specialist care

22. In the meantime, on 28 May 2004, the first applicant had applied to the Draguignan Youth Court seeking a measure of "educational assistance" for her daughter. In a decision of 2 August 2004 the Youth Court ordered a measure of investigation and educational guidance and prescribed a psychiatric examination as follows:

> "It appears that Charlotte, who is almost four years old, is embroiled in a relentless conflict between her parents, before the courts and in the media, and this must be upsetting or disturbing for her. Charlotte may also feel and apprehend fear about the prospect of being separated for good from her father or mother. These conditions may particularly give rise to anxiety, suffering and worry for a little girl."

23. In an educational assistance order of 27 September 2004 the Draguignan Youth Court decided on the placement of the second applicant for a period of six months in specialist family care with the ADSEA for the

département of Var, with a right of access for both parents, on the following grounds:

> "It transpires from the interim report issued by the department responsible for the investigation and educational guidance, from the representations of the parents and the child's *ad hoc* administrator, from the submissions of the parties and the public prosecutor, from the press articles in the case file, from correspondence and from judicial decisions, that the conflict between the parents reached a climax on 23 September 2004 in Les Adrets, inevitably causing this little girl psychological distress, fear, anxiety, terrors and confusion.
>
> Charlotte was at the heart of a situation of severe and active physical and mental violence and witnessed serious clashes between adults of which she was the subject.
>
> These circumstances have entail for this child a strong emotional condition that endangers her health and security.
>
> The idea, for Charlotte, of being constantly reminded that she risks being permanently separated from her father or mother must inevitably have been strengthened on that occasion ...
>
> Charlotte is living today in semi-clandestine conditions, deprived of contact with her father, the subject of concern among members of her family, and a hostage in the conflict between her parents, as enshrined in various decisions.
>
> In order to give her some respite, some time to catch her breath and get on with her childhood, to distance her from the competition of which she is the target, with the risk of a psychological breakdown, it is appropriate to order that she be placed for a period of six months in specialist family care with the ADSEA for the *département* of Var."

24. In a judgment of 3 December 2004 the Aix-en-Provence Court of Appeal endorsed the child's temporary placement in care but, when ruling on the merits, ordered that she be removed from care and returned to her father in accordance with the US court's decision and its own decision of 13 May 2004.

25. On 4 December 2004 Charlotte left France for the USA.

26. In a judgment of 21 March 2005 the Youth Court ordered the discontinuance of the educational assistance measure:

> "The conflict over this child must have placed Charlotte in a situation of uncertainty, anxiety and suffering.
>
> The present outcome of this conflict, namely Charlotte's separation from her mother, must have been very psychologically harmful for this four-year-old child who until then had benefited from the warm and orderly environment provided by the mother.
>
> A whole sphere of her past life has thus disappeared – left behind in a few hours on the plane.
>
> This wrench will take a long time to heal.

In this sense, Charlotte remains in a situation of danger in terms of her health, within the meaning of Article 375 of the Civil Code.

The fact that Charlotte lives with her father in the USA nevertheless precludes the continuation of any measure of support for the girl or her parents.

On that ground alone it is ordered that the educational assistance measure be discontinued."

(d) Judgment of the Court of Cassation dismissing the first applicant's appeal against the judgment of the Aix-en-Provence Court of Appeal

27. In a judgment of 14 June 2005 the Court of Cassation dismissed an appeal by the first applicant in spite of the advocate-general's submissions to the contrary. The judgment is reasoned as follows:

"It is apparent from Article 13 (b) of the Hague Convention of 25 October 1980 that an exception to the child's prompt return may be allowed only if there is a grave risk of harm or of an intolerable situation. Under Article 3 § 1 of the New York Convention on the Rights of the Child – a provision which is directly applicable in the French courts – the best interests of the child must be a primary consideration in the assessment of the relevant circumstances.

Without having to deal with a mere argument, the Court of Appeal noted, in its discretion, after referring to the conditions of the child's life with her mother, that there was no evidence that the father had displayed a dangerous attitude towards his daughter, that it had been established that he was neither an alcoholic nor a drug addict, that the child's psychological condition was satisfactory, and that her father would offer her favourable living conditions in the United States, with the assistance of a nursing school graduate. These findings show that the child's best interests were taken into consideration by the Court of Appeal, which rightly concluded, without laying itself open to the complaints in the present appeal, that it was appropriate to order the child's prompt return in accordance with the Hague Convention."

3. Divorce proceedings initiated by the first applicant in France

28. In parallel to the various sets of proceedings mentioned above, the first applicant initiated divorce proceedings in France on 6 November 2003, when she filed a petition for divorce, on the grounds of fault, with the Draguignan family-affairs judge. In a decision of 24 November 2003, a hearing for an attempt at reconciliation was scheduled for 8 June 2004. At that hearing, Mr Washington claimed that the French family-affairs judge should decline jurisdiction in favour of the Family Court of the State of New York.

29. In a decision of 15 June 2004 the judge upheld the objection to jurisdiction. In a judgment of 24 February 2005 the Aix-en-Provence Court of Appeal set aside that decision and held that the French court had jurisdiction to rule on the divorce.

30. On 30 March 2005 the first applicant filed an updated petition for divorce. In a decision of 31 March 2005, a hearing for an attempt at

reconciliation was scheduled for 30 June 2005. In connection with that hearing, Mr Washington filed pleadings seeking an order that he be examined before the Family Court of the State of New York, and in the alternative the postponement of the hearing so that he would be able to attend. The proceedings were adjourned until a hearing of 2 August 2005. Mr. Washington failed to appear and did not give reasons for this. The reconciliation hearing was thus held in his absence.

31. In a non-reconciliation decision of 16 August 2005, and after pointing out that a decision on the child's return given in the context of the Hague Convention did not determine the merits of any custody issue (Article 19), the family-affairs judge ruled that parental authority would be exercised jointly by both parents, that the child would habitually reside in France at her mother's house, and that the father would have rights of visiting and staying contact for one half of the school summer holidays every year, and every other year, alternately with the mother, for the whole of the Christmas holidays. The decision states as follows:

> "The petitioner's claims, in the light of the evidence concerning the living conditions offered to the child, as noted by the judges of the Aix-en-Provence Court of Appeal, do not appear to be contrary to the child's interests. They must therefore be granted as to their principle."

32. In a judgment of 24 April 2007 the Draguignan *tribunal de grande instance* granted the parties' divorce and held that the second applicant should live with her mother, with her father being granted a right of contact.

33. The Government indicated that subsequent to the enforcement of the decision concerning the child's return, the French Central Authority had received requests from the first applicant's lawyer for the purpose of transmitting to the US Central Authority a request for Charlotte's return on the basis of the non-reconciliation decision holding that the child should live with her mother. No action had been taken in response to these requests on the ground that Article 3 of the Hague Convention was not applicable as the child's habitual residence had been in the United States at the time of the French decision. Lastly, during the public hearing before the Court, the Government explained that on 24 November 2005 the first applicant had summoned Mr Washington to appear before the Draguignan Criminal Court, for the offence of failing to hand over a child to the person having custody, in breach of the decision of 16 August 2005, and that the court, having found that it was not established that the summons had been served on its addressee, had invited her to serve a new summons for a hearing on 7 September 2007.

4. Custody proceedings in the United States

34. Following the orders of 15 September 2003 and 24 February 2004 (see paragraphs 11 and 17 above), the Family Court of the State of New York made a new order ("order to show cause") on 11 October 2005 in

which the first applicant was summoned to a hearing scheduled for 28 November 2005 for the purpose of submitting the reasons why an order should not be made, upon a petition from Mr Washington, to the effect that her visits to Charlotte would be restricted to the courthouse under the supervision of the child's paternal grandmother and an officer of the court and that she would have to surrender the child's French passport prior to the first visit and refrain from applying for a new one. She was moreover ordered to post with the court a bond in the amount of 50,000 dollars which would be subject to forfeiture in the event she removed the child from the country.

35. On 18 November 2005 the first applicant received a letter from the French Ministry of Foreign Affairs which stated as follows:

> "In your interview of 14 October 2005 you expressed your fear that you would not be given leave to enter the United States and thus would not be able to visit your daughter Charlotte, since, on the United States immigration questionnaire that you would have to complete, you would be asked expressly if you had committed a wrongful child abduction.
>
> The Ministry of Foreign Affairs is not in a position to give you an assurance that the United States authorities would allow you to enter their country.
>
> I am able to inform you, however, that a representative of the United States Embassy in France, who was asked about this matter on the telephone, indicated that as you would be coming from a State which is a co-signatory with the United States of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, you should not be prevented from entering US territory."

36. On 23 November 2005 the first applicant's representative in the United States requested an adjournment of her court appearance until 19 December 2005 and filed an "affirmation in support of request for adjournment" stating that she had been informed of the court's objection to her contacting her daughter before that appearance.

37. At the hearing of 19 December 2005 representations were heard from the parties. The first applicant requested the court, among other things, to dismiss the father's application and to register the non-reconciliation decision of 16 August 2005 of the Draguignan *tribunal de grande instance* granting her custody of Charlotte.

38. In a decision of 3 February 2006, delivered on 8 February, the judge of the Family Court of the State of New York granted Mr Washington's application to restrict the mother's right of visitation. The court found first that the State of New York alone had the authority and jurisdiction to rule on issues of custody relating to the child, that it would not relinquish jurisdiction, that no French law or ruling could change the domestic law and that it would not recognise the orders of any other court which purported to exercise jurisdiction which was not in conformity with the applicable laws of New York State and international treaties which governed such issues.

As regards the non-reconciliation decision of 16 August 2005 granting custody of Charlotte to the mother, it refused to recognise it as binding on that court. The court found that the father's request was justified by the mother's conduct and by the attitude of the French courts and authorities, which had for many months aided the mother in her appropriate actions. Observing that immediately after the child had returned to the United States a French court had determined that the mother should have custody, the judge was of the opinion that if the child were to return to France the likelihood for the father of having that most recent ruling overturned would be remote. The judge concluded as follows:

> "Based on the foregoing, this Court will not consider granting the mother unsupervised visitation and will conduct no further hearings on the issues of custody and visitation unless and until all of the following things have taken place:
>
> 1. The mother must apply to the appropriate French courts and obtain the following results:
>
> a. An order which vacates any orders which purport to grant custody of this child to the mother.
>
> b. An order which unequivocally and irrevocably acknowledges that New York alone has exclusive subject matter jurisdiction over the issue of custody of this child so long as the father continues to be a resident of New York State.
>
> c. An order registering and recognizing the New York order, granting the father full custody of the subject child, as the only valid order relating to the custody of this child.
>
> d. ...
>
> 2. ...
>
> 3. Before any unsupervised visitation is granted, the mother must post a cash or surety bond in the amount of $25,000.00 ...
>
> 4. Any time the mother is exercising any form of visitation with the child, she must surrender her passport to the child's law guardian ...
>
> 5. ..., all visitation with the child shall be supervised and shall be confined to the area of Dutchess County, New York, unless prior court approval has been granted.
>
> I realize these may seem like harsh conditions and restrictions. However, these conditions and restrictions are born of the extremely inappropriate conduct of the mother and the clear attitude and intentions of the French courts and authorities to favor the mother, ignoring applicable laws and international protocols relating to the issues involved in this case.
>
> The mother shall have the right to apply to this court for a relaxation of the conditions outlined above upon notice to this court that the French order purporting to

grant her custody of the child has been vacated and the order of this court has been registered and recognized in France as the only valid order ...”

39. The order was followed by the usual indications about the possibility of lodging an appeal before the Appellate Division, Second Department, no later than thirty days after receipt of the order. The first applicant did not exercise her right of appeal.

40. Lastly, there is evidence that on 15 January 2007 the French Central Authority sent a letter to counsel for the first applicant, beginning as follows:

“Dear Madam,

I have been informed by my counterpart in the United States that Mr Washington does not accept the offer of mediation that was made to him, since he cannot be certain of the mother's intentions, and this perhaps explains why you decided, at the same time as he was approached about a friendly settlement, to reactivate the criminal proceedings, of which I have been informed by the public prosecutor of Aix-en-Provence.

The terms of the US judgment being unequivocal, it seems pointless to bring any proceedings in the United States with a view to extending the contact between Charlotte and her mother before securing a change in the French decision concerning parental authority.

It is up to your client to lodge an application for that purpose with the family-affairs judge. The French Central Authority is quite prepared to confer once again with the US Central Authority in order to ascertain what assistance could be provided to Ms Maumousseau should she wish to bring proceedings in the United States for an extension of her access rights, as and when such proceedings are justified by new developments. ...”

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND DOMESTIC PRACTICE

1. Domestic law and the case-law of the Court of Cassation

41. Article 388-1 of the French Civil Code provides:

“In all proceedings relating to him, a minor capable of discernment may, without prejudice to the provisions as to his intervention or consent, be heard by the court or, when his interests so require, a person appointed by the court for that purpose.

A minor shall be granted a hearing if he so requests. If a minor refuses a hearing, the court shall assess the merits of the refusal. He may be heard alone, with a lawyer or with a person of his choosing.

Where that choice does not appear to be consonant with the child's interests, the court may appoint another person.

The hearing of a minor does not confer on him the status of a party to the proceedings.

The court shall ensure that the minor has been informed of his right to be heard and to be assisted by a lawyer."

42. The Court of Cassation was consistent in its case-law concerning the application of Article 13 of the Hague Convention until the above-cited judgment of 14 June 2005 (see paragraph 27 above). In a judgment of 12 July 1994, the first Civil Division of the Court of Cassation gave the following reasons for its decision:

"The harm or intolerable situation, within the meaning of [Article 13 (b) of the Convention of 25 October 1980], results as much from the further change in the removed child's current environment as from the environment that he will discover or rediscover in the State of his habitual residence.

Furthermore, after observing, in the light of the expert's report, that Fareed's separation from his mother, taking into account the child's tender age and the circumstances in which he had come to live exclusively with her for over a year, 'would be experienced by the child as the loss of a loved one', the Court of Appeal, exercising its power of discretion, held that for the time being his return to the United States of America would expose him to a grave risk of psychological harm. It therefore justified its decision in accordance with the law."

In a judgment of 22 June 1999 the same Division dismissed an appeal on points of law as follows:

"The Court of Appeal, which rightly found, based on its own reasoning and that of the court below, that a grave risk of harm or of an intolerable situation – circumstances that under Article 13 (b) of the Hague Convention justify the retention of children who have been removed – might be entailed by a further change in the children's environment, decided in its discretion that separating a three-year-old child from her mother and a brother and sister from each other would cause an immediate risk of psychological harm, and that the sudden return of the children to Germany would place them in an intolerable situation in view of their tender age." (Court of Cassation, First Civil Division, 22 June 1999).

2. International law

(a) Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (ratified by France and the United States of America)

43 The relevant provisions read as follows:

"The States signatory to the present Convention,

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

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

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

Article 1

"The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 3

"The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 7

"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."

Article 12

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

Article 13

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

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

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

Article 20

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

Article 21

"An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

The Hague Convention was adopted on 24 October 1980 by the Fourteenth Session of the Hague Conference on Private International Law (the "Conference"), an intergovernmental organisation, in Plenary Session. In 1982 the Conference produced and published a final Explanatory Report on the Hague Convention to which the Court refers. The report was drafted by Mrs Élisa Pérez-Vera, Reporter to the organisation's First Commission, which had been responsible for preparing the Hague Convention; it is available on the Internet at http://hcch.e-vision.nl/upload/expl28.pdf. Paragraph 34 of the report reads as follows:

"... it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."

(b) Convention on the Rights of the Child of 20 November 1989 (ratified by France, but not by the United States of America)

44 The relevant provisions of the Convention on the Rights of the Child read as follows:

Preamble

"... Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ..."

Article 3 § 1

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 11

"1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements."

45. In its "General Comment No. 5 (2003)", on States Parties' obligations to develop general measures of implementation of the 1989 Convention on the Rights of the Child, the Committee on the Rights of the Child, the United Nations body that monitors its implementation, encouraged States Parties to ratify the Hague Convention for the purposes of implementing the above-mentioned Article 11.

Article 12

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

46. The Committee on the Rights of the Child, in its Concluding Observations of 30 June 2004 concerning France, in the context of the second periodic report submitted by that State (CRC/C/15/Add.240), indicated that it was concerned about "inconsistencies in legislation as well as the fact that in practice, the interpretation of the legislation, and determination of which child is 'capable of discernment', may leave

possibilities of denying a child this right or make it subject to the child's own request and may give rise to discrimination" (§§ 21 and 22 of its Observations). In its "General Comment No. 7 (2005)" on implementing child rights in early childhood, the Committee stated that Article 12 of the Convention on the Rights of the Child applied both to younger and to older children, early childhood being defined as the period below the age of eight years.

(c) Parliamentary Assembly of the Council of Europe

47. Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe on a European Charter on the Rights of the Child states the following as the first of a number of general principles:

> *"a.* Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs; ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 6 § 1 AND 8 OF THE CONVENTION, TAKEN TOGETHER

48. The first applicant complained that Charlotte's return to the United States had been enforced in breach of Article 13 (b) of the Hague Convention and Article 8 of the European Convention on Human Rights, taking the view that the child's separation from her mother and from her environment in France had placed her in an "intolerable situation" in view of her very young age and had been contrary to her "best interests". She complained about the new case-law of the Court of Cassation and criticised the lack of consideration for Charlotte's separation from her and from the environment in which the child had settled in France. Article 8 of the Convention 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."

The first applicant further argued that she had been deprived of her right of access to a court with full jurisdiction, as both the Court of Cassation and the Court of Appeal had accepted that a court hearing a request for a child's return under the Hague Convention had no authority to examine the

situation as a whole in order to determine whether the return was in the child's best interests. She relied on Article 8 taken together with Article 6 § 1 of the Convention, of which the relevant part reads as follows:

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

She further alleged that the police intervention at Charlotte's nursery school on 23 September 2004 had constituted ill-treatment and would significantly affect her daughter psychologically. She relied on Article 8 taken together with Article 3 of the Convention, which reads as follows:

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

A. Admissibility

49. The Court notes at the outset that the first applicant relied, in conjunction with Article 8, both on Article 6 § 1 of the Convention, complaining in substance that the examination of the child's "best interests" by the domestic courts, stemming from the application of the Hague Convention, had been incomplete, and on Article 3, complaining that the attempt to enforce the child's return had been traumatic for her daughter. The Court, however, will examine the application only under Article 8, being of sole relevance to the present case, as it finds that the complaints are essentially directed against the merits of the decision ordering Charlotte's return to her father in the United States and the conditions of enforcement of that order. As a subsidiary consideration, with regard to the complaint under Article 3, even supposing that this Article is applicable the Court notes that no remedy – such as the filing of a criminal complaint with the competent authority – had been used to complain about the ill-treatment allegedly sustained, whereas under Article 35 § 1 of the Convention it can hear a case only after the exhaustion of domestic remedies (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V) and this complaint cannot therefore succeed in any event.

50 The Court further observes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It notes moreover that no other ground for declaring it inadmissible has been established. It should therefore be declared admissible.

B. The merits

The parties' submissions

(a) The Government

51. The Government, having to reply only to the complaint under Article 8 of the Convention, did not deny that the impugned court decisions ordering the child's return to her father constituted interference with the child's right to respect for her family life. They were of the opinion, however, that this interference fulfilled the conditions of Article 8 § 2.

52. The Government first expressed the view that the impugned measure had been in accordance with the "law", namely the Hague Convention of 25 October 1980, which satisfied the criteria of foreseeability and accessibility that had emerged from the Court's case-law; on this point they cited the *Tiemann v. Germany and France* decision of 24 April 2000. They noted that the first applicant was familiar with the provisions of the Hague Convention since she herself had relied on Article 13 (b) in asserting her rights.

53. Secondly, the interference had pursued a legitimate aim, namely the protection of health and morals and the protection of the rights and freedoms of others, and the child's return to the United States had been ordered in the interest of the child's welfare and to put an end to an unlawful situation, not to favour her separation from her mother. The Government pointed out in this connection that the principle laid down in the preamble to the Hague Convention that a child wrongfully removed by its parents should be promptly returned to the State of its habitual residence was based on the premise that the primary victim was the child itself, thus obliging the States Parties to act diligently, in accordance with Articles 7 and 11 of the Hague Convention. The Government also observed that the Court had found against States which had not ensured a child's prompt return, had judged the adequacy of a measure by the swiftness of its implementation, and had further held that in certain cases it was for the competent national authorities to punish the abducting parent, as the passage of time could have irremediable consequences for relations between the child and the parent with whom it did not live; they cited, among other authorities, the *Maire v. Portugal* judgment of 26 June 2003 and the *Ignaccolo-Zenide v. Romania* judgment of 25 January 2000. In the present case, by contrast, the Government asserted that the French authorities had made adequate and effective efforts to enforce the Court of Cassation's judgment of 14 June 2005 and to uphold both the child's right to be reunited with her father and the father's right to have his daughter returned to him, in accordance with Article 8 of the Convention as interpreted in the light of the Hague Convention.

54. The Government further argued that the measure had been proportionate to the legitimate aim pursued. They emphasised, by way of preliminary argument, that Article 13 (b) of the Hague Convention was not applicable automatically and that the assessment of the facts constituting the "psychological or physical harm" incurred by the child or the "intolerable situation" in which he or she would be placed in the event of his or her return fell within the absolute discretion of the courts hearing the case. They took the view that the child's "best interests" had constantly been taken into account, as could be seen from the wording of the impugned decisions.

55. The Government pointed out that in its judgment of 13 May 2004, which contained lengthy reasoning, the Court of Appeal had first noted that the father's conduct did not constitute harm within the meaning of the above-mentioned Article 13 (b), finding that none of the evidence in the case-file corroborated the mother's claims, and had taken the view that the child's return would not place her in an intolerable psychological situation, adding that "[t]he harm referred to in Article 13 (b) of the Hague Convention [could] not be constituted solely by separation from the parent who acted unlawfully and created the risk". On this point, the Government contended that no criticism could be laid against a court, as the first applicant had done, for making a restrictive interpretation of the exceptions to the principle of the child's prompt return, nor could it be inferred that this court had refused as a matter of principle to take account, in assessing the alleged risk, of the new situation arising from the child's abduction. They observed that the first applicant's interpretation would amount to rendering the Hague Convention devoid of substance, and it would be contrary to its very purpose if the parent responsible for the wrongful removal could systematically rely on his or her own unlawful action to invoke a risk of serious trauma in the event of the child's return to his or her place of habitual residence. The Government observed that the analysis made by the domestic courts was consistent with the solutions usually adopted by the various States Parties to the Hague Convention, and with the Court's case-law. They then concluded that the Court of Appeal had struck a fair balance between the competing interests, since it had taken into account, first, Charlotte's living conditions in her new environment (her strong attachment to her mother and her good relations with her maternal grandparents and her perfect integration in France), inferring therefrom that she had a strong capacity of adaptation – as had been noted by the Court of Appeal in its 3 December 2004 judgment concerning the child's provisional placement in care -; and, secondly, the material, emotional and psychological aspects of the living conditions offered by her father, which were those that she had known for three years (the father's irreproachable conduct, contrary to the unproven allegations of the first applicant, the possibility for him to organise his working hours to look after Charlotte, his circle of family and friends, and the positive material aspects of the conditions in which the

child would be received). The Court of Appeal had thus conducted a general examination of the best solution for the child, leading the Court of Cassation to find that it had legally substantiated its decision.

56. Lastly, the Government pointed out that the sole purpose of the return decision had been to put an end to an unlawful situation, that it was not a decision on the merits concerning the child's habitual residence and that it did not therefore entail Charlotte's long-term separation from her mother, because the latter had always had the possibility of filing her claims with the United States court, which had precisely indicated in its order of 8 March 2004 that it retained jurisdiction to reconsider, upon the application of either party, the child's best interests and the directions it had made.

(b) The first applicant

57. The first applicant argued that the Government's observations showed that they had admitted that the justification for the return decision lay in the consideration that the abducting parent had to be punished and that a "risk of serious trauma" could not therefore be taken into account in so far as it was the consequence of a wrongful removal. She emphasised that the Court of Appeal had refused, as a matter of principle, to take the child's "best interests" into account, as that would have resulted in the endorsement of an allegedly unlawful action. In finding that "[t]he harm referred to in Article 13 (b) of the Hague Convention [could] not be constituted solely by separation from the parent who acted unlawfully and created the risk", the domestic courts had thus refused to consider the effect that Charlotte's return would have on her, whilst the Court of Appeal had noted that according to an expert's report "[i]t would ... be harmful for this child if her points of reference were changed and she was placed in a situation where she became separated from her mother and her mother's family", and the advocate-general at the Court of Cassation had raised the question whether "the Court of Appeal's refusal to deal with the consequences of the risks of separating a girl of three and a half years old from her mother, with whom she had always lived, [was] compatible with the requirements of Article 3 § 1" of the Convention on the Rights of the Child.

2. The Court's assessment

(a) Reasons for the impugned order for the child's prompt return

58. The Court observes at the outset that the possibility for Ms Maumousseau and her daughter Charlotte of continuing to live together is a fundamental consideration that clearly falls within the scope of family life within the meaning of Article 8 of the Convention, and that Article is

therefore applicable in the present case (see, among many other authorities *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII).

59. Moreover, it cannot be disputed that the French courts' order for the child's return constituted an "interference" in respect of the two applicants, within the meaning of paragraph 2 of that same Article, it being understood that the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition (see, for example, *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-...).

60. The Court reiterates that the Convention cannot be interpreted in a vacuum and must therefore be applied in accordance with the principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *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).

As regards the obligations that Article 8 imposes on the Contracting States with respect to reuniting parents with their children, they must be interpreted in the light of the requirements of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 51, ECHR 2003-V, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I) and with those of the Convention on the Rights of the Child of 20 November 1989 (see *Maire*, cited above, § 72).

61. In the present case, the Court notes that the French courts' decisions ordering the child's return were based on the provisions of the Hague Convention, which was in force in France and was applied with the aim of protecting Charlotte's rights and freedoms, such aim being recognised as legitimate within the meaning of paragraph 2 of Article 8 of the Convention (see, on this point, *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

62. The Court will therefore endeavour to determine whether the interference in question was "necessary in a democratic society" within the meaning of the second paragraph of Article 8 of the Convention, interpreted in the light of the above-mentioned international instruments, the decisive issue being whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters. In this connection, whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be

fair and such as to afford due respect to the interests safeguarded by this Article (see *Eskinazi and Chelouche*, cited above).

63. The Court first observes that whilst the second applicant's removal to France had not been wrongful, since her father had not opposed it, the failure to return the child to her place of habitual residence, where Mr Washington had custody of his daughter jointly with his wife, was wrongful within the meaning of Article 3 of the Hague Convention. It further notes that the Aix-en-Provence Court of Appeal and the Court of Cassation took the view, first and foremost, that the child's return to the United States of America would not expose her to "physical or psychological harm", within the meaning of Article 13 (b) of the Hague Convention. On this specific point the Court of Appeal noted the total lack of evidence in support of the first applicant's claims but, by contrast, regarded as conclusive the numerous attestations in favour of Charlotte's father and, moreover, the results of a test showing the absence of any trace of drugs. As regards the "intolerable situation" in which Charlotte was allegedly going to be placed as a result of separation from her mother, the Court of Appeal carefully analysed the child's living conditions in France, in both emotional and material terms, and those offered by her father in the United States. In that connection the court pointed out the second applicant's strong capacity of adaptation and indicated that the harm referred to in Article 13 (b) of the Hague Convention could not be constituted solely by separation from the parent who was responsible for the wrongful removal or retention. The Court of Cassation, for its part, departed from precedent and endorsed that new approach.

64. The first applicant complained that the interpretation by the domestic courts of the exception under Article 13 (b) of the Hague Convention had been too restrictive and that her daughter's "best interests" had not been considered completely, in the light of Article 13 (b) of the Hague Convention, Article 8 of the Convention and Article 3 § 1 of the New York Convention. In her view, the consequences for her daughter of being separated from her environment in France and from her mother had not been taken into account by the domestic courts, whilst their decision placed Charlotte in an "intolerable situation" in view of her tender age, in particular, and because her mother could not return to the United States. She added that the extent of the judicial scrutiny in respect of that matter had been reduced inordinately because the court adjudicating on the application for the child's return under the Hague Convention had refrained from assessing the situation as a whole in deciding whether or not such return was in the child's "best interests". At the public hearing before the Court, the first applicant lastly claimed that Article 13 (b) of the Hague Convention should be regarded as covering all types of harm, including the consequences of the child's separation, to ensure the harmonious application of the above-mentioned international conventions.

65. The Court would emphasise the specific nature of the present case, arising firstly from its human dimension and particular legal context, and secondly from the questions of principle that it raises, relating mainly to the compatibility of the obligations imposed on the respondent State in the light of the various international legal instruments that are applicable.

66. The Court notes that since the adoption of the New York Convention on the Rights of the Child of 20 November 1989, "the best interests of the child" in all matters concerning it, within the meaning of the New York Convention, have been paramount in child protection issues, with a view to the child's development in its family environment, as the family constitutes "the fundamental group of society and the natural environment for the [child's] growth and well-being", to quote the preamble. As the Court has previously found, this primary consideration may comprise a number of aspects.

67. In matters of child custody, for example, the reason for considering the "child's best interests" may be twofold: firstly, to guarantee that the child develops in a sound environment and that a parent cannot take measures that would harm its health and development; secondly, to maintain its ties with its family, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots (see *Gnahoré v. France*, no. 40031/98, ECHR 2000-IX).

68. The Court is of the view that the concept of the child's "best interests" is also a primary consideration in the context of the procedures provided for in the Hague Convention. Inherent in that concept is the right for a minor not to be removed from one of his or her parents and retained by the other, that is to say by a parent who considers, rightly or wrongly, that he or she has equal or greater rights in respect of the minor. In this connection it is appropriate to refer to Recommendation No. 874 (1979) of the Council of Europe's Parliamentary Assembly which states: "Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs". The Court further observes that in the Preamble to the Hague Convention the Contracting Parties express their conviction that "the interests of children are of paramount importance in matters relating to their custody" and stress their desire to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access". These stipulations must be regarded as constituting the object and purpose, within the meaning of Article 31 § 1 of the Vienna Convention on the Law of Treaties, of the Hague Convention (see, to that effect, *Paradis and Others v. Germany* (dec.), no. 4783/03, 15 May 2003).

69. The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, that

instrument seeks to deter the proliferation of international child abductions. It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child's habitual residence, in accordance with Article 19 of the Hague Convention (see, to that effect, among other authorities, *Eskinazi and Chelouche*, cited above).

70. The Court cannot, however, agree with the reasoning of the first applicant when she asserts that a court dealing with a request for the return of a child under the Hague Convention conducts an incomplete assessment of the child's situation and therefore of its "best interests".

71. The Court fails to see how the interpretation by the domestic courts of Article 13 (b) of the Hague Convention would necessarily be incompatible with the notion of the "child's best interests" embodied in the New York Convention. It considers, on this point, that it would be desirable if this notion of "best interests" could always be interpreted in a consistent manner, regardless of the international convention invoked. It notes, moreover, that the New York Convention obliges States Parties to take measures to combat the illicit transfer and non-return of children abroad and that these States are urged to enter into bilateral or multilateral agreements or accede to existing agreements – of which the Hague Convention is one (see paragraphs 43 and 44 above).

72. The Court observes that there is no automatic or mechanical application of a child's return once the Hague Convention has been invoked, as indicated by the recognition in that instrument of a number of exceptions to the member States' obligation to return the child (see in particular Articles 12, 13 and 20), based on objective considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to each case.

73. In the Court's view, if the first applicant's arguments were to be accepted, both the substance and primary purpose of the Hague Convention, an international legal instrument in the light of which the Court applies Article 8 of the Convention, would be rendered meaningless, thus implying that the above-mentioned exceptions must be interpreted strictly (see, to this effect, the Explanatory Report on the Hague Convention, § 34, quoted in paragraph 43 above). The aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition, by the passage of time, of a *de facto* situation that he or she unilaterally created.

74. In the present case, as the Court has already observed, the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and

reasonable assessment of the respective interests of each person, with a constant concern for determining, as requested of them, what the best solution would be for Charlotte in the context of a request for her return to the United States of America, her country of birth (see, to this effect, *Gettliffe and Grant v. France* (dec.), no. 23547/06, 24 October 2006). In doing so, the courts did not identify any risk that Charlotte would be exposed to physical or psychological harm in the event of her return, and they stressed that the mother retained the possibility, contrary to her allegation, of accompanying her daughter to the United States in order to assert her custody and access rights in that country. On that point, the Court moreover takes the view that this is an essential element, as the first applicant had free access to US territory and had the possibility of bringing her case before the competent US courts at the appropriate time (see paragraphs 100-104 below).

75. The Court is therefore satisfied that Charlotte's "best interests", which lay in her prompt return to her habitual environment, were taken into account by the domestic courts when they examined the request for her return under the Hague Convention.

76. The Court further notes that there is nothing to suggest that the decision-making process which led the domestic courts to order the impugned measure had not been fair or had not allowed the applicants to present their case fully (see *Tiemann*, cited above).

77. As regards the argument that the domestic courts had not taken testimony from the child, even though it had not been raised before the domestic courts, it was raised during the public hearing before the Court and thus calls for certain considerations on its part.

78. Admittedly, the Court notes that the Committee on the Rights of the Child, in its Concluding Observations of 30 June 2004 concerning France, in the context of the second periodic report submitted by that State, expressed its concern about the application of Article 12 of the New York Convention (see paragraph 46 above); similarly, it notes that in its "General Comment No. 7" of 2005 the Committee stated that Article 12 applied both to younger and to older children, early childhood being defined as the period below the age of eight (ibid.).

79. However, the Court is of the opinion that the failure to take testimony from Charlotte in the present case did not entail a violation of Article 8 of the Convention. It observes in this connection that in the case of *Eskinazi and Chelouche* (cited above) it stressed that "it [was] not its task to substitute its own assessment of the facts and the evidence for that of the Turkish courts regarding the adequacy of such a delicate process or to review the interpretation and application of the provisions of international conventions (in the present case Article 13 of the Hague Convention and Article 12 § 1 of the Convention on the Rights of the Child), other than in cases of an arbitrary decision".

80. Nothing to this effect has been adduced by the first applicant or can be established from the material in the case file. The Court further notes that the child was interviewed on several occasions by various experts, her responses being reproduced in their reports and then referred to in the impugned judicial decisions. The Court finds, in any event, that in view of the child's age, the taking of testimony from her could have been regarded in the present case as non-decisive.

81. In these circumstances the Court takes the view that, having regard to the margin of appreciation enjoyed by the authorities in such matters, the return decision was based on relevant and sufficient grounds for the purposes of paragraph 2 of Article 8, considered in the light of Article 13 (b) of the Hague Convention and Article 3 § 1 of the Convention on the Rights of the Child, and that it was proportionate to the legitimate aim pursued.

(b) Conditions of enforcement of the child's return

82. The first applicant further complained about the manner in which the police had intervened in Charlotte's school for the purposes of enforcing the judgment of 13 May 2004.

1. Principles established in the Court's case-law

83. The Court points out that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. As to the State's obligation to take positive measures, Article 8 includes the right of a parent – in this case the father – 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 (see, for example, *Ignaccolo-Zenide*, cited above, § 94). However, this obligation is not absolute, since the reunion of a parent with his or her child may not be able to take place immediately and may require preparation. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. In addition, when difficulties appear, mainly as a result of a refusal by the parent with whom the child lives to comply with the decision ordering the child's prompt return, the appropriate authorities should then impose adequate sanctions in respect of this lack of cooperation and, whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives (see *Maire*, cited above, § 76). Lastly, in this kind of case, the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have

irremediable consequences for relations between the child and the parent with whom it does not live. The Hague Convention recognises this fact because it provides for a range of measures to ensure the prompt return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously to ensure the return of children and any failure to act for more than six weeks may give rise to a request for explanations (see *Maire*, cited above, § 74).

2. Application of the above principles

84. In the present case, the Court considers that the obligation of swiftness in the implementation of the child's return, together with the mother's obstructive conduct, are factors that the domestic authorities had to take into account when deciding on concrete measures to ensure the effectiveness of the French judicial decision. The Court notes that Charlotte, following the delivery of the Court of Appeal's judgment of 13 May 2004, became untraceable, as her mother had hidden her whereabouts from the authorities to evade execution of the decision (see paragraph 20 above), thus showing the first applicant's total lack of cooperation with the French authorities. The circumstances of the police intervention at Charlotte's nursery school on 23 September 2004, albeit somewhat unclear, for the purposes of enforcing the judgment of 13 May 2004, were therefore the result of the first applicant's constant refusal to hand Charlotte over to her father voluntarily, despite a court order which had been enforceable for more than six months.

85. Although police intervention is not the most appropriate way of dealing with such situations and may have traumatic effects, the Court notes that it took place under the authority and in the presence of the public prosecutor of Draguignan, a professional legal officer with a high level of decision-making responsibility under whose orders the four accompanying police officers were placed. Furthermore, faced with the resistance of the people who had taken the applicants' side in the dispute, the authorities had not persisted in their attempt to take the child away. The Court therefore takes the view that the use of coercive measures cannot by itself entail a violation of Article 8 of the Convention.

86 Consequently, there has been no breach of Article 8 of the Convention.

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

87. Relying on Article 6 § 1 of the Convention, the first applicant further argued that the French State was responsible for a violation of her right to an effective remedy, as a result of the impossibility for her to assert her custody and access rights effectively before the courts in the United States.

She claimed that, in ordering her daughter's return to that country, the French authorities had not made sure *in concreto* that her rights would be preserved and, in particular, had not made the return subject to guarantees that she would have access to those courts. The first applicant explained that she had nevertheless pointed out that, in view of the US decision concerning the father's right of custody, it was to be feared that she would no longer be free to travel to and from that country, which was entitled to deny entry to anyone who had prevented a US citizen from exercising custody rights. She could not therefore be certain that she would be able to present her case effectively before the US courts or even to enter the country. Even if she did obtain leave to enter, she alleged that she would not be able to see her daughter in view of the order of the New York State Family Court, which had decided that her visits could only take place in the "courthouse" and that she would have to deposit with the court 50,000 dollars, which was a considerable sum. In addition, she claimed that she had recently been required to undertake not to take any steps to contact her daughter in the United States, including by telephone, in return for the possibility that she might then be given of presenting her case before a US court.

A. Admissibility

88 The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. The merits

1. The parties' submissions

(a) The Government

89. The Government first indicated that under the Hague Convention (Article 16) the French courts were not entitled to examine the merits of the dispute over the right of custody, as that fell within the jurisdiction of the US court in the place of the child's habitual residence. They pointed out that the Hague Convention was not meant to limit the jurisdiction of the court hearing the request for the child's return or to restrict its obligation to consider all the elements of the dispute, but sought to prevent the abducting parent from being tempted to submit the question of custody rights to the court that he or she imagined would be the most favourable to his or her claims.

90. They accordingly took the view that Article 6 of the Convention had not been breached as a result of the New York Family Court's jurisdiction over questions of custody and access, since the first applicant had been able to go to the United States and assert her rights in adversarial proceedings.

91. They observed, firstly, that the first applicant was not entitled to draw the conclusion, based on the fact that she had deliberately removed herself from the jurisdiction of the US courts, that she had been deprived of access to a court having jurisdiction to deal with all aspects of the case. On the date when the impugned judgment was delivered, she still had the possibility of submitting a request to a court in the United States and the responsibility of the French State could not be engaged since it was bound by the prescribed procedure in such circumstances. The Government noted that the first applicant had, moreover, been lawfully summoned by the judge of the New York court, which, in its order of 8 March 2004, had reserved the right to review its directions at the request of either party. They took the view that it was the mother's conduct and the difficulties encountered by the father which had justified the major restrictions imposed by this judge on the mother's access rights in his order of 8 February 2006, and not the normal enforcement of the return procedure; they noted that this order nevertheless provided that the mother had the right to apply to the court for a relaxation of the conditions thus laid down.

92. Secondly, the Government took the view that the alleged risk that the first applicant would not be able to go to the United States was purely hypothetical, as attested by the analysis of the Court of Appeal's judgment of 13 May 2004. They moreover observed that prior to 2006 the applicant had not expressed the slightest intention of returning to that country, whereas she could have sought the "reactivation" of her Green Card or used other solutions for travel to the United States, in particular the possibility of applying for a "Returning Resident's Immigrant Visa". Cooperation between the Central Authorities, instituted by the Hague Convention itself, also ensured that a parent, in the event of a voluntary initiative, could return with no difficulty to the child's country of residence. In addition, the Government produced an official record dated 9 July 2004 showing that the first applicant had made representations to the prosecutor following the judgment of 13 May 2004 ordering Charlotte's return. It can be seen from this document, among other things, that in response to the mother's fears concerning the possibility of her arrest if she travelled to the United States, the public prosecutor notified her of a letter of 28 June 2004 from the New York Family Court certifying that no warrant had been issued for her arrest, and of a letter dated 2 July 2004 from the French Bureau of Consular Affairs referring to the legislation that applied in the United States to the right of abode of foreigners and explaining the various options open to her if she wished to reside there. Lastly, the Government observed that these fears had been shown by the facts of the case to be unfounded, because she had

appeared before the judge hearing the case prior to the delivery of his order of 8 February 2006. The Government thus concluded that, in order to engage France's responsibility in this respect, the first applicant would have had to have shown that she had attempted to enter the United States but had been prevented from doing so.

(b) The first applicant

93. The first applicant took the view that, before ordering her daughter's return to America, the French authorities should have made sure, *in concreto*, that she would be able to present her case before the United States courts. She disputed the Government's assertion that she had removed herself from the jurisdiction of the US courts, because she had, in particular, appeared at the hearing before the Family Court which had made the order of 8 February 2006.

94. She argued that the prerequisites laid down by the judge, in his order, for any examination of her right of access – the vacating of any orders which granted her custody and the recognition of the US order granting the father custody – had proved impossible to fulfil in terms of French statutory procedure, since no domestic remedy enabled a party to satisfy the demands of a foreign State which sought to obtain the annulment of a French decision that was an integral part of the French legal order. She further observed that "nullity of a judgment [could] be sought only by using the statutory remedies", as provided in Article 460 of the New Code of Civil Procedure – namely appeal to a superior court, an application by a party or third party for a judgment to be set aside, an application to re-open civil proceedings and an appeal on points of law – and that these remedies were available only under certain precise conditions – not fulfilled here – relating to issues of time or disregard for legal rules, or possibly to the fraudulent evasion of statutory provisions. She added that the existence of such a remedy would imply that the French court itself was entitled to interfere with the manifestation of an attribute of French sovereignty, namely to do justice when a French national was concerned. Having been aware of the risk of a violation of her right of access to a court, even before it had taken place, the French authorities had been guilty of an indirect violation of Article 6 of the Convention.

2. The Court's assessment

95. The Court first observes that the dispute relating to the merits of the custody and access rights is now a matter for the competent judicial authorities of the United States of America, where Charlotte had her habitual residence. It is not therefore the Court's task to address the determination of those rights because that country is not a party to the Convention and, furthermore, the application was lodged against France.

96. The Court reiterates, however, that where the courts of a State party to the Convention are required to enforce a judicial decision of the courts of a country that is not a party, the former must duly satisfy themselves that the proceedings before the latter fulfilled the guarantees of Article 6 of the Convention, such a review being especially necessary where the implications are of capital importance for the parties (see *Pellegrini v. Italy*, no. 30882/96, § 40, ECHR 2001-VIII).

97. In the present case, even supposing that the applicants' situation is comparable to that of Mrs Pellegrini, who was complaining about a declaration by the Italian courts that a judgment of the Vatican courts was enforceable, the Court notes that the first applicant did not raise a complaint of that nature before the domestic courts or in its own proceedings, on the grounds, firstly, that the proceedings before the competent authorities in the United States had been unfair and, secondly, that the French courts had failed in their duty to ensure, before ordering the child's return, that the first applicant had had a fair hearing in that country (see, *mutatis mutandis, Eskinazi and Chelouche*, cited above).

98. In any event, the Court, having regard to the material in the case file, has no evidence to suggest that the impugned foreign decisions – the New York State Family Court's orders of 15 September 2003 and 8 March 2004 – were given following proceedings that did not afford the essential guarantees of Article 6 of the Convention (contrast *Pellegrini*, cited above).

99. Moreover, the Court takes the view that the French authorities were obliged to assist with Charlotte's return to the United States, having regard to the object and purpose of the Hague Convention, unless any objective material had led them to believe that the child and, if appropriate, the mother, would be the victims of a "flagrant denial of justice" in the United States (see, *mutatis mutandis*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 88, ECHR 2005-I; *Einhorn v. France* (dec.), no. 71555/01, ECHR 2001-XI; *Drozd and Janousek v. France and Spain*, 26 June 1992, § 110, Series A no. 240; *Soering v. the United Kingdom*, 7 July 1989, § 113, Series A no. 161; and in particular *Eskinazi and Chelouche*, cited above). The "denial of justice" being prohibited by international law (see *Golder v. the United Kingdom*, cited above, § 35), France had a duty to ensure that this principle was respected with regard to its reciprocal commitments with the United States. In these conditions, the Court is required to examine the circumstances of which the French authorities had or ought to have had knowledge at the time when Charlotte's return was requested, ordered and then enforced.

100. The Court observes first of all that the first applicant's allegation that it might be impossible for her to enter the United States in order to present her case was purely hypothetical, as was found by the Aix-en-Provence Court of Appeal in its judgment of 13 May 2004, which contained lengthy reasoning on this point, and as stated by the Government in their

observations, which were not challenged by the first applicant; moreover, the Court notes that the presumption of such a risk has been rebutted by the facts of the case and her fear was thus unfounded.

101. The Court further notes that the first applicant was free to bring her case before the competent US court, and had indeed been expressly invited to do so. Even though she had been lawfully summoned to the hearing of 14 November 2003 and that of 8 March 2004, she did not appear before the New York court, which reserved the right, however, in its order of 8 March 2004, to review its decision on the custody of Charlotte at the request of either party. As a result, at the time when Charlotte's return was ordered and then enforced, or on the date when the Court of Cassation dismissed the first applicant's appeal, the French courts had no material in their possession to suggest that the child or its mother might be the victims of a "flagrant denial of justice" (see, to the same effect, *Eskinazi and Chelouche*, cited above).

102. However, whilst the first applicant certainly had access to the United States, she observed that a problem was likely to arise as regards her effective access to the competent US court, having regard to the unambiguous terms of the New York Family Court's order of 8 February 2006 in which the judge refused to examine her claims to custody and access rights without the prior fulfilment of certain conditions.

103. It therefore remains for the Court to analyse the factual circumstances subsequent to Charlotte's return in order to determine whether the responsibility of France may be engaged. This analysis is all the more necessary as the two parties referred to the order of 8 February 2006 but drew different conclusions from it. The Court takes the view that the possible responsibility of France, which may be engaged irrespective of the national authority to which the breach of the Convention in the domestic system is imputable (see, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 146, ECHR 2004-II, and *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103), may be established, in the present case, in respect of acts or omissions subsequent to the child's return, only through an administrative authority – to be precise, at the level of the Central Authority as provided for in the Hague Convention – and no longer at the level of a judicial authority.

104. That being so, the Court notes that the first applicant, who benefited from the effective assistance of a lawyer in the United States, did not appeal against the order of 8 February 2006 and did not make any request under Article 21 of the Hague Convention (paragraphs 39 and 43 above). It observes that the French Central Authority has always remained alert to the applicants' situation, in accordance with its obligations under the Hague Convention, an instrument that particularly relies on cooperation between Central Authorities in order to fulfil the objectives set out in its preamble and first Article. The Court takes note in this connection of the content of the French Central Authority's letter of 15 January 2007, from

which it can be seen that a mediation attempt had been proposed, admittedly in vain, and that it was prepared to confer once again with its US counterpart in favour of the first applicant. The Court takes note of the declarations that were made to this effect by the Government during the public hearing before it.

105 The Court, for all these reasons, finds that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously that the application is admissible;

2. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 6 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Zupančič, joined by Judge Gyulumyan, is annexed to this judgment.

B.M.Z
S.Q.

DISSENTING OPINION OF JUDGE ZUPANČIČ, JOINED BY JUDGE GYULUMYAN

With regret, I feel compelled to file a dissenting opinion in this case because I disagree both with the position of the French Court of Cassation and with the majority's opinion.

To go immediately into *medias res*, I will refer to paragraph 69, third sentence, where the majority mention that the intent of the Hague Convention is simply to re-establish the *status quo ante*, in order to prevent the legal consolidation of a factual situation which has been illicit from the very beginning.

In private law we, indeed, adhere to the formula *quod ab initio vitiosum est, tractu tempore convalesere non potest*. The emphasis in the above-mentioned third sentence is clearly on the qualifier *"*as fast as possible*"* (in French: *au plus vite*). In child psychology it is well known that development takes place in the first six years and that, therefore, what happens in that period of life is determinative of much of the person's adult personality. Because of this crucial period in a child's life, it may well be true that what would have been good for the child yesterday is no longer going to be good for the child tomorrow. The passage of time, in that period of life, is constitutive of personality; the days, weeks, months and years which pass create new "restore points" in the future adult's personality.

The passage of time, in other words, is not simply the passage of time; one may well speak of the fundamental programming of personality. The above-mentioned private law maxim, according to which something that has been corrupt from the beginning is incapable of convalescing, should not apply in child custody matters. The events, among them childhood traumas, create situations in a tender child's psychology which will completely pervade its new development.

It is for that reason that I consider the third sentence in the majority's paragraph 69 as establishing the crucial perspective on the facts of this case.

The mother, who has wrongfully retained the child, admittedly, has illegally created that situation. The situation lasted for 19 months, during which the child was with her in France rather than in the State of New York. Nevertheless, this situation cannot be assessed from a formalistic point of view postulating, for example, that the initial illicit detainment should be seen as something which will contaminate the legal, moral, and above all psychological position of the mother *vis-à-vis* the child, the father and society at large. It would be inhuman, in any event, to maintain that the mother, who has always taken care of her little girl, would be to blame because she wants to retain the child – despite the opposition of the father and the two legal processes that the father's lawyers have set in motion. Moreover, there were reasons justifying the mother's wish to separate from

the father. We will deal with these in the latter part of this dissenting opinion.

One cannot over-emphasise the fact that what has happened in this particular case is simply against the best interests of the child.

The over-reaching criterion of The Hague and New York Conventions – a criterion which ultimately supersedes all other determinative criteria – is precisely and always the "best interests of the child". It follows logically that it is for each legal organ, including the court of last resort, to keep all other facts of the case in the perspective of its ultimate factual appreciation of what is in the best interest of the child.

On the face of this case, it is impossible to maintain that it would be in any way advantageous for the four-year-old Charlotte Washington to be torn from the hands of her mother by force and transported back to the State of New York into the hands of her father with whom she has not been in any meaningful contact for 19 months. No amount of legalistic acrobatics can overshadow this simple fact. The "best interests of the child" is the fundamental determinative criterion, a true *questio facti*, which must be assessed *de novo* by each court including the court of last resort. Even the European Court of Human Right cannot, in a similar case, escape this need for factual assessment.

The perspective in this case is, therefore, what is the *prima facie* nature of the situation. It is impossible to start from the premise, given precisely the best interests of the child, that the burden should be on the applicants to show that the snatching of the child by the French State from the mother is something which is not legitimate. The simple factual and psychological situation was such that the reverse ought to have been true, that is to say, that the burden ought to have been on the French State to show that it was, despite the passage of time, legitimate to snatch the child by crude police force, put her on an aeroplane and send her to the State of New York.

Here we come back to the third sentence in the majority's paragraph 69 which does admit that *the passage of time is essential*. It follows logically that the position of the majority is *contradictio in adiecto* in relation to the precise extent to which its own perspective, as well as the perspectives of the Hague and New York Conventions, do coincide with the criterion "as soon as possible" (*au plus vite*).

The majority then attempt to circumambulate the contradiction problem in paragraph 71:

> "The Court fails to see how the interpretation by the domestic courts of Article 13 (b) of the Hague Convention would <u>necessarily</u> be incompatible with the notion of the 'child's best interests' embodied in the New York Convention". (emphasis added)

Clearly, the logical misstep derives from the use of the word "<u>necessarily</u>". The Hague Convention's provision 13 (b), which states:

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."

is not "necessarily" incompatible with the best interests of the child – provided that the *restitutio in integrum* takes place in a matter of weeks (not months or years!) after the event.

Another logical mistake is made by the majority in paragraph 73, where we read that, according to the Court, to accept the arguments of the mother would undermine the Hague Convention's first objective, which is, according to the majority, to impede the retaining parent from legitimising a unilaterally created situation by the "mere" passage of time which, naturally, plays into his or her hands:

> "73. In the Court's view, if the first applicant's arguments were to be accepted, both the substance and primary purpose of the Hague Convention, an international legal instrument in the light of which the Court applies Article 8 of the Convention, would be rendered meaningless, thus implying that the above-mentioned exceptions must be interpreted strictly (see, to this effect, the Explanatory Report on the Hague Convention, § 34, quoted in paragraph 43 above). The aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition, by the passage of time, of a *de facto* situation that he or she unilaterally created."

What the majority misunderstand here is evidently that the passage of time, whether licit or illicit, is determinative of the best interests of the child. There are plenty of instances of this in the Court's own inconsistent case-law, where decisions have been made to favour the retaining mother or to favour the foster parents after a certain period of time –, for the obvious reason that the child at a tender age who has been in a certain domestic setting in which he or she feels secure would be traumatised if he or she were to be displaced.

This is precisely what Article 13 (b) of the Hague Convention hints at. What counts, in other words, is the well-being of the child in the setting to which the child has not only become accustomed but which has structural influences on the development of his or her personality. To uproot the child in order to vindicate the abstract juridical goals such as announced in the above-quoted paragraphs of the majority, goes against most basic human good sense. In short, one need not be a child psychologist or paedopsychiatrist to understand that a child who has been with her mother all her life, once she has laid down her roots in the stable setting of a small French village, will be traumatised if those roots are cut and the child forcibly sent to the State of New York.

The crucial paragraphs of the majority's opinion, however, demonstrate the same illogicality as the "Court of Cassation's departure from precedent". In both instances the abstract general prevention has prevailed over the best interests of the child. I asked the pertinent question during the public hearing and I received the answer that there had been no political pressure in order for this to happen. I hope this is true. It is nevertheless difficult to understand how the Court of Cassation could suddenly have begun to prefer the general preventive effect over the best interests of the child.

Be that as it may, the inherent logic of the situation is similar to that in *Ignaccolo-Zenide v. Romania* and in other similar cases, in which the Court has taken inconsistent positions sometimes approving the best interest of the child and sometimes insisting that the child ought to have been snatched from the parent in question (*Nuutinen v. Finland*). Given these inconsistencies, it is clear that the Grand Chamber of this Court should rule on the following question:

In situations where the passage of time has created the psychological constellation in which the child's best interest is no longer to be snatched and returned to the complaining parent, the best interests of the child – according to the Hague and New York Conventions – should prevail. Should the best interests of the child be subordinate to a strict formalistic logic given the illegal nature of the initial retention of the child?

Clearly, this question goes to the heart of both Conventions as well as to our own interpretation of Article 8 of the European Convention on Human Rights.

According to Article 43 of the European Convention on Human Rights, the request for referral to the Grand Chamber must be accepted "if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance". Even if the case-law produced by the Chambers of the Court were completely consistent, which it is not, the question is of such general importance that it calls for the Grand Chamber's reassessment. The Chamber had in fact wished to have the case heard by the Grand Chamber under Article 30 § 1, because it considered that the case raised a serious problem affecting the interpretation of the Convention.

This proves that the Chamber itself, prior to the impediment set forth by the French Government, had considered that it would be necessary for the Grand Chamber to rule on a serious question affecting the interpretation of the Convention. Given that, under Article 30, the parties retain their right to object, a question might be raised as to whether this objection is not in itself incompatible with the purpose and intent of Article 30.

In this connection it is clear that individual parties to a dispute ought not to have a determinative power to influence who, the Chamber or the Grand Chamber, will rule on an important question concerning the interpretation of the Convention. The only way to make Article 30 *in fine* compatible with

the rest of the norm in question is to postulate the possibility that subsequent to the Chamber's judgment there should be a request for referral to the Grand Chamber by one or both of the parties under Article 43 § 1. In a very real sense, therefore, paragraph 2 of Article 43 then binds the panel of five judges to accept this case for Grand Chamber proceedings, as this would have happened under Article 30 were it not for the objection of the French government. The intent of Article 30 *in fine* is that the Parties retain the possibility that the case as such, without any broad implications for the *stare decisis*, may first be adjudicated by the Chamber.

The procedure before the Chamber clearly functions here as an ante-chamber to the Grand Chamber.

In paragraph 84 the majority also emphasise the mother's total lack of cooperation, which in turn was supposed to justify the forceful intervention (snatching) by the police in Charlotte's kindergarten. An important aspect of this case derives from the cruel and draconian reactions of the Dutchess County Family Court in the State of New York. There the first instance judge Mr Damian J. Amodeo reacted by immediately depriving the French mother of her custody, which had initially been joint custody, and in fact putting her under suspicion of having kidnapped the child. Such kidnapping of course is a crime in the State of New York[1] and would make the mother subject to arrest in the United States at the very port of entry, for example at JFK airport. If the mother wished to contest the decision of the local American judge, if she wanted to appear herself before the Dutchess County Family Court, she would at the very least risk visa refusal and possibly arrest. If she were arrested she would risk imprisonment. The arrest on the probable cause that she had committed a Class E Felony would be wholly within the discretion of the local police.

Moreover, to blame the mother for not having appeared in the Dutchess County Family Court in order to litigate the issue as to whether Charlotte would leave for the US from France is absurd and points to the revanchist attitude of the local American court. The legal reaction of this family judge does not inspire respect; it is an arrogant over-reaction which was later manifest in the draconian conditions which the same judge imposed in case the mother should wish to see the child. To lay down the conditions requiring a 25,000 USD deposit and the deposit of the passport, for the

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[1] **New York Penal Law, Section 135.50 Custodial interference in the first degree.** A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree: 1. With intent to permanently remove the victim from this state, he removes such person from the state […]

Section 60.12 Authorized dispositions; alternative indeterminate sentence of imprisonment; domestic violence cases […] 2. The maximum term of an indeterminate sentence imposed pursuant to subdivision one of this section must be fixed by the court as follows: (d) For a class E felony, the term must be at least three years and must not exceed four years.

opportunity to see the child in the court's building for a period of half an hour in the presence of a policeman, – in the language of the American Supreme Court Justice Frankfurter – shocks the conscience. Such conditions are completely discriminatory, and this is easy to prove given that such conditions would never have been imposed on a United States citizen.

It is difficult to see how the French Court of Cassation could have overlooked the vindictive nature of the over-reaction of the local judge. This is all the more difficult to understand given that there were suspicions about the father's having inflicted domestic violence for which the local police had to be alerted and called in, as well as suspicions concerning drug abuse by him. It further borders on the absurd to place faith in the father's statement that during his absence for work in the State of New York the child would be taken care of by an unemployed nurse in the apartment building where the father lives.

Family law procedure is not a criminal procedure and therefore suspicions concerning the father's past behaviour can neither be subject to presumption of innocence nor are they to be litigated as if the burden of proof ought to be on the accusing mother. The undisputed fact that the police had been called in by the neighbours because of the reasonable suspicion of domestic violence inflicted by the father should have cast an ominous shadow over the father's appropriateness to assume complete custody of the child. The Dutchess County Family Court judge ought to have weighed the evidence and refrained from his radical reaction based on nothing more but the *ex-parte* submitted "evidence" of the father. It is then doubly absurd for the French legal system to react complacently in a situation in which everything spoke for the mother except the "general preventive effects" such as alluded to by the majority in paragraph 73.