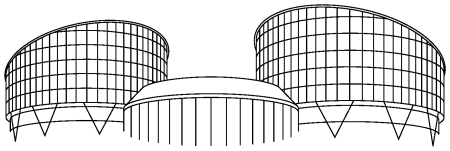

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.A. v. AUSTRIA

(Application no. 4097/13)

JUDGMENT

STRASBOURG

15 January 2015

FINAL

15/04/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.A. v. Austria,

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

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 16 December 2015,

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

PROCEDURE

1. The case originated in an application (no. 4097/13) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr M.A. ("the applicant"), on 14 January 2013. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mrs A. Mascia, a lawyer practising in Strasbourg. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the Austrian authorities had failed to ensure his daughter's return to Italy, thus violating his right to respect for his family life.

4. On 18 June 2013 the application was communicated to the Government.

5. The Italian Government made use of their right to intervene under Article 36 § 1 of the Convention. They were represented by their Agent, Ms E. Spatafora.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1968 and lives in Vittorio Veneto.

7. The applicant entered into a relationship with D.P., an Austrian national, and lived together with her in Vittorio Veneto. Their daughter, who is an Italian and Austrian national, was born in December 2006. Under Italian law the applicant and D.P. had joint custody of her.

8. The relationship between the applicant and D.P. deteriorated and the latter left the family home on 31 January 2008, taking their daughter with her.

9. The applicant applied to the Venice Youth Court (*tribunale per i minorenni di Venezia*) for an award of sole custody of the child and asked the court to issue a travel ban prohibiting her from leaving Italy without his consent.

10. On 8 February 2008 the Venice Youth Court issued a travel ban in respect of the applicant's daughter. On the same day the applicant learned that D.P. had left Italy with the child and had travelled to Austria, where she intended to take up residence.

11. On 23 May 2008 the Venice Youth Court lifted the travel ban in respect of the applicant's daughter, granted preliminary joint custody of the child to both parents, and authorised her to reside with her mother in Austria, having regard to her young age and close relationship with her mother. It also appointed an expert who was entrusted with the task of collecting the necessary information for a final decision on custody. In addition, the court granted the applicant access rights twice a month in a neutral location, noting that the meetings should alternate between Italy and Austria and that the dates and arrangements should be agreed with the expert.

12. According to the applicant, D.P. brought their daughter to Italy only once. Visits took place in Austria, although D.P. did not facilitate their organisation. At a later date visits ceased, allegedly due to D.P.'s obstructive behaviour. In a report of 15 May 2009 the expert noted that she was not in a position to evaluate the applicant's ability to take care of his daughter.

13. According to the Government the applicant met his daughter fifteen times in Austria, where supervised visits took place between October 2008 and June 2009. Subsequently, he refused to travel to Austria without giving any reasons.

A. Proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") and proceedings in Austria concerning custody of the applicant's daughter

14. The applicant applied for assistance to secure his daughter's return under the Hague Convention. His application was forwarded via the respective central authorities in Italy and Austria to the Leoben District Court (*Bezirksgericht*), where proceedings began on 19 June 2008. Subsequently, the court appointed an expert.

15. On 3 July 2008, the Leoben District Court dismissed the applicant's application for the return of the child under the Hague Convention. Referring to the expert's opinion and having regard to the very young age of the child, the court found that her return would constitute a grave risk for her within the meaning of Article 13(b) of the Hague Convention.

16. On 1 September 2008, the Leoben Regional Court (*Landesgericht*) set aside that decision because the applicant had not been duly heard in the proceedings.

17. On 21 November 2008 the Leoben District Court, having heard the applicant, again dismissed his application for his daughter's return, referring to the Venice Youth Court's decision of 23 May 2008.

18. On 7 January 2009 the Leoben Regional Court dismissed the applicant's appeal, finding that returning the child to him and her separation from her mother would entail a grave risk of psychological harm within the meaning of Article 13(b) of the Hague Convention.

19. Meanwhile, in March 2009 D.P. brought proceedings before the Judenburg District Court, seeking an award of sole custody of the child.

20. On 26 May 2009 the Judenburg District Court held that it had jurisdiction with regard to custody, access and maintenance issues in respect of the child by virtue of Article 15(5) of EU Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("the Brussels IIa Regulation").

21. On 25 August 2009 the same court made a preliminary award of sole custody to D.P., referring to the child's close links with Austria and the risk of danger to her well-being upon a possible return to Italy.

22. On 8 March 2010 the Judenburg District Court awarded D.P. sole custody of the child.

B. Proceedings under the Brussels IIa Regulation concerning the enforcement of the Venice Youth Court's judgment of 10 July 2009

23. In the meantime, on 9 April 2009 the applicant made an application to the Venice Youth Court for his daughter's return under Article 11(8) of the Brussels IIa Regulation.

24. In a judgment of 10 July 2009 the Venice Youth Court, having held a hearing, ordered the child's return to Italy. The child would live with her mother, should the latter decide to return to Italy with her. In that event the Vittorio Veneto social services department was required to provide them with accommodation. In addition, a programme for the exercise of the applicant's access rights would have to be established. If the child's mother did not wish to return to Italy, the child was to reside with the applicant.

25. The Venice Youth Court found that it remained competent to deal with the case, as the Judenburg District Court had wrongly determined its jurisdiction under Article 15(5) of the Brussels IIa Regulation. It noted that its previous decision of 23 May 2008 had been designed as a temporary measure in order to re-establish contact between the applicant and his daughter through access rights and to obtain a basis for an expert opinion for the decision on custody of the child. However, the child's mother had failed to co-operate with the appointed expert and had refused a programme of access rights for the applicant prepared by the expert. The latter had stated in her preliminary opinion that she was not in a position to answer all questions relating to the child's best interests in a satisfactory manner.

26. On 21 July 2009 the Venice Youth Court issued a certificate of enforceability under Article 42 of the Brussels IIa Regulation.

27. On 22 September 2009 the applicant sought the enforcement of the Venice Youth Court's judgment of 10 July 2009. He was represented by counsel in these and all subsequent proceedings.

28. On 12 November 2009 the Leoben District Court dismissed the applicant's request for enforcement of the Venice Youth Court's order to return the child. It noted that the child's mother was not willing to return to Italy with her. However, the child's return without her mother would constitute a grave risk for her within the meaning of Article 13(b) of the Hague Convention.

29. On 20 January 2010 the Leoben Regional Court quashed that decision and granted the applicant's request for enforcement.

30. The Leoben Regional Court noted that under Article 11(8) of the Brussels IIa Regulation a judgment refusing return under Article 13 of the Hague Convention was irrelevant where the court which was competent pursuant to the Brussels IIa Regulation had ordered the child's return in a subsequent judgment. It confirmed that the Venice Youth Court had been competent to issue the judgment of 10 July 2009, as D.P. had unlawfully

removed the child from Italy and the applicant had immediately requested her return. Moreover, the applicant had submitted a certificate of enforceability under Article 42 of the Brussels IIa Regulation in respect of the judgment at issue. The Austrian courts therefore had to recognise the judgment and to enforce it. They were not to establish anew whether the child's return would be contrary to her best interests. In any event, there was no indication that the circumstances had changed since the Venice Youth Court had given its judgment. It was for the court of first instance to order appropriate measures of enforcement.

31. D.P. lodged an appeal on points of law with the Supreme Court (*Oberster Gerichtshof*) on 16 February 2010.

32. On 20 April 2010 the Supreme Court requested a preliminary ruling by the Court of Justice of the European Union (CJEU), submitting a number of questions concerning the application of the Brussels IIa Regulation.

33. On 1 July 2010, the CJEU issued a preliminary ruling (C-211/10 PPU) confirming the jurisdiction of the Italian courts in the case and the enforceability of the Venice Youth Court's judgment of 10 July 2009. It found, in particular, that:

(1) a provisional measure [such as the one issued by the Venice Youth Court in 2008] did not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b) subparagraph (iv) of the Brussels IIa Regulation and could not be the basis of a transfer of jurisdiction to the courts of the Member State to which the child had been unlawfully removed;

(2) Article 11(8) of the Regulation applied to a judgment of the court with jurisdiction ordering the return of the child, even if it was not preceded by a final judgment of that court relating to custody of the child;

(3) Article 47(2) subparagraph (2) of the Regulation had to be interpreted as meaning that a judgment delivered subsequently by a court of the Member State of enforcement which made a provisional award of custody could not preclude enforcement of a certified judgment previously delivered by the court which had jurisdiction in the Member State of origin and had ordered the return of the child; and

(4) enforcement of a certified judgment [ordering the child's return] could not be refused by the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change had to be pleaded before the court which had jurisdiction in the Member State of origin, which also had to hear any application to suspend the enforcement of its judgment.

34. On 13 July 2010 the Supreme Court dismissed D.P.'s appeal on points of law. It noted that according to the CJEU's ruling the Austrian courts' only task was to take the necessary steps for the enforcement of the return order, without proceeding to conduct any review of the merits of the

decision. If D.P. asserted that the circumstances had changed since the Venice Youth Court had given its judgment, she had to apply to that court, which would also be competent to grant such an application suspensive effect.

35. The Supreme Court noted that it was now for the first-instance court to enforce the Venice Youth Court's judgment. In doing so, it had to take into account the fact that the Venice Youth Court had in the first place envisaged that the child should reside with her mother upon her return to Italy and had ordered the Vittorio Veneto social services department to make accommodation available for them. The first-instance court would therefore have to ask the applicant to submit appropriate evidence, in particular confirmation from the Venice Youth Court or Vittorio Veneto municipal council, that accommodation was indeed available. The first-instance court would then have to order the mother to return with the child within two weeks. Should she fail to comply within that time-limit, the first-instance court would, upon the applicant's request, have to order coercive measures for the child's return, while still giving the mother the opportunity to avoid such drastic measures by voluntarily returning to Italy with the child.

36. On 31 August 2010 the Venice Youth Court refused to grant an application by D.P. for the enforcement of its judgment of 10 July 2009 to be stayed. Referring to that decision, the applicant asked the Leoben District Court to order his daughter's return to Italy.

37. The applicant claimed that he had offered to make accommodation (apparently a flat belonging to him) available to D.P. and his daughter, but that the Leoben District Court had found that this did not fulfil the conditions set by the Venice Youth Court in its judgment of 10 July 2009.

38. On 17 February 2011 the Leoben District Court asked the applicant to submit evidence that appropriate accommodation would be made available to his daughter and her mother by the Vittorio Veneto social services department, as required by the Venice Youth Court's judgment of 10 July 2009.

39. By letter of 22 March 2011 the Austrian Federal Ministry of Justice, as Central Authority, informed its Italian counterpart accordingly and also noted that to date the condition had not been complied with. A similar letter was sent to the Italian Central Authority on 27 May 2011. Three further letters with similar content were sent to the Italian Central Authority prior to November 2011.

C. Proceedings under the Brussels IIa Regulation concerning the enforcement of the Venice Youth Court's judgment of 23 November 2011

40. By a judgment of 23 November 2011 the Venice Youth Court withdrew D.P.'s custody rights and awarded the applicant sole custody of the child. It further ordered the child's return to Italy to reside with the applicant in Vittorio Veneto. The court ordered the Vittorio Veneto social services department – if need be in co-operation with the neuropsychiatry department of the local health authority – to ensure that contact between the child and her mother was maintained and to give the child linguistic and educational support in order to assist her integration into her new family and social environment.

41. The Venice Youth Court referred to its decision of 23 May 2008, which had been aimed at preserving the child's relationship with her mother while re-establishing contact with the applicant, noting that such attempts had failed owing to a lack of co-operation from the mother. It had therefore ordered the child's return to Italy in its judgment of 10 July 2009. It further considered that D.P. had unlawfully removed the child to Austria and had subsequently deprived her of contact with the applicant without good reason. She had thus acted contrary to the child's best interests. It therefore found that sole custody was to be awarded to the applicant. Given that to date any attempts to establish contact step by step had failed, his daughter was to reside with him immediately. The court noted that this would entail a difficult transition for her, but considered that the damage caused by growing up without her father would weigh even heavier. The court considered that the social services department would have to give the child educational and linguistic support to help her settle in her new family and social environment and to maintain contact with her mother. Finally, the court considered that the child's return would not entail any grave risk of psychological or physical harm within the meaning of Article 11 of the Brussels IIa Regulation, which in turn referred to Article 13 of the Hague Convention.

42. D.P. did not appeal against this judgment.

43. On 19 March 2012 the applicant notified the Leoben District Court of the Venice Youth Court's judgment of 23 November 2011. He also submitted a certificate of enforceability under Article 42 of the Brussels IIa Regulation.

44. On 3 May 2012 the Leoben District Court dismissed the applicant's request for enforcement of the Venice Youth Court's order for the child's return. Referring to the Supreme Court's decision of 13 July 2010, it considered that he had failed to submit proof that appropriate accommodation would be made available for the child and her mother upon their return.

45. The applicant appealed. He submitted, in particular, that the Venice Youth Court's judgment of 23 November 2011 had granted him sole custody of the child and had ordered her return to Italy, where she was to reside with him.

46. On 15 June 2012 the Leoben Regional Court granted the applicant's appeal and ordered D.P. to hand the child over to the applicant within fourteen days, noting that enforcement measures would be taken in case of failure to comply.

47. The Regional Court found that the condition that appropriate accommodation be made available to the child and the mother was no longer valid: in its judgment of 23 November 2011 the Venice Youth Court had awarded sole custody of the child to the applicant and had ordered that she return to reside with him. The applicant had submitted that judgment together with a certificate of enforceability under Article 42 of the Brussels IIa Regulation. The mother's obligation to return the child to the applicant thus resulted directly from the Venice Youth Court's judgment of 23 November 2011. Finally, the Leoben Regional Court noted that the award of custody made by the Judenburg District Court on 8 March 2010 could not prevent the enforcement of the Venice Youth Court's judgment. The latter had retained its competence to rule on custody matters, as D.P. had unlawfully removed the child to Austria and the applicant had made a timely request for her return under Article 10 of the Brussels IIa Regulation.

48. D.P. did not comply with the return order. She lodged an extraordinary appeal on points of law with the Supreme Court.

49. On 13 September 2012 the Supreme Court rejected D.P.'s extraordinary appeal on points of law, as the case did not raise an important legal issue. It noted that the return order had become final and was enforceable. The first-instance court now had no other task than to define the steps to be taken to enforce the return order. The CJEU had clarified that where there was a certificate of enforceability under Article 42(1) of the Brussels IIa Regulation, the requested court had to proceed with the enforcement of the main judgment. Any questions relating to the merits of the return decision, in particular the question whether the requirements for ordering a return had been met, had to be raised before the courts of the requesting State in accordance with the laws of that State. Consequently, any change in circumstances affecting the issue of whether a return would endanger the child's well-being had to be raised before the competent court of the requesting State. D.P.'s argument that the child's return would lead to serious harm for her and entail a violation of Article 8 of the Convention was therefore not relevant in the proceedings before the Austrian courts, but rather had to be raised before the competent Italian courts.

50. On 1 October 2012 the Leoben District Court held that it was not competent to conduct the enforcement proceedings and transferred the case

to the Wiener Neustadt District Court, apparently on account of a change of residence by D.P. and the child.

51. On 4 October 2012 the Wiener Neustadt District Court issued a decision on the next steps to be taken in the enforcement proceedings. The judge noted, in particular, that a continuation of the path chosen by both parents, namely the use of the child in the conflict between them, would lead to the child being traumatised, especially if the parents' unbending position eventually led to an enforcement of the return order by coercive measures as a last resort. He noted that the best interests of the child required the parents to reach a workable compromise. The judge therefore proposed that a hearing in the presence of both parents be held in order to seek a constructive solution. Accordingly, he asked both parents to indicate within two weeks whether they were ready to take part in the proposed hearing. The judge further noted that if the parents were not willing to take part in the hearing, the enforced return of the child would be arranged. In this connection, the judge stated that any trauma suffered by the child because of such enforcement would then have to be laid at the door of the parents. Moreover, the applicant would be required to find a way to deal with the trauma caused to the child.

52. On 16 October 2012 the applicant informed the Wiener Neustadt District Court that he was not ready to take part in a hearing with the child's mother, but wanted to arrange the return of the child with the least traumatic impact possible. He therefore suggested that he come to Austria with his parents to pick up the child or, alternatively, that D.P. travel to Italy with the child to hand her over. He therefore asked D.P. to either set a pick-up date in Austria or to inform him of a date when she would bring the child to Italy.

53. On 23 October 2012 D.P. informed the District Court that she was ready to take part in the proposed hearing. She also informed the court that she had appealed against the decision which had transferred the case from the Leoben District Court to the Wiener Neustadt District Court. Consequently, the decision establishing the latter court's competence had not become final. She therefore asked the court to await the decision on her appeal before taking any further steps.

54. In the related case brought before the European Court of Human Rights by the mother of the child (*Povse v. Austria* (dec.), no. 3890/11, 18 June 2013), the Court granted a request for interim measures on 4 December 2012. It asked the Government to stay the child's return to Italy. Having obtained information from the Austrian and Italian Governments and from the applicants, the Court lifted the interim measure on 18 February 2013.

55. On 4 April 2013 the applicant's counsel requested that the enforcement proceedings be continued.

56. On 25 April 2013 the Wiener Neustadt District Court decided to continue the enforcement proceedings and, on 30 April 2013, requested that the parties submit their views within two weeks in order to reach a comprehensive solution for the benefit of the child. According to the Government, the applicant refused to contribute to that process.

57. In a decision of 20 May 2013 the Wiener Neustadt District Court ordered D.P. to hand over the child to the applicant by 7 July 2013 and stated that in case of failure to comply coercive measures would be applied. The District Court noted that it was for D.P. to choose whether she would accompany her daughter to Italy or whether she would set a date within that timeframe for the applicant to pick up the child in Austria. Furthermore, the District Court, referring to the Supreme Court's judgment of 13 September 2012, repeated that it was for the Italian courts to examine any issues relating to the child's well-being. It noted finally that the deadline for handing over the child had been set in such a way as to allow her to finish the school year in Austria.

58. As D.P. did not comply with the order to hand over the child, an attempt to enforce it by means of coercive measures was made in the early hours of 24 July 2013 without prior notice. The attempt, in which the judge, trained bailiffs and police officers participated, was unsuccessful, as D.P. and the child were not present at their place of residence. The applicant had been informed of the planned enforcement and was present.

59. On 9 August 2013 D.P. asked the Venice Youth Court to stay the enforcement of its judgment of 23 November 2011. Furthermore, she sought an award of sole custody in her favour. She alleged that she had not been adequately heard in the initial proceedings. Furthermore, she asserted that there had been a change of circumstances, in that her daughter was fully integrated into her living environment in Austria and had formed bonds with D.P.'s family, consisting of her mother, the latter's partner and her younger half-brother. There had been no contact between father and child for a lengthy period and the child had no knowledge of Italian. D.P. submitted an expert opinion, according to which the child's return to her father through the use of coercive measures would cause serious harm to the child.

60. On 14 August 2013 the Wiener Neustadt District Court dismissed D.P.'s application for a stay of enforcement, but decided to provisionally refrain from returning the child until the Venice Youth Court gave a decision on D.P.'s action before it.

61. In his observations of 18 October 2013 the applicant claimed that he had not yet been duly notified of the fresh proceedings before the Venice Youth Court. The Government, in their submissions of 18 November 2013, stated that the proceedings were pending before the Italian courts and that the parties had been notified of the dates of hearings. Moreover, the Government submitted that the applicant had not taken advantage of

numerous opportunities to re-establish communication between himself and his daughter.

62. According to information provided by the applicant in a letter of 17 November 2014, the Venice Youth Court held hearings in January and April 2014 in the presence of both parents and fixed a series of meetings between the applicant and his daughter. A number of meetings took place between February and May at intervals of three weeks in Austria and then in June in Italy. The mother of the child was present at the meetings and on some occasions also her partner. The applicant alleges that on two occasions the mother's partner threatened him and disrupted the meetings. According to the applicant meetings which had been scheduled for July and August 2014 did not take place as the mother refused to bring the child to Italy. The Venice Youth Court held a further hearing on 29 September 2014 and scheduled further meetings in Italy between the applicant and his daughter for December 2014 and January 2015. The proceedings before the Italian courts are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

63. The enforcement of child custody decisions is based on section 110 of the Non-Contentious Proceedings Act (*Außerstreitgesetz*). This provision also applies to the enforcement of decisions under the Hague Convention and, according to the Supreme Court's case-law, to the enforcement of return orders under Article 11(8) of the Brussels IIa Regulation.

64. Section 110(1), taken in conjunction with section 79(2), provides for the imposition of the following sanctions: fines to enforce actions that need not be taken in person, imprisonment for contempt of court for a duration of up to one year to enforce actions that are to be performed in person, compulsory attendance, seizure of documents and, finally, appointment of a curator *ad litem*. As more lenient measures, the court may also reprimand a party or threaten to take coercive measures.

65. Section 110(2) allows for the use of reasonable direct coercion. Direct coercion may only be applied by court organs and is in practice entrusted to specially trained bailiffs. According to the Supreme Court's case-law, the use of direct coercion, meaning the physical taking away of the child, is possible as a measure of last resort for the implementation of a return order. However, since the use of direct coercion constitutes a massive interference with the child's personal circumstances, a particularly careful approach should be adopted when removing a minor from his or her previous living environment (judgment of 17 February 2010, 2 Ob 8/10f).

66. Section 110(3) provides that the court may refrain from continuing with enforcement proceedings if and as long as they constitute a risk for the well-being of the minor.

The Government argued that in accordance with the CJEU ruling of 1 July 2010, the courts were not entitled to rely on section 110(3) of the Non-Contentious Proceedings Act to review a return order on the merits or to examine whether there were reasons for granting a stay of enforcement, even if it was alleged that there had been a change in circumstances, as it was exclusively within the competence of the courts of the State of origin to rule on an application for a stay of a return order given under Article 11(8) of the Brussels IIa Regulation. In the context of the enforcement of a return order under that Regulation, the scope of application of section 110(3) of the Non-Contentious Proceedings Act was limited to cases in which the act of enforcement in itself endangered the minor's well-being because of an acute danger to the child arising during the removal (for instance on account of strong resistance by or acute health problems of the minor concerned).

III. RELEVANT INTERNATIONAL LAW AND EUROPEAN UNION LAW

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

67. The relevant provisions of the Hague Convention read as follows:

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 4

"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

Article 11

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ..."

Article 12

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

Article 13

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

...

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

2. Council Regulation (EC) No. 2201/2003 of 27 November 2003

68. The relevant provisions of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa Regulation")[, repealing Regulation (EC) No. 1347/2000,] read as follows:

Preamble

"(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

...

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

...

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be 'automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'. This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law."

Article 1

"1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

(a) divorce, legal separation or marriage annulment;

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

(c) the designation and functions of any person or body having charge of the child's person and property, representing or assisting the child;

(d) the placement of the child in a foster family or in institutional care;

(e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

..."

Article 10

"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful

removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

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

or

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

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

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

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

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

Article 11

"1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make it impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority of the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submission to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

69. Pursuant to Article 40(1)(b) of the Regulation, section 4 of the Regulation applies to "the return of a child entailed by a judgment given pursuant to Article 11 (8)." Article 42, which also forms part of section 4 of the Regulation, provides as follows:

Article 42

"1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8) the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning the return of child(ren)).

The certificate shall be completed in the language of the judgment."

Article 47

"1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment."

Article 60

"In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by the Regulation:

...

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

70. The applicant complained that the Austrian courts had violated his right to respect for his family life in that they failed to enforce the Venice Youth Court's judgments ordering his daughter's return to Italy. He relied on Article 8 of the Convention, which, in so far as relevant, 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."

71. The Government contested that argument.

A. Admissibility

1. The parties' submissions

72. The Government raised a number of objections regarding the admissibility of the case.

73. Firstly they asserted that the Venice Youth Court's judgment of 10 July 2009, which had ordered the child's return to Italy where she would reside with her mother, if the latter wished to relocate with her or, alternatively, with the applicant, had been replaced by the Venice Youth Court's judgment of 23 November 2011. In that judgment, the said court had awarded sole custody to the applicant and had ordered that his daughter be returned to reside with him. The Government argued that the first judgment had thus become obsolete and there was no need for the Court to examine the applicant's complaint in so far as it related to the non-enforcement of the first judgment. Following its approach in the *Povse* case (cited above, § 69), the Court should limit its examination to the enforcement of the second judgment.

74. In the alternative, the Government submitted that the applicant had failed to comply with the six-month rule laid down in Article 35 § 1 of the Convention in so far as his complaint concerned the non-enforcement of the Venice Youth Court's judgment of 10 July 2009. As the said court's judgment of 23 November 2011 had replaced its first judgment, the applicant should have lodged his application concerning the non-enforcement of that judgment within six months after the new judgment had been issued. Consequently, his application lodged on 14 January 2013 had to be regarded as out of time.

75. Furthermore, the Government asserted that the applicant had failed to exhaust domestic remedies, as he had not made use of the possibility to lodge an application under section 91 of the Courts Act (*Gerichts-organisationsgesetz*) in respect of the enforcement of both judgments of the Venice Youth Court.

76. The applicant contested the Government's view. He pointed out that both judgments of the Venice Youth Court had been given in the course of the same set of proceedings. The enforcement proceedings in Austria had started on 22 September 2009 when he had sought the enforcement of the Venice Youth Court's judgment of 10 July 2009 and were still pending. Consequently, his application lodged on 14 January 2013 had been introduced in good time. The applicant did not comment on the Government's submissions concerning exhaustion of domestic remedies.

77. The Italian Government did not make submissions on these issues.

2. The Court's assessment

(a) Exhaustion of domestic remedies

78. The Court will first examine the Government's objection that the applicant has failed to exhaust domestic remedies.

79. The Court reiterates that that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted. An applicant must have provided the domestic courts with the opportunity which is in principle intended to be afforded to Contracting States, namely the opportunity of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and which, at the same time, are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among many other authorities, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII).

80. According to the Court's established case-law, an application under section 91 of the Courts Act is an effective remedy in respect of complaints under Article 6 of the Convention regarding the length of proceedings (see, for instance, *Holzinger v. Austria (no. 1)*, no. 23459/94, § 25, ECHR 2001-I). However, the Court has not yet pronounced itself on the question whether section 91 of the Courts Act can also be regarded as an effective remedy in respect of complaints under Article 8 alleging a failure to act or to conduct proceedings expeditiously, affecting an applicant's right to respect for his or her family life.

81. The Court reiterates that there is a difference in the nature of the interests protected by Articles 6 § 1 and 8. Thus, Article 6 § 1 affords a procedural safeguard including the right to have a determination of one's "civil rights and obligations" within a "reasonable time", while Article 8, including the procedural requirements inherent in it, aims at the wider purpose of ensuring proper respect for family life (see, *mutatis mutandis*, *McMichael v. the United Kingdom*, 24 February 1995, § 91, Series A no. 307-B). Given the different nature and aims of the two provisions, the finding that a remedy is effective for a complaint about the length of proceedings under Article 6 § 1 is not decisive for the question whether this is also the case for a complaint under Article 8.

82. The Court notes that the issue was also raised by the Government in a case which concerned both a complaint under Article 6 § 1 about the length of the custody proceedings in the case and a complaint under Article

8 that the domestic court's inactivity had enabled the applicant's husband to take their son to Turkey before a substantive decision on custody was given (*Kaplan v. Austria* (dec.), no. 45983/99, 14 February 2006). The Court, while finding that failure to make use of the application under section 91 of the Courts Act led to non-exhaustion in respect of the length complaint under Article 6 § 1, did not decide on the question whether section 91 of the said Act might also provide an effective remedy in respect of the complaint under Article 8. Instead, it noted that the applicant had reiterated her request to be granted custody several times and had, moreover, twice sought an interim order in order to prevent her husband from taking their son to Turkey. As such requests called by their very nature for a speedy decision, the Court was satisfied that the applicant had made sufficient use of remedies for her complaint under Article 8 of the Convention.

83. In the present case, the applicant complained that the Austrian authorities had failed to enforce an order for his daughter's return to Italy. He had requested her return under the relevant provisions of the Brussels IIa Regulation which, in so far as the return of a wrongfully removed child is concerned, builds on the Hague Convention. The applicant requested that the Austrian courts enforce the order for his daughter's return, submitting the Venice Youth Court's judgments of 10 July 2009 and of 23 November 2011 respectively, each accompanied by a certificate of enforceability under Article 42 of the Brussels IIa Regulation. In both sets of proceedings he appealed against the Leoben District Court's decision refusing the child's return. In the Court's view, the applicant made use of the appropriate mechanism, the very aim of which is to bring about the speedy return of a wrongfully removed child, and thus, at least in substance, claimed his right to respect for his family life before the Austrian courts (see, *mutatis mutandis*, *Raw and Others v. France*, no. 10131/11, § 62, 7 March 2013).

84. In both sets of proceedings, the appellate court and the Supreme Court ruled that the Venice Youth Court's return order was to be enforced. In addition, the CJEU's ruling of 1 July 2010 made it clear that the Austrian courts were under an obligation to enforce the return order within the framework of the Brussels IIa Regulation (paragraph 33 above). The courts were therefore called upon to proceed with the enforcement of the Venice Youth Court's judgments. It was for the authorities to act, not for the applicant (*Raw and Others*, cited above, § 62, with further references). Moreover, the Court notes that the Government have not submitted any particular example showing the application of section 91 of the Courts Act in the specific context of proceedings concerning the enforcement of a return order. The Court concludes that in the present case the applicant was not required to make use of this remedy.

85. The Court therefore dismisses the Government's objection of non-exhaustion.

(b) The further objections raised by the Government

86. The Court now turns to the other two points raised by the Government, namely that it should limit its examination to the enforcement of the Venice Youth Court's second judgment, i.e. the one given on 23 November 2011, which made the latter court's first judgment obsolete or, alternatively, find that the applicant has failed to comply with the six-month rule in so far as his complaint related to the Venice Youth Court's first judgment, namely the one given on 10 July 2009.

87. The Court observes that the applicant does not complain in the first place that the Austrian courts failed to enforce one or the other of the Venice Youth Court's judgments but alleges that they displayed a lack of respect for his family life throughout the proceedings which, in his assertion, have to be considered as a whole.

88. Furthermore, the Court observes that in the *Povse* case (cited above, § 69) case, to which the Government referred, it had noted that it would concentrate its examination on the enforcement of the Venice Youth Court's second judgment. However, it did not declare the complaint inadmissible in so far as it related to the enforcement of the Venice Youth Court's first judgment. The main issue raised by that case, brought by the mother of the applicant's daughter on her own behalf and on behalf of the child, was whether the Austrian courts' obligation under the Brussels IIa Regulation to proceed to the enforcement of the Venice Youth Court's judgments without any further examination of the merits violated their right to respect for their family life. Consequently, the same issue arose in respect of the enforcement of both judgments of the Venice Youth Court and the Court could concentrate its examination on the enforcement of the second judgment which was still pending.

89. The applicant's complaint in the present case is of a different nature. He complains in essence that the manner in which the Austrian courts conducted the proceedings in their entirety violated his rights under Article 8. The Court notes the fact that until the present day the applicant has not been able to obtain his daughter's return to Italy. In the Court's view it would be artificial to consider the proceedings for the enforcement of the Venice Youth Court's judgments of 10 July 2009 and 23 November 2011 as separate and unconnected, when examining whether or not the Austrian authorities have failed to show respect for the applicant's family life.

90. Consequently, the Court dismisses the Government's objections set out above.

(c) Conclusion

91. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

92. The applicant asserted that throughout the proceedings the Austrian courts had failed to act expeditiously and to take sufficient steps to ensure the enforcement of his daughter's return to Italy.

93. In respect of the enforcement of the Venice Youth Court's judgment of 10 July 2009, the applicant asserted in particular that following the Supreme Court's judgment of 13 July 2010 the competent District Court limited itself to requesting proof that appropriate accommodation would be available for D.P. and his daughter without giving any indication as to how he could comply with that requirement.

94. In respect of the enforcement of the Venice Youth Court's judgment of 23 November 2011, the applicant asserted that proceedings had been examined at three levels of jurisdiction in Austria before the judge at the Wiener Neustadt District Court had taken the first steps towards enforcement of the judgment. They had been interrupted by the interim measure applied by the Court in the *Povse* case (cited above) and had only been resumed on his request in April 2013. The attempt of 24 July 2013 to have the child handed over to him by coercive measures had been flawed: he alleged that the absence of his daughter from her place of residence must have been due to information being leaked, and claimed that he had not received the necessary assistance from the judge. In addition, he asserted that the subsequent decision of 14 August 2013 to refrain from taking further enforcement measures while the proceedings brought by D.P. before the Venice Youth Court were pending had had no legal basis and had thus been arbitrary.

95. In sum, he alleged that the Austrian courts, instead of taking effective measures to enforce the return of his daughter, had remained passive or had acted arbitrarily, thus violating his right to respect for his family life.

96. For their part the Government, referring to the Court's case-law in child abduction cases, observed that States were under a positive obligation to take all measures that could reasonably be expected of them to enforce a decision ordering a child's return. The obligation was, however, not absolute but required the State to take the interests of all those concerned, and in particular the well-being and rights of the child, into account. They observed that the Court had frequently pointed out that the best interests of the child were of paramount importance.

97. Furthermore, the Government pointed out that in relations between EU member States the Brussels IIa Regulation took precedence over the Hague Convention. Pursuant to Article 47 of the Brussels IIa Regulation the law of the member State of enforcement was relevant for the enforcement proceedings, as had also been confirmed by the CJEU's ruling in the present

case. Enforcement law had to be in compliance with Article 8 of the Convention. In that connection, the Government pointed out that according to the Court's case-law, domestic authorities had to do their utmost to facilitate cooperation among the parties concerned, which remained an important ingredient, as any obligation to apply coercion against a child had to be limited.

98. The Government conceded that although the applicant had not made use of his right to visit his daughter since mid-2009, the non-enforcement of the return orders had affected his right to respect for his family life.

99. The Government then gave a detailed overview of the steps taken by the Austrian authorities in the proceedings. Regarding the enforcement of the Venice Youth Court's judgment of 10 July 2009, which the applicant had applied for on 22 September 2009, they pointed out that the case raised controversial questions of EU law and had to be submitted to the CJEU for a preliminary ruling. Having obtained that ruling the Supreme Court ordered the child's return in its decision of 13 July 2010. The District Court then took the necessary steps, calling repeatedly on the applicant directly and via the Austrian and Italian Central Authorities to furnish proof of the fulfilment of the condition imposed by the Venice Youth Court, namely that accommodation be made available for the applicant's daughter and her mother by the Vittorio Veneto social services department. No such proof was forthcoming between February and November 2011. The fact that a prerequisite for the child's return required by the Venice Youth Court had not been met could not be blamed on the Austrian courts.

100. Regarding the enforcement of the Venice Youth Court's judgment of 23 November 2011, which the applicant had applied for on 19 March 2012, they pointed out in particular that once the Supreme Court had confirmed on 13 September 2012 that the judgment had to be enforced, the competent District Court had attempted to bring about co-operation between the applicant and the mother of the child in order to facilitate the handover and to limit the impact on the child. Subsequently, the District Court had been prevented from taking any steps from 4 December 2012 to 18 February 2013, during the period in which an interim measure had been applied by the Court in the related *Povse* case (cited above). Once the District Court had been informed of the lifting of the interim measure, it had continued the proceedings in April 2013 and on 20 May 2013 had ordered that the child be handed over by 7 July. An attempt made on 24 July 2013 to remove the child from her place of residence through the use of coercive measures had been unsuccessful due to her absence. The Government pointed out that careful preparation was needed for the use of coercive measures as they could only be carried out by specially trained bailiffs. The Government contested the applicant's allegation that there must have been a leak as regards the date of the enforcement, noting that this allegation was unsubstantiated and unsupported by any evidence. Finally, the District

Court could not be blamed for having refrained from taking further enforcement measures once D.P. had lodged applications with the competent Italian court seeking a stay of the enforcement of the judgment of 23 November 2011 and a new ruling on custody.

101. In sum, the Government asserted that the Austrian courts had taken all reasonable measures with a view to enforcing the return order. In the choice of steps taken, the competent District Court had struck a fair balance between implementing the applicant's rights and having regard to the best interests of a young child, which had to be given priority in its deliberations.

102. The Italian Government observed that the case involved a delicate balance of interests between the fundamental rights involved and expressed the view that the national authorities were best placed to find a solution that duly took into account the best interests of the child.

2. The Court's assessment

(a) Principles established by the Court's case-law

103. The Court notes, firstly, that the relationship between the applicant and his daughter amounts to family life within the meaning of Article 8 of the Convention. The child was born in December 2006 from the relationship between the applicant and D.P. and lived in the applicant's household until the age of one year and two months. After her mother moved to Austria with her in February 2008, the applicant visited her regularly from October 2008 until mid-2009. Since then they had no further contact until February 2014 (see paragraph 62 above). While the parties disagree as to the reason for the lack of contact between the applicant and his daughter, the existence of family life between them is not in dispute.

104. That being so, it must be determined whether there has been a failure to respect the applicant's family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Raw and Others*, cited above, § 78; *Maire v. Portugal*, no. 48206/99, § 69, ECHR 2003-VII; *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 55, 24 April 2003; and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I).

105. In relation to the State's positive obligations the Court has repeatedly held that Article 8 includes a parent's right to have measures

taken with a view to being reunited with his or her child and an obligation on the national authorities to take such measures (*Raw and Others*, cited above, § 79; *Maire*, cited above, § 70; *Sylvester*, cited above, § 58; and *Ignaccolo-Zenide*, cited above, § 94).

106. However, the national authorities' obligation to take such measures is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all are always important ingredients. While national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. In a situation where contact between parent and child might jeopardise such interests or infringe such rights, the national authorities are under a duty to ensure that a fair balance is struck between them (see, *Raw and Others*, § 80; *Maire*, cited above, § 71; *Sylvester*, cited above, § 58; and *Ignaccolo-Zenide*, cited above, § 94).

107. Moreover, the Court has repeatedly held that coercive measures against children are not desirable in this sensitive area (*Maire*, cited above, § 76, and *Ignaccolo-Zenide*, cited above, § 106) or might even be ruled out by the best interests of the child (*Raw and Others*, cited above, § 80).

108. The Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights. The Court considers that, in the area of international child abduction, the positive obligations that Article 8 of the Convention lays on the Contracting must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (see, among others, *Ignaccolo-Zenide*, cited above, § 95) and the Convention on the Rights of the Child of 20 November 1989 (see, for example *Maire*, cited above, § 72), which attach paramount importance to the best interests of the child (see *Raw and Others*, cited above § 82, and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, §§ 49-56 and 137, ECHR 2010 and *X. v. Latvia*, [GC], no. 27853/09, §§ 93 and 96, ECHR 2013).

109. Finally, the Court reiterates that in cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to an 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 non-resident parent. The Hague Convention recognises this fact because it provides for a whole series of measures to ensure the immediate

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 in proceedings for the return of children and any failure to act for more than six weeks may give rise to a request for a statement of reasons for the delay *(Raw and Others*, cited above, § 83; *Maire*, cited above, § 74; and *Ignaccolo-Zenide*, cited above, § 102).

(b) Application of these principles to the present case

110. The present case concerns the applicant's complaint about a lack of respect for his family life in that the Austrian courts failed to enforce the Venice Youth Court's judgments ordering his daughter's return to Italy.

111. The main point to be assessed is whether the Austrian authorities have taken all the measures that they could reasonably be expected to take in order to ensure the return of the applicant's daughter (see, among other authorites, *Raw and Others*, cited above, § 84; *Maire*, cited above, 73; and *Ignaccolo-Zenide*, cited above, §§ 96 and 101).

112. In addition, the Court notes that the present case concerns the return of a child from one EU member State to another. In relations between EU member States the rules on child abduction contained in the Brussels IIa Regulation supplement those already laid down in the Hague Convention. Both instruments are based on the philosophy that in all decisions concerning children, their best interests must be paramount (see *X. v. Latvia*, cited above, §§ 96-97).

113. The Hague Convention and the Brussels IIa Regulation, which in the field of child abduction builds on it, associate this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's best interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13, first paragraph (b) of the Hague Convention – see *X. v. Latvia*, cited above, § 97).

114. Under the Brussels IIa Regulation, which builds on the Hague Convention and is based on the principle of mutual trust between EU member States, the competency to assess whether non-return would be in the child's best interest is distributed as follows: the State to which the child has been wrongfully removed can oppose return in justified cases. However, under Article 11 (8) of the Brussels IIa Regulation the State in which the child had its habitual residence prior to the wrongful removal can override a decision refusing return pursuant to Article 13 of the Hague Convention. If such a decision is accompanied by a certificate of enforceability pursuant to

Article 42 of the Regulation, the requested State has to enforce it. According to Article 47 of the Regulation the law of the State of enforcement applies to any enforcement proceedings.

115. The Court's task in the present case is to assess whether the Austrian courts took swift and adequate measures to secure the return of the applicant's daughter. The decisive issue is whether the domestic courts, in their choice and implementation of enforcement measures struck a fair balance between the competing interests at stake – those of the child, of the two parents and of public order – taking into account, however, that the best interest of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child" (see, *mutatis mutandis*, *X. v. Latvia*, cited above, § 95).

116. The Court considers it useful in the present case to give an overview of the conduct of the proceedings before entering into the detailed assessment of the Austrian authorities' handling of the case.

(i) The conduct of the proceedings

117. It is uncontested that D.P. had wrongfully removed the child to Austria in February 2008. However, the Venice Youth Court had initially, by judgment of 23 May 2008 (see paragraph 11 above), authorised her and the child to stay in Austria and had granted access rights to the applicant. Visits took place between October 2008 and mid-2009. Subsequently, the applicant had no further contact with his daughter until February 2014. While the parties disagree whether this was due to the applicant's failure to make use of his right to visit his daughter or to obstruction by the child's mother, the fact that there was no contact between the applicant and his daughter from mid-2009 until February 2014 is not in dispute.

118. Regarding the first set of proceedings, the Court notes the following: On 22 September 2009 the applicant sought the enforcement of the Venice Youth Court's judgment of 10 July 2009 given pursuant to Article 11(8) of the Brussels IIa Regulation. He also submitted a certificate of enforceability under Article 42 of the Regulation. That judgment had ordered the return of the applicant's daughter to Italy leaving two options to the child's mother: if she wished to return with the child, the judgment required the Vittorio Veneto social services department to provide them with accommodation. In case she did not wish to return, the child was to reside with the applicant.

119. By a decision of 12 November 2009 the Leoben District Court refused enforcement. Its decision was set aside by the Leoben Regional Court on 20 January 2010 on the ground that it was contrary to the provisions of the Brussels IIa Regulation. D.P.'s appeal on points of law of 16 February 2010 raised a number of rather complex questions concerning

the application and interpretation of the Brussels IIa Regulation, which led the Supreme Court to request the CJEU for a preliminary ruling on 20 April 2010. The CJEU gave judgment on 1 July 2010. On 13 July 2010 the Supreme Court dismissed D.P.'s appeal on points of law confirming that the Austrian courts had to enforce the Venice Youth Court's judgment without reviewing the merits of the case, while it was for D.P. to raise any argument relating to a change of relevant circumstances before the competent Italian court. D.P. made use of this opportunity but the Venice Youth Court dismissed her application for a stay of the enforcement of its judgment on 31 August 2010.

120. According to the file, no action was taken until 17 February 2011 when the Leoben District Court requested the applicant to provide evidence that appropriate accommodation would be made available (see paragraph 38 above). More than a month later, on 22 March 2011, the Austrian Central Authority informed its Italian counterpart that the condition of providing accommodation had not been complied with. Further letters with similar contents were sent to the Italian Central Authority between May and November 2011. It appears that no reply was received from the Italian authorities.

121. Regarding the second set of proceedings, the Court notes the following: While the proceedings concerning the enforcement of the Venice Youth Court's judgment of 10 July 2009 had come to a standstill, the applicant had obtained a new judgment by the Venice Youth Court on 23 November 2011. It transferred sole custody of his daughter to him and ordered that she return to Italy to reside with him.

122. On 19 March 2012 the applicant sought the enforcement of that judgment again submitting a certificate of enforceability under Article 42 of the Brussels IIa Regulation. The Leoben District Court, by decision of 3 May 2012, once more refused the request for the return of the applicant's daughter. On 15 June 2012, the Leoben Regional Court granted the applicant's appeal on the ground that the condition that accommodation be made available was no longer applicable and ordered D.P. to hand over the child within fourteen days, with enforcement measures to be taken in case of failure to comply. D.P. did not comply with the order but made use of the possibility of lodging an appeal on points of law with the Supreme Court, which was rejected by that court on 13 September 2012 as the legal issues has already been clarified in the first set of proceedings.

123. Subsequently, on 1 October 2012, the competence to deal with the present case was transferred from the Leoben District Court to the Wiener Neustadt District Court, as D.P. and the applicant's daughter had changed their place of residence. The Wiener Neustadt District Court attempted to obtain the co-operation of both parents, while threatening to make use of coercive measures should no negotiated solution be found. The first attempt was made on 4 October 2012, when the Wiener Neustadt District Court

ordered both parents to indicate within two weeks whether they were prepared to take part in a hearing with the aim of finding an agreed solution for the child's return. The applicant indicated that he was not prepared to take part in the hearing. It appears that no steps were taken in November 2012. The proceedings were interrupted between the beginning of December 2012 and mid-February 2013 (see paragraph 54 above). Subsequently, two months elapsed until April 2013, when the District Court resumed the proceedings and made a second attempt to bring about both parents' co-operation.

124. Following the second unsuccessful attempt to bring about both parents' co-operation, the District Court issued an order on 20 May 2013, setting 7 July 2013 as the deadline for the child's handover to the applicant as the next step, again threatening the use of coercive measures in the event of non-compliance. As D.P. did not comply with the order, the court made an attempt to enforce the order through the use of coercive measures on 24 July 2013. That attempt remained unsuccessful.

125. On 9 August 2013 D.P. sought a stay on the enforcement of the child's return from the Venice Youth Court and asked it to take a new decision on custody, seeking an award of sole custody of the child. She advanced a number of arguments alleging that the circumstances had changed and that the child's return to Italy would endanger her well-being (see paragraph 59 above). Thereupon, on 14 August 2013 the Wiener Neustadt District Court decided to refrain from further enforcement measures, pending the decision of the Venice Youth Court. According to the information available to the Court, the proceedings before the Venice Youth Court are still pending.

(ii) Whether the Austrian authorities took swift and adequate measures

126. The Court will now examine whether the Austrian courts took swift and adequate measures to protect the applicant's right to respect for his family life.

127. The Court notes firstly, that the decisions in the first set of proceedings followed at reasonable intervals. The case, raising a new issue regarding the application of the Brussels IIa Regulation came before three levels of jurisdiction. In addition it was submitted to the CJEU for a preliminary ruling. The Court reiterates that bringing the case before the CJEU was a necessary step in order to bring the control mechanism provided for in European Union law into play (see, *Povse*, cited above, §§ 81-83). Up to 31 August 2010 when the Venice Youth Court dismissed D.P.'s request for a stay of the enforcement of its return order, the Court does not see any failure of the Austrian courts to handle the case expeditiously.

128. The subsequent phase, however, was marked by a period of inactivity. Although almost a year had gone by since the applicant's request

for his daughter's return, the Leoben District Court remained inactive for five and a half months until mid-February 2011, when it contacted the applicant and then the Italian central authority in order to establish whether accommodation for the applicant's daughter and her mother would be made available. Given that the Venice Youth Court's judgment had provided alternatives for the child's return either with or without her mother, the Court can accept that the Austrian courts gave preference to the first alternative which involved a less drastic interference with the family life between the applicant's daughter and her mother. However, no explanation has been provided for the District Court's failure to take action for a protracted period. The Court notes that in return proceedings far shorter delays give rise to concern. In the context of the Hague Convention any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay (see, for instance, *Ignaccolo-Zenide*, cited above, §102). The delay here at issue weighs all the more heavily, given that contacts between the applicant and his daughter had already broken off in mid-2009, The District Court must have been aware that any further delay might have irremediable consequences for the relationship between them.

129. Subsequently, the Austrian authorities were faced with the lack of any reply from the Italian authorities between March and November 2011. As the proceedings had reached a deadlock, it is understandable that the applicant sought a new judgment from the Venice Youth Court, which he obtained on 23 November 2011. However, he only requested its enforcement on 19 March 2012. The request was refused by the Leoben District Court. While it is a normal occurrence for a court decision to be set aside on appeal, the Court notes that the District Court's decision triggered a new round of appeal proceedings before the Leoben Regional Court, which decided in the applicant's favour and finally opened up the possibility for D.P. to lodge a further appeal on points of law with the Supreme Court, although the relevant legal issues had already been resolved in the first set of proceedings.

130. At the time the Wiener Neustadt District Court became competent to deal with the case in October 2012, a period of three years had gone by since the applicant had requested the enforcement of the Venice Youth Court's first judgment ordering his daughter's return. As follows from the considerations set out above, this situation was in part attributable to the lack of expedition in the Austrian courts' own handling of the case. Moreover, there had not been any contacts between the applicant and his daughter during this period. In that connection, the Court notes that it does not appear that the applicable law provided the courts with adequate means to re-establish such contact while the proceedings were pending.

131. Given the difficult situation, the Court considers that the District Court took appropriate steps, trying to secure the parties' co-operation in order to avoid coercive measures in the interest of the child. Although the

Court discerns some delays in November 2012 and between February and April 2013, it does not consider them decisive in themselves. Ultimately, faced with the unbending position of both parents, the District Court proceeded to the implementation of coercive measures. While the attempt at enforcement of 24 July 2013 was unsuccessful, the Court sees no indication in the file that the failure of the attempt could be attributed to the conduct of the Austrian authorities, as alleged by the applicant.

(iii) Overall assessment

132. Although the Court attaches considerable weight to the delay caused by the Leoben District Court in the first set of proceedings, it does not overlook a number of factors which contributed to the difficulty in dealing with the case. To begin with, there was the lack of any reply by the Italian authorities in the first set of proceedings. The applicant's choice, though understandable, to make a request for enforcement of the Venice Youth Court's second judgment, meant that the whole range of remedies was again available to the parties. Finally, the fact that contact between the applicant and his daughter had been interrupted since mid-2009 made the authorities' task all the more difficult. The unbending position of both parents added further to the difficulty of the case. This became particularly apparent in the second set of proceedings, which were marked by the District Court's attempts to bring about co-operation between the parties, with the aim of avoiding coercive measures against the applicant's daughter. However, the Court reiterates that that the lack of co-operation between separated parents is not a circumstance which by itself may exempt the authorities form their positive obligations under Article 8 (see *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 176, 27 September 2011).

133. The Court would add the following considerations. It cannot but note that despite the fact that the applicant submitted a final and enforceable return order to the Austrian courts in September 2009, the Austrian authorities have not been able to bring about an enforcement of this or the subsequent return order until today. In that context, it is of particular importance to note that so far no final decision has been taken which would conclude that return would be against the child's best interests. The issue whether circumstances have changed to such an extent that an enforcement of the Venice Youth Court's judgment is no longer justified is currently pending before the Venice Youth Court.

134. According to the Court's established case-law, effective respect for family life requires that the future relations between parents and children are not determined by the mere effluxion of time (see, among others, *H. v. the United Kingdom*, 8 July 1987, § 90, Series A no. 120; *Raw and Others*, cited above, § 83). In that connection, the Court has also repeatedly noted that the passage of time can have irremediable consequences for relations between the child and the parent who does not live with it (see, for instance

Keegan v. Ireland, 26 May 1994, § 55, Series A no. 290; *Ignaccolo-Zenide*, cited above, § 102; *Maire*, cited above, § 74). This raises the question whether the procedural framework in place allowed the applicant to pursue his rights effectively.

135. In the specific the context of return proceedings, the Court has held that it is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention (see, for instance *Ignaccolo-Zenide*, cited above, § 108; *Sylvester*, cited above, § 68). Moreover, in a recent case relating to proceedings under the Hague Convention, the Court examined whether the procedural framework provided by the State was adequate to give effect to the object and purpose of that Convention (see, *López Guió v. Slovakia*, no. 10280/12, §§ 106-111, 3 June 2014). In the Court's view, similar considerations apply in the present case.

136. Specific streamlined proceedings may be required for the enforcement of return orders – be it under the Hague Convention or under the Brussels IIa Regulation – for a number of reasons. Without overlooking that the enforcement proceedings have to protect the rights of all those involved, with the interests of the child being of paramount importance, the Court notes that it is in the nature of such proceedings that the lapse of time risks to compromise the position of the non-resident parent irretrievably (see, *Lópes* Guió, cited above, § 109). Moreover, as long as the return decision remains in force the presumption stands that return is also in the interests of the child (see, *X. v. Latvia*, cited above, §§ 96-97). The proceedings available to the applicant in the present case followed the normal pattern of enforcement proceedings. They did not contain any specific rules or mechanisms to ensure particular speediness. It does not appear either that the authorities had appropriate means at their disposal to ensure that contact between the applicant and his daughter, which had broken off in mid-2009, was re-established and maintained while the proceedings were pending.

137. In conclusion, the Court considers that the Austrian authorities failed to act swiftly in particular in the first set of proceedings. Moreover, the available procedural framework did not facilitate the expeditious and efficient conduct of the return proceedings. In sum, the applicant did not receive effective protection of his right to respect for his family life.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. Article 41 of the Convention provides:

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

A. Damage

140. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage, arguing that the Austrian courts' failure to enforce his daughter's return to Italy has deprived him of contact with his daughter over a lengthy period.

141. The Government contested the applicant's claim. They asserted that the applicant himself did not make any attempt to get in contact with his daughter and that, in any case, the amount claimed appeared excessive in the light of awards made by the Court in comparable cases.

142. The Court accepts that the applicant must have suffered distress as a result of the Austrian Court's failure to enforce the return of his daughter to Italy, which is not sufficiently compensated by the finding of a violation of the Convention. Having regard to the sums awarded in comparable cases and making an assessment on an equitable basis, the Court awards the applicant EUR 20,000 in respect of non-pecuniary damage.

B. Costs and expenses

143. The applicant also claimed EUR 39,283.85 under the head of costs and costs and expenses. This sum is composed of EUR 24,393.65 incurred in the proceedings before the Venice Youth Court and EUR 14,890.20 incurred in the proceedings before the Court. These amounts included value-added tax.

144. The Government submitted that the applicant had failed to give any indication as to the existence of a causal link between the costs claimed for the proceedings before the Venice Youth Court and the alleged violation. Regarding the costs claimed in respect of the proceedings before the Court, the Government argued that they appeared excessive.

145. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the proceedings before the Venice Youth Court and considers it reasonable to award the sum of EUR 5,000 for the proceedings before the Court, plus any tax that may be chargeable to him on that amount.

C. Default interest

146. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 20,000 plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 5,000, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President