CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF CARLSON v. SWITZERLAND

(Application no. 49492/06)

JUDGMENT
This version was rectified in accordance with Rule 81 of the Rules of Court
on 8 December 2008

STRASBOURG

6 November 2008

FINAL

06/02/2009

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

In the case of Carlson v. Switzerland,

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

Christos Rozakis, *President*,
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 16 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 49492/06) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United States national, Mr Scott Norman Carlson ("the applicant"), on 11 December 2006.

2. The applicant was represented by Mrs N. Mole of the AIRE Centre, London, assisted by lawyers, Mr H. Setright Q.C. and Mr E. Devereux[1]. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, Head of the Human Rights and Council of Europe Section of the Federal Office of Justice, and by their Deputy Agent, Mr A. Scheidegger.

3. The applicant alleged that the proceedings brought before the Swiss courts for the return of his child had breached Articles 6, 8 and 14 of the Convention, in conjunction with Article 5 of Protocol No. 7 to the Convention.

4. On 12 June 2007 the Court decided to give notice of the application to the Government. It also decided to examine the admissibility and merits of the case at the same time, in accordance with Article 29 § 3, and to give priority to the application under Rule 41 of the Rules of Court.

5. Observations were received from the National Center for Missing and Exploited Children, a non-governmental organisation which had been granted leave to intervene as a third party in accordance with Rule 44 § 2.

[1] Rectified on 8 December 2008: addition of Mrs N. Mole and Mr E. Devereux as representatives.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Scott Norman Carlson, is a United States national who was born in 1962 and lives in Washington.

7. On 4 August 2001 the applicant married D., a Swiss national who was born in 1969. They decided to live in the United States of America (District of Columbia).

8. On 3 July 2004 their son, C., was born there. He is a national of the United States and of Switzerland. Parental responsibility was exercised jointly by both parents.

9. Between February and July 2005 D. made several trips to Switzerland, sometimes accompanied by C. She decided to settle there with the child, in the municipality of Stansstad (Canton of Nidwalden), from 1 August 2005 onwards.

10. On 16 September 2005, D. and C. moved to Obersiggenthal (Canton of Aargau).

11. On 28 September 2005 D. petitioned for divorce before Baden District Court (Canton of Aargau) and at the same time requested interim measures for the duration of the divorce proceedings, particularly with a view to obtaining custody of the child.

12. On 29 September 2005 the applicant petitioned for separation before a US court.

13. In a decision of 30 September 2005, the President of the appropriate division of Baden District Court provisionally granted D. custody of C.

14. On 31 October 2005 the applicant started proceedings in Baden District Court. Relying on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the Hague Convention”, see paragraph 38 below), he sought an order that his son be returned promptly to the United States. In support of his request he stated that his wife had gone to Switzerland in July 2005, accompanied by the child, for a holiday and also for health reasons. The applicant had joined her for a two-week holiday in September 2005 and had agreed with his wife that he would return alone to the USA on 28 September 2005. Just before his departure D. had, however, presented him with a divorce agreement. He had found it unacceptable and had thus refused to sign it. He then returned to the USA without his child.

15. In a decision of 14 November 2005 the President of the appropriate division of Baden District Court ordered D. to surrender C.'s passport and prohibited her from leaving Switzerland. At the same time, he decided to join the proceedings concerning the child's return to the divorce proceedings, including the determination of rights of custody and access.

16. On 21 November 2005 D. deposited the child's Swiss passport.

17. On 3 December 2005 D. submitted her observations on the request for the child's return to the USA, arguing that the parties had decided to move to Switzerland at the start of 2005. Thus, she alleged, the provisions of the Hague Convention were not applicable to the present case.

18. On 17 February 2006 the President of Baden District Court dismissed the applicant's request for the child's return to the USA. He found that the situation admittedly appeared to be one of wrongful removal or retention within the meaning of Article 3, sub-paragraph (a), of the Hague Convention, given that parental responsibility for C. had been exercised jointly by both parents under the applicable laws of the District of Columbia where the child had habitually resided before his removal. The President further acknowledged that the decision of 14 November 2005 to join the proceedings concerning the child's return and the divorce proceedings had not complied with Article 16 of the Hague Convention, which precluded any decision on the merits of rights of custody before the ruling on the child's return.

19. The court nevertheless refused to grant the request for the child's return to the USA, finding that the applicant had consented to the removal and retention of the child, thus removing any wrongfulness from D.'s conduct for the purposes of Article 3, sub-paragraph (a), of the Hague Convention.

20. In the absence of witnesses, the President of the appropriate division of the court examined whether the applicant's allegations could be regarded as sufficiently credible (*hinreichend glaubhaft*). He found that the applicant had been unable to submit evidence in support of his allegation that, whilst he had agreed to the mother's temporary stay in Switzerland, this had only been on the condition that she return the child to the United States once her visit to Switzerland for medical treatment had ended. Moreover, the judge took the view that the applicant had failed to show that the mother's health problems had been resolved in September 2005 and that D.'s residence in Switzerland was thus no longer justified from that time. On the contrary, the applicant could not reasonably have believed that his wife and child were only going to remain in Switzerland for a short time, as the mother had had herself registered in two Swiss municipalities in succession and had taken steps to find work there. The applicant had been kept informed of all these developments by his wife, whom he had in fact visited on several occasions.

21. In view of the above, the judge of Baden District Court found, first, that the child's removal to Switzerland had not been unlawful under Article 3, sub-paragraph (a), of the Hague Convention, since the applicant had given his express consent, and, secondly, that there was insufficient evidence to substantiate the allegation of the child's wrongful retention.

22. In parallel the applicant brought an action for unjustified delay before the Court of Appeal (*Obergericht*) of the Canton of Aargau. He

requested, firstly, an immediate decision on his application of 31 October 2005 for the child's return to the United States, and, secondly, the opening of a disciplinary procedure and the taking of appropriate measures against the President of Baden District Court.

23. In a decision of 27 February 2006 the Court of Appeal's supervisory panel (*Inspektionskommission des Obergerichts*) observed that the impugned decision, concerning the child's return to the USA, had been given in the meantime, on 17 February 2006. It noted that the District Court had exceeded the six-week time-limit provided for in Article 11 of the Hague Convention for a decision on the child's return. It further found that there had been an unjustified delay in the proceedings brought by the applicant. As regards the requested disciplinary measures against the President of Baden District Court, the panel found that such measures were not appropriate having regard to the circumstances that had led to the delay. It pointed out that the President of the District Court was required to adhere to a calendar that the panel itself had imposed, requiring disposal of older cases and the holding of hearings that could not be adjourned. Other factors came into play, such as the absence of a *greffière* and the busy end-of-year period. The panel also found that there were no indications to suggest that the delay could be attributed to other grounds, of a political nature, as the applicant had claimed.

24. On 7 March 2006 the applicant lodged a second appeal before the Canton of Aargau Court of Appeal against the District Court's decision of 17 February 2006, arguing among other things that the latter had reversed the burden of proof, in patent disregard of Article 13 of the Hague Convention.

25. In a decision of 10 April 2006 the Court of Appeal dismissed the applicant's appeal. Whilst it acknowledged that the President of Baden District Court had wrongly reversed the burden of proof against the applicant, it nevertheless concluded that in the light of all the circumstances of the case, the other party had succeeded in demonstrating that the applicant had, in a sufficiently unequivocal manner, consented to the child's retention for an indefinite period.

26. On 11 May 2006 the applicant lodged a public-law appeal with the Federal Court, seeking the prompt return of his child to the United States. He alleged that there had been numerous violations of the right to be heard, in particular because the District Court had not duly taken into account or had misconstrued his offers to adduce proof to show that he had not consented to his child's retention. Moreover, he criticised the fact that the District Court had merged the proceedings concerning the child's return with the divorce proceedings and that its decision on the child's return had by far exceeded the time-limit provided for under Article 11 of the Hague Convention. Lastly, he argued that the reversal of the burden of proof clearly constituted a violation of Article 13 of the Hague Convention.

27. In a judgment of 13 July 2006, the Federal Court dismissed the public-law appeal. It did not call into question the fact that the District Court had wrongly merged the two sets of proceedings. However, it failed to address the question of the time taken by the court below to reach its decision.

28. The Federal Court shared the District Court's view that the child's removal and retention had *a priori* been capable of breaching the applicant's right of custody within the meaning of Article 3 of the Hague Convention.

29. However, the Federal Court rejected the allegations concerning the right to be heard, indicating in detail the reasons why it considered unfounded the arguments put forward by the applicant to prove that he had not consented to his child's retention in Switzerland. By contrast, the Federal Court regarded it as established that the parties had decided, in the summer of 2005, that the mother and her child would settle in Switzerland on a long-term basis. It was proven, according to the Federal Court, that the applicant had agreed that the mother would find employment and buy a car there. Moreover, it could not be argued that the Court of Appeal had reached its conclusions only by reversing the burden of proof against the applicant. Thus, the Federal Court found that the Court of Appeal had properly applied Article 13, sub-paragraph (a), of the Hague Convention. Accordingly, it refused to order the child's return to the United States.

30. On 12 and 18 December 2006 the applicant lodged a request with the Federal Court for the revision of the judgment of 13 July 2006. He alleged in particular that he had suffered discrimination as the child's father.

31. In a judgment of 6 February 2007 the Federal Court declared the request for revision inadmissible, because the allegation about discriminatory treatment did not constitute a valid ground for revision under the applicable law.

32. On 13 September 2007 the supervisory panel of the Aargau Canton Court of Appeal found that there had been no unjustified delay in the revision proceedings.

33. On 18 September 2007 the District Court of Baden declared inadmissible a request for the revision of the 10 April 2006 judgment of the Aargau Canton Court of Appeal.

34. According to a letter from the United States Embassy in Berne, dated 20 November 2007, its staff had attempted in vain to make contact with the child's mother.

35. On 26 November 2007 the applicant lodged a request for a right of access.

36. On 29 November 2007 Baden District Court ordered that the applicant be granted a right of access.

37. On 4 December 2007 the Aargau Canton Court of Appeal declared inadmissible another request for the revision of the judgment that it had

given on 10 April 2006. That decision was served on the applicant, according to him, on 15 December 2007.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

38. The relevant provisions of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which entered into force in respect of Switzerland on 1 January 1984, read as follows:

> "Preamble
>
> The States signatory to the present Convention,
>
> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
>
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:
>
> Article 1
>
> The objects of the present Convention are –
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
>
> ...
>
> Article 3
>
> The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

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

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

...

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. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

...

Article 13

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

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

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

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

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

...

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

...

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

39. In a recent case that is largely comparable to the present one, the Federal Court upheld the appeal of a mother, a Swiss national, who opposed a request for the return of her child made by the child's father, a French national living in France. The court took the view that the father had "subsequently acquiesced", within the meaning of Article 13, sub-paragraph

(a), of the Hague Convention, in the child's retention, especially because he had taken to Switzerland items belonging to the mother that were to be used by her in her professional activities in Switzerland (see Federal Court judgment of 17 November 2006, 5P.380/2006). Generally speaking, the Federal Court finds it easier to accept the existence of a tacit agreement as to the removal or retention of a child where the party requesting the child's return has actively contributed to the settlement of the child and the accompanying parent in the destination country (ibid., see also the Federal Court judgment of 15 November 2005, 5P.367/2005).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicant alleged that the proceedings before Baden District Court, which ended with the decision of 17 February 2006, had, in a number of ways, breached his right to respect for family life, as guaranteed by Article 8 of the Convention. He claimed in particular that the court had clearly exceeded the six-week time-limit for reaching a decision on the child's return, as provided for by Article 11, second paragraph, of the Hague Convention, especially because it had merged the proceedings concerning the child's return with the divorce proceedings. He further claimed that the domestic courts had obliged him to prove, contrary to the clear wording of Article 13, first paragraph, of the Hague Convention, that he had not consented to the child's retention in Switzerland. He thus relied on Article 8 of the Convention, of which the relevant part reads as follows:

> "1. Everyone has the right to respect for his private and family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Preliminary objection of failure to exhaust domestic remedies

(a) The parties' submissions

41. In the Government's submission, the complaints under Article 8 of the Convention had not been raised in the context of the applicant's public-law appeal. In their view, it had merely been claimed before the Federal Court, in that appeal, that there had been a violation of Article 29 of the Constitution (procedural safeguards) and of Article 13 of the Hague Convention. Moreover, the Government argued that the Federal Court, which the applicant had requested to examine his complaints about those two violations, had not been called upon to address the question whether the existence of the procedural safeguards on which the applicant sought to rely could be inferred from Article 8 of the Convention.

42. The Government further observed that, in his public-law appeal, the applicant had certainly mentioned, in the summary of the facts of the case, his complaint about an unjustified delay and about the corresponding decision of the Court of Appeal's supervisory panel. However, he had not alleged before the Federal Court that the Cantonal Court proceedings had been excessively long, but had complained only about a violation of the right to be heard, about the assessment of evidence and about a violation of Article 13 of the Hague Convention. In that same context, the Government claimed that the second paragraph of Article 11 of that convention provided for a specific procedure in the event of a failure to meet the time-limit and that the applicant, to their knowledge, had not initiated such a procedure.

43. In view of the foregoing, the Government requested the Court to declare inadmissible the complaint under Article 8 for failure to exhaust domestic remedies.

44. The applicant was convinced that he had sufficiently and in substance submitted his complaints under Article 8 of the Convention before the domestic courts.

B. The Court's assessment

45. The Court reiterates the principle that every complaint to be submitted to it must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Ankerl v. Switzerland*, 23 October 1996, § 34, *Reports of Judgments and Decisions* 1996-V).

46. The applicant, being duly represented by a lawyer and having had legal training himself, admittedly failed to complain expressly, before the domestic courts, of a violation of his right to respect for his family life,

under Article 8 of the Convention. However, in the appeal he lodged on 7 March 2006 with the Court of Appeal, against the District Court's decision, he expressly stated that the court below had reversed the burden of proof, in patent disregard of Article 13 of the Hague Convention (see paragraph 38 above).

47. He subsequently reiterated that complaint in the context of his public-law appeal of 11 May 2006 before the Federal Court. In that same appeal he further alleged that the District Court had not duly taken into account or had misconstrued his offers to adduce proof to show that he had not consented to his child's retention by its mother. Moreover, he criticised the fact that the first-instance court had joined the proceedings concerning the child's return to the divorce proceedings.

48. The Court therefore has no doubt that the applicant raised, in substance, his complaints about an interference with his right to respect for family life under Article 8 of the Convention. Moreover, since the Federal Court expressly addressed these complaints, they cannot be declared inadmissible for failure to exhaust domestic remedies.

49. Before the Federal Court, the applicant further alleged that the District Court had by far exceeded the strict time-limit for a decision on the child's return under Article 11 of the Hague Convention (see paragraph 38 above). Moreover, he brought a claim for unjustified delay before the Canton of Aargau Court of Appeal, requesting that a decision on the child's return be taken immediately.

50. In view of the foregoing, the Court finds that the applicant has complied with the requirement to exhaust domestic remedies.

2. Objection as to the applicant's "victim status"

51. The Government observed that, in so far as the applicant had claimed that the first-instance court had clearly exceeded the six-week time-limit for a decision on the child's return, as provided for under Article 11 of the Hague Convention, it was appropriate to examine the applicant's status as "victim" in this connection.

52. They observed that the applicant had lodged, on 2 February 2006, a complaint for unjustified delay before the Court of Appeal of the Canton of Aargau. He had requested first that a decision be taken promptly and, secondly, that disciplinary proceedings be brought against the President of Baden District Court. The Court of Appeal's supervisory panel had found, in a decision of 27 February 2006, that the District Court had exceeded the six-week time-limit for its decision on the applicant's request for the child's return, as provided for under Article 11 of the Hague Convention, and that there had been an unjustified delay in the proceedings. However, the panel had been of the opinion that it was not appropriate to take disciplinary measures against the President of Baden District Court and that there was

no evidence to suggest that the delay could be attributed to other grounds, as the applicant had claimed.

53. In view of the foregoing, the Government argued that the applicant had had an effective remedy by which to submit his complaint about the excessive length of the proceedings. Consequently, the applicant was no longer a "victim" within the meaning of Article 34 of the Convention.

54. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 183, ECHR 2006-V; *Eckle v. Germany*, 15 July 1982, Series A no. 51, §§ 69 et seq.; *Amuur v. France*, § 36, 25 June 1996, *Reports* 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X).

55. In the present case, the Court of Appeal's supervisory panel expressly found, in a decision of 27 February 2006, that the District Court had exceeded the six-week time-limit provided for in Article 11 of the Hague Convention. However, the Court notes that no steps have apparently been taken to afford redress for the violation observed. In particular, the applicant was not granted any compensation or a reduction in court costs following the finding that the court had failed in its duty of diligence. Nor have the Government indicated that the applicant had a remedy by which to obtain redress.

56. Consequently, the Court takes the view that the applicant can still claim to be a "victim", within the meaning of Article 34 of the Convention, in respect of his complaint about the length of the proceedings before the District Court. The Court further observes that no other grounds have been established for declaring inadmissible the complaints under Article 8 of the Convention. They must therefore be declared admissible.

B. The merits

1. The parties' submissions

(a) The applicant

57. Contrary to the Government's submission, the applicant argued that he had not been duly heard during the proceedings concerning his child's return. In the applicant's opinion, the various shortcomings of the Swiss courts in implementing the Hague Convention, taken together, had entailed a violation of Article 8 of the Convention.

58. The applicant further argued that the authorities had given priority to the mother's interests, despite the fact that the spirit of the Hague Convention required mechanisms that were gender-neutral.

59. The applicant also argued that the decision of Baden District Court of 14 November 2005 merging the proceedings concerning the child's return with the divorce proceedings, not only entailed a fundamental breach of Article 16 of the Hague Convention, but was also contrary to the principles underpinning Articles 6 and 7 of that convention. He alleged that the merger of the proceedings continued until 17 February 2006, when the Court of Appeal's supervisory panel took its decision, thus well after the deadline for the conclusion of the Hague Convention proceedings concerning the child's return.

60. The applicant further contended that, contrary to the clear wording of the first paragraph of Article 13 of the Hague Convention, Baden District Court had obliged him to prove that he had not consented to the child's retention in Switzerland. That court had insufficiently taken into account or had arbitrarily construed his offers to adduce evidence in order to refute the other party's allegation that he had consented to the child's retention.

(b) The Government

61. The Government argued that in the present case the Federal Court had first rigorously examined each of the applicant's complaints concerning the evidence that the Court of Appeal had failed, according to him, to take sufficiently into account. They observed that the applicant – like the child's mother – had been able to express his views before the lower courts and adduce any evidence that appeared appropriate to him. The Government concluded that the Court of Appeal had sufficiently taken into account the applicant's arguments and that, on the basis of the numerous documents submitted, it had simply reached a different conclusion to that desired by the applicant, which did not constitute a breach of the right to be heard.

62. Subsequently, in the Government's submission, the Federal Court had carefully examined, in the light of Article 13 of the Convention, whether the child's mother had made certain acts probable and whether those acts had enabled the finding, in law, that the applicant had – expressly or cogently – consented to or subsequently acquiesced in his son's settlement in Switzerland. The Federal Court had observed in this connection that the applicant had not alleged any arbitrariness as regards the Court of Appeal's summary of the mother's arguments or of his own.

63. It was therefore quite correctly, and after a rigorous examination of the circumstances of the case, that the Federal Court had concluded that it was established with sufficient probability that in the summer of 2005 the parties had jointly intended that the mother and child should settle in Switzerland and that the applicant had agreed that the mother should look for work and buy a car there. Accordingly, it could not be argued that the

Court of Appeal had reached that conclusion merely by having reversed the burden of proof against the applicant.

64. The Government thus concluded that the applicant's complaint about the reversal of the burden of proof was unfounded; both the Court of Appeal and the Federal Court had remedied this by requesting the mother to prove that the applicant had consented to or subsequently acquiesced in his son's long-term stay in Switzerland, in accordance with the Hague Convention.

(c) The third-party intervener

65. The National Center for Missing and Exploited Children submitted that Article 1 of the Hague Convention showed that the exceptions provided for in Article 13, sub-paragraph (a), of that convention called for a restrictive interpretation to avoid undermining the rights guaranteed in Articles 6 and 8. As regards the "consent" or "acquiescence" of one of the parents, it had to be given unequivocally and unconditionally.

66. The National Center for Missing and Exploited Children was convinced that one of the Hague Convention's underlying principles was that proceedings concerning divorce and child custody could not prejudge proceedings brought for the child's return. By requiring the States parties to the convention to guarantee the prompt return of an abducted child, the Hague Convention sought to avoid the passing of a lengthy period of time, after which the restoration of the *status quo ante* would become practically impossible.

67. The third-party intervener lastly emphasised the importance of the positive obligation imposed on States parties, under Article 7, sub-paragraph 2 (b) of the Hague Convention, to guarantee that the parent complaining of the abduction had contact with his or her child (see paragraph 38 above).

2. The Court's assessment

(a) Principles developed by the Court in cases concerning child abduction

68. The Court has had occasion to set out and develop guidelines to be followed in child abduction situations where it has to ascertain whether the authorities of a State party to the Convention have fulfilled their obligations under Article 8 of the Convention (see, in particular, *Maumousseau and Washington v. France*, no. 39388/05, §§ 58-83, ECHR 2007-XIII; *Bianchi v. Switzerland*, no. 7548/04, §§ 76-85, 22 June 2006*; Monory v. Romania and Hungary*, no. 71099/01, §§ 69-85, 5 April 2005*; Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII; *Karadžić v. Croatia*, no. 35030/04, §§ 51-54, 15 December 2005*; Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, §§ 48-52, ECHR 2003-V*; Sylvester v. Austria*, nos. 36812/97 and 40104/98, §§ 55-60, 24 April 2003*; Paradis*

v. Germany, (dec.), no. 4783/03, 15 May 2003; *Guichard v. France* (dec.), no. 56838/00, ECHR 2003-X*; Ignaccolo-Zenide v. Romania*, no. 31679/96, §§ 94-96, ECHR 2000-I*;* and *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

69. The principles emerging from this case-law may be summarised as follows:

(i) The essential object of Article 8 of the Convention is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

(ii) The Court's role, however, is not to substitute its decision for that of the appropriate domestic authorities in regulating the issues of custody and access, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. In so doing, it must determine whether the reasons purporting to justify the actual measures adopted with regard to the applicant's enjoyment of his right to respect for family life are relevant and sufficient under Article 8.

(iii) As regards more specifically the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation for the national authorities to take such action.

(iv) The crucial point is therefore whether the domestic authorities have taken all the measures that could reasonably be expected of them to facilitate the exercise of the rights of custody, parental responsibility and access that a parent is recognised as having under the applicable law or as a result of judicial decisions.

(v) However, the national authorities' obligation to take measures for that purpose is not absolute. The nature and extent of such measures will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parents might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them.

(vi) The Convention must not be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of

Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Party.

(vii) The obligations that Article 8 of the Convention imposes on the States with respect to reuniting parents with their children must therefore be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

(viii) The Court further reiterates the well-established principle of its case-law that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). Accordingly, it observes that an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time. The Court may also have regard, under Article 8, to the form and length of the decision-making process.

(ix) In this context the Court has noted that the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the return of an abducted child, including the enforcement of the final decisions, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent with whom the child does not live.

(b) The application of the general principles to the present case

70. Turning to the circumstances of the present case, the Court finds it appropriate to clarify at the outset that the applicant did not complain about the grounds ultimately adopted by the domestic courts in refusing to grant his request for the return of the child (contrast, for example, *Maumousseau and Washington*, cited above, §§ 58-81), but the manner in which those courts responded to his request. In other words, he pointed out a number of shortcomings and defects in the proceedings before the District Court and complained about their duration. The Court takes the view that the main issue is thus the duty to act promptly in the implementation of the child's return to the United States. Accordingly, it finds it appropriate to examine the case in terms of the "positive" obligations imposed by Article 8 on the domestic courts.

71. In the present case, the three persons concerned had lived in the United States until the child's mother indicated to her husband that she intended to visit Switzerland with the child. Subsequently, the applicant requested the Swiss courts to order the child's return to his habitual residence. He alleged that the prolonging of the visit constituted a wrongful removal or retention of his child within the meaning of Article 3 of the Hague Convention, as he exercised parental responsibility for the child jointly with his wife. The proceedings he brought thus directly concerned

the family life of these three persons. The Court further notes that it is not in dispute that, for the applicant and his son, to continue to live together represents a fundamental element that falls within the scope of family life within the meaning of the first paragraph of Article 8 of the Convention, which is therefore applicable in the present case (see *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII, and *Bianchi*, cited above, § 86).

72. The Court further notes that, under Article 3 of the Hague Convention, the removal or retention of a child is to be considered wrongful where "it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention" (see paragraph 38 above). As regards the applicant's son, the Court takes the view that the mother's refusal to take him back to the United States after his stay in Switzerland in the summer of 2005 certainly falls within the scope of that convention.

73. The Court would also point out that it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law (see *Winterwerp v. the Netherlands*, 24 October 1979, § 46, Series A no. 33), of which the international treaties incorporated therein form a part. However, in so far as the Court has jurisdiction to review the procedure followed before domestic courts, in particular to ascertain whether the interpretation by those courts of the Hague Convention's guarantees gave rise to a violation of Article 8 of the Convention (see *Monory*, cited above, § 81, *Iglesias Gil and A.U.I*, cited above, § 61, and *Guichard*, decision cited above, pp. 414 et seq.), it is required to examine whether and to what extent the manner in which they proceeded was consistent with the object and purpose of the Hague Convention, which are, according to the preamble and Article 1 in particular, to guarantee the "prompt return" of wrongfully removed or retained children (see paragraph 38 above).

74. The Court is entirely in agreement with the philosophy underlying the Hague Convention. Inspired by a desire to protect children, regarded as the first victims of the trauma caused by their removal or retention, this instrument seeks to deter the proliferation of international child abductions (see *Maumousseau and Washington*, cited above, § 69). In this kind of case, the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent with whom it does not live (*ibid.*, § 83). It is therefore a matter, once the conditions for the application of the Hague Convention have been met, of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental responsibility to be determined by the courts that have jurisdiction in the place of the child's habitual residence, in accordance with Article 19 of the Hague Convention (see paragraph 38 above; also see, to

that effect, among other authorities, *Maumousseau and Washington*, cited above, § 69, and *Eskinazi and Chelouche*, cited above).

75. A number of factors should be mentioned in this context. It should first be pointed out that Article 16 of the Hague Convention requires a stay of the proceedings on the merits of rights of custody until a decision has been taken on the child's return (see paragraph 38 above). The Court shares the view of the third-party intervener that this rule seeks to ensure that the custody proceedings do not prejudge those concerning the child's return. The separation of the two sets of proceedings must enable the court to rule on the possible return of the abducted child with the requisite diligence. In the present case the applicant submitted on 31 October 2005 a request for her son's return to the United States. Further to that request, the President of Baden District Court ordered the applicant's wife to surrender the child's passport immediately and prohibited her from leaving Switzerland. At the same time, it was decided to join the proceedings concerning the child's return to the divorce proceedings, which are also supposed to deal with custody rights and parental responsibility. However, such an approach is not only clearly at odds with Article 16 of the Hague Convention, as the Federal Court indeed recognised (see paragraph 27 above), it also had the effect of prolonging the proceedings before the domestic courts that were to rule on the return of the abducted child.

76. In addition, the President of Baden District Court did not order that the child should remain in Switzerland until his decision of 17 February 2006, three and a half months after the applicant had lodged his request for the child's return on 31 October 2005. The Court observes that this period of time is not consistent with Article 11 of the Hague Convention, which requires the judicial or administrative authorities concerned to act "expeditiously" in proceedings for the return of children and any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay (see, for the text of this provision, paragraph 38 above, and for cases where it has been applied, *Ignaccolo-Zenide*, cited above, § 102, *Monory*, cited above, § 82, and *Bianchi*, cited above, § 94).

77. Moreover, contrary to the clear wording of Article 13, sub-paragraph (a), of the Hague Convention (see paragraph 38 above), the President of the District Court reversed the burden of proof, as was in fact recognised by the Court of Appeal (see paragraph 25 above). In other words the first-instance court required the applicant to "establish" that he had not "consented to or subsequently acquiesced" in the child's removal or retention. In the view of the Court – which shares the third-party intervener's view that the notions of "consent" and "acquiescence" should be interpreted restrictively and that they have to be expressed unequivocally and unconditionally – this approach immediately placed the applicant in a clearly disadvantageous position. It is true that the second court, namely the Court of Appeal, correctly applied the above-cited Article 13. As the Federal Court pointed

out, the reversal of the burden of proof did not by itself enable the Court of Appeal to reach the conclusion that the applicant had consented to his child's retention. This fact is not, however, capable of remedying the failure to uphold the equality of arms at first instance, in patent disregard of the clear wording of Article 13, sub-paragraph (a), of the Hague Convention. The information obtained through the reversal of the burden of proof was not without relevance for the domestic courts' assessment of the actual situation.

78. Whatever measures may have been taken at domestic level to redress breaches of the Hague Convention, they are not capable in the present case of absolving the State from its international responsibility. A State's responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in the light of the relevant principles of international law (see, in this connection, *Hadri-Vionnet v. Switzerland*, no. 55525/00, § 55, ECHR 2008-... ; *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336; and *Avşar v. Turkey*, no. 25657/94, § 284, ECHR 2001-VII).

79. Moreover, in circumstances that were admittedly different from those of the present case, the Court has laid down the principle that it is for the Contracting States to organise their services and train their personnel in such a way that they can meet the requirements of the Convention (see, *mutatis mutandis*, *Hadri-Vionnet*, cited above, §§ 54-57; *Dammann v. Switzerland*, no. 77551/01, § 55, 25 April 2006; *Scordino (no. 1)* [GC], cited above, § 183; and *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V). In the Court's view, this is all the more true in an area as sensitive as that of child abduction, where a particularly high degree of diligence and prudence should be shown.

80. In view of the foregoing, the Court is not convinced that the “best interests” of C., which lay in a rapid decision for his prompt return to his habitual environment, were taken into account by the domestic courts when they examined the request for his return under the Hague Convention (contrast *Maumousseau and Washington*, cited above, § 75).

81. Given that those shortcomings were not redressed by the higher courts, the Court takes the view that the applicant's right to respect for his family life has not been protected effectively by the domestic courts as prescribed by Article 8 of the Convention.

82. Accordingly, there has been a breach of Article 8 in this connection.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. The parties' submissions

83. The applicant submitted that he had also sustained a breach of his right to be heard within the meaning of Article 6 § 1 of the Convention. He first complained that the domestic courts had breached the equality of arms principle, in particular because he had not had an interpreter, had not been duly informed by the courts during the proceedings and had not been given enough time to respond to the other party's allegations. He further submitted that he had not had a public hearing before the domestic courts. He also alleged that the domestic courts had been neither impartial nor independent within the meaning of Article 6 § 1. In addition, the applicant implied that his right to be heard had been breached, in particular because the domestic courts had obliged him to prove, contrary to the clear wording of Article 13, first sub-paragraph, of the Hague Convention, that he had not consented to the child's retention in Switzerland. Moreover, he alleged that those same courts had not sufficiently taken into account or had arbitrarily assessed his offers to prove that he had not consented to the child's retention.

84. In support of those allegations the applicant relied on Article 6 § 1 of the Convention, of which the relevant part reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

85. Citing a number of cases dealt with by the Court, the applicant was convinced that Article 6 applied to this type of proceedings.

86. The Government argued that the outcome of proceedings concerning the return of a child was not "decisive for civil rights and obligations" (see *H. v. France*, 24 October 1989, § 47, Series A no. 162-A), and that Article 6 did not therefore apply in the present case.

B. The Court's assessment

87. The Court is satisfied that Article 6 applies in the present case (see, for example, *Bianchi*, cited above, § 110, and *Maumousseau and Washington*, cited above, § 88), but takes the view that this complaint should be declared inadmissible for the reasons given below.

88. The Court observes that the applicant again relied on a reversal of the burden of proof, as regards the question of his consent to the child's retention in Switzerland, this time in relation to Article 6 § 1.

89. In the present case, the Court takes the view, however, that the complaint submitted under Article 6 § 1 of the Convention – namely, the question of the reversal of the burden of proof – must be regarded as

constituting one of the essential points of the complaint under Article 8 (see, to this effect, *Karadžić,* cited above, § 67; *Sylvester*, cited above, §§ 73-77; and *Bianchi*, cited above, § 114). It accordingly finds that there is no need to examine this allegation separately under Article 6 of the Convention.

90. The applicant further submitted that the domestic courts had not sufficiently taken into account or had arbitrarily assessed his offers of proof to challenge the other party's allegation that he had consented to the child's retention.

91. In this connection, the Court reiterates that Article 6 § 1 does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts. Its task consists in ascertaining whether the proceedings, as a whole, were conducted fairly (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

92. As regards the present case, the Court observes that the domestic decisions were taken after adversarial proceedings during which the applicant was able to challenge the grounds put forward by the other party and to submit the arguments he considered relevant to his case. The domestic courts, in particular the Federal Court, assessed the credibility of the various items of evidence submitted in the light of the circumstances of the case and duly gave reasons for their decisions in this connection. It does not appear that the domestic courts drew any arbitrary conclusions from the facts submitted to them. Consequently, the Court finds that the proceedings taken as a whole were fair. The complaint is therefore manifestly unfounded.

93. The applicant further complained that the domestic courts had breached the equality of arms principle, in particular because he had not had an interpreter before the domestic courts, had not been duly informed by them during the proceedings and had not been given enough time to respond to the other party's allegations. He also asserted that he had not had a public hearing before the Swiss courts. Lastly, he alleged that the domestic courts had been neither impartial nor independent within the meaning of Article 6 § 1.

94. The Court reiterates that the purpose of the principle of the exhaustion of domestic remedies is to afford to Contracting States the opportunity to prevent or redress the alleged violations before they are submitted to it. Thus the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Ankerl*, cited above, § 34). In the present case the Court observes that the applicant failed to raise these complaints, at least in substance, before the domestic courts. Consequently, they must be declared inadmissible for non-exhaustion of domestic remedies.

95. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 5 OF PROTOCOL No. 7

96. The applicant also complained that he had been discriminated against as the child's father. He relied in this connection on Article 14 of the Convention, taken together with Article 5 of Protocol No. 7, which read as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 5 of Protocol No. 7

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

97. The Court observes that the applicant submitted this complaint only in the context of his request for revision before the Federal Court. That complaint was then rejected by that court as belated.

98. It follows that, even supposing that the complaint falls within the scope of the provisions invoked, it must be rejected for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. 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

100. By way of pecuniary damage, the applicant claimed 75,000 euros (EUR) for future litigation and EUR 100,000 for the cost of reintegrating the child into his family environment, i.e. EUR 25,000 for travel expenses and EUR 75,000 (EUR 25,000 per annum for three years) for the

employment of a German-speaking "caretaker", in the event that his judicial actions resulted in the child's return to the United States.

101. In the Government's submission, the Court's settled case-law showed that the granting of an award presupposed that the claims had been duly substantiated and that there had been a direct and close causal link between the alleged damage and the Court's finding of a violation of the Convention. In respect both of the sum claimed for "future litigation" and of that claimed for the child's reintegration, these were claims for hypothetical future expenses. The Government thus argued that these claims should be rejected.

102. The Court shares the Government's view as regards the award claimed for future litigation and for the cost of reintegrating the child into the applicant's family environment, as such expenses are for the time being purely speculative. Consequently, the Court rejects the applicant's claim in respect of pecuniary damage.

103. As to non-pecuniary damage, the applicant claimed the sum of EUR 50,000 for psychological and emotional damage sustained as a result of the failure of the Swiss authorities to ensure contact between him and his son during the judicial proceedings, the length of those proceedings and the discriminatory effect of the interpretation of Article 13, sub-paragraph (a), of the Hague Convention.

104. The Government replied that the first complaint, concerning access rights, was not part of the subject-matter of the present proceedings before the Court. Given the sums awarded by the Court in this type of case, the Government indicated that they would be prepared, if the Court found a violation of Article 8 of the Convention, to grant the applicant, in addition to the redress for non-pecuniary damage provided by the publication of the Court's judgment, the sum of EUR 7,000 under this head.

105. Taking into account the circumstances of the present case, in particular the shortcomings in the application of the Hague Convention, which led to a breakdown in relations between the applicant and his son, the Court takes the view that the applicant has sustained considerable non-pecuniary damage that cannot be compensated for solely by the finding of a violation of this provision.

106. Ruling on an equitable basis, as required by Article 41, and in the light of all the circumstances of the present case and of comparable cases, it awards the applicant in respect of non-pecuniary damage the sum of EUR 10,000 together with any tax that may be chargeable on that amount.

B. Costs and expenses

107. In respect of costs and expenses the applicant claimed the total sum of EUR 95,019.77 broken down as follows:

– EUR 58,031.70 for counsel in the Hague Convention proceedings;

– EUR 8,496.05 for counsel in the divorce proceedings;

– EUR 9,827.19 for translation expenses;

– EUR 18,664.83 for the proceedings before the Court, i.e. EUR 8,170.63 for the AIRE Centre in London and EUR 10,494.20 for the fees of two experts on the Hague Convention, Mr H. Setright and Mr E. Devereux.

108. The Government indicated that, according to the Court's settled case-law, it granted the reimbursement of costs and expenses only where they were related to the violation observed; the fact that the appeals lodged by the applicant in the domestic proceedings and in Strasbourg had only been partly successful should also be taken into account by the Court. Moreover, the Government argued that the applicant had to submit his claims with figures and a breakdown by category, together with the relevant supporting documents.

109. As regards the amount of EUR 58,031.70 for the costs and expenses of the applicant's counsel, the Government first noted that the "memorandum" submitted by him in support of his claims did not show in detail the number of hours spent on the various tasks, nor does it mention the hourly rate applied. Moreover, the Government took the view that the amount claimed under this head was totally disproportionate.

110. In the Government's submission, the same applied to the sum of EUR 9,827.19 claimed for translation expenses, since the invoices submitted by the applicant in that connection did not give a precise indication of the services invoiced and failed to show the number of hours spent on the various translations. Nor did they mention the hourly rate.

111. As regards the applicant's claim of EUR 8,496.05 for the costs and expenses of the lawyer who worked on his divorce, the Government argued that the applicant's divorce proceedings did not relate to the violation of the Convention alleged before the Court.

112. As regards the total sum of EUR 18,664.83 claimed by the applicant for the proceedings before the Court, that is to say EUR 8,170.63 for the fees of the AIRE Centre in London and EUR 10,494.20 for the fees of the Hague Convention experts, the Government observed that the reply to the Government's observations and the request for just satisfaction, both dated 17 December 2007, should be taken into account. Accordingly, they argued that the sum claimed under this head was disproportionate. Moreover, as regards the experts' fees, the Government observed that the invoice of 17 December 2007, addressed to the AIRE Centre by one of the experts, did not indicate what services corresponded to the sums claimed. In addition, the Government had doubts as to the "necessity" of recourse to experts in the matter at the stage of the reply to the Government's observations, bearing in mind in particular that, according to the AIRE Centre's invoice, the case had already been dealt with by at least five

lawyers from that centre and by the lawyer who had worked on the Hague Convention proceedings.

113. Having regard to the foregoing, the Government took the view that the sum of EUR 4,000 would cover all the costs and expenses for the domestic and Strasbourg proceedings.

114 The Court reiterates that, where it finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before the Strasbourg institutions, but also those incurred before the national courts for the prevention or redress of the violation (see, in particular, *Zimmermann and Steiner v. Switzerland*, 13 July 1983, § 36, Series A no. 66). However, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V, and *Linnekogel v. Switzerland*, no. 43874/98, § 49, 1 March 2005).

115. In the present case, the Court observes that, for the reimbursement of costs and expenses, it is necessary to bear in mind that only one complaint has been declared admissible (see, *mutatis mutandis*, *Olsson v. Sweden (no. 2)*, 27 November 1992, § 113, Series A no. 250, and *Linnekogel*, cited above, § 50).

116. Moreover, the Court takes the view, like the Government, that the sum of EUR 8,496.05 corresponding to the fees and expenses of the divorce lawyer does not concern the present application. Nothing is therefore payable by the Government under this head.

117. In addition, the Court shares the Government's opinion that the applicant has not sufficiently substantiated his claims, which therefore do not satisfy the requirements of Rule 60 § 3 of the Rules of Court.

118. In view of the foregoing, the Court regards the applicant's claims as excessive. In the light of the elements in its possession and the criteria developed in its case-law, the Court awards the applicant the total sum of EUR 12,000 plus any tax that may be chargeable, in respect of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible as to the complaint under Article 8 of the Convention and the remainder inadmissible;

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, to be converted into Swiss francs (CHF) at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in French, and notified in writing on 6 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President