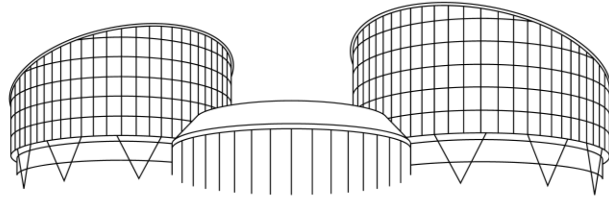

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF STRÖMBLAD v. SWEDEN

(Application no. 3684/07)

JUDGMENT

STRASBOURG

5 April 2012

FINAL

05/07/2012

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of Strömblad v. Sweden**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 6 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 3684/07) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Swedish national, Mr Einar Strömblad (“the applicant”), on 15 January 2007.

2. The applicant was represented by R. Harrold-Claesson, a lawyer practising in Olofstorp. The Swedish Government (“the Government”) were represented by their Agent, Mr B. Sjöberg, of the Ministry for Foreign Affairs.

3. The applicant complained that the Swedish courts’ protracted custody proceedings, including their handling of his request for the return of his daughter under the Hague Convention, and the Tax Authority’s decision to remove his daughter from the population register, violated Articles 6, 8 and 13 of the Convention.

4. On 26 June 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court) and the above application was assigned to the newly composed Fifth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1950 and lives in Kristianstad.

7. In 1999 the applicant married L., a Ukrainian national holding permanent residence permits in the Czech Republic and in Sweden. In February 2004 she obtained Swedish nationality. In August 2003 their daughter, N., was born. She is also a Swedish national.

8. Between May and August 2005 L. visited her parents in Prague together with N. Upon their return, the applicant's relationship with L. quickly deteriorated and, in September 2005, she returned to her parents' home in Prague with N. They have remained there ever since.

A. The proceedings relating to custody and rights of contact

9. In September 2005 the applicant submitted an application for divorce from L. to the District Court (*tingsrätten*) in Kristianstad. He further requested sole custody of N. or, if the court decided that the parties should have joint custody, that N. should live with him. In any event, if the court were to decide that N. should live with her mother, he wanted contact rights to be exercised on a regular basis according to a specific schedule.

10. L. agreed to the divorce but opposed the applicant's requests in relation to their daughter. She wanted sole custody of N. but agreed, pending the final outcome of the proceedings, that the applicant could visit N. in Prague for a few hours every other weekend with her or her mother (N.'s maternal grandmother) present.

11. On 14 November 2005, after having held an oral hearing, the District Court decided that, pending the final outcome of the proceedings, the applicant and L. should have continued joint custody of N. but that she should live with her mother and see her father for four hours every other weekend in the presence of L. or a person of her choice. The court further ordered the Kristianstad Social Council to carry out an investigation into the custody of N., her place of residence and contact to her. In its interim decision, the court noted that neither the applicant nor L. appeared to be unsuitable as guardians for N. Therefore, despite their difficulties in co-operating and the distance between their places of residence, there were not enough reasons to dissolve the joint custody of N. Moreover, having regard to N.'s young age and the fact that the main responsibility for her daily care had rested with L., the court found it to be in the child's best interest to live with L. even though L., by moving to Prague, had made it more difficult for N. to see her father. In this respect, the court emphasised that L. had a great responsibility to ensure that N. would be able to see the applicant. The

parties were left to agree on where it would be best for N. and the applicant to meet.

12. The applicant appealed against the decision to the Court of Appeal (*hovrätten*) of Skåne and Blekinge, maintaining his requests for sole custody of N. and for her to live with him. In the alternative, he wanted his right of contact with N. to be exercised in southern Sweden.

13. L. opposed any changes to the District Court's decision.

14. On 13 December 2005 the Court of Appeal upheld the lower court's decision in full. It found that no circumstances had been presented which indicated that the District Court's decision was not in the best interests of the child. This decision was final.

15. Subsequently, the applicant requested the District Court to change its interim decision, *inter alia*, in respect of N.'s place of residence and the contact rights. He claimed that the interim decision in force had made it impossible for him to create meaningful contact with N., since it was too expensive for him to travel to Prague every other weekend. Moreover, he wanted to be able to spend time with his daughter alone.

16. As L. opposed any changes to the interim decision, the District Court held an oral hearing, at which the applicant, his representative and L.'s representative were present. L. did not attend.

17. In an interim decision of 23 January 2006, the District Court altered its previous decision by granting the applicant a right of contact to N. every other weekend for four hours on both Saturday and Sunday. For the rest, the court found it to be in the best interests of N. to keep the interim arrangements until final judgment was delivered in the case.

18. The applicant appealed to the Court of Appeal, demanding that N.'s permanent place of residence should be in Sweden.

19. On 28 February 2006 the Court of Appeal rejected the appeal, noting that it was not legally possible for it to decide where a child should live; it could only decide with whom. No appeal lay against the decision.

20. In 2006 the Social Council made an investigation concerning the custody of N., her place of residence and contact to her, but the District Court did not find the results satisfactory. Thus, by decision of 2 July 2007, the District Court mandated a company, Access Borders SE, to investigate N.'s living conditions in the Czech Republic. The report was to be submitted to the court at the latest on 15 October 2007. Moreover, the court decided that N. should meet with the applicant for four hours on 8 December 2007 and for four hours on 9 December 2007 in Sweden. Furthermore, the date for the main hearing in the case was fixed for 11 and 12 December 2007.

21. The hearing was cancelled and, apparently, the applicant and N. did not therefore meet as scheduled in Sweden.

22. In a report faxed to the District Court on 18 December 2007, Access Borders SE informed the court of its efforts to carry out an investigation

into N.'s living conditions in Prague but stated that this had not been possible because L.'s representative in Prague had acted in a manner which obstructed the impartial investigation.

23. On 13 March 2008 the District Court took a number of procedural decisions, *inter alia,* rejecting L.'s request to have all documents in the case-file translated into Czech and deciding that the parties should finalise their pleadings by 21 April 2008 so that the main hearing could take place. Moreover, it rejected a request by the applicant to order further investigations into N.'s situation in the Czech Republic while maintaining the assignment given to Access Borders SE. In this respect, the District Court noted that a new investigation would be very time-consuming and therefore not appropriate but that it would take into consideration when deciding the case that L. had refused to co-operate in the investigation by Access Borders SE ordered by the court.

24. On 2 March 2010 the District Court took further procedural decisions, *inter alia*, rejecting a request by the applicant to hear a new witness. Moreover, it rejected the applicant's request for edition of certain documents.

25. On 27 July 2010 the District Court, after having held an oral hearing, delivered its judgment. The court decided that L. should have the sole custody of N. and granted the applicant a right of contact with N. four days in a row on a monthly basis, which should gradually be increased.

The District Court held that both the applicant and L. were suitable parents. It further concluded that the fact that N. had not seen her father for the last five years was to a large extent caused by L.'s behaviour and that it was to be feared that N. would not have any future contact with the applicant if she stayed with L. in Prague. However, the court held that, despite invitations from L., the applicant had not even once gone to Prague. In the court's view he had thus not made sufficient efforts to enforce his rights of contact in respect of N. Lastly, the court concluded that the advantages of a change of N.'s domicile would not outweigh the drawbacks, *inter alia*, since N. had not seen the applicant for several years and no longer spoke Swedish.

26. The applicant appealed against the judgment to the Court of Appeal, which refused leave to appeal on 29 September 2010.

27. On 8 December 2010 the Supreme Court refused leave to appeal.

B. Proceedings relating to the Hague Convention

28. In December 2005 the applicant applied to the Swedish Ministry for Foreign Affairs for assistance for the return of N. to Sweden in accordance with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). The Ministry for Foreign Affairs, which is the Swedish Central Authority in charge of

matters falling under the Hague Convention, forwarded the applicant's request to its Czech counterpart.

29. As there was no real progress in the case, the applicant contacted the Ministry for Foreign Affairs in May 2006 expressing his concern and requesting that the Ministry put some pressure on the Czech Central Authority.

30. Following correspondence between the authorities, the Czech Central Authority requested, in accordance with Article 15 of the Hague Convention, that the applicant obtain a decision from the Swedish courts to the effect that the removal of N. by her mother had been wrongful within the meaning of Article 3 of the Hague Convention. In June 2006 the Ministry for Foreign Affairs forwarded this request to the District Court in Kristianstad since the latter was dealing with the custody case.

31. By judgment of 10 October 2006 the District Court declared that L.'s retention of N. in the Czech Republic was not unlawful within the meaning of Article 3 of the Hague Convention. In reaching this conclusion, it had regard to the fact that, in November 2005 when it had taken its interim decision that N. should live with her mother, it had known that they were staying in Prague. Thus, it had accepted that N. was not in Sweden but in Prague with L. for which reason the retention was not unlawful.

32. The applicant appealed to the Court of Appeal, claiming that the District Court should have focused on the actual removal of N. from Sweden by L. and not on the retention. In his view, the removal had been unlawful and the Hague Convention was therefore applicable. Later decisions by the Swedish courts could not justify the removal retroactively.

33. On 19 December 2006 the Court of Appeal rejected the applicant's appeal, finding that neither the removal nor the retention of N. by L. was unlawful. This judgment was final.

34. However, the applicant applied to the Supreme Court (*Högsta domstolen*) for re-opening of the case as he considered that he had suffered a miscarriage of justice. On 1 February 2007 the Supreme Court rejected the application.

C. Proceedings relating to N.'s removal from the population register

35. In June 2006 L. sent a notification of change of address to the Swedish Tax Authority (*Skatteverket*) on N.'s behalf. Since parents who have joint custody of a child need to agree on a change of address for the child, the Tax Authority forwarded the notification to the applicant for comments. The applicant opposed the change of N.'s place of residence in the Swedish population register (*folkbokföringen*) since he considered the removal of N. to be unlawful and the custody proceedings were still ongoing.

36. On 11 September 2006 the Tax Authority dismissed L.'s notification of N.'s change of address because notification had to be made jointly by both guardians. However, at the same time it decided, on its own initiative, to remove N. from the population register as having emigrated, since it was clear that N., since 10 September 2005, had no longer lived at the registered address in Sweden but with L. in Prague. In reaching this conclusion, it had regard to the District Court's interim decision of 14 November 2005 that N. should be living with her mother.

37. The applicant appealed against the decision to the County Administrative Court (*länsrätten*) of the County of Skåne, demanding that the Tax Authority's decision be repealed and that N.'s registered place of residence should not be changed until a final decision in the custody case had been reached.

38. On 10 October 2006 the County Administrative Court dismissed the appeal on the ground that both parents, since they had joint custody, had to agree on the appeal. Thus, since L. did not support the applicant's appeal, the court could not consider it on the merits.

39. Upon further appeal by the applicant, the Administrative Court of Appeal (*kammarrätten*) in Gothenburg refused leave to appeal. However, the applicant lodged a further appeal to the Supreme Administrative Court (*Regeringsrätten*), maintaining his claims and invoking Articles 8 and 13 of the Convention. He considered that since the custody case and the proceedings relating to his demand under the Hague Convention were still pending, the Tax Authority should not prejudge those proceedings by removing N. from the population register as having emigrated. This was a violation of his rights under Article 8 and, consequently, he had a right under Article 13 of the Convention to have an effective remedy, that is, the national courts were under an obligation to try his appeal on the merits.

40. On 18 December 2006 the Supreme Administrative Court refused leave to appeal.

II. RELEVANT LAW AND PRACTICE

A. The population register

41. According to the National Registration Act (*folkbokföringslagen*, 1991:481 –hereafter "the Act"), the general rule is that a person is registered in the population register at the address where he or she has his or her regular place of residence (Sections 6 and 7 of the Act).

42. However, Section 20 of the Act states that a person who can be assumed in his or her daily life, regularly to spend the night out of the

country for a period of at least one year, shall be removed from the population register as having emigrated.

43. A change of address or a move abroad of a child shall be reported to the Tax Authority by the child's guardian (Section 30 of the Act). If the parents have joint custody, both have to consent to the reported change (judgment by the Supreme Administrative Court, RÅ 1995 *ref*. 74). Still, the Tax Authority may decide to register a change of address or move abroad on its own initiative if there are reasons for it (Section 34 of the Act).

B. The Hague Convention

44. The Articles of the Hague Convention, relevant for the present case, read as follows:

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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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 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 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained

in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

C. Domestic practice and ongoing legislative work concerning compensation for violations of the Convention

45. In a judgment of 9 June 2005 (NJA 2005 p. 462) concerning a claim for damages brought by an individual against the Swedish State, *inter alia*, on the basis of an alleged violation of Article 6 of the Convention on account of the excessive length of criminal proceedings, the Supreme Court held that the plaintiff's right under Article 6 of the Convention had been violated. Based on this finding, and with reference, *inter alia*, to Articles 6 and 13 of the Convention, the Supreme Court concluded that the plaintiff was entitled to compensation under Swedish law for both pecuniary and non-pecuniary damage.

46. In a judgment of 21 September 2007 (NJA 2007 p. 584), the Supreme Court held that the plaintiffs' right to respect for their private life under Article 8 of the Convention had been violated because a police decision on a medical examination of some of them had not been "in accordance with the law". Having found that compensation for the violation could not be awarded directly on the basis of the Tort Liability Act, the Supreme Court held that there was no reason to limit the scope of application of the principle established in the above-mentioned two cases to violations of Articles 5 and 6 of the Convention and concluded that the plaintiffs should be awarded non-pecuniary damages for the violation of Article 8.

47. Furthermore, the Chancellor of Justice has delivered decisions concerning compensation to individuals for violations of the Convention. In a decision of 23 June 2009, the Chancellor of Justice awarded an individual damages for violations found under, *inter alia*, Articles 8 and 13. The case concerned, *inter alia*, storage of certain personal information concerning the applicants in the data bases of the Swedish Security Service.

48. In May 2009 the Government decided to set up a working group on tort liability and the Convention to study the current legal situation. In December 2010 the working group submitted its report (*Skadestånd och Europakonventionen,* SOU 2010:87) to the Government. In the report it is proposed that the Tort Liability Act be amended in order to allow natural and legal persons to obtain damages from the State or a municipality for violations of the Convention. Such an action against public authorities would be examined by a general court which would need first to establish that a right provided by the Convention has been violated. The aim of the proposal is to provide a legal basis for granting non-pecuniary damages arising from disregard of the Convention, and to fulfil, together with the

other already existing legal remedies, Sweden's obligations under Article 13 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

49. The applicant complained that the Swedish courts' protracted custody proceedings, including their handling of his request under the Hague Convention, and the Tax Authority's decision to remove N. from the population register, constituted a violation of his and his daughter's right to family life as provided in Article 8 of the Convention. He also relied on Article 6 of the Convention.

The Court considers that this complaint should be examined under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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."

50. The Government contested the claim.

A. Admissibility

51. The Government maintained that the application was inadmissible because the applicant had not exhausted the domestic remedies in respect of claiming damages from the state due to the alleged violation of Article 8 of the Convention. They referred to, *inter alia*, the Swedish Supreme Court's decisions and judgments of 9 June 2005 and 21 September 2007 as well as the Chancellor of Justice's decision of 23 June 2009 (see paragraphs 45-47), in which individuals had been awarded compensation for pecuniary and non-pecuniary damage due to the violation of different Articles of the Convention. They also pointed out that the Svea Court of Appeal had, in a judgment dated 12 January 2006, concluded that there had been a violation of Article 8 and that non-pecuniary damages should be awarded on the basis of the principle established in the Supreme Court's judgment NJA 2005 p. 462. In the Government's opinion, Swedish law thus provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in

respect of any violation of the Convention, including under Article 8, at the time when the application was lodged with the Court. The application was lodged with the Court one and a half years after the delivery of the first of the mentioned Supreme Court judgments and one year after the Svea Court of Appeal's judgment concerning Article 8 in particular. Accordingly, the legal position under domestic law had to be considered to have been sufficiently clear at the time when the present application was introduced before the Court.

52. The applicant disagreed and maintained that the domestic remedies had been exhausted.

53. The Court reiterates that the purpose of the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system.

54. Turning to the present case, the Court notes that the early judgments referred to by the Government concerned matters under Articles 6 and 13 of the Convention and that a Supreme Court judgment awarding damages under Article 8 was delivered after the application at issue was lodged with the Court. While the Court welcomes the development in Swedish law concerning the possibility to claim compensation on the basis of alleged violations of the Convention, it must be kept in mind that this development is a rather recent one. Consequently, it cannot generally be required of an individual applicant to pursue a compensation claim in respect of Convention issues that have not been determined by the domestic courts or are not closely related to issues that have been so determined. The reason for this is that, in many of these cases, the existence of the remedy cannot yet be considered as sufficiently certain (see, for example, *Bladh v. Sweden* (dec.), no. 46125/06, §§ 23-27, 10 November 2009 and *Fexler v. Sweden*, no. 36801/06, § 44, 13 October 2011).

55. In these circumstances, in the Court's view, it has not been shown with sufficient clarity that, at the time of the applicant's lodging the present application, there existed a remedy which was able to afford redress in respect of the violation alleged by the applicant and which he should be required to have pursued. The Government's objection as to the exhaustion of domestic remedies must therefore be dismissed.

56. The Court consequently 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 submissions of the parties

(a) The applicant

57. The applicant maintained that his and N.'s right to family life was violated by the District Court's protracted handling of the custody proceedings as well as by the national courts' and the Ministry for Foreign Affairs' failure to handle his request under the Hague Convention in a correct and timely manner. He likewise contended that the Tax Authority's decision to remove N. from the population register violated their right to family life.

58. The applicant stressed that the time-factor was crucial in cases like the present one and that he was not in any way to blame for the delay in the proceedings before the District Court. He stated that the District Court's interim decision in November 2005 had had a great impact on the subsequent proceedings. In his view, the District Court did not even at an early stage of the proceedings consider how N.'s right to contact with both her parents could be ensured.

59. He also noted that Swedish courts have unlimited powers to decide on procedural matters in cases concerning custody and that the District Court had approved L.'s requests for time extensions on several occasions.

60. Moreover, he alleged that the Swedish courts had ignored the core purpose of the Hague Convention, that is, discouraging child abduction by removing any legal advantage a parent may believe he or she gains by fleeing to another country.

61. He further claimed that the main reason why he had not been able to exercise his contact rights to N. was that he could not afford to travel to Prague. Moreover, during the Hague Convention proceedings he was recommended not to go to the country to which N. had been abducted.

62. The applicant further held that the Tax Authority's decision to remove N. from the population register implied an approval of L.'s removal of N. to the Czech Republic and thereby a prejudgment of the proceedings relating to custody and the Hague Convention. He also reiterated that the Tax Authority's decision was used by L. as an argument for not returning N. to Sweden in the proceedings before the Swedish courts.

(b) The Government

63. The Government held that the national authorities had taken all necessary steps to facilitate a reunion between the applicant and his daughter that could reasonably be demanded in the special circumstances of the case. They further stated that there were several reasons why the proceedings before the District Court had been protracted.

64. They emphasized that the Swedish social services had carried out an investigation concerning the custody and contact with L. However, since this investigation was not considered satisfactory, the District Court had mandated a company, Access Borders SE, to investigate N.'s living conditions in the Czech Republic and had requested a report by 15 October 2007. The report was however not completed within the set time and the District Court therefore had to cancel the scheduled main hearing. In December 2007 Access Borders SE had informed the court that it had been impossible to carry out an investigation because L.'s representative in Prague had acted in a manner which obstructed the impartial investigation.

65. The Government further pointed out that a decision concerning contact had been taken by the District Court already a few weeks after the case had been brought to the court. Moreover, they held that the applicant's behaviour was one factor contributing to the lengthy proceedings.

66. In the Government's opinion the applicant had failed to take all possible steps to exercise his provisional rights of contact. He had, for example, never travelled to Prague in order to visit his daughter. They furthermore held that the applicant had refrained from using the possibility of applying to a Swedish Court for a declaration of enforceability in the Czech Republic pursuant to the Brussels II regulation of the provisional rights of contact granted to him by the Swedish courts.

67. The Government concluded that, taking into account the margin of appreciation enjoyed by the competent authorities, the Swedish State had complied with its positive obligation to ensure respect for the applicant's right to respect for his family life in accordance with Article 8 of the Convention.

68. As regards the proceedings pursuant to the Hague Convention, the Government stated that an application for the return of N. had been received by the Swedish Central Authority (the Ministry for Foreign Affairs) on 23 December 2005 and had been forwarded to the Czech Central Authority on 14 February 2006. They further underlined that the applicant initially had wished to investigate whether such proceedings were the most effective way for him to return his daughter to Sweden and that the Czech Central Authority had reported to the Swedish Central Authority that the mother opposed a voluntary return of the girl to Sweden. The application for an Article 15 Declaration was not sent to the District Court until 21 June 2006 and on 10 October 2006 the court delivered a decision saying that the retention of N. was not to be regarded as wrongful under Article 3 of the Hague Convention. The Court of Appeal upheld the decision in December 2006. The total length of these proceedings was thus less than one year, including the handling of the case by the Swedish Central Authority and two Swedish courts.

69. The Government thus held that there was no doubt that the length of the court proceedings relating to the Hague Convention was fully compatible with the Convention.

70. They further contended that the removal of N. from the population register did not constitute a violation of the applicant's rights set forth in the Convention. In their view, the applicant's complaint in this regard seemed to be directed towards the legislation as such and not towards its application in the present case. The Government stated that the legislation in the present case was clear and the decision was based on the direct application of the relevant law. The information that N.'s actual place of residence was abroad had been communicated to the Tax Agency over a long period of time, both by the applicant and later also by L. The Tax Agency was required to take its decision based on the actual circumstances and the criterion of "regular place of residence" was fulfilled regardless of the applicant's allegation that L.'s removal of N. from Sweden was unlawful. Thus, the decision to remove N. from the population registration was correct and in accordance with the applicable law.

2. *The Court's assessment*

(a) General principles

71. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (see *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290).

72. Domestic measures hindering enjoyment of family life such as a decision granting custody over children to a parent constitutes an interference with the right to respect for family life (see, for example, *Hoffmann v. Austria*, judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29, and *Palau-Martinez v. France*, no. 64927/01, § 30, ECHR 2003-XII).

73. Any such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *W. v. the United Kingdom*, 8 July 1987, § 60, Series A no. 121).

74. Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the

implementation, where appropriate, of specific steps (see *Zawadka v. Poland*, no. 48542/99, § 53, 23 June 2005).

75. The Court has repeatedly held that Article 8 includes a right for parents to have measures taken with a view to their being reunited with their children, and an obligation on the national authorities to take such measures. This also applies to cases where contact and residence disputes concerning children arise between parents (see *Kosmopoulou v. Greece*, no. 60457/00, § 44, 5 February 2004).

76. In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see *W. v. the United Kingdom,* cited above, § 59, and *Keegan*, cited above, § 49).

77. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation when deciding on custody (see, *inter alia*, *C. v. Finland*, no. 18249/02, § 53, 9 May 2006 and *Wildgruber v. Germany*, (dec.) nos. 42402/05 and 42423/05, 29 January 2008). However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of contact, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V (extracts).

78. Where the measures in issue concern parental disputes over their children, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact and residence disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance (see *Zawadka,* cited above, § 54, and *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A). Moreover, lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures to reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child (see *Zawadka,* cited above, § 67) which, depending on their nature and seriousness, may override those of the parent (see *Hoppe v. Germany*, no. 28422/95, § 49, 5 December 2002).

79. Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process

clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on relevant considerations and is not one-sided, and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (see *W. v. the United Kingdom*, cited above, §§ 62 and 64 *in fine*).

80. Furthermore, the Court has repeatedly found that in cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. This duty is decisive in assessing whether a case concerning contact to children had been heard within a reasonable time as required by Article 6 § 1 of the Convention and also forms part of the procedural requirements implicit in Article 8 (see, *inter alia, Hoppe v. Germany*, no. 28422/95, § 54, 5 December 2002 and *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII).

(b) Application of the above principles to the present case

81. The Court finds, and this is common ground between the parties, that the relationship between the applicant and his daughter amounted to "family life" within the meaning of Article 8 § 1 of the Convention.

82. The Court reiterates that it is not for it to say how the domestic courts should have decided on the applicant's requests. However, in the present case, it must be determined whether there has been a failure to respect the applicant's family life, in particular whether the respondent State has complied with its positive obligations under Article 8 of the Convention.

(i) The custody proceedings

83. The Court observes that pursuant to the District Court's interim decision of 14 November 2005, which was upheld by the Court of Appeal, the applicant and L. should have joint custody of N. and the applicant should have right of contact with N. every other weekend for four hours.

84. The Court further notes that the applicant stated already in the beginning of the process in October 2005 that L. had moved to Prague with N. without his permission and that he feared that the separation between him and N. would become permanent if the court decided in favour of L. Moreover, in January 2006, the applicant requested the District Court to alter its previous interim decision since it was practically impossible for him to exercise the contact rights that he had been granted in November 2005.

85. The Government argued that other factors than the District Court's inactivity had had an adverse impact on the length of the proceedings. They also stressed that a decision concerning contact had been taken by the

District Court already a few weeks after the case had been brought to the court.

86. While the Court accepts that several factors, *inter alia*, the parties' behaviour, contributed to the protracted proceedings before the District Court, it reiterates that the lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their positive obligations under Article 8. Having examined the materials submitted by the parties, the Court also notes that there were lengthy periods of limited activity on the part of the District Court (for instance, the period between March 2008 and March 2010; see §§ 23-24 above). The Court points out that the case was pending for almost five years before the District Court and that the applicant had made the court aware of the practical difficulties for him to exercise his rights of contact already in October 2005. The Court also notes that the applicant had a considerable interest in the outcome of the proceedings. Furthermore, the passage of time certainly had an adverse effect on his relationship with his daughter because she had been left at a very young age in the factual custody of her mother in another country.

87. In its judgment of 27 July 2010, the District Court held that both the applicant and L. were suitable parents. It further concluded that the fact that N. had not seen her father for the last five years was to a large extent caused by L.'s behaviour. However, the court concluded that the advantages of a change of N.'s domicile would not outweigh the drawbacks, *inter alia,* since N. had not seen the applicant for several years and no longer spoke Swedish.

88. In the Court's opinion, it is thus clear from the District Court's judgment that the passage of time and the practical difficulties faced by the applicant in exercising the provisional rights of contact had an impact on the outcome of the case.

89. In view of the foregoing, the Court cannot find that the domestic courts dealt diligently with the applicant's request to grant him custody of his daughter. The Court, therefore, finds that the procedural requirements implicit in Article 8 were not complied with.

90. There has accordingly been a violation of Article 8 of the Convention in this regard.

(ii) The Hague Convention proceedings

91. In so far as the complaint about the outcome of the Hague Convention proceedings is concerned, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention as interpreted in the light of the requirements of the Hague Convention. However, it is not its function to deal with errors of fact or law allegedly

committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

92. In the instant case, the Court notes that there is no appearance of arbitrariness in the proceedings pursuant to the Hague Convention. Furthermore, there is no indication of arbitrariness or unreasonabless in the decisions of the Swedish courts.

93. As regards the length of the Hague Convention proceedings, the Court notes that they commenced on 23 December 2005 and ended on 19 December 2006. The total length of these proceedings was thus less than one year, including the handling of the case by the Swedish Central Authority and two Swedish courts.

94. Having examined the materials submitted by the parties, the Court cannot find any lengthy periods of inactivity on the part of Swedish authorities in these proceedings. Moreover, the Court does not consider the overall duration of these proceedings unreasonable, in particular taking into account that the applicant initially had wished to investigate whether an application pursuant to the Hague Convention was the most effective way for him to return his daughter to Sweden. The Court thus finds that the Hague Convention proceedings do not, in themselves, raise any issues under Articles 8 of the Convention. However, in so far as these proceedings might have delayed the custody proceedings, the Court has paid regard to them when considering the custody proceedings above.

(iii) The proceedings relating to N.'s removal from the population register

95. Lastly, as concerns the Tax Authority's decision to remove N. from the population register, the Court notes that such decisions are administrative, the purpose of which is to reflect an actual situation. In the Court's view, there is nothing to suggest that a child's registration at a specific address affects issues of custody or rights of contact and in the present case there is no indication that the Tax authority's decision had any bearing on the outcome of the custody case or the Hague Convention proceedings. Accordingly, there is no violation of Article 8 in this regard.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

96. The applicant further complained that the proceedings relating to the removal of N. from the population register violated his right to an effective remedy under Article 13 of the Convention, which reads as follows.

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

97. The Government contested that argument.

98. The Court notes that this complaint is linked to complaint under Article 8 and should, for the reasons set forth in paragraphs 53-56, be declared admissible. The Court further observes that it has already, under Article 8 above, examined the applicant's complaint that the Tax Authority's decision prejudged the proceedings relating to custody and the Hague Convention. Accordingly, the Court considers that it is not necessary to examine his complaint under Article 13.

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. Non-pecuniary damage

100. The applicant claimed 1,200,000 Swedish kronor (SEK) (approximately EUR 128,800[1]) in respect of non-pecuniary damage.

101. The Government considered the claim excessive.

102. The Court accepts that the lengthy custody proceedings have caused the applicant non-pecuniary damage, which cannot be made good by the mere finding of a violation. The Court therefore, making its assessment on an equitable basis, awards the applicant EUR 7,000 in respect of non-pecuniary damage.

B. Costs and expenses

103. The applicant also claimed, as far as can be ascertained, SEK 77,439 (approximately EUR 8,310) for the costs and expenses incurred before the domestic courts and SEK 150 000 (approximately EUR 16,000) for those incurred before the Court. Furthermore, he claimed SEK 1,400,000 (approximately EUR 150,270) for "future costs".

104. The Government fully rejected the claim concerning "future costs" on the ground that this claim had not been specified within the meaning of Rule 60 of the Rules of Court. They further found the claims regarding costs and expenses before the domestic courts and for those incurred before the Court, to be excessive. Moreover, they held that the applicant had failed to specify these claims and concluded that reasonable compensation for costs incurred in the proceedings before the Court should not exceed EUR 3,000.

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[1] As of 20 February when the claim was raised.

105. The Court reiterates that compensation for costs incurred in the domestic proceedings may only be granted insofar as they were necessary in trying to prevent the violation found (*König v. Germany* judgment of 10 March 1980 (Article 50), Series A no. 36, p. 17, § 20). In the present case only the possible increased costs due to the District Court's inactivity in the custody proceedings fulfil this condition. Since the applicant received legal aid which covered 80 % of the costs before the domestic courts in the custody proceedings, the Court finds that he has already been adequately compensated in this regard. This part of the claim must therefore be rejected.

106. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses before the Court 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, the Court notes that the applicant has failed to specify his claims regarding costs and expenses as stipulated in Rule 60 of the Rules of Court. Regard being had to this fact, as well as to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 (value added tax included) for the proceedings before the Court.

C. Default interest

107. 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

1. *Declares* the application admissible unanimously;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention in regard to the protracted custody proceedings;

3. *Holds* by 5 votes to 2 that there has been no violation of Article 8 of the Convention in regard to the remainder of the application;

4. *Holds* unanimously that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds* unanimously
   (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 Swedish kronor at the rate applicable at the date of settlement:

(ii) EUR 7,000, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 3,000, 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;

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

Done in English, and notified in writing on 5 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Dean Spielmann
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Power-Forde and Nußberger is annexed to this judgment.

D.S.
C.W.

JOINT PARTLY DISSENTING OPINION OF JUDGES POWER-FORDE AND NUSSBERGER

We disagree with the majority in finding no violation of Article 8 in relation to the applicant's complaint concerning the domestic courts' assessment of his claim under the *Hague Convention on the Civil Aspects of International Child Abduction* (herein after "the Hague Convention"). Whilst we accept that the Hague proceedings were dealt with expeditiously (September 2005 to October 2006), we cannot accept the reasoning of the District Court's finding that the retention of the child in the Czech Republic was not to be regarded as wrongful pursuant to Article 3 of the Hague Convention. In our view, there is an obvious lacuna in the judgment of the District Court insofar as the applicant's complaint about the wrongfulness of the child's removal from Sweden is concerned.

The basic idea enshrined in the Hague Convention is to prohibit the wrongful action of one party from predetermining or having a bearing upon later decisions taken on custody and contact rights. Essentially, illegal actions should not 'pay' and no parent or guardian should win any legal advantage for having wrongfully removed a child from the jurisdiction in which he or she was habitually resident immediately prior thereto: *Ex iniuria ius non oritur*. It is for this reason that the Hague Convention requires Contracting States to act expeditiously in proceedings for the return of children whose removal is considered to be wrongful.

The respondent State submits that since the retention of the child in the Czech Republic was found to be lawful, the matter of whether her removal from Sweden was wrongful "lacked relevance".[1] How can a complaint under the Hague Convention concerning the wrongful removal of a child lack relevance? It appears to us that the Swedish court did not assess, in any meaningful way, the alleged wrongfulness of the applicant's child's *removal* from Sweden but focused instead only upon the issue of her *retention* in the Czech Republic. The reason given by the District Court for not deeming that retention to be wrongful was that shortly after her initial removal from Sweden that same Court had made an interim order that the child should reside permanently with her mother.[2] Herein lies the core of the problem in this case.

An interim decision on custody and residence cannot have the effect of circumventing a State's obligations under the Hague Convention nor can it displace the entire philosophy and rationale upon which that Convention is founded. In our view, the District Court in determining the application under the Hague Convention ought to have taken into account the legal situation that prevailed as of September 2005 (namely, at the time of her

[1] Paragraph 13 of the Government's Submissions dated 20 November, 2008.
[2] Order dated 14 November 2005.

removal from Sweden) and not the situation that existed in October 2006. The Hague Convention is very clear in this respect. The alleged wrongfulness of a removal has to be assessed in the light of the circumstances present at the time of the removal and not with regard to subsequent developments. If the Swedish courts had ordered the prompt return of the applicant's child to Sweden in 2005/2006 then all issues in relation to custody or residence could have been determined within that jurisdiction having regard to what was in her best interests. Having failed entirely so to do, it proceeded to assess the custody proceedings, some five years later, in the light of the passage of time and of the practical difficulties faced by the applicant in exercising his provisional rights of contact. On this basis, it concluded that the advantages of a change in the child's domicile would not outweigh the disadvantages since she had not seen the applicant for several years and spoke no Swedish. This approach, in our view, stands in marked contrast to the entire philosophy upon which the Hague Convention is founded, namely, the prevention of a later decision on a matter being influenced by a change of circumstances brought about through the unilateral action of one of the parties.

We consider that no criticism, express or implied, can be made of the applicant for the rupture in the relationship with his child. We accept that the costs involved in visiting the Czech Republic were prohibitive having regard to his financial circumstances. We also note that he was expressly advised against such a visit by the Swedish authorities for so long as the proceedings under the Hague Convention were pending.[1]

In the light of the principles laid down in *Neulinger and Shuruk v. Switzerland*[2] we can accept that the return of the applicant's child to Sweden some five years after her removal from that jurisdiction may not have been in her best interests. However, it does not follow that the failure of the Swedish courts to assess, at the relevant time, the alleged wrongfulness of her initial removal and, if necessary, to order her return, did not violate the applicant's rights under Article 8.

We find that there has been a violation of the applicant's rights to respect for his family life based not solely upon the procedural aspect of Article 8 but also, substantively, on the basis of the domestic courts' failure to consider his claim in relation to the wrongful removal of his daughter from Sweden. That failure, in our view, contributed significantly to the situation in which the applicant finds himself today.

[1]Applicant's Submissions dated 20 February, 2009, page 10.
[2] *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010.