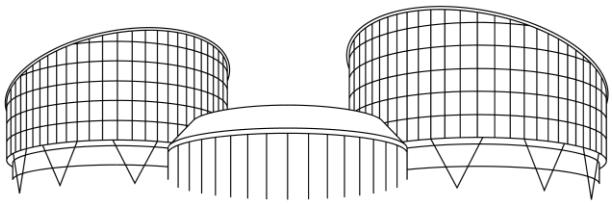

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 13420/12
M.R. and L.R.
against Estonia

The European Court of Human Rights (First Section), sitting on 15 May 2012 as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 6 March 2012,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Ms M.R., is an Estonian national who was born in 1981. The second applicant, Ms L.R., is an Estonian and Italian national who was born in 2009. The President decided that their identity should not be disclosed to the public (Rule 47 § 3). The applicants live in Kõrveküla, Tartu County. They were represented before the Court by Mr T. Pilv and Ms H. Jürimäe, lawyers practising in Tartu.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants and as they appear from the documents on file, may be summarised as follows.

1. The background of the case

3. The first applicant met R., an Italian national and the father of the second applicant, their daughter, during her studies in the Netherlands. They developed a relationship and after completing her studies she often stayed with R. in Arluno near Milan. On 30 June 2009 the second applicant was born in Italy. After the birth of the child, relations between the parents deteriorated. According to the first applicant she suffered mental abuse from R. Allegedly, R. had only wished to bring the child up in accordance with Italian traditions and with assistance from his parents, whereas the first applicant's opinions had been disregarded. R. had worked long hours and had barely participated in taking care of the child.

4. The applicants travelled to Estonia on a number of occasions, including for three weeks starting from 26 December 2010. Thereafter, they went to Estonia on 2 March 2011 with R.'s consent. However, they did not return to Italy on 11 March 2011, as had been agreed, but stayed in Estonia.

2. Proceedings in Estonia

(a) Proceedings before the County Court

(i) The parties' requests and the course of the proceedings

5. On 7 March 2011 the first applicant asked the Tartu County Court to award her sole custody of the child.

6. On 16 March 2011 R. travelled to Estonia. He wished to see the child but refused to do so in a law firm, as proposed by the first applicant. However, he met the first applicant who gave him the keys to his apartment in Italy at his request.

7. On 29 March 2011 R. made a request to the Italian Ministry of Justice for the child's return under the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). On 13 April 2011 the Italian authorities forwarded the request to the Estonian Ministry of Justice and on 10 May 2011 it was sent to the Tartu County Court.

8. The County Court dealt with the requests of both parents in the same proceedings. A hearing took place on 27 May 2011, with the participation of the first applicant, R., the second applicant's State-appointed lawyer and a social worker from the Tartu rural municipality where the applicants resided in Estonia. At the closure of the hearing, the court announced that it

would make its ruling after the receipt of an opinion from the Italian child protection services. The subsequent proceedings were conducted in writing.

9. On 30 May 2011 the County Court issued a temporary injunction concerning R.'s access rights to the child according to which he could meet her in the presence of her mother and a third person of his choice. This arrangement was later amended by the court so as to enable the first applicant to be also accompanied by a person of her choice during the meetings. R. met the child on four weekends between May and July 2011. At least at some of the meetings both Italian and Estonian psychologists were present. According to the first applicant, R. subsequently ceased to show interest in the child.

10. On 1 July 2011 the County Court notified the first applicant that she had until 1 August 2011 to send them her written submissions concerning R.'s claim for the return of the child to Italy. It informed her of its intention to rule on the matter by 15 August 2011 at the latest. In her submissions the first applicant referred to the need for several items of evidence yet to be received (opinion of the Tartu rural municipality, medical expert opinion, and additional information from the Italian authorities) and requested the postponement of the County Court's ruling until the receipt of further evidence. She raised the issue of the child's sexual abuse by R. The first applicant also submitted to the court written statements from a number of persons (her mother and other relatives, friends, colleagues and a teacher) describing the relations between the parties and R.'s abusive behaviour, as well as a psychotherapist's observations based on the first applicant's counselling. According to a note by a child psychiatrist the child was restless and nervous and had sleep disorders; it was suggested that the meetings with R. be conducted at home in a secure environment.

11. On 25 August 2011 the Italian Ministry of Justice transferred to its Estonian counterpart a report by the Magenta Children and Family Protection Centre. It was noted that no extensive replies to the questions formulated by the Estonian authorities could be given on the basis of the information gathered. The Italian authorities had met R. and his parents and visited R.'s residence. They had also met the first applicant's music teacher. It was noted in the report that R. had a controlling and egocentric character and traits of dependence. Latent depressive tendencies could be seen in R.'s family of origin where the woman's natural role was seen as that of taking care of children, even at the expense of her professional self-fulfilment. A family pattern of this kind could have also been established in the relationship between R. and the first applicant and caused her uneasiness. It was noted that R. had denied that his mother had been treated for mood disorders, although this had been the case. Lastly, it was noted that in order to conclusively answer the questions posed it was necessary to assess both of the parents and to observe the father's relationship with the child.

12. On 23 September 2011 a psychology expert drew up a written opinion at the request of the County Court. She had met the applicants on 1 and 5 September 2011. In response to the County Court's questions she noted that it was not possible to decide on the issue of sexual abuse as alleged by the first applicant. In respect of whether her transfer to Italy would cause her serious mental suffering, the expert noted that the child needed a secure, customary and stable environment, that she had a close attachment relationship with her mother and that her separation from her mother would definitely cause her serious mental suffering and could have a serious life-long negative influence on her. At the age in question the child and mother belonged together. Even if the mother could stay in Italy without being prosecuted, she would be fully dependent on the child's father and at risk of mental and physical violence; there would be a resurgence of the situation from which the mother had escaped from Italy. Traumatisation of the mother would have a negative effect on the child's development. The expert concluded that in these circumstances the return of the child to Italy would cause her serious mental suffering and would definitely not proceed from the child's well-being and needs.

13. On 28 September 2011 the first applicant submitted further written observations and documentary evidence to the County Court and noted, *inter alia*, that all the relevant circumstances had not been established and that the court's delivery of its ruling on the matter should be postponed.

(ii) The County Court's decision

14. By a decision of 7 October 2011 the Tartu County Court ordered the second applicant's return to Italy pursuant to the Hague Convention. It established that the child had resided in Italy together with her parents until 2 March 2011 and that this finding was not affected by the first applicant's argument that she had only studied and temporarily lived in that country. The court further established that the parents had joint custody of the child in Italy; the father had consented to the child's travelling to Estonia but not to her settling in Estonia. The court found that the retention of the child in Estonia was wrongful within the meaning of Article 3 of the Hague Convention and that the father was entitled to claim her return under Article 12. In respect of the question whether the return of the child was excluded under Article 13 § 1 (b) of the Hague Convention, the court noted that it had to consider the information concerning the child's social background provided by the central authority or other competent authority of the child's habitual residence. It referred to the Estonian Supreme Court's judgment of 6 December 2006, according to which a child could only not be returned on the basis of Article 13 § 1 (b) of the Hague Convention if this would result in extremely serious damage to the child's well-being. Such exceptional threat to the child's well-being had to be sufficiently specific and probable.

15. The County Court considered that the second applicant's return to Italy would not cause her more suffering than it would an average two-year-old. On the basis of evidence at the court's disposal (expert opinion by a psychologist and information from the kindergarten) it could not be concluded that the father had ill-treated the child or been violent towards the first applicant. Nor could it be established on the basis of the information provided by the Magenta child protection agency that the child's return to Italy would be contrary to her interests. As the Italian authorities had referred to the need to monitor relations between the father and the child, their supervision of what was going to happen in the family was ensured. The court noted that pursuant to the Hague Convention the child was not returned to the other parent but to the other country; therefore, the court did not find the first applicant's arguments about the separation of mother and child relevant. A close relationship between the mother and child would also contribute to the child's sense of security in Italy where she had been living until 2 March 2011. R. had confirmed at the court's hearing that he was ready to provide the applicants with lodging and subsistence. The conflict between the parents could not determine the choice of the child's country of residence; these matters could be taken into account in the determination of the parents' rights of custody. The first applicant's arguments related to her impossibility to return to Italy because of the risk of arrest were irrelevant because the Italian authorities could in any event make use of the European arrest warrant. The court concluded that there were no circumstances that allowed dismissing the request for the second applicant's return to Italy.

16. The court acknowledged that the second applicant had developed certain routines and a feeling of security in Estonia. Nevertheless, courts could not favour a parent altering a child's country of residence without the consent of the other parent. The first applicant should have sought the determination of her custody rights in the first place and only thereafter changed her and – depending on the custody rights awarded – the child's residence.

17. The County Court ruled that it had no jurisdiction over the first applicant's claim for sole custody as the child was to be returned to Italy. The court dismissed the first applicant's requests for a further hearing to be held, for her and witnesses to be examined and for a psychiatric expert examination of R. to be ordered. It noted that owing to exceptional circumstances (delayed receipt of the reply from the Italian social services and the lodging of complaints of abuse) it had not been able to resolve the matter within six weeks. Nevertheless, further suspension of the proceedings was not possible but it was open to the first applicant to make the requests in question in the proceedings concerning the custody rights.

(b) Proceedings before the Court of Appeal

18. The applicants appealed against the County Court's decision, requesting the dismissal of R.'s request for the second applicant's return to Italy and resumption of the examination of the first applicant's claim for sole custody of the second applicant. The first applicant submitted to the Tartu Court of Appeal, *inter alia*, an extract of the second applicant's medical record according to which the applicants had been examined in a psychiatric department of the Tallinn Children's Hospital in October 2011. It had been found that the child had a secure attachment relationship with her mother and that in the event of the continuation of the stressful period related to the court proceedings the mother and child would need psychological support.

19. By a decision of 12 December 2011 the Tartu Court of Appeal upheld the first-instance court's ruling. It considered that the child had lived with her parents in Italy until 2 March 2011 and had become accustomed to her social and family environment in that country. It was natural that she had also developed such relations in Estonia after her unlawful retention but neither this nor the child's earlier visits to Estonia meant that her habitual residence was in Estonia. The Court of Appeal agreed with the County Court's finding that the return of the child was not excluded under Article 13 of the Hague Convention. It considered that according to the spirit of the Hague Convention the child's swift return to her habitual living environment was presumed to be in her best interests. This also had a general preventive effect ensuring that parents would not take their children unlawfully to another country. Accordingly, a child could only not be returned in exceptional circumstances.

20. The Court of Appeal was of the view that the second applicant's return to Italy would not necessarily lead to her separation from her mother and accordingly the related arguments of the appeal were unfounded. It referred to several items of evidence adduced by R. including, *inter alia*, an opinion of Italian experts, according to which the child's return to Italy was in her interests, and a notice from the kindergarten the second applicant had attended in Italy, according to which there had been nothing to indicate the use of physical or mental violence against the child. The Court of Appeal concluded that the second applicant would not be placed in an intolerable situation upon her return to Italy and that the first applicant's claims of the abuse of the child by her father were groundless.

21. The Court of Appeal noted that the evidence adduced by the first applicant, which the first-instance court had disregarded, did not demonstrate reliably that R. had abused the child. The psychology expert who had examined the second applicant had not confirmed that she had been abused by her father. The expert's opinion that the child's return to Italy would cause her serious suffering had been based on the first applicant's groundless claim that the child would be separated from her on

return. The Court of Appeal noted that the first applicant had confirmed at the County Court's hearing that R. had not been violent towards the child and only later in the proceedings had she claimed that R. had abused the child. The Court of Appeal was in agreement with R.'s opinion that the first applicant had raised the accusation about the abuse of the child in order to justify her retention in Estonia. The allegation of abuse had not been raised in Italy or immediately after the applicants' arrival in Estonia; it had only been made to the police on 12 July 2011. The Court of Appeal considered the first applicant's allegations of abuse were not credible. The parents' mutual accusations indicated that there were strained relations between them but did not in themselves prove the existence of the grounds for refusing the return of the child under Article 13 § 1 (b) of the Hague Convention.

22. The Court of Appeal referred to the Supreme Court's judgment of 6 December 2006, according to which a child could only not be returned on the basis of Article 13 § 1 (b) of the Hague Convention if this would result in extremely serious damage to the child's well-being. The harmful effects that could arise from the separation of the child from the parent could be avoided by the return of the child together with the parent in question.

(c) Appeals to the Supreme Court and subsequent developments

23. On 6 February 2012 the Supreme Court declined to examine appeals lodged by the first applicant and the second applicant's representative.

24. On 22 February 2012 the Supreme Court refused to reopen the proceedings.

25. On 29 February 2012 the first applicant received a bailiff's notice (deposited on 28 February 2012), according to which the child had to be returned to Italy within ten days.

3. Proceedings in Italy concerning the custody of the second applicant

26. On 15 April 2011 R. made a request to the Milan Youth Court seeking the return of the child and a prohibition on her leaving Italy; he also claimed sole custody of the child with visitation rights accorded to the first applicant. On 2 May 2011 the Youth Court suspended the proceedings. It appears that a time-limit was subsequently set for R. to settle the case, regard also being had to the proceedings pending in Estonia, and that the first applicant's submissions in English were not admitted by the Youth Court. Pursuant to the Milan Youth Court's provisional ruling of 23 December 2011, the first applicant was ordered to return the child to Italy to her father to whom sole custody of the child was accorded. In the event of her failure to do so she would lose her parental rights. The Arluno Social Services were requested to take the matter under their supervision and arrange the meetings between the child and the mother in a neutral

environment as well as give the court feedback about the relationship between the child and each of the parents.

27. A hearing before the Milan Youth Court took place on 2 March 2012 with the participation of the first applicant and R. According to the first applicant, the court considered that she and the child should move into R.'s residence for two weeks and stay there with R. and a psychologist or psychiatrist of his choosing. Thereafter the mother's access rights to the child would be terminated and the child would remain under the supervision of social workers.

4. Criminal proceedings

28. On 12 July 2011, in Estonia, the NGO Järva Naiste Varjupaik (Järva Women's Shelter) reported R. for sexually assaulting the second applicant on the basis of information received from the first applicant in the course of counselling. On 22 July 2011 the first applicant was interviewed by a police investigator. She submitted that she had seen R. sexually abusing their daughter in the summer of 2010. The first applicant further submitted that in February 2010 R. had pushed her over while she had been holding the then seven-month-old child.

29. A similar criminal investigation was opened in Italy on the basis of the first applicant's complaint of 5 August 2011. On 6 October 2011 the police informed the Milan Prosecutor's Office of the state of the investigation. According to the information provided, the first applicant's music teacher and R.'s former wife had been interviewed in September 2011. The first applicant had talked to the music teacher about her problems with R. and his parents and had also made comments about R.'s behaviour towards their daughter. R.'s former wife had described R. as reliable and affectionate in a relationship, and said that he had never been violent, aggressive, disrespectful, controlling or jealous. What had been decisive for ending their marriage had been the influence that R.'s parents, particularly his father, had exercised over him. Such influence had never been contested by R. who had had very strong ties, verging on dependence, with his family. She had also made reference to R.'s obsession with cleanliness. The police also examined a report by the Italian Embassy in Tallinn concerning the second applicant's living conditions in Estonia – which were described in positive terms – and information from the Magenta child protection agency. In respect of the alleged sexual abuse, the police considered that there was a lack of information allowing this to be put into context and found that a precise understanding of the circumstances and sequence of the events was necessary for assessing their criminal relevance or their inappropriateness from a parental education point of view. The information available demonstrated the first applicant's difficulty in living with R., above all in relation to the interference and influence exercised by his father. At the same time, nothing had emerged to suggest that R. was sexually deviant.

Lastly, the police noted that there were separate criminal proceedings pending concerning child abduction and detention abroad in respect of the first applicant initiated on the basis of a complaint by R.

30. Criminal proceedings have also been opened in Italy in respect of R.'s alleged violence towards the first applicant.

31. In February 2012 the first applicant reported R. to the Estonian authorities for allegedly making a false accusation and using a forged document. It appears that R., in turn, has reported the first applicant for allegedly making a false accusation.

B. Relevant domestic law

32. In a judgment of 6 December 2006 (case no. 3-2-1-123-06) the Civil Chamber of the Supreme Court dealt with a case under the Hague Convention. It noted, *inter alia*, that as a rule, a child who had been wrongfully removed or retained in another Contracting State had to be promptly returned. Pursuant to Article 13 § 1 (b) a wrongfully removed or retained child could only not be returned in exceptional circumstances, that is when his or her return would cause extremely serious harm to the child's well-being. In this connection, the child's well-being had to be under extraordinary threat that was sufficiently specific and probable. An extensive interpretation of Article 13 § 1 (b) and other grounds for refusal to return a child would undermine the purpose of the Hague Convention. Proceeding from the above, the Supreme Court considered it impossible not to return the child concerned merely because the mother's care was important for an infant and the child had continuously been with the mother up until the material time and had no experience of living alone with the father. Since the dispute between the parties did not concern the child's place of residence but the return of the child under the Hague Convention, there was no need to resolve the question of which parent should be given priority in bringing up the child. The only matter to be determined was that of the child's prompt return. Under the Hague Convention the child was not to be returned to the other parent but, as a rule, simply returned to the country of his or her habitual residence. The harmful effects that could arise from the separation of the child from a parent could in most instances be avoided by the return of the child together with the parent, separation from whom could cause serious damage to the well-being of the child. The Supreme Court also noted that the risk to the child's well-being, referred to in the provision concerned, had to be proved.

C. Relevant international law

33. The relevant provisions of the Hague Convention, which entered into force in respect of Estonia on 1 July 2001, read, in so far as relevant, as follows.

Article 1

"The objects of the present Convention are:

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

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

Article 3

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

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

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

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

Article 4

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

Article 11

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

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. 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 12

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

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

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

Article 13

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

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 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."

Article 20

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

COMPLAINTS

34. The applicants complained, relying on Articles 3, 6 § 1, 8 and 14 of the Convention, that the Estonian courts' decision to return the second applicant to Italy had been in breach of international law and contrary to the practice of the European Court of Human Rights. They referred to the Court's findings in the cases of *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010; *Raban v. Romania*, no. 25437/08, 26 October 2010; *Šneersone and Kampanella v. Italy*, no. 14737/09, 12 July 2011; and *X v. Latvia*, no. 27853/09, 13 December 2011. The national courts had failed to follow the best interests of the child. They had disregarded the evidence concerning the child's habitual residence, her integration into Estonian life and lack of such integration into life in Italy, the applicants' arguments relating to the close relations between the child and her mother, the personality of the child's father, abuses committed by him, the first applicant's impossibility to return to Italy, and evidence demonstrating that the second applicant would endure serious mental and physical suffering if sent back to Italy. The courts had also disregarded or dismissed the first applicant's requests for further evidence to be obtained.

THE LAW

35. The applicants complained under different Articles of the Convention about several aspects of the proceedings before the domestic courts and their decisions ordering the return of the second applicant to Italy. Being the master of the characterisation to be given in law to the facts of the case (see, for example, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), the Court considers that the applicants' complaints fall to 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."

A. General principles

36. An interference with the right to respect for private and family life will be in breach of Article 8 of the Convention unless it can be justified

under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

37. Furthermore, in the case of *Neulinger and Shuruk* (cited above, §§ 131-40, with further references), the Court articulated and summarised a number of principles that have emerged from its case-law on the issue of the international abduction of children, as follows:

(i) The Convention cannot 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 Parties (see *Neulinger and Shuruk*, cited above, § 131, with further references).

(ii) The positive 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 (see *Maire v. Portugal*, no. 48206/99, § 72, ECHR 2003-VII, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I).

(iii) The Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi v. Switzerland*, no. 7548/04, § 92, 22 June 2006, and *Carlson v. Switzerland*, no. 49492/06, § 73, 6 November 2008).

(iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX).

(v) "The child's interests" are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to have his or her development in a sound environment ensured (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006). The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular its age and level of maturity, the presence or absence of its parents and its environment and experiences.

(vi) A child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition

in that instrument of a number of exceptions to the obligation to return the child (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it (see *Maumousseau and Washington*, cited above, § 72).

(vii) The task to assess those best interests in each individual case is thus primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Kutzner v. Germany*, no. 46544/99, §§ 65-66, ECHR 2002-I; see also *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV; *Bianchi*, cited above, § 92; and *Carlson*, cited above, § 69).

(vii) In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII (extracts)). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see *Maumousseau and Washington*, cited above, § 74).

B. Application of the above principles in the instant case

38. The Court observes at the outset that Article 8 is applicable in the present case (see, for example, *Neulinger and Shuruk*, cited above, § 90) and that it has no doubts that the domestic decisions in question interfered with the applicants' rights under Article 8, be it due to the possible difficulties of continuing to live together or to the inherent obligation to relocate to another country (see *Mattenklott v. Germany* (dec.), no. 41092/06, 11 December 2006).

39. In respect of the lawfulness of the interference, the Court observes that the impugned decisions concerning the second applicant's return to Italy were based on the Hague Convention, which has been incorporated into Estonian law. The matter was dealt with by competent courts at three levels of jurisdiction and they concluded, in duly reasoned decisions which

disclose no sign of arbitrariness, that the second applicant's retention in Estonia was wrongful as the child's father had not consented to her stay in that country and that she should be returned to Italy, which had been the country of her habitual residence. Thus, the Court finds that the decision concerning the second applicant's return to Italy was "in accordance with the law" within the meaning of Article 8 § 2.

40. The domestic courts' decisions also pursued the legitimate aim of protecting the rights and freedoms of the second applicant and her father (see, on this issue, *Tiemann*, cited above, and *Bayerl v. Germany* (dec.), no. 37395/08, 13 October 2009).

41. It remains to be determined whether the interference with the applicants' rights was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

42. The Court notes in this context that the domestic authorities did not order the second applicant's return to Italy automatically or mechanically after having found that the Hague Convention was applicable. A hearing was held by the County Court and subsequently the parties were invited to make their submissions in writing on several occasions. The parties were able to adduce evidence and the County Court itself ordered an expert examination of the child and sought additional information from the Italian authorities. The Court also notes that the second applicant was represented in the proceedings by a State-appointed lawyer and that a representative of the local government of the applicants' place of residence in Estonia was involved in the proceedings. Furthermore, the applicants were able to exercise their right of appeal to the Court of Appeal and to the Supreme Court. Thus, the Court considers that the applicants were able to fully present their case. The fact that several of the first applicant's requests, such as for an additional hearing, the examination of witnesses and a psychiatric expert examination of R., were dismissed, did not render the proceedings unfair. The Court attaches particular importance in this context to the need to conduct the proceedings in question swiftly and to the fact that these proceedings were not meant to determine the merits of the custody issue (Article 19 of the Hague Convention).

43. In respect of the question whether the domestic authorities succeeded in striking a fair balance between the interests at stake bearing in mind the child's best interests as the primary consideration and whether they conducted an in-depth examination of the entire family situation, the Court observes that the domestic courts based their decisions on ample evidence adduced by the parties and obtained by the courts themselves. The Court notes that the domestic authorities proceeded from the presumption that pursuant to the rationale of the Hague Convention, the immediate return of the child to her habitual place of residence was in her best interests and it also had a general preventive effect. Therefore, the courts considered that the return of the child could only be refused in exceptional circumstances

(compare *Maumousseau and Washington*, cited above, § 73, and *Lipkowsky and McCormack v. Germany* (dec.), no. 26755/10, 18 January 2011, where the Court found that the exceptions for not returning a child under the Hague Convention had to be interpreted strictly).

44. The Court further observes that the domestic authorities had regard to several expert opinions, including those from the court-appointed psychologist and from a psychotherapist who had counselled the first applicant in Estonia as well as written opinions from Italian psychologists adduced by R. The Estonian psychotherapist and an Italian psychologist were present at at least some of R.'s meetings with the child in the summer of 2011 in Estonia and it can be understood that in their opinions they took into consideration their observations made at these meetings. The Court notes that in the different opinions the effects of the child's return and the relations between the parents and with the child were assessed differently. It appears from the domestic courts' decisions and the materials submitted by the applicants that the Italian experts pointed out the first applicant's communication problems and considered that the child's return to Italy was in her interests (see paragraph 20 above). At the same time, the Estonian experts emphasised the close relations between the mother and the child and concluded that the child's return to Italy would cause her serious harm as she would be separated from her mother; even if the mother were to move to Italy, she would be at risk of mental and physical abuse by the child's father which would also have negative effects on the child's development (see paragraphs 12 and 18 above).

45. The Court further notes that none of the experts was able to confirm that the child had been sexually abused (see paragraph 12 above). The Estonian courts also obtained information from the Italian authorities in whose opinion there had been tensions between the parents and the relations between the father and the child had to be monitored. The information also comprised some assessment of the father's personality, which gave no grounds for the courts to rule out the child's return (see paragraphs 11 and 15 above). Moreover, neither the information obtained from Italy nor the first applicant's statements in court revealed that the father had been violent towards the child. As concerns written statements from a number of the first applicant's relatives, friends and colleagues, the Court of Appeal noted that the first-instance court had disregarded this evidence; nevertheless, the appellate court found for its part that neither this evidence nor the information concerning the criminal proceedings against R. sufficiently proved the first applicant's allegations of sexual abuse of the child.

46. Consequently, the Court cannot agree with the first applicant's argument that the domestic courts failed to analyse the evidence in question. Although the standard of proof in matters such as the present one need not be the same as in criminal proceedings, the Court does not consider that there was any degree of arbitrariness on the part of the domestic courts in

not attaching paramount importance to the fact that the first applicant had reported the child's father for committing certain offences. The Court also refers, in this context, to the fact that the right to be presumed innocent is a right protected under the Convention and reiterates, moreover, that it is primarily for the domestic courts to assess the evidence.

47. In respect of the applicants' argument that the father of the child would continue to work and the child would be taken care of by his parents or spend her days in child care in the event of her return to Italy, the Court reiterates that the proceedings under the Hague Convention cannot be deemed to determine custody rights and, moreover, the first applicant also worked in Estonia, her parents apparently helped her to take care of the child and the child attended a kindergarten in Estonia.

48. As concerns the first applicant's allegation that it would be impossible for her to return to Italy because of the mental and physical violence she would be subjected to by R., her lack of any social network in that country, loss of income, lack of sufficient knowledge of the Italian language and risk of arrest in connection with the criminal proceedings against her in Italy, the Court notes at the outset that the domestic courts did not order the first applicant's return to Italy. Nevertheless, in response to the first applicant's argument that the separation of the child from her mother would be likely to cause serious harm to the child, the courts referred to such a possibility indicating that the harmful consequences could be avoided by the return of the child together with the parent in question. According to the County Court's judgment R. had expressed his readiness to provide the applicants with lodging and subsistence on their return. Furthermore, in connection with the alleged risk of arrest the domestic courts took into account the possible use of the European arrest warrant by the Italian authorities which rendered the first applicant's arguments concerning the impossibility of her return inappropriate (see paragraph 15 above). The Court also takes note in this context of the doubts cast by the first applicant as to whether R. would indeed support the applicants. However, it is not for the Court to determine whether R.'s offer was of a binding nature or assess the probability of the first applicant's arrest by the Italian authorities. It notes, nevertheless, firstly, that the domestic courts addressed the objections raised by the first applicant in this connection and, secondly, that the Italian authorities are bound by the Convention in the conduct of the criminal proceedings. The same applies to the civil proceedings in Italy concerning the custody of the child, in connection with which the first applicant argued that the Estonian courts' failure to take into account the violation of her rights in the Italian proceedings amounted to a separate violation of Article 6 of the Convention. Moreover, these proceedings are still pending and, in any event, the Estonian authorities cannot be held responsible for any alleged violations by the Italian courts (compare *Van den Berg and Sarrì v. the Netherlands* (dec.), no. 7239/08,

2 November 2010). Furthermore, the first applicant had lived in Italy for a certain period of time and pursued music studies in that country before she left for Estonia. Thus, it cannot be said that she had no connections whatsoever with that country. Therefore, the Court considers that by dismissing the first applicant's arguments concerning her impossibility to return to Italy the domestic courts did not overstep their margin of appreciation.

49. In conclusion, the Court notes that the national courts found that there was no information that the child's return to Italy would involve a risk of physical or psychological harm or otherwise place her in an intolerable situation. The Court reiterates that such an assessment is primarily the task of the domestic authorities who enjoy a certain margin of appreciation in that regard. There is nothing to indicate that the domestic courts' assessment was arbitrary or that the authorities failed to strike a fair balance between the competing interests at stake in the present case. The Court also reiterates that the proceedings in question did not involve any determination of the parents' custody rights, which are subject to separate proceedings in Italy, a Contracting State bound by the Convention.

50. It follows that the applicants' complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

51. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

For these reasons, the Court by a majority

Declares the application inadmissible.

Søren Nielsen Registrar	Nina Vajić President