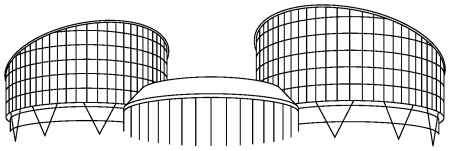

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF K.J. v. POLAND

(Application no. 30813/14)

JUDGMENT

STRASBOURG

1 March 2016

FINAL

01/06/2016

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

In the case of K.J. v. Poland,

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

András Sajó, *President,*
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 9 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 30813/14) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr K.J. ("the applicant"), on 12 April 2014.

2. The applicant was represented by Mr G. Thuan Dit Dieudonné, a lawyer practising in Strasbourg. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicant alleged mainly that the refusal of the Polish family court to order the return of his child in application of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, constituted a violation of his right for respect of his family life and a breach of Article 8 of the Convention.

4. On 15 September 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

5. The applicant was born in 1978. He is Polish and lives in Kent, the United Kingdom. He is married to M.J., who is also Polish. In 2005 the couple moved to the United Kingdom. Their daughter was born there in January 2010. Parental responsibility was exercised jointly by both parents.

B. Child retention and proceedings under the Hague Convention

6. On 17 July 2012 M.J. and the child went to Poland on holiday, with the applicant's consent. On 9 September 2012 M.J. informed the applicant that she was not coming back to the United Kingdom with the child.

7. On 21 September 2012 the applicant applied to the United Kingdom Central Authority for a return order for the child under the Hague Convention.

8. It appears that in mid-October 2012 the application was registered with the Grudziądz District Court. Judge D.K. was assigned to preside over the case.

9. In response to the applicant's request, M.J. submitted that in 2011 she and her husband had become distant from each other; the applicant had lost interest in his family and had been spending his spare time playing computer games. For those reasons, and also out of fear that the child would never again be allowed to leave the United Kingdom, M.J. did not agree to her daughter's returning to the United Kingdom alone and informed the domestic court that she did not wish to go back there with the child.

10. The first hearing was held on 19 December 2012 before the Grudziądz District Court, with Judge D.K. presiding. The applicant and his lawyer attended the hearing.

11. The second hearing was held on 4 February 2013 before the same judge. The applicant and his lawyer attended the hearing. The domestic court heard two witnesses and ordered a report of experts in psychology from the Family Consultation Centre (*Rodzinny Ośrodek Diagnostyczno Konsultacyjny* "RODK").

12. On 22 March 2013 the experts examined the applicant, M.J. and the child, who was three years old at the time. The report was issued on 17 April 2013.

13. The third hearing was held on 8 May 2013 before Judge D.K. At this hearing, the Grudziądz District Court decided to dismiss the applicant's request for the child's return (III Nsm 999/12).

14. The first-instance court ruled on the basis of the following evidence: testimony of the applicant, M.J. and the members of both families and the RODK experts' report.

15. The RODK experts were ordered to make the following assessment:

> "whether moving [the child] into her father's care, linked with her separation from the mother, would disturb [the child's] sense of security and would affect her emotional state in a negative way; or is it recommended, [with a view to] the adequate psycho-physical development of the child, to [put the child under the father's care] linked with [giving] an order to surrender the child by the mother."

16. The experts concluded that "the child's return to the United Kingdom and her separation from the mother", her primary caregiver, "would cause more emotional harm to the child than the lack of daily contact with her father." In particular, the child's sense of security and stability could be disturbed. To this effect the report read as follows: "Considering the [young] age and the sex of the child, it must be stated that the mother is currently best suited to satisfy her daughter's needs."

The experts also noted that the child was emotionally attached to both parents; she was developing well; perceived Poland and the United Kingdom on an equal footing; spoke Polish and had adapted well to her new life in Poland. It was recommended that the child should stay with her mother in Poland and have regular contact with her father.

17. The first-instance court considered that the RODK's report was thorough, clear and of a high evidentiary value.

18. On the merits, the Grudziądz District Court considered that it was called to examine "the relationship between the child and [each of] the parents, her physical and psychological development and also, any [possible] physical or psychological harm [which could occur] in the event of the child's return to her father without the mother."

19. The domestic court attached importance to the young age of the child (who was three years and four months old at the time of the ruling) and the fact that the mother had always been the child's primary caregiver. The reasons for the mother's refusal to return to the United Kingdom together with the child were not discussed by the domestic court. The district court held, relying on the experts' report, that there was a grave risk of psychological harm if she were to return to the United Kingdom without her mother. It was noted that Article 13 (b) of the Hague Convention protected abducted children to such a great extent that it did not allow for their return if that was going to place them in a "disadvantageous situation" (*w niekorzystnej sytuacji*).

20. The applicant appealed, arguing among others the following points of fact and law: the first-instance court ruled in breach of Article 13 (b) of the Hague Convention, firstly in that they concluded that in the circumstances of the case there was a grave risk that the child's return to the United Kingdom would expose her to intolerable psychological harm and

would place her in a disadvantageous situation, and secondly in that they wrongly assumed that the child would have to be separated from the mother even though the latter had not cited any objective obstacles to her returning to the United Kingdom; the first-instance court ruled in breach of Article 3 of the Convention on the Rights of the Child and its general directive that the best interest of the child be protected; the facts as established by the domestic court contradicted the evidence produced in the course of the proceedings; the court's conclusion that the child's return would expose her to intolerable psychological harm contradicted the findings of the expert report; and the court should not have refused to adjourn the hearing at which the applicant was not represented by a lawyer.

21. At the appellate hearing, the applicant also argued (6) that the experts in psychology who had drafted the RODK's report for the first-instance court were incompetent.

22. On 14 October 2013 the Toruń Regional Court dismissed the appeal (IV Ca 1865/12).

23. The appellate court fully relied on the findings of fact made by the first-instance court, and held that the child's return to the United Kingdom with or without the mother would place her in an intolerable situation ("*w sytuacji nie do zniesienia*"). Firstly, in view of the child's very young age and the fact that since the retention the child had been under her mother's care practically round the clock and that her contact with the applicant had been rare, the child's separation from her mother would cause negative and irreversible consequences. Secondly, the child's return with her mother would not have a positive impact on the child's development either. To this effect, it was noted that M.J. had never adapted to her life in the United Kingdom; she was in conflict with the applicant and her departure from Poland would be against her will and forced by the circumstances.

24. As to the remaining grounds of the applicant's appeal, the regional court ruled in the following manner: contrary to the applicant's impression, the RODK's report was clear and adamant in its conclusion that the child's best interest would be better served if she were allowed to stay in Poland with her mother; in view of the fact that the applicant's lawyer had gone on holiday and the applicant had not agreed to be represented by a substitute lawyer, granting his motion for adjournment was not justified; and the argument about the incompetence of the RODK's experts was, firstly, belated (the applicant had not raised that issue before the first-instance court or in his appeal) and, secondly, inconsistent with the applicant's reliance on the impugned report in support of his remaining arguments.

C. The applicant's contact with the child, divorce application and recent developments

25. At the first hearing, held on 19 December 2012 by the Grudziądz District Court, the applicant's lawyer applied, expressly citing Article 21 of the Hague Convention, for arrangements for organising and securing the effective exercise of the applicant's right of contact during the Hague Convention proceedings.

26. The domestic court did not rule on that application.

27. On 28 December 2012 the applicant applied to the Grudziądz District Court for a contact order in respect of the child. He did not rely on Article 21 of the Hague Convention. He asked, *inter alia*, for an interim order to be issued obliging M.J. for the duration of the Hague Convention proceedings to allow him to take the child to his house every second and fourth weekend of the month from 3 p.m. on Friday until 8 p.m. on Sunday, and to talk to the child by telephone or Skype every Monday, Wednesday and Friday between 4 p.m. and 7 p.m.

28. On 28 February 2013 the Grudziądz District Court, with D.K. as the presiding judge, decided under Article 445 1 § 1 and 2 of the Code of Civil Procedure to stay the proceedings concerning the applicant's contact with the child until the end of the couple's divorce proceedings, which had been instituted before the Toruń Regional Court on 14 January 2013 (III. R. Nsm 35/13).

29. On 25 March 2013 the divorce application lodged by M.J. (IC 117/13) was rejected by the Toruń Regional Court, with S.M. as the presiding judge accompanied by two lay judges. The regional court favoured the jurisdiction of the English courts because the last common place of residence of the couple was in Maidstone, the United Kingdom. On 24 June 2013 the Gdańsk Court of Appeal, with D.K. as the presiding judge, dismissed M.J.'s interlocutory appeal against that decision.

30. The applicant submitted that when the Hague Convention proceedings had been pending in Poland, he had seen his daughter on several occasions, in the mother's house and in her presence.

31. On 28 November 2014 the Grudziadz District Court issued a decision on the applicant's contact with his daughter. A copy of this decision has not been submitted to the Court. It appears that the applicant was authorised to see his daughter the second and the fourth weekend of every month; during one week of winter holidays; during two weeks of summer holidays and on selected days of Christmas and Easter holidays. It appears that the applicant did not appeal against this decision.

On 31 August 2015 the Grudziądz District Court, with D.K. as presiding judge, confirmed that the above-mentioned decision was binding and enforceable as of 8 July 2015.

32. Divorce proceedings are currently pending in the United Kingdom.

II. RELEVANT INTERNATIONAL AND COMPARATIVE LAW

A. The Hague Convention

33. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction which has been ratified by Poland (Dz.U.1995 r. Nr 108, poz. 528, date of entry onto force 1 November 1992) and the United Kingdom provides, in so far as relevant, 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 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 16

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

Article 19

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

..."

B. The Pérez-Vera Explanatory Report on the 1980 Hague Child Abduction Convention

34. The Explanatory Report on the 1980 Hague Child Abduction Convention, prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982 ("the Pérez-Vera Report"), provides the following comments on the notion of "the best interest of the child":

"... 'the legal standard 'the best interest of the child' is that at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard ... the general statement of the standard does not make it clear whether 'the interest' of the child to be served are those of the immediate

aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age' ..." (§21, p. 431)

"... [the philosophy of the Convention] can be defined as follows: the struggle against the great increase on international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests...the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child...'the presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives' ..." (§24, pp. 431 and 432)

"It is thus legitimate to assert that the two objects of the Convention – one preventive, the other designed to secure the immediate reintegration of the child into his habitual environment – both correspond to a specific idea of what constitutes the 'best interests of the child' ... However ... it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected ..." (§ 25, p. 432)"

35. As a consequence, the Hague Convention contains a number of clearly derived from a consideration of the interest of the child, namely that of a serious risk that a child's return would expose him or her to "physical or psychological harm" or otherwise place the child in an "intolerable situation".

36. The Pérez-Vera Report contains the following general comments about the exceptions to the principle of the child's prompt return under Article 13 (b):

"... [the exceptions] to the rule concerning the return of the child must be applied only as far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter... The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration..." (§34, pp. 434 and 435)

"... the exceptions [in Articles 13 and 20] do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances ..." (§113 p. 460)

"... With regard to article 13, the introductory past of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs a and b is imposed on the person who opposes the return of the child ..." (§ 114, p. 460)

"... The exceptions contained in [article 13] b deal with situations ... where the return of the child would be contrary to its interests ... Each of the terms used in this provision, is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects, that the exceptions are to receive a wide interpretation ..." (§116, p. 461)

37. With regard to Article 29 the Pérez-Vera Report states that the aim of the Hague Convention is to provide additional means of helping persons whose custody or contact rights have been breached. Those persons have a choice either to apply directly to the Central Authorities, as provided for in the Hague Convention, or to institute relevant proceedings before the authorities of the State where the child is located. In such a case, where the applicants have recourse to a direct action before the competent authorities, they can choose to submit their application "whether or not under the provisions" of the Hague Convention. In the latter case, according to the explanatory report, the authorities are not obliged to apply the provisions of the convention unless they have been incorporated in their domestic law.

C. The International Convention on the Rights of the Child

38. The relevant provisions of the United Nations Convention on the Rights of the Child, signed in New York on 20 November 1989, read as follows:

Preamble

"The States Parties to the present Convention,

...

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

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

Have agreed as follows:

...

Article 3

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

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth... to know and be cared for by his or her parents...

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will...

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child...

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

..."

D. European Union law

39. Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as "Brussels II bis Regulation") reads, in particular, as follows:

"...

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

...

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

return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

...

Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

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

or

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

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

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

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

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

Article 11

Return of the child

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

...

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

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

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

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

..."

E. European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children

40. The European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (known as "Luxembourg Convention") reads, in so far as relevant, as follows:

"...

Article 1

For the purposes of this Convention:

a child means a person of any nationality, so long as he is under 16 years of age and has not the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the State addressed;

...

d improper removal means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:

i the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised;

...

Article 5

1 The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order:

...

b to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or of the applicant;

...

Article 8

1 In the case of an improper removal, the central authority of the State addressed shall cause steps to be taken forthwith to restore the custody of the child where:

a at the time of the institution of the proceedings in the State where the decision was given or at the time of the improper removal, if earlier, the child and his parents had as their sole nationality the nationality of that State and the child had his habitual residence in the territory of that State, and

b a request for the restoration was made to a central authority within a period of six months from the date of the improper removal.

...

Article 11

...

3 Where no decision on the right of access has been taken or where recognition or enforcement of the decision relating to custody is refused, the central authority of the State addressed may apply to its competent authorities for a decision on the right of access, if the person claiming a right of access so requests.

...

Article 19

This Convention shall not exclude the possibility of relying on any other international instrument in force between the State of origin and the State addressed or on any other law of the State addressed not derived from an international agreement for the purpose of obtaining recognition or enforcement of a decision.

Article 20

1 This Convention shall not affect any obligations which a Contracting State may have towards a non-Contracting State under an international instrument dealing with matters governed by this Convention.

2 When two or more Contracting States have enacted uniform laws in relation to custody of children or created a special system of recognition or enforcement of decisions in this field, or if they should do so in the future, they shall be free to apply, between themselves, those laws or that system in place of this Convention or any part of it. In order to avail themselves of this provision the State shall notify their decision to the Secretary General of the Council of Europe. Any alteration or revocation of this decision must also be notified.

III. RELEVANT DOMESTIC LAW

41. The amendment to the 1964 Code of Civil Procedure (*Kodeks Postępowania Cywilnego*) introduced on 19 July 2001, which entered into force on 27 September 2001 regulates the proceedings concerning the return of children under the Hague Convention (Articles 598^{1}-598^{14} of the Code of Civil Procedure).

Article 598^{2} provides that when proceedings under the Hague Convention are pending, the domestic court shall not, in principle, rule on the issue of parental rights and custody. Custody proceedings shall be

stayed *proprio motu* until the end of the proceedings concerning the child's return.

Article 445^1 operates in the general context of family disputes over minor children and provides that when proceedings for divorce are pending, separate proceedings concerning right of contact shall not be instituted or shall be stayed *proprio motu* if they had been instituted prior to the application for divorce. Under this provision, the issue of the right of contact shall be decided by the court before which the divorce proceedings are pending by means of interim procedure.

Lastly, under paragraph 2 of this provision proceedings for the right of contact shall be resumed if the final and binding ruling ending the divorce proceedings is silent on the issue of contact. Otherwise, proceedings for the right of contact shall be discontinued.

42. Irrespective of the above-mentioned regulations, a party to civil proceedings is entitled to apply for an interim measure (Article 730 et al. of the Code of Civil Procedure). Article 755 of the Code of Civil Procedure specifically provides that matters of custody and contact with a child may be regulated by a court by means of an interim measure. Under Article 737 of the Code of Civil Procedure, an application for an interim measure shall be examined without undue delay, in principle no later than one week after the date of its lodging with the court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE OUTCOME THE PROCEEDINGS FOR THE CHILD'S RETURN UNDER THE HAGUE CONVENTION AND THE DECISION-MAKING PROCESS

43. The applicant complained of a breach of his right to respect for his family life under Article 8 of the Convention because of the dismissal of his Hague Convention request. The applicant elaborated on this complaint, indicating that the unfavourable outcome of the impugned proceedings resulted from the misapplication of the Hague Convention and from various alleged shortcomings in the decision-making process. Article 8 of the Convention reads as follows:

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

A. Admissibility

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

B. Merits

1. The parties' submissions

45. In his application to the Court, the applicant complained of a breach of Article 8 of the Convention on account of the outcome of his Hague Convention proceedings. In his subsequent observations on the case he specified a series of shortcomings in the decision-making process leading to the refusal to grant his Hague Convention request.

46. More specifically, the applicant submitted that the Polish family court had misapplied the Hague Convention procedure in that they had focused on two elements which were absent from the Hague Convention test under Article 13. Incidentally, these elements also constituted wrong assumptions, namely that the applicant's daughter would have to be separated from her mother and that she would be placed in her father's custody.

To this effect, the applicant considered that the issue which had been put forward by the first-instance court to the RODK's experts had been formulated erroneously *de jure* since the applicant's request for the child's return under the Hague Convention had not aimed at "moving the child into the father's care" but simply at returning the child to her habitual place of residence regardless of who was responsible for her care. Firstly, such was the nature of the Hague Convention requests which pursued its restorative objective. And secondly, with regard to the applicant's specific case, in the divorce proceedings pending in the United Kingdom the applicant had specifically asked for shared and not exclusive custody of his daughter.

In the applicant's opinion, the subsequent judicial examination of his Hague Convention request was likewise erroneously focused on those two elements.

47. The applicant also argued that the impugned decision of the domestic court, which resulted from an incorrectly broad interpretation of Article 13 (b) of the Hague Convention, was contrary to the child's best interests within the meaning of that provision and instead protected the interests of the child's mother, who had decided not to return to the United Kingdom without indicating any objective reasons for such a decision.

48. Moreover, the applicant submitted that the decision-making process leading to the adoption of the impugned decision was contrary to the procedural requirements of Article 8 of the Convention.

49. Firstly, in the applicant's opinion, the Polish family court had taken too long to examine his Hague Convention request, in breach of the requirement of expeditious proceedings under Article 11 of the Hague Convention. Secondly, in the absence of a decision to adjourn, the applicant had to attend one hearing before the first-instance court without a lawyer. Thirdly, the presiding judge who issued the first-instance ruling was to be biased because she "welcomed the divorce petition" filed by the applicant's wife. Fourthly, the RODK's report was, in the applicant's view, issued unlawfully because the appointment of expert psychologists and their professional liability was not regulated under Polish law at the time. And fifthly, under the Hague Convention and under the Brussels II Regulation, the Polish courts should not have examined the divorce application brought by M.J. as long as the applicant's request for the child's return was pending.

50. The Government refrained from making comments on the merits of the case.

2. The Court's assessment

(a) General principles

51. The general principles on the relationship between the Convention and the Hague Convention, the scope of the Court's examination of child international child abduction applications, the best interests of the child and on the procedural obligations of the States, are laid down in the Court's Grand Chamber judgment in the case of *X v. Latvia* (see *X v. Latvia* [GC], no. 27853/09, §§ 93-102, 107 ECHR 2013) and also in a number of other judgments concerning proceedings for return of children under the Hague Convention (see *Maumousseau and Washington v. France*, no. 39388/05, § 68, 6 December 2007; *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 102, ECHR 2000-I; *Iosub Caras v. Romania*, no. 7198/04, § 38, 27 July 2006; *Shaw v. Hungary*, no. 6457/09, § 72, 26 July 2011; and *Adžić v. Croatia*, no. 22643/14, §§ 93-95, 12 March 2015).

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

52. In the instant case, the primary interference with the applicant's right to respect for his family life may not be attributed to an action or omission by the respondent State, but rather to the action of the applicant's wife and his child's mother, a private individual, who has retained their daughter in Poland (see *López Guió v. Slovakia*, no. 10280/12, § 85, 3 June 2014).

53. That action nevertheless placed the respondent State under positive obligations to secure for the applicant his right to respect for his family life, which included taking measures under the Hague Convention with a view to ensuring his prompt reunification with his child (see *Ignaccolo-Zenide*, cited above, § 94).

54. In the present case, while holding that the retention of the child away from her habitual residence in the United Kingdom was wrongful within the meaning of Article 3 of the Hague Convention, the domestic courts took twelve months to examine the applicant's request for the return of his daughter, and eventually dismissed it on the ground that her return without her mother would place the girl in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention.

55. The Court finds therefore that the events under consideration in the instant case, in so far as they give rise to the responsibility of the respondent State, amounted to an interference with the applicant's right to respect for his family life (see *Iosub Caras*, cited above, § 30).

56. The Court also notes that this interference had its legal basis in the Hague Convention, which entered into force in Poland in 1992 and which forms part of its domestic law. Moreover, the domestic courts acted in what they considered to be pursuit of the legitimate aim of protecting the rights and freedoms of the child and her mother (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, §§ 99 and 106, ECHR 2010, and, *mutatis mutandis*, *Maummousseau*, cited above, § 61).

57. The Court must therefore determine whether the interference in question was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, interpreted in the light of the relevant international instruments, and whether when striking the balance between the competing interests at stake appropriate weight was given to the child's best interests, within the margin of appreciation afforded to the State in such matters.

58. The Court must be also aware of the context which is all-important for the interpretation of treaties. The 1980 Hague Convention is not the only instrument regulating matters connected with child abduction in relations between Poland and the United Kingdom. Both States are also parties to the 2003 Brussels II bis Regulation and the 1980 Luxembourg Convention. The 1980 Hague Convention itself has to be interpreted and applied in the context of these instruments.

59. The Court observes that the assessment of the child's best interests carried out by the Polish family courts in the course of the applicant's Hague Convention proceedings has indeed revolved around the question of whether moving the child into her father's care and separating her from the mother would disturb the child's sense of security and would have a negative impact on her emotional state (see paragraphs 15, 18 and 23 above).

60. Firstly, a question to this effect was formulated in explicit terms and put to the RODK's experts with a view to obtaining a report which later served as the basis of the family courts' assessment of the exceptions under Article 13 (b) of the Hague Convention (see paragraphs 16 and 17 above). The RODK's experts in fact recommended that the child should continue

living in Poland because her return to the United Kingdom *without* the mother would be more harmful to her than the lack of daily contact with her father (see paragraph 16 above).

61. Secondly, the first-instance court assessed the risk of psychological and physical harm to the child in the event of her return to her father *without* the mother; no consideration having been given to the alternative return of the child *with* the mother (see paragraph 18 above). As a matter of fact the district court held that there was a grave risk of psychological trauma for the child in the event of her immediate separation from her mother, because of the girl's young age and because her mother had always been her primary caregiver (see paragraph 19 above).

62. Thirdly, even though the appellate court reformulated its reasoning when upholding the decision to dismiss the applicant's Hague Convention request, the fact that the child's mother was unwilling to live in the United Kingdom remained central to its analysis (see paragraph 23 above). Being faced with the applicant's explicit argument that the lower court had breached Article 13 (b) of the Hague Convention in that it had wrongly assumed that the child would have to be separated from the mother in absence of any objective obstacles to her return to the United Kingdom (see paragraph 20 above), the appellate court appears to have accepted that the conflict between the applicant and M.J. and the latter's alleged inability to adapt to her life abroad were reasons objective and convincing enough to prompt the conclusion that with or without her mother the child's return to her habitual environment would place her in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention (see paragraph 23 above).

63. It is not the Court's task to take the place of the competent authorities in determining whether a grave risk exists that the child would be exposed to psychological harm within the meaning of Article 13 of the Hague Convention if she returned to the United Kingdom. However, the Court is in a position to ascertain whether the domestic courts, in applying and interpreting the provisions of that convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests (see, amongst other authorities, *Olsson v. Sweden* judgment of 24 March 1988, Series A no. 130, p. 32, § 68).

64. The Court observes that it was the applicant's estranged wife who opposed the child's return. It was therefore for her to make and to substantiate any potential allegation of specific risks under Article 13 (b) of the Hague Convention (see paragraph 38 above). While this provision is not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" – it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13 (b) concerns only situations which go

beyond what a child might reasonably be expected to bear (see *X v. Latvia*, cited above, § 116, and *Maumousseau and Washington*, cited above, §§ 69 and 73).

65. In the instant case, the applicant's wife objected to the child's return to the United Kingdom, giving two reasons. The first was essentially the break-up of the marriage, and the second her fear that the child would not be allowed to leave the United Kingdom (see paragraph 9 above).

66. The Court considers that both of these arguments fell short of the requirements of Article 13 (b) of the Hague Convention which were described above. The domestic courts nevertheless proceeded with the case, assessing the said Article 13 (b) risks in view of what appears to be a rather arbitrary refusal of the child's mother to return with the child as discussed in paragraph 60 above.

67. In addition to restating consistently that the exceptions to return under the Hague Convention must be interpreted strictly (see *X v. Latvia*, cited above, § 116), this Court has also specifically held that the harm referred to in Article 13 (b) of the Hague Convention cannot arise solely from separation from the parent who was responsible for the wrongful removal or retention. This separation, however difficult for the child, would not automatically meet the grave risk test (see *mutatis mutandis*, *G.S. v. Georgia*, no. 2361/13, § 56, 21 July 2015).

68. Nothing in the circumstances unveiled before the domestic courts objectively ruled out the possibility of the mother's return together with the child. It was not implied that the applicant's wife did not have access to UK territory (see, *mutatis mutandis*, *Maumousseau*, cited above, § 74) or that she would have faced criminal sanctions upon her return (see, *a contrario*, *Neullinger*, cited above, §§ 149 and 150). In addition, nothing indicated that the applicant might actively prevent M.J. from seeing her child in the United Kingdom or might deprive her of parental rights or custody (see, *mutatis mutandis*, *Paradis and Others v. Germany* (dec.), no. 4783/03, 15 May 2003). Instead, the appellate court upheld the conclusion and the reasoning of the lower court that the child's *separation* from the mother would have negative irreversible consequences, adding that it was so because since the abduction the child had been under her mother's care practically round the clock, and her contact with the applicant had been rare (see paragraph 23 above).

69. The alternative part of the appellate court's ruling, namely its holding that the child's return to the United Kingdom *with* the mother would not have a positive impact on the child's development, because M.J.'s departure from Poland would be against her will (see paragraph 23 above), must be considered equally misguided. The domestic court has clearly gone beyond the elements which ought to have been assessed under Article 13 (b) of the Hague Convention. Moreover, even in doing so, it seemed to have completely ignored the remaining conclusions of the

RODK's experts, namely that the child, who was apparently adaptable, was in good physical and psychological health, was emotionally attached to both parents, and perceived Poland and the United Kingdom as on an equal footing (see paragraph 16 above).

70. Lastly, the Court observes that the issues of custody and access are not to be intertwined in the Hague Convention proceedings (see paragraph 38 above, and see also *Maumousseau*, cited above, § 69). Consequently, whether in the light of international law or of domestic law, it was erroneous for the family court in the instant case to assume that if returned to the United Kingdom the child would be placed in the applicant's custody or care.

71. The Court also observes that, as regards the length of the impugned domestic proceedings, despite the recognised urgent nature of the Hague Convention proceedings, a period of one year elapsed from the date on which the applicant's request for the return of the child was registered with the Grudziadz District Court to the date of the final decision. No explanation was put forward by the Government for this delay.

72. Consequently, even though the six-week time-limit is non-obligatory under the Hague Convention (see paragraph 33 above), the Court considers that exceeding it by forty-five weeks, which is more than eightfold, in the absence of any circumstances capable of exempting the domestic courts from the duty to strictly observe it, does not meet the urgency of the situation and is not in compliance with the positive obligation to act expeditiously in proceedings for the return of children (see *Carlson v. Switzerland*, no. 49492/06, § 76, 6 November 2008; *Karrer v. Romania*, no. 16965/10, § 54, 21 February 2012; *R.S. v. Poland*, no. 63777/09, § 70, 21 July 2015; *Blaga v. Romania*, no. 54443/10, § 83, 1 July 2014; and *Monory*, cited above, § 82; see also, *a contrario*, *Lipkowsky* (dec.), cited above).

73. In conclusion, in the circumstances of the case seen as a whole and notwithstanding the respondent States' margin of appreciation in the matter, the Court considers that the State failed to comply with its positive obligations under Article 8 of the Convention.

74. In view of the above conclusion, it is unnecessary that the remainder of the applicant's complaint about the allegedly defective procedure be examined by the Court.

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

76. Lastly, the Court observes that, as the child has lived with her mother in Poland for over three years and a half, there is no basis for the present judgment to be interpreted as obliging the respondent State to take steps ordering the child's return to the United Kingdom.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE DOMESTIC COURTS' FAILURE TO ISSUE AN INTERIM CONTACT ORDER

77. In his observations on the admissibility and the merits of the case which were submitted to the Court on 19 January 2015, the applicant made an additional complaint, namely that the Polish family court failed to secure the exercise of his right of contact during the Hague Convention proceedings. In result, his contact with the child was irregular and rare, as it was at the absolute discretion of the abducting mother. That, in the applicant's view, was in breach of Article 21 of the Hague Convention and in violation of his and his daughter's right for respect for their family life under Article 8 of the Convention.

78. The Court considers that the above grievance cannot be viewed as an integral part of the applicant's main complaint, which concerned the dismissal of his Hague Convention request and the features of these proceedings in so far as they might have influenced that outcome. Consequently, the applicant's allegation that his contact was not secured by the domestic court during the return proceedings must be examined as a separate complaint. It is not open to the Court, however, to set aside the application of the six-month rule even in the absence of the relevant objection from the Government (see, among many other authorities, *Wereda v. Poland*, no. 54727/08, § 57, 26 November 2013; *Belaousof and Others v. Greece*, no. 66296/01, judgment of 27 May 2004, § 38; *Miroshnik v. Ukraine*, no. 75804/01, § 55, 27 November 2008; *Tsikakis v. Germany*, no. 1521/06, § 55, 10 February 2011; and *Ciornei v. Romania*, no. 6098/05, § 19, 21 July 2009).

79. In view of these considerations, it must be noted that the examination of the merits of the applicant's request for contact arrangements was stayed by the Grudziądz District Court on 28 February 2013 until the termination of the divorce proceedings (see paragraph 28 above). The latter proceedings ended on 24 June 2013 with the decision of the Gdańsk Court of Appeal (see paragraph 29 above). The applicant informed the Court that on 28 November 2014 a decision on contact arrangements had been issued (see paragraph 31 above). The latter development, however, is of no importance since the Hague Convention proceedings, for the duration of which the applicant sought to have contact with his child, ended on 14 October 2013 (see paragraph 22 above).

80. Having regard to the above, the Court finds that the applicant's complaint that the Polish family court failed to secure his right of contact during the return proceedings has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

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

A. Damage

82. In his application form, the applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. In his subsequent submissions on just satisfaction, he claimed EUR 1,886 in respect of pecuniary damage, representing loss of income when the applicant was absent from work to participate in the impugned domestic court proceedings. At that point, the applicant also claimed EUR 50,000 in respect of non-pecuniary damage.

83. The Government submitted that no causal link existed between the applicant's Article 8 application and the pecuniary damage which he had allegedly suffered. Moreover, they argued that the non-pecuniary damages sought were excessive and did not correspond to what had originally been claimed by the applicant.

84. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court accepts that the applicant must have suffered distress and emotional hardship, as a result of the Polish court's refusal to order her daughter's return to the United Kingdom, which is not sufficiently compensated for by the finding of a violation of the Convention. Having regard to the sums awarded in comparable cases, and making an assessment on an equitable basis, the Court awards the applicant EUR 9,000 in respect of non-pecuniary damage.

B. Costs and expenses

85. The applicant also claimed EUR 7,447.74 for costs and expenses incurred in relation to the proceedings before domestic courts and EUR 3,000 for those incurred before the Court. The former amount comprised EUR 5,473.54 of the applicant and his witness's travel expenses (transportation, hotels and parking fees) incurred between December 2012 and October 2013 and EUR 1,974.2 of various court and translation fees.

86. The Government argued that only costs actually incurred in the preparation and defence of the applicant's case before the Court should be taken into consideration.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,145 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the Article 8 complaint about the outcome of the Hague Convention proceedings and the decision-making process admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,145 (six thousand one hundred and forty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 1 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	András Sajó
Deputy Registrar	President