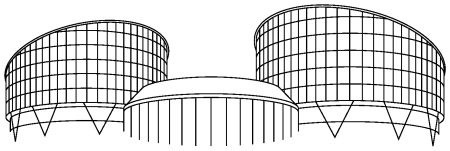

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF FRISANCHO PEREA v. SLOVAKIA

(Application no. 383/13)

JUDGMENT

STRASBOURG

21 July 2015

FINAL

21/10/2015

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Frisancho Perea v. Slovakia,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Branko Lubarda, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 30 June 2015,

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

PROCEDURE

1. The case originated in an application (no. 383/13) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Peruvian national, Mr Jose Augusto Frisancho Perea ("the applicant"), on 27 December 2012.

2. The applicant was represented by Mr I. Gažík, a lawyer practising in Prievidza. The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

3. The applicant complained, in particular, that he had not been allowed to take part in the proceedings initiated by his wife before the Constitutional Court in relation to an order for the return of their children to the country of their habitual residence under the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), that the Constitutional Court's judgment quashing the return order had arbitrarily frustrated the entire purpose of the Hague Convention proceedings, and that the proceedings for the enforcement of the return order had been unfair in that an order by the Constitutional Court suspending the enforceability of the order and other material relevant for their outcome had not been made available to him.

4. On 11 July 2014 the above complaints were communicated to the Government under Articles 6 § 1, 8 and 13 of the Convention and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963 and lives in Maryland (the United States of America).

A. Background

6. In 1999 the applicant married A., a Slovak national. There were three children of the marriage: B., born in 1999, C., born in 2002, and D., born in 2004.

The children are all Slovak nationals, while B. is also a Peruvian national, and C. and D. also have the United States nationality.

7. For about eight years, until July 2010, the family lived together in one household in Maryland. A. then moved to stay with friends, took the children with her, the couple agreed on alternating custody, and they started receiving marriage counselling. Nevertheless, A. filed for divorce, but then withdrew her petition.

8. On 25 August 2010 A. left the United States for Slovakia, taking the children with her. The following day she informed the applicant that they had left and that she had no intention of coming back.

9. In September 2010 A. filed for divorce in Slovakia and requested that the children be entrusted to her custody by way of an interim measure. The status and outcome (if any) of these proceedings is not known.

B. Hague Convention Proceedings

10. On 14 October 2010 the applicant filed an application for the return of the children to the United States as the country of their habitual residence, relying on the (Slovakian) International Private and Procedural Law Act (Law no. 97/1963 Coll., as amended), the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, and the Hague Convention.

11. On 25 November 2010 the applicant's Hague Convention application was transmitted to the Bratislava I District Court, through the intermediary of the Slovak Central Authority responsible for implementing the Hague Convention.

12. On 21 January 2011 the District Court ordered the children's return to the United States, having found that it was the country of their habitual residence, that they had been removed from there wrongfully, and that no obstacles to the return had been established.

13. On 28 April 2011 the Bratislava Regional Court dismissed an appeal filed by A. and upheld the return order. The matter thus became resolved by force of a final and binding decision on 9 May 2011.

C. Enforcement proceedings

14. On 31 May 2011 the applicant filed for judicial enforcement of the return order.

15. Upon several unsuccessful attempts at having A. comply with the order voluntarily, the Komárno District Court acceded to the petition on 28 November 2011 by issuing a warrant for the order's enforcement.

16. On 29 June 2012 the Nitra Regional Court quashed the enforcement warrant following an appeal by A. It observed that, meanwhile, A. had challenged the decision of 28 April 2011 by way of a complaint under Article 127 of the Constitution (Constitutional Law no. 460/1992 Coll., as amended) to the Constitutional Court; that on 15 December 2011 the Constitutional Court had declared that complaint admissible; and that, at the same time, it had suspended the enforceability of the return order pending the outcome of the proceedings on the merits of the complaint of A. (see paragraphs 20 and 21 below).

The Regional Court concluded that, in those circumstances, an essential prerequisite for the enforcement of the return order had lapsed.

Consequently, the matter was remitted to the District Court for a new decision to be taken in the light of the outcome of the constitutional complaint of A.

17. The applicant challenged the decision of 29 June 2012 by way of an appeal on points of law. He pointed out that there had been no hearing before the Regional Court and that it was only from the Regional Court's decision that he had learned of the Constitutional Court's decisions underlying it and of other new relevant facts, such as that the applicant had applied for the enforcement proceedings to be stayed.

As the Constitutional Court's decisions had not been served on him and he had had no knowledge of those facts, he had been deprived of an opportunity to comment and to consider the taking of other legal steps.

This was contrary to the principles of adversary proceedings and equality of arms and, in the applicant's submission, he had thereby been "prevented from acting before the court", which constituted an admissibility ground for his appeal under Article 237 (f) of the Code of Civil Procedure (Law no. 99/1963 Coll., as amended – "CCP").

18. On 6 December 2012 the Supreme Court declared the appeal inadmissible. It observed that the Regional Court had of its own motion obtained a copy of the Constitutional Court's decision to suspend the enforceability of the return order, that it had based its decision on it, and that

a copy of the Constitutional Court's decision had never been served on the applicant.

However, the Supreme Court also noted that the Constitutional Court's decision was binding upon the Regional Court and considered that, therefore, having it served on the applicant and having allowed him to comment could not have had any impact on the Regional Court's decision.

Therefore, in the Supreme Court's conclusion, the ground invoked by the applicant for the admissibility of his appeal had not been given.

19. In consequence, it became incumbent upon the District Court to rule on the applicant's enforcement petition anew, which it did on 18 January 2013 by dismissing it.

The District Court observed that on 16 May 2012 the Constitutional Court had quashed the decision upholding the return order and that it had remitted the appeal of A. against that order to the Bratislava Regional Court for a new determination (see paragraph 23 below). The return order was thus pending on appeal and, as such, it was no longer enforceable.

The District Court's decision became final and binding on 8 February 2013.

D. Constitutional proceedings

1. Complaint by A.

20. On 6 July 2011 A. challenged the decision of 28 April 2011 to uphold the return order (see paragraph 13 above) by way of a complaint to the Constitutional Court. It was directed against the Regional Court and, in it, she submitted that the applicant had filed observations in reply to her appeal against the return order; that she had not been served a copy of these observations; that her appeal had been determined without a hearing; and that she had accordingly been deprived of the opportunity to comment on those observations, which was contrary to her rights under Articles 46 § 1 (right to judicial protection), 47 § 3 (equality of parties to judicial proceedings) and 48 § 2 (right to comment on the evidence assessed) of the Constitution, as well as Article 6 § 1 (fairness) of the Convention.

In addition, A. requested that the Constitutional Court indicate an interim measure to the effect that the enforceability of the contested decision be suspended.

21. On 15 December 2011 the Constitutional Court declared the complaint admissible and ruled that the enforceability of the decision of 28 April 2011 should be suspended pending the outcome of the constitutional proceedings on the merits.

As to the latter ruling, the Constitutional Court found (i) that the suspensive measure was not contrary to any important public interest, (ii) that not having the enforceability of the return order suspended could

lead to an irreversible situation and "cause detriment to the property sphere" of A. in potential violation of her fundamental rights and freedoms, and (iii) that having the enforceability suspended "gave rise to no risk of damage to any party concerned".

22. In the ensuing proceedings on the merits, the Bratislava Regional Court as the defendant of the complaint submitted, *inter alia*, that there was no statutory requirement for observations in reply to an appeal to be communicated to the appellant for further observations, unless the former observations had a substantial impact on the determination of the appeal. However, the applicant's observations in reply to the appeal by A. had had no such impact.

23. In a judgment of 16 May 2012 the Constitutional Court found a violation of the rights of A. as identified above (see paragraph 20), quashed the decision of 28 April 2011, remitted the case to the Regional Court for a new determination of the appeal of A. against the return order, and awarded her legal costs. In principle, the Constitutional Court fully embraced the line of argument advanced by A.

24. The Constitutional Court also noted that the applicant had sought leave to intervene in the proceedings as a third party.

In that respect, it observed that constitutional proceedings were conducted in the procedural framework laid down in the Constitutional Court Act (Law no. 38/1993 Coll., as amended), as a *lex specialis*, and in the CCP, as a *lex generalis*. The Constitutional Court Act however envisaged no standing for third parties to intervene in proceedings on individual complaints, and its quality of a *lex specialis* excluded the application of the third-party-intervention rules under the CCP.

For that reason, the Constitutional Court observed specifically that it had taken no account of the submissions made by the applicant.

25. The applicant obtained a copy of the Constitutional Court's judgment on 16 August 2012.

2. Complaint by the applicant

26. On 28 February 2013 the applicant lodged a complaint with the Constitutional Court, alleging *inter alia* a violation of his rights under Article 46 § 1 of the Constitution and Article 6 § 1 of the Convention (fairness) in the enforcement proceedings, in particular in their phase before the Regional Court and the Supreme Court, and raising in substance the same arguments as in his appeal on points of law (see paragraph 17 above). The applicant pointed out, in addition, that that it had been for substantially the same reasons that the Constitutional Court itself had found a violation of the rights of A. in relation to her appeal against the return order.

27. On 5 November 2013 the Constitutional Court declared the complaint inadmissible. It fully endorsed the reasoning behind the Supreme

Court's decision of 6 December 2012 (see paragraph 18 above) and concluded that, accordingly, the complaint was manifestly ill-founded.

The decision was served on the applicant on 9 December 2013.

E. Subsequent developments

28. Following the Constitutional Court's judgment of 16 May 2012, on 21 September 2012, the Bratislava Regional Court decided again on the appeal by A. against the return order of 21 January 2011 by quashing that order and remitting the case to the Bratislava I District Court for a new determination.

29. In the subsequent period a number of hearings were held at first instance and courts at two levels of jurisdiction dealt with various procedural matters such as translations of documents into a language the applicant understood, court fees and costs of the translations, the applicant's visiting rights in relation to his children pending the outcome of the proceedings on the merits, an injunction prohibiting A. to leave and remove the children form the territory of Slovakia, admission of the mother of A. to the proceedings as a third party, two procedural fines on A., her challenges to the first-instance judge for bias, her request for a legal-aid lawyer and establishing her whereabouts. There is no indication that any of the fines and interim rulings were actually enforced.

30. No decision on the merits was taken and the District Court decided to terminate the proceedings on 28 November 2014. It referred to Article 12 (last sentence) of the Hague Convention, which permits termination of the proceedings if there is an indication that the child in question has been taken to another State, and observed that A. and the children had moved to Hungary and had established residence there.

31. On 7 January 2015 the applicant appealed and his appeal appears to be still pending.

II. RELEVANT DOMESTIC, EUROPEAN AND INTERNATIONAL LAW AND PRACTICE

A. Hague Convention

32. For the purposes of the present case, the key provisions of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction state as follows:

> "The States signatory to the present Convention,
>
> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

...

Article 1

The objects of the present Convention are –

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

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

...

Article 11

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

...

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.

...

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 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.

..."

B. Further relevant provisions of European and international law

33. Further relevant provisions of the Hague Convention, the United Nations Convention on the Rights of the Child, the Charter of Fundamental Rights of the European Union and Regulation No. 2201/2003 have recently been summarised in the Court's judgment in the case of *X v. Latvia* ([GC], no. 27853/09, §§ 34-42, ECHR 2013).

C. Relevant domestic law and practice

1. Constitution

34. Article 127 reads as follows:

"1. The Constitutional Court shall decide on complaints by natural or legal persons alleging a violation of their fundamental rights or freedoms ... unless the protection of such rights and freedoms falls within the jurisdiction of a different court.

2. If the Constitutional Court finds a complaint to be justified, it shall deliver a decision stating that the person's rights or freedoms as set out in paragraph 1 have been violated by a final decision, specific measure or other act and shall quash that decision, measure or act. If the violation that has been found is the result of a failure to act, the Constitutional Court may order [the authority] which has violated the [person's] rights or freedoms to take the necessary action. At the same time it may remit the case to the authority concerned for further proceedings, order that authority to refrain from violating the [person's] fundamental rights and freedoms ... or, where appropriate, order those who have violated the rights or freedoms set out in paragraph 1 to restore the situation to that existing prior to the violation.

3. In its decision on a complaint the Constitutional Court may grant appropriate financial compensation to a person whose rights under paragraph 1 have been violated.

4. The liability for damage or other loss of a person who has violated the rights or freedoms as referred to in paragraph 1 shall not be affected by the Constitutional Court's decision."

2. Constitutional Court Act (Law no. 38/1993 Col., as amended)

35. Article 21:

"1. The parties to proceedings (*účastníci konania*) are the plaintiff and, as the case may be, the person against whom the application is directed, as well as [other] persons so identified under this Act.

2. Intervening parties to proceedings (*vedľajší účastníci konania*) are persons so identified under this Act, as long as they do not waive this status. They have the same rights and duties in the proceedings as the parties, but they act always in their own name."

36. Article 51

"The parties to proceedings [concerning individual complaints] are the complainants and the person against whom the complaint is directed."

3. The U.N. Convention on the Rights of the Child and the Hague Convention in Slovakia

37. The U.N. Convention on the Rights of the Child entered into force in respect of Slovakia on 6 February 1991 (Notice of the Ministry of Foreign Affairs no. 104/1991 Coll.), while the Hague Convention did so on 1 February 2001 (Notice of the Ministry of Foreign Affairs no. 119/2001 Coll.).

4. The Constitutional Court's practice as regards third-party interventions

38. The Constitutional Court's practice at the given time has been recently summarised in the Court's judgment in the case of *López Guió v. Slovakia* (no. 10280/12, §§ 62-4, 3 June 2014.

39. In a judgment of 23 May 2014 in case no. IV. ÚS 100/2014, the Constitutional Court ruled on the merits of an individual complaint by a mother and her two minor children concerning an international child abduction case. It noted that, following its decision to declare the case admissible, it had notified the children's father of its decision and it had invited him to submit written observations. The Constitutional Court noted that there was no statutory basis for allowing the father the standing of a third party in the constitutional proceedings and that, in similar cases, the Constitutional Court would simply take the observations into consideration when deciding on the given case. In the case at hand, the Constitutional Court cited the father's observations and dealt with the matters raised by him in its judgment.

5. Other practice

40. In an unrelated international child abduction case before the Bratislava II District Court (case no. 49P 414/2007), an extraordinary appeal

on points of law was lodged by the Public Prosecution Service against a final, binding and enforceable return order. On 4 February 2009, in response to an enquiry prompted by the father of the child concerned, the President of the District Court provided the Office of the President of Slovakia with an update on the state of the proceedings and added the following comment:

> "It does not behove me to judge the actions of the Office of the Prosecutor General. I am not privy to the reasons why an extraordinary appeal on points of law was lodged. I detect a problem in the system, which allows for such a procedure even in respect of decisions on the return of minor children abroad ('international child abductions'). Irrespective of the outcome of the specific case, the possibility of lodging an appeal on points of law and an extraordinary appeal on points of law in cases of international child abduction protracts the proceedings and negates the object of the [Hague Convention], which is as expeditious a restoration of the original state [of affairs] as possible, that is to say the return of the child to their country of habitual residence within the shortest possible time."

THE LAW

I. ALLEGED VIOLATIONS OF THE CONVENTION

41. The applicant complained that the decision of the Constitutional Court of 15 December 2011 and other material relevant for the conduct and outcome of the enforcement proceedings had not been served on him; that he had thereby been deprived of the possibility to comment, to adjust his strategy, and to exercise his rights on equal footing to A.; that he had not been allowed to take part in the proceedings initiated by A. before the Constitutional Court despite having a direct interest in their outcome; and that by the proceedings on A.'s complaint and its judgment of 16 May 2012 the Constitutional Court had frustrated the entire purpose of the Hague Convention proceedings.

In that respect, the applicant relied on Article 6 § 1 of the Convention and, in substance, also on Articles 8 and 13 of the Convention.

A. Admissibility

42. The Government pointed out that in its judgment of 16 May 2012 the Constitutional Court quashed the decision of 28 April 2011 as unlawful. In their view, this should have provided the applicant with an action for damages under the State Liability Act. Moreover, should the applicant have any complaints in relation to the proceedings subsequent to the Constitutional Court's judgment, he could have made them before the Constitutional Court by way of a fresh individual complaint of his own. These remedies were compatible with the requirements of Article 13 of the

Convention and, consequently, the complaint under that provision was manifestly ill-founded. As the applicant had not used them, as regards the underlying alleged violations he had failed to meet the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention.

43. The applicant disagreed and considered, in particular, that an action for damages under the State Liability Act could not be used in the circumstances of his case.

44. The Court observes that the application focuses on the proceedings before the Constitutional Court and on the repercussions of its decisions in the enforcement proceedings and in the Hague Convention proceedings. In other words, the application is not concerned with the decision of 28 April 2011, which was in the applicant's favour, and the quashing of which by the Constitutional Court is the object of this application.

45. The remedy under the State Liability Act referred to by the Government thus does not appear to be relevant in the circumstances of the present case.

46. Moreover, the Court observes that the applicant is in fact not complaining about the course of the proceedings following the Constitutional Court's judgment.

47. It follows that the Government's non-exhaustion objection must be dismissed.

48. The Court notes that this part of 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

49. Relying on Article 6 § 1 and, in substance, Articles 8 and 13 of the Convention, the applicant complained that he had been denied access to the proceedings on the constitutional complaint by A., that those proceedings and the Constitutional Court's decisions in them had suppressed the object and purpose of the Hague Convention proceedings, that the failure to provide him with access to the Constitutional Court's decisions from those proceedings and to other material had curtailed his rights in the enforcement proceedings; and that he had had no effective remedy in that respect.

50. The Court considers that, on the facts of the present case, these complaints most naturally fall to be examined under Article 8 of the Convention (see *López Guió*, cited above, § 77), the relevant part of which 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."

1. The parties' arguments

51. The Government admitted that the Constitutional Court's judgment of 16 May 2012 had constituted an interference with the applicant's Article 8 rights but contended that such interference had been compatible with the requirements of that provision.

In that regard, they submitted that the aim of that judgment had been to rectify a procedural error committed by an ordinary court and to ensure the observance of the guarantees of Article 6 of the Convention. That aim served the protection of the rights and freedoms of others, in particular A. and the children, and was therefore to be considered legitimate in terms of the second paragraph of Article 8.

As to the proportionality of the contested interference, the Government submitted that the constitutional complaint was conceived as a tool for the protection of constitutionality. In the present case, had the Constitutional Court not corrected the error of the ordinary court, it would have been open for A. to apply to the Court. In that regard, the Government referred to the Court's judgment in the case of *B. v. Belgium* (no. 4320/11, 10 July 2012) and added that, should A. have been successful before the Court, she could have sought reopening of the proceedings at the national level, which would have protracted the domestic proceedings even further.

In addition, the Government pointed out that the defendant of the constitutional complaint by A. had been the Bratislava Regional Court (see paragraph 20 above). By defending the complaint it *de facto* defended the interests of the applicant. Even if the applicant were to be admitted to the constitutional proceedings as a third party, this would not have given him the standing to pursue any specific claim. Therefore, in the Government's view, the applicant's lack of direct access to the constitutional proceedings had not been disproportionate to the aim pursued by those proceedings.

Furthermore, the Government emphasised that, in the subsequent course of the Hague Convention proceedings, a number of measures were taken by the authorities with a view to ensuring respect for the applicant's Article 8 rights and that the limited effect of these measures was mainly attributable to A., a private party.

Moreover, as regards the applicant's lack of access in the enforcement proceedings to the Constitutional Court's decision suspending the enforceability of the return order, the Government referred to the Supreme Court's decision of 6 December 2012 and the Constitutional Court's decision of 5 November 2013 (see paragraphs 18 and 27 above) to the effect that the Constitutional Court's decision suspending the enforceability of the return order was binding upon the enforcement court. Therefore, the

applicant's alleged lack of access to the Constitutional Court's decision could not have had any impact on the enforcement court's decision.

52. The applicant disagreed and reiterated his complaints. In particular, he emphasised that the domestic courts had failed to ensure effective protection to his Article 8 rights and that, even when they had issued decisions in his favour, such decisions had not been enforced.

53. In a further reply, the Government reiterated their arguments on all counts.

2. The Court's assessment

54. The Court observes that there was no dispute between the parties that the relationship between the applicant and his children was one of family life, that the proceedings for their return under the Hague Convention, the ensuing proceedings for the enforcement of the order of the children's' return under the Hague Convention and the proceedings on the constitutional complaint of A. impacted on the applicant's right to respect for his family life and that, consequently, his complaints fell within the ambit of Article 8 of the Convention.

55. In its judgment in the case of *López Guió* (cited above, §§ 83, 84 and 87, 3 June 2014, with further references), concerning a situation structurally similar to that obtaining in the present case, the Court reiterated that:

- while the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by the public authorities, there are in addition positive obligations inherent in an effective "respect" for family life;

- such positive obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures, and

- such positive obligations include a right for parents to have access to measures which will enable them to be reunited with their children and an obligation on the national authorities to take such action.

56. On the fact of the present 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 actions of A., a private party, who allegedly wrongfully removed the children from the country of their habitual residence.

57. In the judgment in *López Guió* (cited above, § 89), the Court noted that, by operation of the Hague Convention, the courts of the country where a child is removed or retained are to carry out proceedings aimed at establishing whether the removal or retention has been wrongful (Article 3 of the Hague Convention) and - if so - to order the return of the child to his or her country of habitual residence (Article 12 of the Hague Convention),

unless there are circumstances preventing the child's return within the meaning of Articles 13 or 20 of the Hague Convention.

58. The Court has also noted that Slovakia is a Contracting State of the Hague Convention and that, in consequence, in circumstances similar to those obtaining in the present case, it had been under an obligation to carry out the proceedings for the return of the child, which it did relying on the Hague Convention, with a view to enabling the courts in the country of the child's habitual residence to resolve all questions relating to the child's status, including matters relating to the applicant's parental rights and responsibilities (see *López Guió*, cited above, § 90).

59. As regards the ensuing enforcement proceedings, the Court considers that on the facts of the present case the proceedings for the execution of the return order must be regarded as an integral part of the trial as a whole (see, mutatis mutandis, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II).

60. The next question for the Court to answer is whether in discharging its obligations under the Hague Convention Slovakia has complied with its positive obligations under Article 8 of the Convention. In that regard, the Court finds it opportune, at the outset, to refer to the summary of the general principles applicable in any assessment under the Convention of complaints concerning proceedings under the Hague Convention set out in its recent judgment in the case of *X v. Latvia* [GC] (cited above, §§ 99-108).

61. In respect of those general principles, the Court would observe, in particular, that the extent of its jurisdiction under Article 32 of the Convention is limited to matters concerning the interpretation and application of the Convention and the Protocols thereto. Nevertheless, in the area of international child abduction, the obligations imposed on the Contracting States by Article 8 of the Convention must be interpreted in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child, and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (see *X v. Latvia* [GC], cited above, § 93, with further references).

62. The decisive issue in that type of case is whether the fair balance that must exist 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, taking into account, however, that the best interests of the child must be the primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child" (see *X v. Latvia* [GC], cited above, § 95, with further references).

63. In addition, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved must be fair and such as to ensure due respect of the interests safeguarded by Article 8

(see *Buckley v. the United Kingdom*, no. 20348/92, § 76, ECHR 1996-IV). In other words, the procedural protection enjoyed by applicants at the domestic level in respect of their rights protected under Article 8 of the Convention has to be practical and effective (see, among many other authorities, *Papamichalopoulos and Others v. Greece*, § 42, 24 June 1993, Series A no. 260-B, and also *Turek v. Slovakia*, no. 57986/00, § 113, ECHR 2006‑II (extracts)), and consequently compatible with that Article.

64. In that regard, the Court reiterates that effective respect for family life requires that the future relations between parents and children are not determined by the mere effluxion of time (see, among others, *H. v. the United Kingdom*, 8 July 1987, § 90, Series A no. 120) and that in cases such as the present one the adequacy of a measure is to be judged by the swiftness of its implementation (see *M.A. v. Austria*, no. 4097/13, § 109, 15 January 2015, with further references).

65. Turning again to the facts of the present case, the Court notes that an order for the return of the applicant's children under the Hague Convention was issued on 21 January 2011 and upheld on 28 April 2011 following an appeal by A. It thus became final and binding within the meaning of Slovakian law on 5 May 2011 and its enforcement was ordered on 28 November 2011.

66. It was at that stage that the Constitutional Court intervened by first suspending the enforceability of the return order and then by quashing the decision to uphold it, which eventually led to the quashing of the enforcement order and dismissal of the application for its enforcement.

67. Similarly to the position in *López Guió* (cited above, § 97), the Court observes in the present case that, although the Constitutional Court's decision suspending the enforceability of the return order and the judgment quashing it did not constitute a final decision on the applicant's Hague Convention application or his application for the enforcement of the return order, it predetermined the final decision on the latter application and, in view of the critical importance attached to the passage of time in the proceedings of this type, it has undeniably had major influence on the further course of the Hague Convention proceedings.

68. As in *López Guió* (cited above, § 98), the Court finds it appropriate to examine whether the Constitutional Court's intervention in the proceedings was compatible with the respondent State's positive obligation as specified above.

69. In that respect, the Court notes that there is no issue in terms of the lawfulness of the Constitutional Court's decision and judgment and considers that it may be acknowledged that its intervention served the legitimate aim of protecting the rights and freedoms of others, namely those of the children and A.

70. The Court shall therefore proceed to examine whether the contested intervention could be considered as having struck a fair balance between the

competing interests at stake. From that perspective, the Court finds the applicant's procedural standing and protection, if any, in relation to the proceedings before the Constitutional Court to be of particular importance.

71. In that respect, the Court observes that the Constitutional Court proceedings were initiated by A. and that the defendant in them was the Bratislava Regional Court. Consequently, the applicant was neither plaintiff nor defendant in those proceedings.

72. As regards the applicable legal regime for third-party interventions in individual-complaint proceedings before the Constitutional Court, the Court examined this matter in *López Guió* (cited above, §§ 102 and 103), where it observed that there was no direct statutory basis for such interventions in the Constitutional Court Act, this being a *lex specialis*, and where it held that the practice of such interventions by virtue of the subsidiary application of the relevant provisions of the CCP, being a *lex generalis*, was rather inconclusive at the relevant time.

73. Although the Constitutional Court's practice in that respect may have meanwhile evolved (see paragraph 39 above), it remains a fact that, despite the applicant's specific request to be allowed to intervene in the contested proceedings as a third party, the Constitutional Court considered itself bound to ignore his views and concerns (see paragraph 24 above).

74. In so far as the Government argued that, by defending the constitutional complaint of A., the Bratislava Regional Court had *de facto* defended the interests of the applicant (see paragraph 52 above), the Court considers the possible unity of interests on the part of the Regional Court and the applicant in relation to the constitutional proceedings to be no more than coincidental and uncertain and in no way substituting the applicant's entitlement to own choices as to the procedural and substantive response to the constitutional complaint of A.

75. The Court finds that the lack of procedural protection for the applicant before the Constitutional Court in this case was aggravated by the lack of an effective possibility of reacting to its decision suspending the enforceability of the return order in the enforcement proceedings. In that regard, irrespective of whether or not the applicant had had access to that decision at the relevant time, as admitted by the Government themselves, any possible response to that decision by the applicant in the enforcement proceedings would have been devoid of any legal effect (see paragraphs 18, 27 and 51 *in fine* above).

76. In addition, as regards the existing procedural framework for Hague Convention proceedings in Slovakia, which in the present case ultimately restarted as a result of the Constitutional Court's intervention, the Court notes in particular the opinion expressed by the President of the Bratislava II District Court (see paragraph 40 above), which may be understood as suggesting that there is a systemic problem in that appeals and extraordinary appeals on points of law are allowed in the course of return proceedings,

with the attendant effect of negating the object and purpose of the Hague Convention. It is of the view that the unfolding of the recommenced Hague Convention proceedings (see paragraphs 29 and 30 above) bears witness to these systemic concerns.

77. The eventual remittal of the present case to the ordinary courts resulted in yet more time being taken to deal with the case. As a result, for a protracted period of time the status of the children has not been determined by any court, the courts in Slovakia having no jurisdiction to do so, and the courts in the country of their alleged habitual residence having no practical opportunity to do so, a state of affairs which can by no means be said to have been in the children's best interests.

78. The above considerations are sufficient for the Court to conclude that the respondent State has failed to secure to the applicant the right to respect for his family life by providing him with proceedings for the return of the children under the Hague Convention in compliance with the requirements of Article 8 of the Convention.

There has accordingly been a violation of Article 8 of the Convention,

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed 500,000 euros (EUR) in respect of non-pecuniary damage.

81. The Government challenged the claim for being overstated.

82. The Court awards the applicant EUR 19,500, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

83. The applicant also claimed EUR 39,887.52 for the "costs of the procedure", of which EUR 7,000 concerned the procedure before the Court. This amount consisted of legal fees and associated expenses of the applicant's lawyers in Slovakia and was supported by an itemised list of the services rendered and bank statements showing that between 2010 and 2015 the applicant had paid EUR 10,300 to his Slovakian lawyers.

The applicant also claimed 20,000 American Dollars (USD) in respect of legal fees which he alleged to have incurred in the United States and Hungary and the costs of his travel to Slovakia.

84. The Government considered the claim in general overstated. In addition, they objected that, for the major part of his claim, the applicant had failed to submit a contract or bill showing that he had paid the claimed amounts or was under an obligation to do so.

Moreover, as regards the Hague Convention proceedings as such, the Government were of the view that the expenses claimed were unrelated to the Convention violations alleged. As there was no remedy against the impugned decision and judgment of the Constitutional Court, there could not have been any compensable domestic expenses of contesting them.

Lastly, they pointed out that there was some duplication in the submitted itemised overview of the legal services received, and that the claim in relation to the costs of legal assistance in the United States and Hungary had not been substantiated in any way at all.

85. 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 7,500 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 19,500 (nineteen thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 21 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President