THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 7239/08
by Miranda VAN DEN BERG and Noa SARRÌ
against the **Netherlands**

The European Court of Human Rights (Third Section), sitting on 2 November 2010 as a Chamber composed of:

Josep Casadevall, *President,*

Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Egbert Myjer,
Luis López Guerra,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 4 February 2008,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Ms Miranda van den Berg, is a Dutch national who was born in 1970 and lives in Amsterdam. The second applicant, Ms Noa Sarrì, is her daughter, who was born in 2000 and has both Dutch and Italian nationality. Noa was living in Amsterdam with her mother at the time the application was lodged but is currently residing in Italy. They were represented before the Court by Mr G.G.J. Knoops, a lawyer practising in Amsterdam.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

Noa, the second applicant, was born in Italy on 5 April 2000. Her father, an Italian national, and the first applicant – who were not married – both had parental authority over her, pursuant to Italian law. The family had been living partly in Italy and partly in Spain. In the course of the years, the relationship between the first applicant and Noa's father deteriorated and she started spending periods of time in the **Netherlands** together with her daughter.

During the first such visit to the **Netherlands**, the first applicant lodged a request, dated 1 July 2003, with the Utrecht Regional Court (*rechtbank*) for the parental authority situation to be changed (*wijziging gezag*) and that she be granted sole legal custody of Noa.

In June 2003 the first applicant had lodged a similar request – for sole parental authority – with the Turin Juvenile Court (*Tribunale per i Minorenni*).

On 27 November 2003 another such request was lodged by the first applicant with the Utrecht Regional Court.

At a moment in time not known to the Court, Noa's father was prosecuted on charges of having abducted his daughter and having threatened the applicant around that same time.

On 14 May 2004 Noa's father was acquitted of those charges. An appeal against this acquittal was lodged by the first applicant, the outcome of which is not known to the Court.

In an interim decision of 1 June 2004 the Turin Juvenile Court entrusted the first applicant with parental authority over Noa until the competent Italian welfare agency had carried out an assessment – on the instructions of the court – of the question to which parent Noa should best be entrusted. The Turin court further stipulated that pending the welfare agency's evaluation and the subsequent proceedings on parental authority, Noa was not to leave Italy. Noa and her mother were housed in a reception centre at that time, in the absence of other adequate housing.

In August 2004, the first applicant and Noa left Italy for the **Netherlands**.

On 23 September 2004, the Juvenile Section of the Turin Court of Appeal (*Corte d'Appello Sezione Speciale per i Minorenni*) ordered Noa's return to Italy, where she was to be placed in the care of the Italian child welfare agency, since the first applicant had breached the Turin Juvenile Court's ruling by taking Noa to the **Netherlands**.

On 26 October 2004 the **Netherlands** Ministry of Justice (*Ministerie van Jusitie*), in its capacity as Central Authority under Article 6 of the Convention on the Civil Aspects of International Child Abduction ("*the Hague Convention*") and on behalf of Noa's father, advised the first applicant voluntarily to return Noa to Italy by 12 November 2004, in compliance with the Turin Court's order of 1 June 2004. Failure to do so would result in the Central Authority bringing a case before a **Netherlands** Regional Court for the purposes of enforcement of Noa's return to Italy.

On 16 November 2004 the first applicant's Dutch lawyer informed the Central Authority of his client's intention not to comply with the Central Authority's request, as she was of the opinion that Noa's place of habitual residence was not Italy. The lawyer also stated that he had been informed by the Utrecht Regional Court that the proceedings for changing parental authority over Noa lodged by the first applicant with that court in 2003 had been stayed for the duration of the proceedings for Noa's return under the Hague Convention.

On 6 December 2004 the Central Authority requested the Amsterdam Regional Court, under Article 12 of the Hague Convention, to order the first applicant to return Noa to Italy, the latter's removal from that country having been effected in violation of Article 3 of the Hague Convention.

By decision of 2 February 2005, the Amsterdam Regional Court rejected the Central Authority's request. It held that although Noa's removal from Italy had been unlawful in terms of Article 3 of the Hague Convention, her return to Italy would entail a grave risk that

she be exposed to physical or psychological harm or otherwise placed in an intolerable situation, within the meaning of Article 13 (b) of the Hague Convention. The Amsterdam Regional Court considered in this regard, *inter alia*, that the first applicant was the only stable factor in Noa's life as regards the latter's care and education and that Noa had never developed strong roots in Italy, whereas she had developed a certain bond with the **Netherlands**, in which country she also attended school and where she was settling in well.

Based on Article 13 (b) of the Hague Convention the Amsterdam Regional Court thus refused to order Noa's return to Italy, her place of habitual residence.

The Regional Court also noted, in its account of the facts, that the proceedings lodged by the first applicant with the Utrecht Regional Court in 2003 for changing parental authority over Noa had been stayed until 29 April 2005, for which date a *pro forma* hearing was scheduled.

On 10 February 2005 the Central Authority filed an appeal with the Amsterdam Court of Appeal (*gerechtshof*) against the Amsterdam Regional Court's decision, arguing, *inter alia*, that the Regional Court's finding as regards the applicability of Article 13 of the Hague Convention was flawed. The first applicant filed a cross-appeal on 2 March 2005 to which the Central Authority replied on 6 April 2005.

On 22 February 2005, a lower Turin court, in a decision on the merits, granted the first applicant's request of June 2003 to be entrusted with sole parental authority over Noa and established contact arrangements between Noa and her father. The latter appealed the judgment.

On 20 April 2005, a Turin appeals court quashed that ruling and attributed sole parental authority over Noa to her father, under the condition that the first applicant be allowed to visit Noa as often as possible in a secured environment and including a prohibition on the first applicant leaving Italy with Noa. The first applicant was not heard before this court.

After hearings had been held on 3 March and 2 May 2005, the Amsterdam Court of Appeal rejected, on 19 May 2005, both the Central Authority's appeal and the first applicant's cross-appeal and upheld the impugned ruling of the Amsterdam Regional Court of 2 February 2005, albeit on different grounds. It took note, *inter alia*, of the lower Turin court's judgment of 22 February 2005 (*supra*) and subsequent quashing thereof by the Turin appeals court on 20 April 2005. It inferred from the latter that Noa, if returned to Italy, would be placed in the custody of her father. The court further had regard to the Dutch Child Care and Protection Board's (*Raad voor de Kinderbescherming*) expert opinion setting out, *inter alia*, the Board's advice not to return Noa to Italy, notwithstanding the illegal nature of the manner in which she had been taken away from that country, in view of the stability which Noa had found in the **Netherlands**.

The Amsterdam Court of Appeal went on to consider that Italy was to be seen as Noa's place of habitual residence within the meaning of the Hague Convention; that the Turin appeals court had failed to hear the first applicant in the proceedings culminating in its judgment of 20 April 2005; that that court had based itself on partly untruthful facts submitted by Noa's father; that, as a result of this mendacious conduct in the Turin proceedings and the misinformed conclusions which that court had drawn from it, Noa would risk being placed in an intolerable situation if returned to Italy, *i.e.* would find herself in the midst of her parents' troublesome relationship; and that such a situation, in which Noa would be forced to give up

her stable life in the **Netherlands** for the uncertainty awaiting her upon her return to Italy, would not be beneficial to her.

The Court of Appeal thus upheld the Amsterdam Regional Court's decision of 2 February 2005 that Article 13 (b) of the Hague Convention precluded Noa from being taken back to her habitual place of residence, being Italy, for fear that she would be exposed to physical or psychological harm or otherwise placed in an intolerable situation.

The Court of Appeal did not make mention of the proceedings lodged by the first applicant with the Utrecht Regional Court for changing parental authority over Noa, in which proceedings a *pro forma* hearing had been scheduled for 29 April 2005 according to the Amsterdam Regional Court in its decision of 2 February 2005.

No reference was made in any subsequent proceedings to those proceedings.

On 16 June 2005 Noa's father lodged an appeal in cassation with the **Netherlands** Supreme Court (*Hoge Raad*) arguing, *inter alia*, that the Amsterdam Court of Appeal had erred in finding that Noa was at risk of being placed in an intolerable situation if returned to Italy.

The Central Authority, by letter of 12 July 2005, informed the Supreme Court that it refrained from lodging an appeal in cassation on behalf of Noa's father. It did, however, endorse the appeal in cassation lodged by him.

On 12 July 2005 the first applicant responded to the cassation appeal and lodged a cross-appeal in cassation in case the principal appeal was successful (*voorwaardelijk incidenteel cassatieberoep*). The first applicant argued that the Amsterdam Regional Court, in its judgment of 2 February 2005, had erred in finding that Noa's removal from Italy by her mother had been wrongful within the meaning of Article 3 of the Hague Convention.

Noa's father responded to the first applicant's cross-appeal on 2 August 2005.

On 20 January 2006 the Supreme Court quashed the impugned judgment and remitted the case to the Court of Appeal of The Hague. It considered that Article 13 (b) of the Hague Convention, which provides for an exception to the general rule underlying the Hague Convention that wrongfully retained or removed children are to be returned to the States where they had their habitual residence, should be applied restrictively. In this regard the Supreme Court referred to the advisory opinion of the advocate-general and references made therein to, *inter alia*, relevant sections of the Explanatory Report to the Hague Convention (see relevant sections below). The Supreme Court held that under the Hague Convention the requested State should refrain from considering that the criteria of Article 13 (b) are fulfilled on the basis of its own findings on the merits that the child's interests are better served in the requested State than in the requesting State. The Amsterdam Court of Appeal had done exactly that, the Supreme Court held.

The first applicant's cross-appeal was rejected.

The Court of Appeal of The Hague, in an interim decision of 20 September 2006, decided that Noa should be heard.

That hearing having taken place and an attempt at mediation having failed, the Court of Appeal, by decision of 17 January 2007, quashed the impugned decision of the Amsterdam Regional Court of 2 February 2005 and ordered the first applicant to return Noa to the latter's habitual residence in Italy within one week of pronouncement of the judgment. It was considered that in her interview with the judges (which had taken place *in camera* just before the hearing) Noa had demonstrated a level of maturity justifying that her opinion be taken into consideration. Noa had shown that she did not have a negative attitude towards her father, that she appeared to be unharmed in her relationship with both parents and that her father had sufficiently demonstrated that he was able to provide her with a positive upbringing and to look after her well. Furthermore, no objective obstacles were found to exist for the first applicant to travel to Italy and visit her daughter as often as possible there.

It was thus the Court of Appeal's conclusion that the situation as set out in Article 13 (b) of the Hague Convention did not arise.

On 14 February 2007 the first applicant lodged an appeal in cassation against that decision arguing, *inter alia*, that Article 8 of the Convention stood in the way of Noa's return to Italy and that Noa had settled in the **Netherlands** – making that country her place of habitual residence in terms of the Hague Convention. It was further argued in this latter context that the efforts to return Noa to Italy despite her being settled in the **Netherlands** amounted to violations of Articles 12 § 2, 13 (b) and 20 of the Hague Convention.

On 7 March 2007 Noa was returned to Italy.

In a decision of 28 September 2007 the Supreme Court rejected the first applicant's appeal in cassation. It held that, after a wrongful removal, the child's habitual residence, as defined by Article 4 of the Hague Convention and *in casu* deemed to be Italy, did not change due to the lapse of time and consequent settlement of the child in another State. This could only be different where the parent invested with parental authority from whom the child had been removed had acquiesced in the situation and any efforts made to return the child to its place of habitual residence had no prospect of restoring the situation prior to the wrongful removal.

The Supreme Court further held that Article 12 § 2 in conjunction with Article 13 (b) of the Hague Convention only applied where a request for the return of a child, settled in its new environment, had been lodged more than one year after the wrongful removal, which was not the case here.

Furthermore, the Supreme Court held that the mere settlement of the child in the receiving State could not, *ipso facto*, lead to the situation described in Article 13 (b) of the Hague Convention. The same held true for Article 20 of the Hague Convention.

As regards Article 8 of the Convention, the Supreme Court found, with reference to the Strasbourg Court's findings in the case of *Ignaccolo-Zenide v. Romania*, (no. 31679/96, § 95, ECHR 2000-I), that a correct reading of that provision in situations like the one at issue prescribed that the authorities of the requested State should in principle abide by the Hague Convention where matters concerned by it were raised. Consequently, no violation of Article 8 was found in the instant case, in the light of the Supreme Court's findings regarding the application of the Hague Convention.

On 23 March 2007, just over two weeks after Noa's return to Italy and pending the proceedings in the **Netherlands**, the first applicant instituted proceedings before the Turin Juvenile Court, requesting a number of urgent interim measures, *inter alia* an investigation by the Italian Child Care and Protection Board into Noa's wellbeing, the restoration of the first applicant's shared parental authority, the establishment of a right to communicate with Noa, as well as the establishment of an arrangement concerning access to Noa in Italy and, during holidays and weekends, in the **Netherlands**.

The second applicant's father opposed these requests on 29 May 2007.

B. Events after the introduction of the application

On 14 October 2008 and in reply to questions put to her pursuant to Rule 49 § 3 (a) of the Rules of Court, the first applicant submitted the following.

The first question regarded the outcome of the request of 23 March 2007 for interim measures lodged by the first applicant on the basis of article 317*bis* of the Italian Civil Code. The request was aimed at, *inter alia*, reverting the *status quo ante* where both the first applicant and Noa's father had parental authority over Noa (it is reiterated that the Turin appeals court had granted Noa's father sole parental custody on 20 April 2005) and ordering an investigation into Noa's wellbeing by the Italian social services (*Servizio Sociali Assistenziale*).

The Turin Juvenile Court, after having held several hearings, had reached a decision on 10 June 2008. It had granted parental authority over Noa to the Italian social services. Both the first applicant and Noa's father were to receive psychological assistance in order to improve their contacts with their daughter. Meetings between the first applicant and Noa were to take place in the presence of the social services, which were also to decide on the frequency of these meetings. Reports on these meetings were to be drafted by the social services by 31 December 2008, for the consideration of the Turin Juvenile Court. The applicant further informed the Court that she had lodged an appeal against this decision. These proceedings were still pending on 14 October 2008.

The first applicant further informed the Court that Noa's current place of residence was with her father in Italy.

In reply to a final question whether there was any other recent information of relevance to the Court, the first applicant submitted that the relationship between her and her daughter had suffered due to the cumbersome and sparse contacts between them following Noa's return to Italy on 7 March 2007.

C. Relevant international law

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, ratified by the **Netherlands** and Italy, 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 6

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

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

Article 11

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

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

Article 12

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

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

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

Article 13

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

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

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

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

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

Article 19

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

Article 20

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

Paragraph 34 of the Explanatory Report on the Hague Convention drafted by Elisa Pérez-Vera in 1982, states as follows:

"To conclude our consideration of the problems with which this paragraph ['D. Exceptions to the duty to secure the prompt return of children'] deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so 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. In fact, the

Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition.

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."

Furthermore, paragraphs 9, 19 and 124 of the Explanatory Report, in so far as relevant, read as follows:

"9. The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent....

19. In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities of the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken – in which case the violated custody rights were exercised *ex lege* – as to removal in breach of a pre-existing custody decision.

124. This provision [article 19] expresses an idea which underlies the whole of the Convention ... This article is restricted to stating the scope of decisions taken regarding the return of the child which the Convention seeks to guarantee, a return which, so as to be 'forthwith' or 'speedy', must not prejudge the merits of custody rights; this provision seeks to prevent a later decision on these rights being influenced by a change of circumstances brought about by the unilateral action of one of the parties."

COMPLAINTS

The applicants complained under Article 8 of the Convention of a violation of their right to respect for their family life by the **Netherlands** authorities' decision to separate them. In that respect the applicants complained about an unrealistic, incorrect (too strict) and legalistic interpretation of the "habitual residence" notion and of an erroneous interpretation of the

exemption clause in Article 13 (b) of the Hague Convention, which amounted to a breach of Article 8.

Secondly, the applicants complained that the **Netherlands** Supreme Court had failed to ensure fair and expeditious proceedings for Noa's return to Italy which, given the length of the proceedings, entailed a violation of both Articles 6 and 8.

Thirdly, the applicants claimed that the failure to remedy procedural deficiencies constituted a violation of Article 6, in that Noa's return to Italy was ordered regardless of the fact that the first applicant had not been heard before the Turin appeals court prior to its decision to attribute parental authority over Noa to the child's father.

Lastly, the applicants complained that the Supreme Court had not discharged itself of its obligation under Article 3 of the Convention on the Rights of the Child of 20 November 1989 to take into account the interests of the child.

THE LAW

A. The first applicant's ability to represent her daughter in the proceedings before the Court

The first applicant contended that, although she no longer had parental authority over her daughter, she was still entitled to bring proceedings on her behalf before the Court. She noted that she had lost custody of her child as a result of court proceedings in Italy that had allegedly contravened the Convention and recalled that prior to the retention of the child, the two parents had had joint custody of their child. Neither of them had superior parental rights over their daughter.

The Court reiterates that in principle a person who is not entitled under domestic law to represent another, or whose entitlement to representation is doubtful, may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a parent who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. In such cases, the standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the child's behalf, too, in order to protect the child's interests (see *Iosub Caras v. Romania*, no. 7198/04, § 21, 27 July 2006 and further references therein).

This principle applies in the present case, in particular now that the first applicant has also contested the way in which the Italian courts decided on the custody rights over Noa, which, in the first applicant's view, violated the applicants' Article 8 rights.

The Court finds that the first applicant has standing to act on her daughter's behalf.

B. Alleged violation of Article 8 of the Convention and the Convention on the Rights of the Child of 20 November 1989

The applicants contended that the manner in which the **Netherlands** Supreme Court had applied the Hague Convention constituted an interference with their right to respect for their family life that was not in accordance with the law or necessary in a democratic society and

that that Court had failed to take into consideration the interests of the child as required by Article 3 of the United Nations Convention on the Rights of the Child.

These complaints merit joint examination.

The applicants invoked Article 8 of the Convention, which reads in its relevant parts:

“1. Everyone has the right to respect for his ... 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) general principles

In its recent ruling in *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131 – 140, 6 July 2010, with further references) the Court articulated and summarized a number of principles that have emerged from its case-law on the issue of the international abduction of children, as follows:

(i) The Convention cannot be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II).

(ii) The positive obligations that Article 8 of the Convention imposes on the States with respect to reuniting parents with their children must therefore be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (*Maire v. Portugal*, no. 48206/99, § 72, ECHR 2003-VII and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I).

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

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

(v) “The child’s interests” are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to have his or her development in a sound environment ensured (see, among many other

authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006). The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.

(vi) A child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see in particular Articles 12, 13 and 20), based on considerations concerning the actual person of the child and its environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it (see *Maumousseau and Washington*, cited above, § 72).

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

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

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

The Court notes, firstly, that it is common ground that the tie between the first and second applicant comes within the sphere of family life under Article 8 of the Convention. It reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (see, amongst many other authorities, *Neulinger and Shuruk v. Switzerland*, cited above, § 90, 6 July 2010; *Maumousseau and Washington c. France*, cited above, §§ 58-59, 2 June 2008; and *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

The events under consideration in the instant case amounted to an interference with the applicants' right to respect for their family life, as it restricted the enjoyment of each other's company.

The Court must accordingly determine whether the interference in question was “necessary in a democratic society” within the meaning of the second paragraph of Article 8 of the Convention, interpreted in the light of the above-mentioned international instruments, the decisive issue being whether a fair and proportionate balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters (see above: “general principles”, under (iv)).

The Court has previously found that the Hague Convention system does not apply its basic rule – that a child should be returned to its state of habitual residence, *i.e.* to the *status quo ante* – automatically or mechanically (see above: “general principles”, under (vi)). The Hague Convention’s premise is to avoid permitting one parent to create unilaterally, by wrongfully removing a child, a situation favourable to him or herself in respect to the child. There exist in the Hague Convention several exceptions to this basic rule, amongst others the one laid down in Article 13 (b), which exceptions are, however, to be interpreted restrictively according to the Explanatory Report on the Hague Convention (relevant sections of which are cited above) so as not to impede its basic rule.

In this context the Court considers that the **Netherlands** authorities engaged in a meticulous assessment of the matter at issue, leading to the conclusion that Noa had been wrongfully removed from her place of habitual residence, within the meaning of Article 3 of the Hague Convention, by the first applicant, but that there were no reasons to believe that Noa would be placed in an intolerable situation, as described in Article 13 (b), upon her return to Italy.

The Court cannot disagree with the national authorities’ findings that Noa’s removal from Italy was wrongful within the meaning of the provisions of the Hague Convention and that the sheer lapse of time subsequently spent by Noa in the **Netherlands** could not change that finding for purposes of the Hague Convention.

As regards the application of the exception clause in Article 13 (b) of the Hague Convention, the Court considers, having regard to the authorities’ margin of appreciation, that the national courts’ decision to order Noa’s return to Italy based on that provision did not fail to strike a fair balance between, on the one hand, the mother’s and Noa’s shared interest and right to continue to exercise family life in the **Netherlands** and, on the other hand, Noa’s own interest, recognised as a child’s primordial interest by the Hague Convention, not to be wrongfully removed and retained from those lawfully attributed with custody over her; *in casu* her father. The Court attaches importance in this respect to the fact that Noa herself was heard by a Court of Appeal to determine any issues that might arise under Article 13 (b) of the Hague Convention, it being understood that that court had first satisfied itself that Noa demonstrated a level of maturity justifying that her opinion be taken into consideration.

Furthermore, the Court notes that the first applicant continued parental authority proceedings in Italy after Noa’s return to that country. Moreover, it cannot be said that pending the proceedings in Italy relating to parental authority and access the first applicant was completely deprived of any possibilities to exercise family life with her daughter.

Accordingly, the Court considers that the national authorities’ decisions were based on reasons that were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8. In particular, regard being had to the authorities’ margin of appreciation in the matter, the interference complained of was not disproportionate to the legitimate aim pursued.

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

C. Alleged violation of Article 6 in conjunction with Article 8 – length of the proceedings

The applicants contended that the competent **Netherlands** authorities failed to adjudicate on Noa's possible return to Italy expeditiously, resulting in a violation of their rights under Article 6 in conjunction with Article 8.

Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlende v. France* [GC], no. 30979/96, § 43, 27 June 2000). Regarding this latter element, special diligence is required in child custody disputes (see *Laino v. Italy* [GC], no. 33158/96, § 18, 18 February 1999).

In cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her. In proceedings under the Hague Convention this is all the more so, as Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay (see *Ignaccolo-Zenide*, cited above, § 102).

Turning to the circumstances of the instant case the Court observes that the proceedings commenced on 6 December 2004 when Noa's father filed his request under the Hague Convention in the **Netherlands** and that they ended on 28 September 2007 when the Supreme Court rendered its second decision. The proceedings thus lasted a total of two years, nine months and 22 days.

The Court notes that the proceedings involved five court instances; that appeal in cassation was lodged twice; that unsuccessful attempts at mediation took place; that the case was of a sensitive nature in need of careful scrutiny due to the profound consequences its outcome had on the lives of those involved, that it necessitated harmonious interpretation of different legal principles emanating from international legal instruments – the Hague Convention and the Convention on the Rights of the Child – and, lastly, that the applicants never availed themselves of their right to request, under Article 11 of the Hague Convention, a statement of reasons for delay that they might have believed existed on the part of the **Netherlands** authorities.

Taking all the particular circumstances of the case into account, and bearing in mind that no protracted periods of inactivity attributable to the domestic authorities have been identified, the Court finds that the overall length of the proceedings did not exceed a reasonable time.

It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Alleged violation of Article 6 – fairness of the proceedings

The applicants complained that by ordering Noa's return to Italy even though they had been made aware of alleged deficiencies in earlier Italian parental authority proceedings, the **Netherlands** authorities breached the applicants' right to a fair trial as guaranteed by Article 6 of the Convention which, in so far as relevant, provides as follows in its first paragraph:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Court observes that the Hague Convention is not essentially concerned with the merits of custody rights. As set out in paragraphs 9, 19 and 124 of the Explanatory Report on that Convention (see above), any debate on the merits of the parental authority claim should be left to the authorities of the State where the child had its habitual residence prior to removal. Accordingly, the proceedings previously conducted in Italy relating to the question of parental authority were not the **Netherlands** authorities' concern for purposes of the Hague Convention proceedings conducted before the **Netherlands** courts. Consequently, the fact that the first applicant had not been heard before the Turin appeals court did not affect the fairness of the proceedings in the **Netherlands**.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Santiago Quesada Josep Casadevall
Registrar President

VAN DEN BERG AND SARRÌ v. THE **NETHERLANDS** DECISION