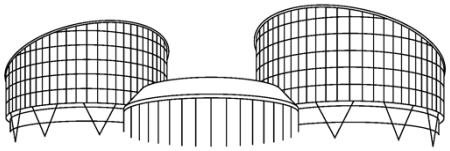

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ADŽIĆ v. CROATIA (No. 2)

(Application no. 19601/16)

JUDGMENT

STRASBOURG

2 May 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Adžić v. Croatia (no. 2),

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

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Gilberto Felici, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 2 April 2019,

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

PROCEDURE

1. The case originated in an application (no. 19601/16) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an American national, Mr Miomir Adžić ("the applicant"), on 7 April 2016.

2. The applicant was represented by Ms I. Bojić, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, that in the proceedings for the return of his son the domestic courts had not held a single hearing and that by refusing to order his son's return to the United States those courts had breached his right to respect for his family life.

4. On 1 September 2016 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Charlotte, North Carolina (the United States of America).

6. The case concerns "non-contentious" proceedings for the return of the child instituted on 13 October 2011 in which the domestic courts refused to order the return of the applicant's son to the United States after the child's

mother (a Croatian national and the applicant's former wife) had in August 2011 "wrongfully retained" him in Croatia within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention").

7. Specifically, on 15 March 2012 the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*), without holding a single hearing, dismissed the applicant's request for the return of the child. Following an appeal by the applicant, on 2 July 2012 the Zagreb County Court (*Županijski sud u Zagrebu*) quashed the Municipal Court's decision and remitted the case. In so deciding it, *inter alia*, instructed the Municipal Court to hold a hearing. The relevant part of the County Court's decision reads as follows:

> "... the first-instance court based [its] decision in part on undisputed facts, and in the relevant part on the arguments and evidence submitted by the counterparty ... even though it failed to give an opportunity to the petitioner to comment on them ... [T]herefore, the petitioner's appeal has to be allowed, the first-instance decision quashed and the case remitted ...
>
> In the fresh proceedings, the first-instance court shall correct the above error by scheduling a hearing (section 309(5) of the Family Act) at which it shall, together with the parties (sections 297-298 of the Civil Procedure Act), examine the circumstances of the case."

8. In the fresh proceedings the Municipal Court obtained an opinion from a forensic expert in psychiatry on whether returning the child to the United States would expose him to psychological harm – that is, to a risk envisaged in Article 13 paragraph 1 (b) of the Hague Convention (see paragraph 27 below with further references). On 21 May 2014 that court, without holding a hearing, again dismissed the applicant's request for his son to be returned to the United States. This decision was upheld on appeal by the Zagreb County Court on 22 October 2014. The Municipal Court justified its decision not to hold a hearing in the following way:

> "... the court did not take evidence by hearing the parties because that would significantly protract the proceedings, bearing in mind that in their testimonies – precisely because they have a personal stake in the outcome of the proceedings and their objectivity is very questionable – the parties mostly want to praise and present themselves in the best light while discrediting the opposing party ... [S]uch testimonies are [therefore] generally not at all suitable [in terms of assisting a court in establishing the facts of a case] and reaching a decision."

9. Those return proceedings (see paragraphs 6-8 above) were already subject to the examination by the Court. In the first *Adžić* case the Court in the judgment of 12 March 2015 held that the domestic authorities had failed to act expeditiously in the proceedings in question. The Court had accordingly found a violation of the State's positive obligations under Article 8 of the Convention (see *Adžić v. Croatia*, no. 22643/14, §§ 96-99, 12 March 2015). At the time the Court adopted its judgment, i.e. 17 February 2015, the proceedings were still pending before the

Constitutional Court (*Ustavni sud Republike Hrvatske*) upon a constitutional complaint lodged by the applicant.

10. In his constitutional complaint the applicant complained of a violation of his right to fair procedure, in particular of a breach of his right to an oral hearing and a breach of the principle of equality of arms and the adversarial principle. More specifically, the applicant submitted that the ordinary courts had not held a single hearing in the case and that the first-instance court had not informed him of its decision to obtain an opinion from a forensic expert in psychiatry, thus preventing him from objecting to the choice of expert. He further complained that he had not been involved in the expert's assessment, even though he had previously expressed his willingness to make himself available for such an assessment. The applicant also complained that the domestic court's refusal to order the return of his son constituted a violation of his right to respect for family life.

11. By a decision of 28 October 2015 the Constitutional Court dismissed the applicant's constitutional complaint. It served its decision on his representative on 4 December 2015. The Constitutional Court examined only the alleged violation of the applicant's right to fair procedure, because it considered that the alleged violation of his right to family life had been addressed by the Court in the first *Adžić* case (see paragraph 9 above).

12. The other relevant facts of the case are set out in detail in the Court's judgment in the first *Adžić* case (see *Adžić*, cited above, §§ 6-57).

II. RELEVANT DOMESTIC LAW

A. The Family Act

13. The relevant provisions of the Family Act of 2003 (*Obiteljski zakon*, Official Gazette no. 163/03 with subsequent amendments), which was in force between 22 July 2003 and 1 September 2014, provided as follows.

14. Sections 306-335 set out special rules on the non-contentious procedure applicable in judicial proceedings in family matters.

15. Section 320 provided that, unless those rules provided otherwise, the rules of regular civil procedure were applicable *mutatis mutandis* in such proceedings. This section thus effectively excluded the application of general rules of non-contentious procedure set out in the Judicial Non-contentious Procedure Act of 1934 (see paragraphs 23-26 below).

16. Section 308 contained some technical rules concerning hearings. Section 309 provided:

- that a court could also render a decision without holding an oral hearing if it considered that the hearing was not necessary (paragraph 1),

- that a court could also base its decision on evidence that had not been presented before the same court (paragraph 2),

- that parties and other participants in the proceedings could also make their statements in writing (paragraph 3),
- that parties and other participants in the proceedings could make their statements even when other parties or participants were not present, and that the court did not always have to give the other party an opportunity to comment on such statements (paragraph 4).

However, paragraph 5 of that section provided that paragraphs 1 to 4 did not apply when there was a dispute between the parties regarding the decisive facts.

17. Section 319 provided that a petition to reopen proceedings was not available against a final decision adopted in non-contentious proceedings in family matters.

B. The Civil Procedure Act

18. The relevant provisions of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77 with subsequent amendments, and Official Gazette of the Republic of Croatia no. 53/91 with subsequent amendments), which has been in force since 1 July 1977, provide as follows.

19. Section 250 provides that a court shall commission an expert opinion when the establishment or clarification of certain facts requires expert knowledge which the court does not possess.

20. Section 251(2) provides that before appointing an expert, the court must consult the parties, but in urgent cases it may do so without consulting them beforehand.

21. Section 260(1) provides that it is for the court to decide whether the expert shall present his or her findings and opinion only orally at the hearing, or also in writing before the hearing.

22. Section 261(4) provides that if the expert opinion is contradictory or has shortcomings, or if there is reasonable suspicion as regards its accuracy, an opinion from another expert shall be obtained only if those shortcomings or suspicion cannot be remedied by hearing the expert again.

C. The Judicial Non-contentious Procedure Act

23. Relevant provisions of the Judicial Non-contentious Procedure Act (*Zakon o sudskom vanparničnom postupku*, Official Gazette of the Kingdom of Yugoslavia no. 175/34), which has been applicable in Croatia since 1934, provide as follows.

24. Section 21(1) provides that, unless the Act provides otherwise, the rules of regular civil procedure are applicable *mutatis mutandis* in non-contentious proceedings.

25. Section 21(4) provides that, in principle, decisions in non-contentious proceedings are adopted without a hearing. If oral hearings are held, they are not public.

26. Section 21(5) provides that the special formalities of regular civil proceedings do not apply as regards hearing the parties and other participants and making inquiries. Parties give statements orally or in writing. When a number of persons have to be heard, each may be heard without the others being present.

III. RELEVANT INTERNATIONAL LAW

27. The text of Article 12 and of Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction, which Convention entered into force in respect of Croatia on 1 December 1991, is quoted in the Court's judgment in the first *Adžić* case (see *Adžić*, cited above, § 62).

28. The relevant part of the Guide to Good Practice Child Abduction Convention: Part II - Implementing Measures, published in 2003 by the Hague Conference on Private International Law, reads as follows:

> **6. SUMMARY: LEGAL PROCEDURAL MATTERS**
>
> "As far as compatible with domestic law, including due process considerations, provisions in implementing legislation to ensure that Hague return applications are dealt with promptly and expeditiously may include:
>
> ...
>
> 6.5 Rules of evidence
>
> 6.5.1 ...
>
> 6.5.2 Documentary evidence: considering Convention procedures allowing documentary evidence from requesting States and thereby eliminating the need to hear oral evidence; save in exceptional cases, placing greater reliance on documentary evidence and sworn statements and less reliance on oral evidence; and in cases where the issue demands oral evidence (conflict in affidavits which goes to a critical point), keeping oral evidence time limited and focused upon the issue.
>
> 6.5.3 Personal appearance of the applicant: considering whether a requirement for the applicant's personal appearance at the proceedings would cause undue delay in the consideration of the case.
>
> ...
>
> **6.5 Rules of evidence**
>
> Rules and practices concerning the taking and admission of evidence, including the evidence of experts, should be applied in return proceedings with regard to the necessity for speed and the importance of limiting the enquiry to the matters in dispute which are directly relevant to the issue of return.
>
> ...

6.5.2 Documentary evidence

'*Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody.*'

The Convention relaxes certain evidentiary rules as a way of speeding up return proceedings. Article 30 of the Convention is intended to facilitate the introduction of documentary evidence, including affidavits. Under Article 30, any application submitted to the Central Authority or petition submitted to the court, along with any documents or information appended thereto, are admissible in court. States are encouraged to ensure, where necessary through implementing legislation, that such documentary evidence can be given due weight under the national evidence rules.

Hague return cases lend themselves to determination by summary proceedings. A full trial, consisting of an evidentiary hearing, will normally not be necessary or desirable. Legislation may provide that affidavit evidence, transcripts of oral evidence and legal argument from the requesting State are admissible as evidence of fact. Rules adopted in several jurisdictions provide for expedited hearings to this effect.

In a number of countries, Hague return proceedings are now conducted primarily on the basis of written submissions and evidence. In order to expedite proceedings, rules have been developed in some countries (often by the judiciary) to define and limit the circumstances in which oral evidence may be admitted. Oral testimony does not necessarily cause undue delay under strict judicial control. Much may depend on the issue. For example, in some jurisdictions oral evidence is more likely to be admitted if there is conflicting documentary evidence by the parties which cannot be resolved without cross-examination or oral evidence. If that is the case, as a general matter, both parties should be given a chance to be heard.

In some jurisdictions where the Convention is functioning very effectively, hearings may be based on affidavits as evidence-in-chief in most instances and conducted without oral testimony, particularly from expert witnesses. When oral evidence is given, usually where there is an unresolvable clash in affidavit evidence on a crucial point, it is highly focused and time limited. In other States no special rules exist. In many systems the individual judge trying the case has a degree of discretion.

...

6.5.3 Personal appearance of the applicant

Due to the international character of Convention cases and the geographical distances involved, the legal requirement in some countries of the applicant's personal appearance at the proceedings in the requested State may cause delay in the proceedings and add excessive expenditure for the applicant. A requirement for the applicant's personal appearance at the proceedings may, in some cases, have the effect of rendering the Convention remedy unavailable. In many instances it may not be necessary for both parents to be physically present at a return hearing, but rather the left-behind parent could be represented to assure full consideration of relevant issues.

> The use of affidavit evidence for overseas applicants may facilitate the proceedings. In such cases it is important that no adverse inference is to arise because the overseas applicant is unavailable for cross-examination on his or her affidavit evidence. To this end, some jurisdictions have court rules which allow for cross-examination of the applicant in his/her own jurisdiction with transmission of the transcript to the requested State for use at the hearing of the application for return."

29. The International Child Abduction Database (INCADAT) is the leading legal database on the Hague Convention. It was established by the Permanent Bureau of the Hague Conference on Private International Law with the object of making accessible on the Internet many of the leading judicial decisions taken by national courts around the world in the application of the Hague Convention, thereby facilitating its uniform interpretation. INCADAT is a free and comprehensive tool for researching cases, case summaries and legal analysis of the application of the Hague Convention. The website also provides additional material relevant to this area of law. For example, it contains case-law analysis sorted by legal issues. This part of the database under the Oral Evidence category states:

> "To ensure that Convention cases are dealt with expeditiously, as is required by the Convention, courts in a number of jurisdictions have restricted the use of oral evidence, ...
>
> ...
>
> Under the rules applicable within the European Union for intra-EU abductions (Council Regulation (EC) No 2201/2003 (Brussels II a)) Convention applications are now subject to additional provisions, including the requirement that an applicant be heard before a non-return order is made [Article 11(5) Brussels II a Regulation], and, that the child be heard 'during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity' [Article 11(2) Brussels II a Regulation]."

IV. RELEVANT EUROPEAN UNION LAW

30. The relevant provision of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as "Brussels II bis Regulation"), namely Article 11 paragraph 5, reads as follows:

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

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 AND ARTICLE 8 OF THE CONVENTION

31. The applicant complained under Article 6 § 1 of the Convention that the proceedings for return of the child had been unfair. In particular, he complained that (a) the adversarial principle had been breached, in that the first-instance court had not informed him of the decision to obtain an opinion from a forensic expert, and he had not been involved in the expert's assessment; and (b) there had been a breach of his right to an oral hearing, in that the courts had not held a single hearing in the case. The relevant part of Article 6 § 1 of the Convention reads as follows:

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

32. The applicant also complained that by refusing to order the return of his son, the domestic courts had violated his right to respect for his family life. He relied on Article 8 of the Convention, which reads as follows:

> "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. Admissibility

33. The Government disputed the admissibility of the application, arguing that it was substantially the same as the applicant's earlier application (see paragraph 9 above). They also argued that the complaint under Article 8 was incompatible *ratione materiae* with the provisions of the Convention.

1. Whether the application is substantially the same as an earlier application examined by the Court

(a) Parties' submissions

34. The Government submitted that the present application was inadmissible, as it was substantially the same as the application in the first *Adžić* case. Specifically, they averred that the two applications concerned the same facts and, essentially, the same complaints.

35. The applicant replied that in his application in the first *Adžić* case he had complained under Article 6 § 1 and Article 8 of the Convention of the

excessive length of the proceedings for the return of his son, and under Article 13 that he had not had an effective domestic remedy for those Convention complaints. He had not raised any other complaints under Article 6 § 1, because at that time the proceedings had still been ongoing (see paragraph 11 above), and such a complaint would have been premature.

(b) The Court's assessment

36. The Court notes that in the first *Adžić* case the applicant complained that the domestic authorities in the above proceedings for the return of the child (paragraphs 6-8) had failed to secure his right to respect for his family life guaranteed by Article 8 of the Convention, in that they had not acted expeditiously in those proceedings (see *Adžić*, cited above, § 66). He also complained that the length of those proceedings was incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, and under Article 13 that he had not had an effective remedy for his Convention complaints (ibid.). Those proceedings were still ongoing at the time the Court adopted its judgment in the first *Adžić* case on 17 February 2015 (see paragraph 9 above).

37. In the present case, the applicant complained under the same Articles, but of the final decision rendered in those proceedings refusing his request for the return of his son (Article 8, see paragraph 32) and of the unfairness of the proceedings (Article 6 § 1, see paragraph 31), it being understood that the proceedings had ended in the meantime.

38. Having regard to its case-law on the matter (see *Previti v. Italy* (dec.), no. 45291/06, §§ 293-294, 8 December 2009; *Kafkaris v. Cyprus* (dec.), no. 9644/09, § 68, 21 June 2011; *Kuppinger v. Germany*, no. 62198/11, §§ 87-92, 15 January 2015; and *Tsartsidze and Others v. Georgia*, no. 18766/04, §§ 64-66, 17 January 2017), the Court finds that the facts complained of in the present case (the domestic courts' refusal to order the return of the applicant's son and the unfairness of the return proceedings) are not the same as in the first *Adžić* case (the duration of the proceedings). This means that the two cases do not concern the same complaints, and consequently that they are not substantially the same.

39. It follows that the Government's objection must be dismissed.

2. Compatibility ratione materiae

(a) Parties' submissions

40. The Government argued that the Court was not competent to examine the applicant's complaint that the domestic courts had wrongly interpreted and misapplied the relevant provisions of the Hague Convention and thereby violated Article 8 of the present Convention.

41. The applicant replied that in a number of cases where applicants, relying on Article 8 of the present Convention, had complained of a

violation of their right to family life, the Court had *de facto* interpreted the Hague Convention and examined its application by domestic courts.

(b) The Court's assessment

42. The Court firstly reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply the domestic law, and rules of general international law and international treaties (see, for example, *X v. Latvia* [GC], no. 27853/09, § 62, ECHR 2013; and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 100, ECHR 2010). The Court's role is confined to ascertaining whether those rules are applicable and whether their interpretation is compatible with the Convention (see *Neulinger and Shuruk*, loc. cit.).

43. The Court further notes that in examining whether an interference with one's right to respect for family life was justified, it is firstly required to determine whether it can be regarded as lawful for the purposes of Article 8 § 2 of the Convention, given that the decision occasioning it must be "in accordance with the law". The fact that the Court's power in reviewing the lawfulness of an interference is limited to cases of flagrant non-observance or arbitrariness (see, for example, *Malinin v. Russia*, no. 70135/14, § 92, 12 December 2017) does not mean that it has no jurisdiction to examine complaints under Article 8 of the Convention where the applicants argue, *inter alia*, that the domestic courts wrongly interpreted or misapplied the domestic or international law.

44. What is more, the Court has repeatedly held that in matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction (see *Neulinger and Shuruk*, cited above, § 132 and the cases cited therein). Therefore, in international child abduction cases where the applicants complain under Article 8 of the Convention and argue, *inter alia*, that the domestic courts wrongly interpreted or misapplied the Hague Convention, such arguments must not be understood literally, but in the light of the above case-law of the Court.

45. It follows that the Government's objection as regards incompatibility *ratione materiae* must be dismissed.

3. Conclusion as regards admissibility

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

B. Merits

1. *Alleged violation of Article 6 § 1 of the Convention on account of the lack of an oral hearing*

(a) Parties' submissions

(i) The applicant

47. The applicant submitted that in a situation such as the one in the present case, where the proceedings for the return of the child had before ordinary courts lasted three years, instead of six weeks as required by the Hague Convention, there was no justification for the domestic courts not scheduling even a single hearing with a view to hearing the parties and establishing the relevant facts. The aim of the recommendation in various international materials referred to by the Government (see paragraphs 28-29 above and paragraph 52 below), suggesting that domestic courts rely primarily on documentary evidence, was to speed up return proceedings under the Hague Convention. However, the Government's argument based on that recommendation was of little relevance in the present case, where the length of the return proceedings had been excessive. What is more, the facts of cases examined by the Court concerning the application of the Hague Convention suggested that the practice of all domestic courts in the Contracting States was to hold a hearing in such proceedings.

48. The applicant particularly contested the Government's argument that the documentary evidence submitted by the parties had been sufficient for the domestic court to fully establish the facts of the case (see paragraph 51 below). In his view, the mere fact that the proceedings before ordinary courts had lasted three years suggested that those courts had been unable to establish all the relevant facts with the required degree of certainty. In the same vein, he criticised the Government's argument (see paragraph 54 below) that, while asking that an oral hearing be held (see *Adžić*, cited above, § 29), he had not specified what evidence should be taken at that hearing. For the applicant, requesting a hearing had implied that he wanted to be heard before the court. What is more, he had explicitly suggested that the recordings of his conversations via Skype with his son (see *Adžić*, § 27) be played and examined at a hearing.

49. The applicant further averred that he should have been heard, if for no other reason than because such an opportunity had indirectly been given to the opposing party, who had been heard on two occasions, by the local social welfare centre and then by the forensic expert (see *Adžić*, §§ 32 and 39). This procedural inequality could have been remedied by holding an oral hearing and allowing him to tell "his side of the story".

50. Moreover, the applicant could not have anticipated that the first-instance court would depart from its "regular" practice and dispense

with a hearing. In such a situation, that court should at least have informed the parties that a hearing would not be held and invited them to submit their closing arguments.

(ii) The Government

51. The Government submitted that Article 6 § 1 of the Convention guaranteed the right to an oral hearing unless there were exceptional circumstances justifying dispensing with such a hearing. They argued that holding a hearing in the present case had not been necessary because the documentary evidence submitted by the parties had been sufficient for the domestic courts to establish the facts of the case, it being understood that it was for those courts to decide which evidence to take and to assess the evidence taken.

52. The Government further submitted that the domestic courts had not been required to hold a hearing, either under the relevant domestic law (see paragraphs 13-14, 16, 23 and 25 above) or under the Hague Convention. Specifically, the Government averred that nothing in the Hague Convention or the preparatory works thereto indicated that an oral hearing was mandatory. On the contrary, the relevant international materials (see paragraphs 28-29 above) suggested that hearings and parties' testimonies were not recommended in proceedings for the return of a child under the Hague Convention. The Government referred in particular to the Guide to Good Practice under the Hague Convention, which placed emphasis on documentary evidence, thereby eliminating the need to hear oral evidence. The Guide also invited the domestic courts to consider whether the personal appearance of the parent requesting the return of the child would cause undue delay in the examination of the case (see paragraph 28 above).

53. The Government particularly emphasised that in the case of *Amade v. the Czech Republic* ((dec.) [Committee], no. 22796/16, 13 September 2016) the Court had held that in proceedings under the Hague Convention there was no obligation to hear the parties, since domestic courts were left a wide margin of discretion in deciding whether or not to hold an oral hearing. Likewise, in the case of *Šneersone and Kampanella v. Italy* (no. 14737/09, 12 July 2011) the Court had found no violation of either Article 8 or Article 6 § 1 of the Convention on account of the fact that a contested decision of the Italian courts in return proceedings under the Hague Convention had been adopted without a hearing.

54. Lastly, the Government pointed out that the applicant had not specified which decisive facts would be established by holding an oral hearing. Instead, he had only asked the court to schedule a hearing as soon as possible (see *Adžić*, cited above, § 29), without specifying what evidence should be taken at the hearing and without explicitly requesting that the court take his testimony. In the Government's view, given that the applicant had made numerous submissions and commented on every aspect of the

case, it was hard to imagine what the probative value of an oral hearing would have been. Holding an oral hearing would only have further protracted the proceedings.

(b) The Court's assessment

55. The Court reiterates that the entitlement to a "public hearing" in Article 6 § 1 of the Convention necessarily implies a right to an "oral hearing". Unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing under Article 6 § 1 implies a right to an oral hearing before at least one instance (see, for example, *Döry v. Sweden*, no. 28394/95, § 37 and 39, 12 November 2002, and *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, § 80, 12 April 2018).

56. The exceptional character of the circumstances that may justify dispensing with an oral hearing in proceedings concerning a "civil" right essentially comes down to the nature of the issues to be decided by the competent national court. The Court has accepted that exceptional circumstances existed in cases where the proceedings concerned exclusively legal or highly technical questions, or where there were no issues of credibility or contested facts which necessitated a hearing and the courts might fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (see, for example, *Mirovni Inštitut v. Slovenia*, no. 32303/13, § 37, 13 March 2018). In this connection, it is also to be noted that Article 6 of the Convention does not guarantee the right to appear before a civil court in person, but rather a more general right to present one's case effectively (see *Margaretić v. Croatia*, no. 16115/13, § 127, 5 June 2014).

57. Turning to the present case, the Court notes that the applicant's request for the return of the child was examined at three levels of jurisdiction and that no hearing was held (see paragraphs 6-8 and 10-11 above). The proceedings before the first and second-instance courts concerned not only issues of law, but also important factual questions. In particular, those courts had to examine (see *Adžić*, cited above, §§ 8-45):

- whether there was a grave risk that the return of the applicant's son to the United States would expose the child to psychological harm or otherwise place the boy in an intolerable situation (see Article 13 § 1 (b) of the Hague Convention mentioned in paragraph 11 above); and
- whether the mother could follow the child, that is, freely return to the United States and get a job there.

58. The domestic courts refused the applicant's requests for an oral hearing because they considered it unlikely that the parties' testimonies could contribute to establishing the facts of the case, and thus could not justify delaying the proceedings any further (see paragraph 8 above).

59. In this connection, the Court reiterates that the national authorities may have regard to the demands of efficiency and economy, and has itself found, for example, that the systematic holding of hearings could be an obstacle to the particular diligence required in certain (types of) cases and ultimately prevent compliance with the reasonable-time requirement of Article 6 § 1 (see *Jussila v. Finland* [GC], no. 73053/01, § 42, ECHR 2006-XIV).

60. This was precisely the domestic courts' and the Government's argument for dispensing with a hearing in the present case (see paragraphs 8 and 53 above). The Government further referred in this connection to the relevant international materials (see paragraphs 28-29 and 52 above) and suggested that such a course of action was recommended in order to comply with the rather short time-limits within which return proceedings under the Hague Convention had to be completed.

61. The Court is not persuaded by this argument, for the following reasons.

62. Firstly, under the Court's case-law (see paragraph 56 above), demands of efficiency and economy alone cannot justify dispensing with a hearing, unless the case concerns exclusively legal or highly technical questions, or where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials. As already noted above (see paragraph 57), such exceptional circumstances did not exist in the present case.

63. Secondly, aside from these considerations (see the previous paragraph), the Court agrees with the applicant (see paragraphs 47-48 above) that the Government's argument based on demands of efficiency and economy is rather unconvincing in a situation such as the one in the present case, where the first-instance court refused to hold an oral hearing even after the proceedings had already lasted almost three years.

64. Thirdly, the Government's argument fails to take into account that the purpose of an oral hearing is not only to take evidence from the parties. It is also a chance for the parties and the court to examine witnesses and experts, it being understood that, as regards witnesses, their spontaneous response to a question in the presence of a judge who can observe their reactions is seen as an important element for assessing their credibility. An oral hearing is also an opportunity for the parties to exchange oral arguments, the importance of which should not be underestimated, and for the court to clarify not only certain factual, but also legal issues, in direct communication with the parties. In this connection, it cannot help but note that the Zagreb County Court, in its decision of 2 July 2012 whereby it allowed the applicant's appeal and quashed the first-instance decision of 15 March 2012, instructed the Zagreb Municipal Civil Court to schedule a

hearing and examine the circumstances of the case together with the parties (see paragraph 7 above).

65. Lastly, the Court notes that its decision in the *Amade* case (see *Amade*, cited above) is a Committee decision and that, contrary to the Government's view (see paragraph 53 above), there is nothing in that decision to suggest that, as a matter of principle, the States have no obligation to hold an oral hearing in return proceedings under the Hague Convention. Nor can such conclusion be derived from the Court's finding in the case of *Šneersone and Kampanella* (cited above) that the lack of an oral hearing in the circumstances of that case had not amounted to a breach of Article 8 or Article 6 § 1 of the Convention.

66. The foregoing considerations are sufficient to enable the Court to conclude that dispensing with a hearing was not justified in the proceedings complained of.

67. There has accordingly been a violation of Article 6 § 1 of the Convention on account of the lack of an oral hearing in the present case.

2. Alleged violation of Article 6 § 1 of the Convention on account of the breach of the adversarial principle and the principle of equality of arms

68. The Court further notes that applicant in the present case did not only complain under Article 6 § 1 of the Convention of the unfairness of the above proceedings for the return of his son. Relying on Article 8 of the Convention, he also complained that those proceedings had resulted in a breach of his right to respect for his family life (see paragraph 32 above). Apart from a breach of the right to a fair trial on account of the lack of an oral hearing examined above, given the nature of the applicant's remaining complaints, there is therefore a certain overlap between the guarantees of Article 6 § 1 and Article 8 of the Convention in the present case. Whilst Article 8 contains no explicit procedural requirements, the decision-making process must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see, for example, *M. and M. v. Croatia*, no. 10161/13, § 180, ECHR 2015 (extracts)). In particular, in a number of child-care cases the Court has examined whether parents had been sufficiently involved in the decision-making process, with a view to establishing whether their rights under Article 8 had been violated (ibid, loc. cit.).

69. Being master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 124, 20 March 2018), and having regard to its case-law (see, for example, *Buscemi v. Italy*, no. 29569/95, §§ 57-63, ECHR 1999-VI), the Court finds that the applicant's remaining complaint under Article 6 § 1 of the Convention, concerning the breach of

the adversarial principle and the principle of equality of arms (see paragraph 31 above), should be examined under Article 8 thereof (see paragraphs 70-96 below).

3. Alleged violation of Article 8 of the Convention

(a) Parties' submissions

(i) The applicant

70. The applicant submitted that the domestic courts' refusal to order the return of his son to the United States had amounted to an interference with his right to respect for his family life. That interference had been unlawful, it had not aimed to protect the interests of the child, but solely those of the mother, and thus it had not been necessary in a democratic society. In particular, as regards the requirement of lawfulness, the applicant argued that the domestic courts had construed the exception set out in Article 13 § 1 (b) of the Hague Convention too widely, an exception which must be interpreted strictly, and had misapplied that Article to the facts of the case.

71. As regards the decision-making process, the applicant emphasised that in the return proceedings in question he had not, unlike his wife, participated in the expert evaluation. That had significantly undermined the procedural balance between the parties to his detriment, given that the final court decision had been based on the report by the expert who had been of the opinion that his son would suffer trauma if returned to the United States without his mother.

72. This misbalance was evident from the fact that the expert opinion was partly based on the interview with his son's mother and with the child who had been interviewed and observed in her presence. For the applicant, in such a situation it was legitimate to wonder whether the expert opinion would have been the same if he had also participated in the expert evaluation. Contrary to the Government's argument that an interview with him as the father would have been unnecessary (see paragraph 76 below), the applicant pointed out that the expert herself had noted in her conclusion that the relationship between the boy and the father could not be assessed because the father had not participated in the evaluation (see *Adžić*, cited above, § 39). In the applicant's view, this suggested that the expert had considered the assessment of the relationship between him and his son necessary to formulate her opinion.

73. The applicant further challenged the Government's argument that the expert had had to interview the mother because the evaluation had involved a five-year-old child who could not go to the expert's office himself, and because the expert's task had been to assess the risk of trauma to which the boy could be exposed if separated from his mother (see paragraph 77 below). While it was natural that the child, at the age of five, could not go to

the expert alone, for the applicant, that was certainly no reason to include the mother in the expert evaluation by interviewing her and leave him, the father, out completely. Furthermore, it was difficult to sustain the Government's argument that, in the given circumstances, it had been possible to assess the risk of trauma to the child solely on the basis of the interview with the boy alone and the interview in the presence of his mother (see paragraph 77 below). In the applicant's view, it was "empirical and natural" that, in order to complete that task, the expert had had to assess the emotional bond between the child and him as the father, and their mutual relationship. That was so because the return of the child to the United States without the mother did not necessarily mean that the child would have experienced trauma, given that the boy would have been returning to the father – a person who had cared for him since birth to the same extent as the mother and to whom he was emotionally attached – and would have been coming back to a familiar environment in which he had grown up.

74. Lastly, as regards the Government's argument that the applicant could have asked the first-instance court to order that the expert report be supplemented or to obtain a second expert opinion from a different expert (see paragraph 78 below), the applicant replied that the court's conduct had prevented him from doing so. After receiving the expert report and objecting to it, the applicant had expected that the first-instance court would schedule a hearing, as required by the rules of civil procedure (see paragraph 21 above), at which he could examine the expert and where the expert could address his objections. Only if the expert had not been able to address the alleged shortcomings of the report would the applicant have been entitled to ask that the report be supplemented or that an opinion from a different expert be obtained (see paragraph 22 above). However, since such a hearing had never been held, the applicant had not had a chance to act as the Government suggested.

(ii) The Government

75. The Government conceded that there had been an interference with the applicant's right to respect for his family life. However, they argued that the interference in the form of the domestic courts' refusal to order the return of the applicant's son to the United States had been in accordance with the law, had pursued a legitimate aim, and had been necessary in a democratic society. In particular, the decision had been based on Article 13 § 1 (b) of the Hague Convention and had sought to protect the rights of others, namely the applicant's son.

76. In reply to the applicant's arguments regarding the decision-making process (see paragraphs 71-74 above), the Government pointed out that the expert evaluation in the present case consisted of a psychological evaluation of the child in order to determine if he would be exposed to the risk referred to in Article 13 paragraph 1 (b) of the Hague Convention if returned to the

United States without his mother. That was so because the mother had alleged that she did not have any document authorising her to enter and stay in the United States, and had no job or accommodation there (see *Adžić*, cited above, §§ 13, 31 and 38). Since the applicant had therefore not been the subject of the expert evaluation, it had not been necessary to involve him.

77. The Government further reasoned that the expert had had to interview the mother because the evaluation had involved a five-year-old child who could not go to the expert's office himself, and because the expert's task had been to assess the risk of possible trauma which the boy could suffer if separated from his mother, and his ability to overcome it. That risk could be assessed by interviewing the child alone and also with his mother. That did not mean that the mother had been involved in the expert evaluation; she had taken the child to the expert's office and had given only basic information. Given the expert's task, interviewing the applicant as the father had not been necessary, because it would not have provided any relevant information for the assessment of the degree of the child's attachment to the mother and her role in the child's life.

78. Had the applicant deemed that his personal involvement in the expert evaluation of the child was crucial and could lead to a different finding by the expert, and ultimately to a different outcome as regards the proceedings, he could have asked the first-instance court to order that the expert report be supplemented, or to order a second expert opinion from a different expert.

(b) The Court's assessment

79. The parties agreed that the Zagreb Municipal Civil Court's decision of 15 March 2012 had constituted an interference with the applicant's right to respect for his family life as guaranteed by Article 8 of the Convention (see paragraphs 70 and 75 above). Having regard to its case-law on the matter (see, for example, *Iosub Caras v. Romania*, no. 7198/04, § 30, 27 July 2006; *Karrer v. Romania*, no. 16965/10, § 42, 21 February 2012; and *K.J. v. Poland*, no. 30813/14, § 55, 1 March 2016), the Court sees no reason to hold otherwise. Indeed, the decision in question restricted the applicant's enjoyment of his son's company, it being understood that the mutual enjoyment by a parent and a child of each other's company constitutes a fundamental element of family life protected under Article 8 of the Convention (see *Iosub Caras*, cited above, §§ 29-30).

80. The Court must further examine whether the interference in question was justified in terms of Article 8 § 2. It reiterates that any interference with the right to respect for family life constitutes a violation of that Article unless it is "in accordance with the law", pursues a legitimate aim, and can be regarded as "necessary in a democratic society" (see, for example, *Vujica v. Croatia*, no. 56163/12, § 87, 8 October 2015).

81. The Court considers that the interference in the present case was based on law, namely Article 13 § 1 (b) of the Hague Convention, which entered into force in respect of Croatia on 1 December 1991 (see paragraph 11 above). Despite the applicant's arguments to the contrary (see paragraph 70 above), the Court further finds that the interference pursued the legitimate aim of protecting the rights and freedoms of others, namely the rights of the applicant's son. It thus remains to be determined whether the interference was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, interpreted in the light of the Hague Convention (see paragraph 44 above).

82. The Court reiterates that in determining whether an interference with one's right to family life was "necessary in a democratic society", it must examine whether a fair balance was struck between the competing interests at stake – those of the child, of the two parents, and of public order – within the margin of appreciation afforded to States in such matters (see, for example, *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007). In so doing, it has to assess whether, in the light of the case as a whole, the reasons adduced to justify the interference were relevant and sufficient for the purposes of Article 8 § 2 (ibid., § 81; and *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, 27 April 2000). Insufficient reasoning in the ruling dismissing or accepting objections to the return of the child under the Hague Convention would be contrary to the requirements of Article 8 of the Convention (see *X v. Latvia*, cited above, §§ 106-107; and *Blaga v. Romania*, no. 54443/10, § 70, 1 July 2014).

83. However, the Court cannot satisfactorily make such an assessment without determining whether the decision-making process, seen as a whole, provided an applicant with the requisite protection of his or her interests (see *Sommerfeld v. Germany* [GC], no. 31871/96, § 66, ECHR 2003-VIII (extracts), and *Sahin v. Germany* [GC], no. 30943/96, § 68, ECHR 2003-VIII), that is, without determining whether the State has complied with the procedural requirements implicit in that Article (see paragraph 68 above).

84. Hence, the Court must determine whether, in the particular circumstances of the present case, and having regard to the importance of the decisions taken, the applicant was involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.

85. In this connection, the Court notes that the main issue the domestic courts had to examine in the return proceedings complained of was whether there was a grave risk that the return of the applicant's son to the United States would expose the child to psychological harm or otherwise place the boy in an intolerable situation (see paragraph 57 above). In order to assess that risk the first-instance court decided to obtain an opinion from a forensic

expert in psychiatry (see *Adžić*, cited above, § 33). The question the expert was instructed to answer was identical to the one that the court had to examine (see paragraphs 9 and 57 above).

86. The expert report suggested that transferring the applicant's son to a different environment would constitute a trauma, but that he would be able to overcome it if his mother lived with him (see *Adžić*, cited above, § 39). Given that the domestic courts eventually found that the boy's return to the United States would expose him to psychological harm – that is, to a risk referred to in Article 13 paragraph 1 (b) of the Hague Convention – if he returned without his mother (see *Adžić*, cited above, § 43), the Court considers that the expert opinion had a preponderant influence on the domestic courts' decision (compare with *Mantovanelli v. France*, 18 March 1997, § 36, *Reports* 1997-II). The Government did not seem to contest that (see paragraphs 76-78 above).

87. Likewise, the Government did not contest the fact that the expert formulated her expert opinion and prepared the report after conducting two interviews with the applicant's son, the first with the mother and the son together and the second in her absence (see *Adžić*, cited above, § 39), that is, without the applicant's involvement.

88. The Government argued that the applicant's involvement had not been necessary because he had not been the subject of the expert evaluation and could not have otherwise provided any relevant information (see paragraphs 76-77 above). At the same time, they tried to justify the mother's involvement by referring to the nature of the expert's task, which had been to assess (a) the risk of possible trauma which the boy might suffer if separated from her, and (b) his ability to overcome it (see paragraph 77 above), a task which could not be completed without first assessing the degree of the child's attachment to the mother and her role in the child's life.

89. The Court is not persuaded by the Government's argument that, in the given circumstances, the applicant's involvement in the expert evaluation was unnecessary. The Court attaches significant importance to the expert's remark that the relationship between the boy and his father could not be assessed because the applicant had not participated in the evaluation (*Adžić*, cited above, § 39). This remark strongly suggests that the expert saw the assessment of the relationship between the son and the father as beneficial, if not necessary, to complete her task.

90. What is more, the Court finds force in the applicant's argument that the risk of trauma which his son might have suffered if returned to the United States without his mother, and his ability to overcome it, could not have been properly assessed without determining the strength of the boy's emotional bond with him as the father (see paragraph 73 above). Indeed, one cannot exclude the possibility that the risk of trauma might have been reduced or more readily overcome if it had been established that the boy had

a strong emotional bond with the applicant, especially taking into account the fact that he would have been returning to a familiar environment in which he had grown up.

91. If the mother's presence during one of the two interviews the expert had with the child was necessary to observe the interaction between them in order to assess the child's emotional bond with her, the same must in principle be true for the assessment of the boy's emotional bond with his father. However, the applicant was not given an opportunity to attend such an interview.

92. The Government argued that this situation could have been remedied had the applicant asked the first-instance court to order that the expert report be supplemented or asked for a second expert opinion from a different expert (see paragraph 78 above). However, in view of the applicant's arguments to the contrary (see paragraph 74 above), and having regard to the relevant provisions of the domestic law (see paragraphs 21-22 above), the Court finds that the applicant had good reason to believe that, in the absence of an oral hearing, he was not entitled to act in the manner suggested by the Government.

93. This further reinforces the Court's above findings under Article 6 § 1 of the Convention on the importance of holding an oral hearing in the present case (see paragraphs 55-67 above). Such a hearing would have given the parties and the first-instance court a chance to question the expert on a number of important issues.

94. Given the preponderant influence of the expert opinion on the domestic courts' decision (see paragraph 86 above), the Court finds that, in the present case, the applicant was not involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests (see paragraph 84 above). His involvement was especially important given that those courts eventually refused to order the return of his son. Moreover, there is nothing to suggest that the applicant's participation in the expert evaluation would have been against the best interests of the child. On the contrary, it could have contributed to establishing what was in the child's best interests. The procedural requirements implicit in Article 8 of the Convention were therefore not complied with.

95. There has accordingly been a violation of Article 8 of the Convention in the present case.

96. Lastly, the Court observes that, there is no basis for the present judgment as such to be interpreted as requiring the respondent State to return the child to the United States (see, *mutatis mutandis*, *K.J. v. Poland*, cited above, § 76, and *G.N. v. Poland*, no. 2171/14, § 72, 19 July 2016).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

99. The Government contested that claim. In particular, they submitted that the Court, when deciding on his earlier application in respect of the same return proceedings, had already awarded the applicant EUR 7,500 for non-pecuniary damage for the violation of Article 8 of the Convention (see *Adžić*, cited above, § 103). They urged the Court to take that sum into account.

100. The Court finds that the applicant must have sustained non-pecuniary damage on account of the violations found. Ruling on an equitable basis, and having regard to its earlier award (see *Adžić*, loc. cit.), the Court awards him EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

1. Parties' submissions

101. The applicant also claimed 25,000 Croatian kunas (HRK) for the costs incurred before the domestic courts, and HRK 37,500 for those incurred before the Court. He also claimed HRK 70,500 for postal, telephone and other (printing, copying and translation) expenses incurred before the domestic courts and the Court.

102. The Government contested these claims as excessive.

2. The Court's assessment

103. The Court rejects the claim for costs and expenses incurred in the domestic proceedings, given that the applicant's representative did not submit itemised particulars of this claim. She thus failed to comply with the requirements set out in Rule 60 § 2 of the Rules of Court.

104. As regards the claim for costs incurred in the proceedings before it, the Court considers it reasonable to award the sum of EUR 1,680.

105. As regards the applicant's claim for expenses, the Court notes that, save in relation to the translation expenses, the applicant's representative failed to comply with the requirements set out in Rule 60 § 2 of the Rules of Court, in that she did not enclose any relevant supporting documents to prove that he had actually incurred those expenses. The Court therefore awards him EUR 840 for translation expenses incurred in the proceedings before the Court.

C. Default interest

106. 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 6 § 1 of the Convention;

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

4. *Holds,*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
      (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,520 (two thousand five hundred and twenty 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;

5. *Dismisses* the remainder of the applicant claim for just satisfaction.

Done in English, and notified in writing on 2 May 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Linos-Alexandre Sicilianos
Deputy Registrar	President