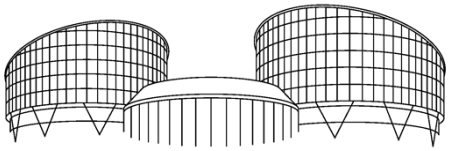

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF VLADIMIR USHAKOV v. RUSSIA

*(Application no. 15122/17)*

JUDGMENT

STRASBOURG

18 June 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 Vladimir Ushakov v. Russia,**

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

Vincent A. De Gaetano, *President,*
Georgios A. Serghides,
Paulo Pinto de Albuquerque,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Alena Poláčková, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 28 May 2019,

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

# PROCEDURE

1. The case originated in an application (no. 15122/17) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Vladimir Nikolayevich Ushakov ("the applicant"), on 4 February 2017.

2. The applicant was represented by Ms L.A. Yablokova, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

3. The applicant alleged that on account of the refusal by the Russian court to order his daughter's return to Finland, in application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, he was a victim of an infringement of his right to respect for his family life within the meaning of Article 8 of the Convention.

4. On 16 June 2017 notice of the application was given to the Government. It was also decided to give priority to the application, in accordance with Rule 41 of the Rules of Court.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### A. Background

5. The applicant was born in 1977 and lives in Vantaa, Finland.

6. The applicant has been living and working in Finland since 1999 on the basis of a permanent residence permit.

7. In 2009 the applicant married a Russian national, Ms I.K., in Helsinki. After the marriage the couple settled in Vantaa, Finland, living in a flat owned by the applicant. I.K. had a temporary residence permit (expired in summer 2015).

8. On 24 December 2012 I.K. gave birth to a daughter, V. The parents exercised joint custody in respect of the child, in accordance with Finnish law. The applicant also has two children from a previous marriage, both residing in Vantaa. V. had a temporary residence permit in Finland (expired in December 2014). On an unspecified date she acquired Russian nationality.

9. In January 2013 I.K. suffered two strokes and was partially paralysed. She was admitted to hospital.

10. The applicant took parental leave to take care of V. I.K.'s parents (most often her father) often visited from Russia to help care for V. while I.K. was undergoing medical treatment.

11. In April 2013 I.K. was discharged from hospital. She had not, however, fully recovered mobility in one hand and one leg.

12. Relations between the applicant and I.K. apparently deteriorated, and in June 2013 I.K. travelled to Russia, accompanied by her father, for further medical treatment and physiotherapy. V. remained with the applicant.

13. Since the applicant had to return to work, in July 2013 he took V. to his parents in Norway, where V. was taken care of by her paternal grandmother and aunt.

14. Following her return to Finland in August 2013, I.K. instituted proceedings with a view to having the child returned to Finland under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention").

15. In October 2013 the applicant brought V. back to Finland, and the proceedings for the return of the child were discontinued.

### B. Divorce, child custody and residence proceedings in Finland. Removal of the child from Finland to Russia

16. Meanwhile, in August 2013 I.K. initiated divorce proceedings, asking the court to grant her sole custody of V. and to determine V.'s place of residence as being with her.

17. Between November 2013 and March 2014 five interim decisions were issued by the Vantaa District Court ("the District Court") determining that, pending resolution of the proceedings, the applicant and I.K. should have joint custody of V. and that the latter should reside with the applicant.

18. On 14 November 2013 the District Court addressed the applicant's concern that there was a risk of I.K.'s taking V. to Russia without his consent and ordered that V.'s passport be handed in to the police.

19. On 23 December 2013 the District Court noted that there was no risk of the child's being taken outside Finland as her passport had been handed in to the police.

20. On 11 April 2014 the District Court dissolved the marriage between the applicant and I.K.

21. On 23 December 2014 the District Court held that the applicant and I.K. should have joint custody of V. and that V. was to reside with the applicant. The court also established a detailed schedule setting out I.K.'s contact with V. up until 2019. In taking that decision the District Court took into account I.K.'s state of health, in particular the fact that she had not completely recovered mobility in one hand and one leg after her stroke and was still undergoing rehabilitation procedures, which made it difficult for her to react quickly to the toddler's active behaviour and to prevent potentially dangerous situations. The judgment was enforceable pending a decision in appeal proceedings.

22. I.K. appealed against the above judgment.

23. On 20 November 2015 the Helsinki Court of Appeal dismissed I.K.'s appeal and upheld the judgment of 23 December 2014. The Court of Appeal confirmed that, since the applicant and I.K. had joint custody of their daughter, I.K. had no right to remove V. from Finland without the applicant's consent.

24. I.K. lodged a further appeal with the Supreme Court of Finland.

25. On 26 February 2016 the Supreme Court refused I.K. leave to appeal.

26. In the meantime, while the appeal proceedings were pending, on 5 February 2015 I.K. took V. to Russia without the applicant's consent. She informed him by email that she did not intend to come back to Finland.

27. On 20 February 2015 the applicant applied to the Finnish Ministry of Justice to have the child returned to Finland under the Hague Convention.

28. The Finnish Ministry of Justice sent an enquiry to the Ministry of Science and Education of the Russian Federation, which confirmed that the child was residing with I.K. in St Petersburg.

## C. Proceedings in Russia

### *1. Proceedings for V.'s return to Finland under the Hague Convention*

29. On 6 August 2015, after failed attempts to come to an agreement with I.K. as regards V.'s return to Finland, the applicant lodged an application with the Dzerzhinskiy District Court of St Petersburg seeking the child's return to Finland on the basis of the Hague Convention.

30. I.K. objected to V.'s return to Finland. Relying on Article 13 (b) of the Hague Convention, she claimed that V. was already settled in her new environment in Russia, that she did not speak the Finnish language, that V.'s return to Finland would separate them and that it would thus be psychologically traumatic for her. She further indicated that V. had been removed to Russia so that she could be provided with the medical assistance she needed and, finally, that the applicant was suffering from a mental disorder.

31. The childcare authority involved in the proceedings considered that the child's interests would best be met if she continued to reside with her mother, I.K.

32. The Ombudsman for Children in St Petersburg considered that V.'s removal from Finland to Russia had not been unlawful since the applicant and I.K. had joint custody of the child and the child's removal to Russia did not diminish the applicant's rights on the territory of the Russian Federation; moreover, V. had a number of medical conditions which could expose her to a risk of physical harm in the event of her return to Finland.

33. By a judgment of 2 December 2015, the Dzerzhinskiy District Court granted the applicant's request and ordered that the child be returned to Finland immediately. The court found, and it was common ground between the parties, that V.'s place of habitual residence was Finland and that her removal from Finland had taken place without the applicant's consent. It concluded, therefore, that the child's removal had been in breach of the applicant's custody rights. It also found that there were no grounds for granting an exception to the child's immediate return under Article 13 (b) of the Hague Convention: the argument concerning the risk of V. suffering psychological harm in the event of her return to Finland and the allegation that the applicant was suffering from a mental disorder were found unsubstantiated; I.K. had provided no evidence to the effect that the medical assistance necessitated by V.'s state of health could not been provided to the latter in Finland; V.'s return to Finland would not entail her separation from I.K. since the Finnish Court had determined that the parties should have

joint custody of the child and had set out a detailed schedule of I.K.'s contact with V.

34. However, on 3 February 2016 the St Petersburg City Court ("the City Court") quashed the above judgment on appeal and rejected the applicant's request for V.'s return to Finland. The City Court held that since the judgment of the Vantaa District Court of 23 December 2014 – which had determined V.'s residence as being with the applicant in Finland – had not yet entered into force, I.K.'s actions in bringing V. to Russia had not been unlawful. The circumstances of the removal of the child, a national of the Russian Federation, to Russia had not violated the applicant's parental rights. The City Court noted that at the time of the child's removal, as well as the time of the examination of the appeal, she had not had a valid Finnish residence permit. The City Court also took into account the following facts: that since February 2015 V. had been permanently resident in St Petersburg – at the address where I.K. was registered – where suitable conditions had been created for her life and development; that both parties had registered places of residence in Russia; that at the time of her removal V. had been aged two years and one month, of which she had spent several months (from July to October 2013) in Norway, where she had been taken by the applicant without I.K.'s consent; and finally that V. did not speak Finnish and since February 2015 had been attending various medical facilities and nursery school in Russia. In view of the foregoing, the City Court came to the conclusion that Finland was not the State in which V. was habitually resident. Since February 2015 V. had integrated well into the Russian social and family environment and her retention in Russia was therefore not unlawful within the meaning of Article 3 of the Hague Convention. V.'s attendance at a kindergarten in Finland for a short period of time between November 2014 and January 2015 did not constitute sufficient proof of integration into the social environment in Finland such that Finland could be considered as the child's habitual place of residence. Lastly, the City Court noted that the report of the Ombudsman for Children in St Petersburg stated that both parents had parental authority in respect of V., that the applicant's rights were not diminished on the territory of the Russian Federation, and that the removal of the child from her mother in Russia to her father in Finland for the purposes of permanent residence in Finland could, on account of her numerous medical conditions, cause her physical harm. The court further noted that medical documents contained in the case file confirmed that the child had a number of medical conditions. It concluded that this circumstance – which under Article 13 (b) of the Hague Convention constituted an exception to immediate return – also led to the conclusion that there were no grounds for granting the applicant's request.

35. The applicant lodged an appeal on points of law with the Presidium of the City Court.

36. On 12 May 2016 a judge of the St Petersburg City Court refused to refer the case for consideration by the Presidium of that Court.

37. On 4 August 2016 a judge of the Supreme Court of Russia refused to refer the case for consideration by the Civil Chamber of that Court.

*2. Child residence and child maintenance proceedings*

38. On 7 September 2016 the Primorskiy District Court of St Petersburg ruled that V. should reside with her mother, I.K., in St Petersburg and ordered the applicant to pay child maintenance starting from 8 June 2015.

39. Referring to temporary financial difficulties and insisting on V.'s return in Finland, the applicant has not been complying with the above-mentioned judgment.

40. On 5 October 2016 enforcement proceedings were instituted against the applicant. Restrictive measures were applied against him by the bailiffs service in the form of a prohibition on exiting the Russian territory. That decision currently prevents the applicant from travelling to Russia.

41. As of 13 February 2018 the applicant's child maintenance arrears amounted to 494,644 Russian roubles (RUB)[1].

42. The applicant has not seen his daughter since she left Finland.

## II. RELEVANT INTERNATIONAL LAW AND PRACTICE

### A. The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980

43. The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") entered into force between Russia and Finland on 1 January 2013. It provides, in so far as relevant, as follows:

**Article 1**

"The objects of the present Convention are –

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

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

..."

**Article 3**

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

1. Approximately EUR 6,750 at the current official exchange rate.

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

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

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

**Article 4**

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

**Article 11**

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

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

**Article 12**

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

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

..."

**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 14**

"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

**Article 19**

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

## B. Explanatory Report to the Hague Convention

44. The Explanatory Report to the Hague Convention, prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982 ( "the Explanatory Report"), provides as follows:

### *1. The notion of 'the best interests of the child'*

"21. ... the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard.

24. ... [the philosophy of the Hague Convention] can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. ... the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child.

... the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.

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

person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained."

### *2. The notion of the child's 'habitual residence' and the 'wrongfulness of his or her removal or retention'*

"64. Article 3 [of the Hague Convention] as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention.

66. ... the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile.

68. The first source referred to in Article 3 is law, where it is stated that custody 'may arise ... by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child.

71. ... from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

### *3. The exceptions to the principle of the child's prompt return under Article 13 (b) of the Hague Convention*

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

residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

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

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

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

#### *4. The use of expeditious procedures by judicial or administrative authorities*

"104. The importance throughout the Convention of the time factor appears again in [Article 11 of the Hague Convention]. Whereas Article 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the first paragraph of this Article restates the obligation, this time with regard to the authorities of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

105. The second paragraph [of Article 11 of the Hague Convention], so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a non-obligatory time-limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay. Moreover, after the Central Authority of the requested State receives the reply, it is once more under a duty to inform, a duty owed either to the Central Authority of the requesting State or to the applicant who has applied to it directly. In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken."

### C. The Convention on the Rights of the Child

45. The relevant provisions of the United Nations Convention on the Rights of the Child, which was signed in New York on 20 November 1989 and entered into force in respect of Russia on 15 September 1990, read as follows:

**Preamble**

"The States Parties to the present Convention,

...

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

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

Have agreed as follows:

..."

**Article 3**

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

..."

**Article 7**

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

..."

**Article 9**

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

..."

**Article 18**

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

..."

## III. RELEVANT DOMESTIC LAW

### A. Constitution of the Russian Federation

46. The generally recognised principles and norms of international law and the international treaties to which the Russian Federation is a party are

an integral part of its legal system. If an international treaty to which the Russian Federation is a party establishes other rules than those provided for by law, the rules of the international treaty must apply (Article 15 § 4).

### B. Code of Civil Procedure of the Russian Federation

47. The procedure for the examination of applications for the return of children unlawfully removed to, or retained in, the Russian Federation, and for securing protection for rights of access in respect of such children in accordance with international treaties to which the Russian Federation is a party, is governed by Chapter 22.2 of the Code.

48. The Code provides that an application for the return of a child is to be lodged with a court by a parent or other individual who believes that his/her custody or access rights have been violated, or by a prosecutor (Article 244.11).

49. The application for return must be examined by the court, with the mandatory participation of a prosecutor and the relevant childcare authority, within forty-two days of its receipt, including time for the preparation of the hearing and the drawing up of the judgment (Article 244.15).

50. A judgment handed down in a case concerning the return of a child unlawfully removed to, or retained in, Russia must contain the reasons why the child must be returned to the State of his/her habitual residence – in accordance with the international treaty to which the Russian Federation is a party – or the reasons for refusing the request for return in accordance with the international treaty (Article 244.16).

51. An appeal may be lodged against the judgment within ten days. The appeal must be examined within one month of its receipt by the appellate court (Article 244.17).

### C. Family Code of the Russian Federation

52. The Code provides that parents enjoy equal rights and discharge equal duties with respect to their children (Article 61 § 1).

53. The exercise of parental rights must not be detrimental to the children's interests. Providing for the children's interests is the principal object of parental care. Parents who exercise parental rights to the detriment of the rights and interests of the children are answerable under procedures established by law (Article 65 § 1).

54. The rights and obligations of parents and children are determined by the law of the State where they have a joint place of residence. If parents and children do not have a joint place of residence, their rights and obligations must be determined in accordance with the law of the State where the children have citizenship. At a plaintiff's request, child maintenance obligations and other relationships between parents and

children may be determined in accordance with the law of the State where the children permanently reside (Article 163).

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE OUTCOME OF THE PROCEEDINGS FOR THE CHILD'S RETURN UNDER THE HAGUE CONVENTION

55. The applicant complained that the refusal by the City Court of his application for the return of his daughter to Finland amounted to a violation of his right to respect for his family life under Article 8 of the Convention, which reads as follows:

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

### A. Admissibility

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

### B. Merits

#### *1. The parties' submissions*

##### (a) The Government

*(i) Initial observations*

57. The Government submitted that there had been no interference with the applicant's right to respect for his family life, since he had not lost personal ties with his daughter. The applicant had never sought contact with V. in Russia by bringing this issue before the childcare authority or the courts. His lack of contact with the child had thus resulted from his own failure to act. If, however, the Court were to find that there had been an interference with the applicant's right to respect for his family life, the

Government considered that it had been in accordance with the law, proportionate and necessary in a democratic society.

58. Relying on the arguments set forth in the City Court's appeal decision of 3 February 2016 (see paragraph 34 above), the Government claimed that Finland had not been the country of V.'s habitual residence, that her removal to and retention in Russia had not been wrongful for the purposes of the Hague Convention, and that in any event V.'s health constituted an exception to her immediate return in application of Article 13 (b) of the Hague Convention. The Government noted in this connection that V. suffered from atopic dermatitis, allergic rhinitis, muscular hypotension, delayed speech, flat feet and iron deficiency. Therefore, she needed to be monitored by medical specialists, as well as to follow a special diet, take medicines, undergo massages, wear orthopedic shoes for preventive purposes, swim, develop fine motor skills and general motor skills, engage in constructive activity, do articular gymnastics and undergo vestibular stimulation. The Government relied on a report by a medical psychologist of the St Petersburg's Centre for Complex Rehabilitation and Development of the Child dated 8 September 2015, which stated that due to her neurotic state, V. was regularly seeing a child psychologist to alleviate emotional tension and anxiety, as well as a speech therapist. The medical psychologist expressed the opinion that V. should remain with the mother, as she was the only person who could provide the required care, and that a change of place of residence would be harmful to V.'s mental development. The fact that the City Court had not examined the availability of the equivalent therapy in Finland did not as such undermine the validity of its decision. The Government therefore concluded that the judgment of the City Court refusing the application for V.'s return to Finland had been based on law.

59. The Government further submitted that the interference with the applicant's right to respect for his family life had been necessary to ensure the best interests of the child. The City Court concluded that the mere fact that the child had resided in Finland had not been sufficient to consider Finland as the place of her habitual residence. The City Court noted that the parties were Russian nationals and had their registered place of residence in the Russian Federation. Apart from the parties' stable bonds with the Russian Federation, the City Court also had due regard to the fact that V. had spent a considerable part of her life outside of Finland, had not integrated into the linguistic and social environment of that country, and did not understand the Finnish language but spoke Russian, which was her mother tongue. She had attended a nursery school in Finland and been exposed to a Finnish-speaking environment for a very limited period of time, and had lived in Norway for several months. The domestic court had objectively and comprehensively examined all of the above-mentioned pieces of evidence, and had taken due account of the fact that V. had spent a

significant part of her life in St Petersburg and had successfully integrated into a new environment, and that her tender age required the constant presence of her mother. It had concluded that to order V.'s return to her father in Finland would be contrary to her interests and could cause her harm. The City Court made an assessment of the documents in the case file, the parties' explanations and the opinions of the competent domestic authorities, including the childcare authority and the Commissioner for the Rights of the Child in St Petersburg, in line with the provisions of the Hague Convention.

60. The Government concluded that the interpretation by the domestic courts of the Hague Convention had been consistent with the recognised common principles of its application and interpretation, with due regard to the facts of the case and the interests of the child.

*(ii) Additional observations*

61. In their additional observations the Government stressed that the City Court had not relied on the fact that the parties and V. were Russian nationals registered as residing in Russia as a decisive circumstance for the purpose of determining the country of V.'s habitual residence. The City Court had taken those factors into account along with various other circumstances. The fact that the applicant had two other children from a previous marriage residing in Finland had not been examined by the Russian courts, as the applicant had never raised it.

62. The Government argued that it had remained open to the applicant to seek contact with V. in Russia with the assistance of the childcare authorities, the Commissioner for Children's Rights in St Petersburg and the court. The exercise by the applicant of his right to have contact with his daughter would not have meant that he had consented to the child's removal from Finland or acknowledged the jurisdiction of the Russian courts. The Government explained the functioning of the mediation and reconciliation procedures at the Office of the Children's Ombudsman in St Petersburg, which, according to statistical data, had been quite successful in resolving about 60 per cent of childcare disputes. They further mentioned the creation in 2013 of the Federal Institute of Mediation under the Ministry of Education and Science of the Russian Federation (Central Authority in Russia), which could also have provided the applicant with mediation services, had he chosen to have recourse to them.

63. The Government further stated that since the City Court had refused to consider Finland as the place of V.'s habitual residence, the civil aspects of international child abduction contained in the Hague Convention had not been applicable to the present case. Therefore neither Article 3 (a) of the Hague Convention providing that custody rights were determined by the law of the State where the child habitually resided, nor the Finnish Act on

Child Custody and Right of Access applied to the legal relationship between the parties.

64. The Government noted that the applicant had not been discharging his duty to support V. financially for a long time.

65. Lastly, the Government provided four examples of cases where the Russian courts had granted return applications lodged by "left-behind" fathers in the absence of any circumstances – in contrast to the present case – indicating that the children should not be returned. They submitted copies of the relevant decisions.

**(b) The applicant**

66. The applicant disagreed with the Government's assertion that there had been no interference with his right to respect for his family life in the present case. He emphasised that he had been granted custody rights in respect of his daughter, rather than just contact rights, which is why following her wrongful removal from Finland to Russia he had chosen to have recourse to lodging a return application under the Hague Convention and not to pursue contact proceedings. While the proceedings in Russia were pending he had attempted, through his legal representative, to arrange meetings with V., in vain. He had not sought assistance from the Russian childcare authorities and the Children's Ombudsman in securing his contact with V., as he had had little hope that such an application could yield any result. He had also feared that a court claim for contact in Russia would have been regarded as his acquiescence to V.'s wrongful removal and recognition of the jurisdiction of the Russian courts.

67. The applicant argued that the quashing by the City Court of the judgment of 2 December 2015 ordering V.'s immediate return to Finland had amounted to unlawful and disproportionate interference with his rights under Article 8 of the Convention, as it had not been necessary in a democratic society. He challenged the City Court's interpretation of the provisions of the Hague Convention regarding its basic concepts, such as "habitual residence", "wrongfulness of the removal", and "exceptions to immediate return". In interpreting those concepts, the court had applied approaches characteristic of the national law, without regard to their autonomous meaning in the light of the Hague Convention. He criticised the court's finding that Finland had not been the place of his daughter's habitual residence despite the fact that she had been born in Finland and had lived there for over two years prior to her removal to Russia, where she had never been before. The applicant noted in this connection that I.K. had not disputed the fact that Finland had been the country of V.'s habitual residence (see paragraphs 14 and 33 above).

68. The applicant also challenged the conclusion of the City Court to the effect that, since the judgment of the Vantaa District Court of 23 December 2014 determining V.'s residence as being with the applicant in Finland had

not yet entered into force, I.K.'s actions in taking V. to Russia had not been unlawful. Even if the judgment of 23 December 2014 had not yet entered into force at the time when V. had been removed to Russia, he and I.K. had joint custody of V. under Finnish family law, namely section 6(1) of the Child Custody and Rights of Access Act (no. 361/1983). Under the Act, custody of a child born in Finland to parents who were married at the time of the child's birth was shared between the child's parents.

69. The applicant deplored the fact that the City Court had taken into account circumstances which had occurred after V.'s removal to Russia, rather than V.'s past experience in Finland prior to her removal. He also deplored that it had put emphasis on the parties' Russian nationality and registered place of residence in the Russian Federation. As regards the City Court's reference to V.'s lack of knowledge of the Finnish language, the applicant pointed out that the child had only just turned two years old when she had been removed to Russia, that both he and the child's mother spoke Russian with V., and that V. had only recently started attending a kindergarten in Finland and could therefore not yet have mastered the Finnish language.

70. The applicant argued that there were no grounds to believe that V.'s return would expose her to any psychological or physical harm or otherwise place her in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention. As regards the City Court's reference to V.'s "numerous medical conditions", the applicant submitted that the medical conditions in question were trivial as they were often present in children living in Nordic countries with cold weather, limited exposure to the sun and high humidity. There had been nothing to suggest that the monitoring and treatment required by V. had been unavailable to her in Finland, a country with a high standard of living and social and medical care. Nor had there been anything to suggest the existence of other grounds justifying the refusal of the application for return under Articles 12, 13 and 20 of the Hague Convention.

71. The applicant further submitted that there was a lack of consistency in the City Court's application of the Hague Convention provisions. Having found that Finland had not been the country of V.'s habitual residence, the City Court should have come to the conclusion that the Hague Convention was not applicable to the case. Nevertheless, it had proceeded with the examination of circumstances constituting an exception to V.'s return under Article 13 (b) of the Hague Convention.

72. The applicant believed that the City Court could not have raised the issue of whether V. had adapted to her life in Russia, since less than one year had elapsed between the child's removal from Finland and the commencement of the return proceedings.

73. The applicant further submitted that although V.'s residence permit in Finland had indeed expired in December 2014, there would have been no

legal obstacles to obtaining a new one from the competent Finnish authorities. He supported his argument by a relevant statement from the Ministry of Justice of Finland.

74. The applicant concluded that the City Court had upset the balance of the competing interests of the child and his parents, as it had not ruled in favour of securing the best interests of V., but in favour of the child's mother.

75. The applicant informed the Court that owing to temporary financial difficulties, he had been unable to pay child maintenance to I.K. and was therefore prevented from visiting V. in Russia (see paragraph 40 above).

*2. The Court's assessment*

**(a) The general principles**

76. In *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131-40, ECHR 2010), and *X v. Latvia* ([GC], no. 27853/09, §§ 92-108, ECHR 2013) the Court articulated a number of principles which have emerged from its case-law on the issue of the international abduction of children, as follows.

77. In the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child of 20 November 1989, as well as the relevant rules and principles of international law applicable in relations between the Contracting Parties.

78. The decisive issue is whether the fair balance that must exist between the competing interests at stake: those of the child, of the two parents, and of public order, has been struck, within the margin of appreciation afforded to States in such matters, taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child".

79. There is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the *status quo* by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13 (b)).

80. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.

81. In the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 (a)) and the existence of a "grave risk" (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). This task falls in the first instance to the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation which, however, remains subject to European supervision. Hence, the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8.

82. A harmonious interpretation of the European Convention and the Hague Convention can be achieved, provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to ascertain that those questions have been effectively examined. Secondly, those factors must be evaluated in the light of Article 8 of the Convention.

83. Lastly, Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such

objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted, is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

**(b) Application of these principles to the present case**

84. The Court notes that a parent and child's mutual enjoyment of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, most recently, *Edina Tóth v. Hungary*, no. 51323/14, § 49, 30 January 2018). Consequently, the relationship between the applicant and his daughter falls within the sphere of family life under Article 8 of the Convention. That being so, the Court must determine whether there has been a failure to respect the applicant's family life. "Respect" for family life implies an obligation for a State to act in a manner calculated to allow these ties to develop normally (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 221, ECHR 2000-VIII).

85. The Court observes that in February 2015, while the couple in the instant case was in the middle of divorce and custody proceedings in Finland, the child's mother took the child, aged two years and one month at the material time, to Russia and never returned to Finland. The primary interference with the applicant's right to respect for his family life may not therefore be attributed to an action or omission by the respondent State, but rather to the actions of a private individual.

86. That action nevertheless placed the respondent State under positive obligations to secure for the applicant his right to respect for his family life, which included taking measures under the Hague Convention with a view to ensuring his prompt reunification with his child (see *R.S. v. Poland*, no. 63777/09, § 58, 21 July 2015, and *K.J. v. Poland*, no. 30813/14, § 53, 1 March 2016). It remains therefore to be ascertained whether, in discharging its obligations under the Hague Convention, Russia has complied with its positive obligations under Article 8 of the Convention.

87. The Court observes that by the final decision of 3 February 2016 the City Court refused the applicant's request for V.'s return to Finland, which amounted to an interference with his right to respect for his family life. This interference had its legal basis in the Hague Convention, which entered into force between Russia and Finland on 1 January 2013, and the City Court acted in what it considered to be pursuit of the legitimate aim of protecting the rights and freedoms of the child.

88. The Court must therefore determine whether the interference in question was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, interpreted in the light of the relevant international instruments, and whether when striking a balance between the competing interests at stake, appropriate weight was given to the child's best interests, within the margin of appreciation afforded to the State in such matters. In order to do so, the Court will have regard to the reasoning advanced by the City Court for its decision.

89. The Court observes that under Article 3 of the Hague Convention, the removal or retention of a child is to be considered wrongful where "it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention" (see paragraph 43 above).

90. The Explanatory Report states that the notion of habitual residence is a question of pure fact, differing in that respect from domicile. It also emphasises that from the Hague Convention standpoint, the removal of a child by one of the joint custody holders without the consent of the other is equally wrongful; this wrongfulness derives not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law and has interfered with their normal exercise. The Explanatory Report further clarifies that the setting in motion of the Convention's machinery for the return of the child depends entirely on whether the removal or retention is considered wrongful in terms of the Convention and that in the absence of the wrongfulness of the removal or retention, no duty to return arises (see paragraph 44 above).

91. The Court observes that in the present case the City Court held that Finland had not been the State of V.'s habitual residence against the background of the following circumstances: the parties and the child were Russian nationals and had their registered residence in Russia; V. did not have a valid Finnish residence permit; since February 2015 she had been permanently residing in St Petersburg where she had been attending medical facilities and nursery school; she had been two years and one month old at the time of her removal, and had already spent three months (July to October 2013) in Norway; and she did not speak Finnish and had not been integrated in the Finnish social environment. The City Court further considered that since the judgment of the Vantaa District Court of 23 December 2014 – which had determined V.'s residence as being with the applicant in Finland – had not entered into force when the removal had taken place in February 2015, I.K.'s actions in bringing V. to Russia and retaining her there had not been wrongful for the purposes of the Hague Convention. The City Court eventually dismissed the applicant's request for his daughter's return to Finland on the grounds that her state of health, as it appeared from the documents contained in the case file, constituted an

exception to her immediate return in application of Article 13 (b) of the Hague Convention (see paragraph 34 above).

92. The Court will ascertain whether the above interpretation and application of the provisions of the Hague Convention by the City Court secured the guarantees of the applicant's rights under Article 8 of the Convention. The Court notes, first of all, that the City Court's refusal to acknowledge Finland as the State of V.'s habitual residence does not sit well with the facts of the present case. The Court notes, in particular, that the applicant's daughter was born in December 2012 in Finland, where she had lived all her life prior to her removal to Russia in February 2015. By temporarily staying with her paternal grandmother in Norway between July and October 2013, she had not ceased to be habitually resident in Finland. Neither could I.K. have created a new habitual residence for V. in Russia, where the child had never been before, on the day of her removal from Finland. Only V.'s experience immediately preceding her removal from Finland, rather than the one that followed the removal, should have been taken into account by the City Court in determining the issue of her habitual residence for the purposes of Article 3 of the Hague Convention.

93. The Court further observes that the City Court's conclusion to the effect that the child's removal to and retention in Russia had not been wrongful in the absence of a final decision by the Finnish courts determining V.'s residence as being with the applicant in Finland contradicts the obvious meaning of Article 3 of the Hague Convention which transpires from the text, the Explanatory Report and the recognised common practice (see paragraph 89 above, and *Monory v. Romania and Hungary*, no. 71099/01, § 81, 5 April 2005). The Court observes in this connection that even in the absence of a final decision by the Finnish courts determining the issues of custody and residence of the child, under Finnish law the applicant and I.K. had joint custody of the child, which both of them were actually exercising (see paragraphs 8 and 68 above). It further observes that the child's removal to and retention in Russia by I.K. had taken place unbeknownst to the applicant and without his consent, which breached his rights protected by law and interfered with their normal exercise. Therefore, it appears that the provisions of the applicable law were in the present case interpreted and applied in such a way as to render meaningless the applicant's lack of consent for V.'s departure to Russia and subsequent stay there for permanent residence (see *R.S. v. Poland*, cited above, § 67).

94. The above factual elements, which are not disputed by the parties (see paragraph 33 above), would normally have been sufficient to reach the conclusion that V.'s removal from Finland, the State where she had been habitually resident immediately prior to such removal, had been wrongful in terms of the Hague Convention. This would then have triggered the duty under the Hague Convention to return V. to Finland.

95. The Court observes, however, that regardless of its refusal to acknowledge Finland as the State of V.'s habitual residence and to recognise that V.'s removal was in breach of the Hague Convention, the City Court did not dismiss from the outset the applicability of Article 3 of the Hague Convention (contrary to the Government's assertion in paragraph 63 above), but proceeded with the examination of whether V.'s return would be contrary to her interests and arrived at the conclusion that the latter's state of health constituted an exception to such return, in application of Article 13 (b) of the Hague Convention.

96. The Court reiterates that it is not its task to take the place of the competent domestic authorities in determining whether a grave risk existed that the child would be exposed to any harm within the meaning of Article 13 of the Hague Convention if she returned to Finland. However, the Court is in a position to ascertain whether the domestic courts, in applying and interpreting the provisions of that convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests (see paragraph 81 above).

97. The Court observes that it was the child's mother I.K. who opposed the child's return. It was therefore for her to make and to substantiate any potential allegation of specific risks under Article 13 (b) of the Hague Convention (see paragraph 44 above). While that provision is not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" – it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return. Nor can it arise solely from separation from the parent who was responsible for the wrongful removal or retention. The exception provided for in Article 13 (b) concerns only situations which go beyond what a child might reasonably be expected to bear (see see *X v. Latvia*, cited above, § 116; *Maumousseau and Washington v. France*, no. 39388/05, §§ 69 and 73, 6 December 2007; and *K.J. v. Poland*, cited above, §§ 64 and 67).

98. In the instant case, I.K. objected to V.'s return to Finland, giving the following reasons: that V. was already settled in her new environment in Russia, that she did not speak Finnish, and that her return to Finland would lead to their separation and would thus be psychologically traumatic for her. She further indicated that V. had been removed to Russia so that she could be provided with the medical assistance she needed and, finally, that the applicant was suffering from a mental disorder (see paragraph 30 above).

99. Although the Dzerzhinskiy District Court, in examining the case at first instance, had duly addressed all the arguments raised by I.K. and concluded that there were no circumstances capable of constituting an exception under Article 13 (b) of the Hague Convention for V.'s return to Finland (see paragraph 33 above), the City Court, acting as a court of appeal, limited its assessment to a simple reference to "V.'s numerous

medical conditions", which could cause her physical harm in the event of her return to Finland. It thus qualified the child's state of health as an exception to her return under Article 13 (b) of the Hague Convention.

100. As can be seen from the Government's submissions, the medical documents referred to by the City Court showed that V. suffered from a number of rather common conditions present in many children, including atopic dermatitis, allergic rhinitis, muscular hypotension, flat feet, iron deficiency and delayed speech, and that the treatment she required involved monitoring by medical specialists, following a special diet, taking medicines, undergoing massages, wearing orthopedic shoes, swimming, developing fine motor skills and general motor skills, engaging in constructive activity, doing articular gymnastics and undergoing vestibular stimulation. The Government also relied on a report by a medical psychologist of the St Petersburg's Centre for Complex Rehabilitation and Development of the Child, stating that V. had been regularly seeing a child psychologist, who considered that V.'s mother was the only person who could provide V. with the required care, and that any change of place of residence would be harmful to V.'s mental development (see paragraph 58 above).

101. The Court notes, however, that the text of the City Court's decision of 3 February 2016 did not contain any details of V.'s medical conditions. Nor did it mention what kind of treatment they required, the course of V.'s current treatment in Russia or the availability of the equivalent treatment in Finland. No assessment was made of other objections raised by I.K. to V.'s return to Finland, which was important for the assessment of V.'s best interests, in particular whether her return to Finland would entail separation from her mother (whether I.K. had access to Finland, whether she would face any sanctions upon her return there, whether the applicant might deprive her of custody or prevent her from having contact with the child, and so on).

102. The Court considers in this regard that whereas circumstances that could have justified applying the exception under Article 13 (b) of the Hague Convention to the general rule of the child's prompt return may have existed but were not mentioned in the domestic decisions, it is not the Court's task to take the place of the national authorities and to establish them.

103. In the light of the foregoing, the Court considers that the City Court failed to genuinely consider and give a sufficiently reasoned decision on whether V.'s state of health, or any other circumstances advanced by I.K., indeed constituted an exception to her immediate return in application of Article 13 (b) of the Hague Convention and to evaluate it in the light of Article 8 of the Convention.

104. Having regard to the circumstances of the case seen as a whole, the Court concludes that the interpretation and application of the provisions of

the Hague Convention by the City Court failed to secure the guarantees of Article 8 of the Convention, that the interference with the applicant's right to respect for his family life had not been "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, and that the respondent State failed to comply with its positive obligations under Article 8 of the Convention to secure to the applicant the right to respect for his family life.

105. There has therefore been a violation of Article 8 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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

107. The applicant claimed compensation for non-pecuniary damage sustained as a result of the alleged violation of the Convention in an amount to be determined by the Court.

108. The Government considered that, since the applicant had failed to quantify his claim for non-pecuniary damage, his claim should be rejected.

109. The Court considers that the applicant must have suffered, and continues to suffer, distress and emotional hardship as a result of the Russian court's refusal to order his daughter's return to Finland, which is not sufficiently compensated for by the finding of a violation of the Convention. In the light of the circumstances of the case, and making an assessment on an equitable basis as required by Article 41, the Court awards the applicant 16,250 euros (EUR) under this head.

### B. Costs and expenses

110. The applicant also claimed 500,000 Russian roubles (RUB) for the costs and expenses incurred before the domestic courts and the Court, of which RUB 350,000 had been incurred in the proceedings before the Russian courts and the remaining sum of RUB 150,000 – in the proceedings before the Court. The applicant supported his claim by copies of legal services agreements with Ms L.A. Yablokova and relevant receipts of payment.

111. The Government submitted that the applicant's claim was unreasonable and excessive and should be rejected.

112. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court accepts the applicant's claims and awards the sum of EUR 6,800 covering costs under all heads.

### C. Default interest

113. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 16,250 (sixteen thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,800 (six thousand eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 18 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

V.D.G.
J.S.P.

# DISSENTING OPINION OF JUDGE DEDOV

I regret that I cannot agree with the majority in the present case that there has been a violation of Article 8 of the Convention. In my view, the circumstances of the present case are similar to those in the case of *X v. Latvia* ([GC], no. 27853/09, ECHR 2013) which led, however, to the opposite result in the Court's analysis.

In both cases the mother of an "abducted" child of a very young age (three years old in both cases) produced reports supporting the existence of a "grave risk" which could entail not only "physical or psychological harm" but also "an intolerable situation". In *X v. Latvia* the applicant (the mother who "abducted" the child) submitted a psychologist's certificate concluding that there existed a risk of trauma for the child in the event of immediate separation from her mother, bearing in mind the child's age and her close emotional ties to her mother. In the present case the mother provided the court of first instance with a report by a medical psychologist from the St Petersburg Centre for Complex Rehabilitation and Development of the Child dated 8 September 2015, which stated that due to her neurotic state, V. was regularly seeing a child psychologist to alleviate emotional tension and anxiety, as well as a speech therapist. The medical psychologist expressed the opinion that V. should remain with the mother, as she was the only person who could provide the required care, and that a change of place of residence would be harmful to V.'s mental development. According to paragraph 58 of the judgment, the report was referred to by the Government in their submissions, but the report was in the case file of the national courts from the very beginning (as is apparent from the date of the report). However, the District Court disregarded the report, saying that "the argument concerning the risk of V. suffering psychological harm in the event of her return to Finland and the allegation that the applicant was suffering from a mental disorder were found unsubstantiated" (see paragraph 33 of the judgment).

In the *X v. Latvia* judgment the Court reacted by stating that "the refusal to take into account such an allegation, substantiated by the applicant in that it was based on a certificate issued by a professional, the conclusions of which could disclose the possible existence of a grave risk within the meaning of Article 13, first paragraph, (b) of the Hague Convention, was contrary to the requirements of Article 8 of the Convention" (§ 117). The St Petersburg City Court demonstrated the same reaction in the present case by quashing on appeal the decision of the District Court concerning the immediate return of the child. However, the Court criticised the City Court for not providing any details of the child's medical conditions. Yet the details were in the report. Again, paragraphs 100 and 101 of the judgment create the impression that the report was available to the Government alone and not to the national courts and to the parties, which is not true. As is

apparent from the case file, the report was submitted to the District Court by the mother. There is no doubt that the adversarial proceedings were impeded and that the applicant did not have the opportunity to exercise his procedural rights. The Appeal Court and the City Court dismissed the father's request for his daughter's return to Finland on numerous grounds based on the documents provided by the parties in the case file, including the young age of the child, her close attachment to her mother, her integration into Russian society, and the necessary measures taken by the mother as her custodian relating to her medical rehabilitation. The Appeal Court referred to the numerous documents contained in the case file.

However, the Court concluded in paragraph 100 of the judgment that the medical documents referred to by the City Court showed that the child suffered from a number of "rather common conditions present in many children, including atopic dermatitis, allergic rhinitis, muscular hypotension, flat feet, iron deficiency and delayed speech, and that the treatment she required involved monitoring by medical specialists, following a special diet, taking medicines, undergoing massages, wearing orthopaedic shoes, swimming, developing fine motor skills and general motor skills, engaging in constructive activity, doing articular gymnastics and undergoing vestibular stimulation". I am a judge; I am not a doctor in a position to draw conclusions about "rather common medical conditions". But, as is clear from the case file, the child underwent a complex medical rehabilitation programme under the supervision of medical specialists in Russia to resolve her problems. This was organised by the mother only after the child's removal to Russia. The mother did not have the opportunity to organise the child's rehabilitation in Finland because the child's father would not agree to it. It appears from the decisions of 23 December 2012 of the Vantaa District Court in Finland, available in the case file of both the Court and the Russian courts, that the parents had different views about the medical care that should be provided to the child, and that the father preferred to visit the doctor from time to time "when it was necessary". As a judge, I can conclude that if the child were returned to the father, the rehabilitation programme would be terminated. I am sure that this is not in the best interests of the child. In this connection I cannot understand the majority's argument in paragraph 101 of the judgment that the national court failed to examine the availability of the equivalent treatment in Finland. No doubt such treatment is available, but the problem is that the father never agreed to make use of that possibility. Moreover, it is confirmed by the case file and not disputed by the parties that the father worked a lot and did not have the opportunity to care for the child himself. That is why he sent the child to his parents and to a kindergarten.

Further, in the same paragraph the Court stressed that no assessment had been made of other objections raised by the mother, which was important for the assessment of the child's best interests, and in particular whether her

return to Finland would entail separation from her mother. I am sorry to have to point this out, but the City Court decided in favour of the mother; therefore, it did evaluate all the possible consequences, including the mother's own difficult situation due to her state of health and the lack of possibilities for her to live in Finland independently. By contrast, the father's mobility is much greater, taking into account the fact that it takes just three hours to get to St Petersburg from Helsinki by train.

In this respect I would like to point out that, according to the Court's case-law (see *X v. Latvia*, cited above, §§ 104-106), the assessment of the child's best interests is considerably limited by the purposes of the Hague Convention on the Civil Aspects of International Child Abduction. The national courts are required to examine only those factors capable of constituting an exception to the child's immediate return. The analysis should cover the entire family situation, the separation from one of the parents and the best interests of the child in general. That is why the Court was not impressed in the present case by the findings of the City Court that the child socialised in Russia and did not speak Finnish, and that it would be difficult for her to integrate into society in Finland. Because, seen from this perspective, even if it would not be in the best interests of the child, she should be returned to her father.

As I already mentioned in my opinion annexed to the judgment in the case of *Adžić v. Croatia* (no. 22643/14, 12 March 2015), the Hague Convention has systemic deficiencies. It does not take into account the young age of the child and his or her close relationship with the mother after birth, the vulnerability of the mother, who usually does not have any income in a foreign country or any place to live, who is completely dependent on her husband, having only a temporary residence permit, and for whom the only purpose of moving to another country is to enjoy family life with her husband. There are hundreds or even thousands of such clone cases. This case is no exception: the Finnish courts decided that the child should reside with her father and that the mother could visit her two days per week. In all such cases the divorced mothers have no chance to have the place of residence determined in their favour. Therefore, it is obvious that, in the event of the child's return, the mother would be deprived of her own custodial rights.

The Hague Convention provides in its Preamble that the interests of children are of paramount importance in matters relating to their custody. This provision is vague and controversial for several reasons. The Hague Convention focuses on the determination of custody rather than on the best interests of the child. But the best interests of the child are not limited to the issue of custody. The Russian courts discussed the issue of the child's habitual residence and established that she was not integrated into Finnish society, having been placed in a Russian-speaking environment from birth up to the time of her removal to St Petersburg. However, this issue does not

make any sense in terms of the Hague Convention because the latter's primary purpose is to protect the right to custody. Finally, the Hague Convention does not regulate situations, such as that in the present case, where the parents were granted joint custody. The Russian courts demonstrated that the quality of care provided by the mother was better, but that is not what the Hague Convention requires.

All these deficiencies, in my view, should lead to a different perception of the interplay between the Convention for the Protection of Human Rights and Fundamental Freedoms and the Hague Convention. Today the Hague Convention predominates entirely over Article 8 of the Convention because no comprehensive analysis of the best interests of the child is possible for either the national courts or for the European Court of Human Rights. The Court, in my humble view, is therefore placed in a position that runs counter to its role to protect vulnerable persons and to fight against discrimination. The whole reasoning in the judgment gives the impression that the Court is analysing the respondent State's compliance with the Hague Convention. Instead, greater emphasis should be placed on the Court's primary role, namely to decide whether the respondent State complied with its positive obligations under Article 8 of the Convention.

I admire the words of the Australian judge (see paragraph 15 of the *X v. Latvia* judgment) who stated as follows:

> "... however, it is not of course for me to say whether the child's presence in Latvia is the consequence of a wrongful removal or retention. With all due respect, it is for the Latvian judge to rule on that question."

This judge has a better understanding of family life than the whole Hague Convention, which pursues the opposite idea in Article 15:

> "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful ..."

It is noteworthy that Article 15 of the Hague Convention was not cited (and therefore, not taken into consideration by the Court in dealing with general principles) in the *X v. Latvia* judgment. By contrast, 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 "the Brussels II *bis* Regulation") was cited in paragraph 42 of the *X v. Latvia* judgment and reads, in particular, as follows:

> "(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case."

Behind those ideas expressed by the Australian judge and the EC Council there is a legal doctrine which is designed to give more protection to a

vulnerable woman and to take into consideration all the conditions in which the child is placed in the woman's home country and the entire family situation. In the present case the applicant (father) sought in the national courts nothing more than the immediate return of the child because his custody rights had been violated. And this is, unfortunately, the only question which was to be decided under the Court's case-law: if there is no grave risk, other difficulties can easily be regarded as tolerable even if they are not in the best interests of the child.

As a result, the Russian authorities were deprived of their margin of appreciation as safeguarded under the Convention. The Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Sahin v. Germany* [GC], no. 30943/96, § 65, ECHR 2003-VIII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 63, ECHR 2003-VIII (extracts).