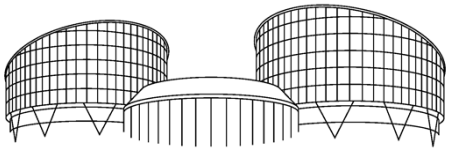

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

**CASE OF P.D. v. RUSSIA**

*(Application no. 30560/19)*

JUDGMENT

Art 8 • Family life • Positive obligations • Domestic courts' refusal of applicant's request for his daughter's return to Switzerland under the Hague Convention • Genuine and objective evaluation of alleged risk of child's return coupled with sufficiently reasoned decisions justifying application of "grave risk" exception

STRASBOURG

3 May 2022

*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 P.D. v. Russia,**

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Anja Seibert-Fohr,
Peeter Roosma,
Frédéric Krenc,
Mikhail Lobov, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 30560/19) 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 Belgian national, Mr P.D. ("the applicant"), on 3 June 2019;

the decision to give notice of the application to the Russian Government ("the Government");

the decision not to have the applicant's name disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Belgian Government, who exercised their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court);

Having deliberated in private on 29 March 2022,

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

# INTRODUCTION

1. The present case concerns the decision of the Russian courts to refuse the applicant's request for the return of his daughter to Switzerland under the Hague Convention on the Civil Aspects of International Child Abduction.

# THE FACTS

2. The applicant was born in 1972 and lives in Le Poizat-Lalleryriat, France. He was represented by Mr O. Ovchynnykov, a lawyer practising in Strasbourg.

3. The Government were represented by Mr M. Galperin, the then Representative of the Russian Federation to the European Court of Human Rights, and lately by Mr M. Vinogradov, his successor in that office.

4. The facts of the case may be summarised as follows.

## I. BACKGROUND OF THE CASE

5. The applicant had a relationship with a Russian national, Ms E. In June 2014 they started living together in Geneva, Switzerland. E. had a son from her previous relationship, A.

6. On 4 June 2014, E. gave birth to their daughter, M., who is a national of Belgium and Russia.

7. On 5 May 2015 the applicant and E. signed an agreement as regards joint custody of their daughter M.

8. In November 2015 the relationship between the applicant and E. deteriorated and the applicant moved out to live in France.

9. From November 2015 to December 2016 the applicant's daughter lived with her mother E. in Geneva and spent several days a week with the applicant at his place of residence in France.

10. On 5 December 2016, while the applicant's daughter M., and M.'s half-brother A., were in the applicant's care, A. was allegedly subjected to sexual abuse by the applicant's close friend, Mr S.

11. On 9 December 2016 S. was arrested; criminal proceedings were instituted against him in Switzerland on charges of committing acts of a sexual nature, coercion to perform such acts, and child pornography; and he was placed in pre-trial detention.

12. At 7.30 a.m. on 16 December 2016 E. left Geneva for St Petersburg, via Zurich, with the children. She never returned to Switzerland.

13. On 5 July 2017 S. was released on bail and obliged to undergo mandatory psychiatric and psychotherapeutic treatment.

14. The Court has not been informed about the outcome of the criminal proceedings against S.

## II. PROCEEDINGS IN SWITZERLAND

15. Meanwhile, following the incident of 5 December 2016, E. applied to the Geneva Adult and Child Protection Court (*le Tribunal de protection de l'adulte et de l'enfant*), challenging the parental authority agreement between her and the applicant and seeking that the applicant be denied all contact with his daughter.

16. At E.'s request, on 13 December 2016 the Geneva Adult and Child Protection Court gave an interim decision to divest the applicant of his parental authority in respect of M., to forbid him all contact with his daughter, to prohibit him from taking the latter outside the territory of Switzerland and from changing her place of residence, and to oblige him to hand the child's documents in his possession to the Minors' Protection Service. That decision was declared immediately enforceable.

17. At the applicant's request, at 7.26 p.m. on 16 December 2016 the Geneva Adult and Child Protection Court gave an interim decision to prohibit

E. from changing M.'s place of residence and from taking her outside the territory of Switzerland, and to oblige her to hand the child's documents to the Minors' Protection Service.

18. On an unspecified date in January 2017 criminal proceedings were instituted against E. in Switzerland on charges of kidnapping. The Court has not been informed about the outcome of those proceedings.

19. On 6 February 2017 the Geneva Adult and Child Protection Court lifted the suspension of the applicant's parental authority in respect of his daughter, considered that there had been no evidence to the effect that contact with the applicant might represent any risk for the child, lifted the ban on the applicant's contact with his daughter and held that, in view of the geographical distance between them, until the child's return to Geneva the contact should take place by means of telephone communication (namely by Skype) three times a week.

20. On 10 July 2017 the Criminal Court of Geneva prohibited S., pending the criminal proceedings against him, from any direct or indirect contact with the applicant, E., or A., with reference to the existence of a risk of revenge and recidivism in view of the crimes previously committed by him in France. No such ban was made in respect of the applicant's daughter.

21. On 21 November 2017 the Geneva Adult and Child Protection Court gave a decision to withdraw E.'s *de facto* custody of the child as well as the right to determine the latter's place of residence, to order the child's placement with the applicant, to order E. to take the child to Switzerland, and to grant her the right to maintain contact with the child, without leaving Switzerland, every other weekend, a day during the week and half of all holidays. That decision was immediately enforceable.

## III. PROCEEDINGS IN RUSSIA

22. Meanwhile, on 23 August 2017 the applicant lodged an application with the Dzerzhinskiy District Court of St Petersburg ("the District Court"), seeking his daughter's return to Switzerland on the basis of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention").

23. In her objections, E. argued that she had exercised sole custody in respect of her daughter at the time of her removal, which allowed her to determine the latter's place of residence without this being wrongful within the meaning of the Hague Convention. She further indicated the existence of circumstances constituting a grave risk that her daughter's return would expose her to psychological harm or otherwise place her in an intolerable situation. In particular, the child had always lived with her mother and half-brother A., to both of whom she was closely attached. At the end of 2016, A. had been sexually abused by the applicant's close friend S., against whom criminal proceedings had been instituted in Switzerland and remained

pending. In July 2017 S. had been released on bail and obliged to undergo mandatory psychiatric treatment. E. considered it necessary to protect A. from painful memories, to minimise the physical and psychological damage sustained by him and to avoid the risk of her daughter being subjected to a similar traumatic experience. Moreover, criminal proceedings had been instituted against her in Switzerland, which involved a risk of her being placed in pre-trial detention and deprived of liberty.

24. On 11 January 2018 the District Court rejected the applicant's claim for his daughter's return to Switzerland. The District Court noted at the outset that it was apparent from the documents in the case file, and was not disputed by the parties, that M.'s habitual place of residence had been Switzerland. It further considered that the child's removal to Russia in December 2016 and her retention there had not been wrongful as it had not been carried out in breach of the applicant's rights of custody. The District Court noted in this connection that at the time when E. had left Switzerland for Russia with the children, at 7.30 a.m. on 16 December 2016, the interim decision of 13 December 2016, divesting the applicant of his parental authority in respect of his daughter and forbidding him to have any contact with her, was in effect, and that was the case until 6 February 2017. During this period, therefore, E. had exercised sole custody of M., which included the right to determine the latter's place of residence. The District Court further noted that the subsequent interim decision of 16 December 2016 forbidding E. to change M.'s place of residence and to leave Switzerland had been taken after E., having sole custody of M., had already left Switzerland with the children. She had learned about this decision at 7.26 p.m. from a letter sent to her by her counsel. No evidence to the contrary had been provided by the applicant. The District Court furthermore noted that the above decision of 16 December 2016 had not provided for the restoration of the applicant's parental authority and had not vested in him the right to determine the child's place of residence. Lastly, the District Court considered, with reference to Article 13 (b) of the Hague Convention, that there had been a risk that the applicant's daughter's return to Switzerland would expose her to physical or psychological harm. The District Court mentioned in this respect the following circumstances: the incident of 5 December 2016 involving the alleged sexual abuse of the applicant's daughter's half-brother A. by the applicant's close friend S. while the children were in the applicant's care, and the related criminal proceedings on charges of committing acts of a sexual nature, coercion to perform such acts, and child pornography, which were pending in Switzerland, S. having been released on bail under an obligation to undergo mandatory psychiatric and psychotherapeutic treatment; the ban on S.'s direct or indirect contact with A., the applicant and E.; the absence of such a ban in relation to M.; and the existence of a risk of revenge or further criminal offences by S. which had been established by the Criminal Court of Geneva on 10 July 2017 in view of the crimes previously committed by him in France (see paragraph 20 above).

The latter circumstance did not exclude the risk of the infliction of physical or psychological harm to M., who could also become a victim of sexual abuse. In view of the above circumstances and the requirements of securing the best interests of the child, taking into account M.'s young age (three years old), and her need for her mother's everyday care, the District Court arrived at the conclusion that there were no grounds for granting the applicant's request for his daughter's return to Switzerland.

25. The applicant appealed, arguing that the child's removal to Russia had been wrongful. The decision of 13 December 2016 had been of a temporary nature and had not implied that E. could change the child's place of residence unilaterally. The applicant had retained his right to be the child's parent and to seek protection of his rights through the existing legal mechanisms. In particular, in the exercise of these rights the applicant had requested the Geneva Adult and Child Protection Court to temporarily prohibit E. from changing the child's place of residence. The applicant further argued that the risk of physical or psychological harm to M. referred to by the District Court in the application of Article 13 (b) of the Hague Convention had not been sufficiently proved.

26. On 22 March 2018 the St Petersburg City Court ("the City Court") upheld the above judgment of 11 January 2018 on appeal, endorsing the District Court's reasoning.

27. On 18 July and 20 November 2018 cassation appeals brought by the applicant were rejected by a judge of the City Court and a judge of the Supreme Court of the Russian Federation ("the Supreme Court"), respectively. The final decision of 20 November 2018 was notified to the applicant's lawyer on 5 December 2018.

## RELEVANT LEGAL FRAMEWORK

28. The Hague Convention on the Civil Aspects of International Child Abduction entered into force between Russia and Switzerland on 1 June 2015.

29. The relevant international law and practice and the relevant domestic law are set out in the Court's judgment in *Vladimir Ushakov v. Russia* (no. 15122/17, §§ 43-54, 18 June 2019).

30. The Swiss Civil Code provides that parental authority includes the right to determine the child's place of residence (Article 301a § 1). A parent exercising parental authority jointly may only change the child's place of residence with the agreement of the other parent or by a decision of the court or the child protection authority if (a) the new place of residence is outside of Switzerland or (b) the change of place of residence has serious consequences for the ability of the other parent to exercise parental authority and have contact (Article 301a § 2). The parent with sole parental authority can

determine the child's place of residence, of which he or she must inform the other parent in good time (Article 301a § 3).

# THE LAW

## ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. The applicant complained that the Russian courts' refusal of his application for his daughter's return to Switzerland under the Hague Convention had 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

32. The Government argued that the application was manifestly ill-founded for the reasons set out below (see paragraph 35 below).

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

### B. Merits

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

34. The applicant maintained his complaint. He argued that the Geneva Adult and Child Protection Court's decision of 13 December 2016 had been of a temporary nature and that his daughter's removal from Switzerland by E. and her retention in Russia had been wrongful within the meaning of the Hague Convention. The decision in question was no longer in force by the time the District Court rejected the applicant's claim for the child's return, and the applicant's parental authority in respect of the latter was no longer the subject of legal challenge. E. had failed to demonstrate that the applicant had not been actually exercising his rights of custody in respect of the child prior to her removal. The reason put forward by the Russian courts as giving rise to a "grave risk" in the event of the child's return – sexual abuse in respect of E.'s son from a previous relationship by the applicant's close friend S. – did not involve a genuine and objective evaluation of the alleged risk to the

applicant's daughter. The applicant concluded that the interference with his right to respect for his family life had not been in accordance with the law and not necessary in a democratic society.

35. The Government reiterated the reasons for the domestic courts' refusal of the applicant's claim for his daughter's return to Switzerland – regarding the lack of wrongfulness of the child's removal from Switzerland and retention in Russia and the risk of her being exposed to physical or psychological harm in the event of return – and submitted that there had been no violation of the applicant's rights under Article 8 of the Convention.

*2. Third-party intervener*

36. The Government of Belgium recapitulated international and domestic law standards in the sphere of international child abduction and took a position on the merits of the case, expressing their concerns as regards Article 8 of the Convention.

*3. The Court's assessment*

37. The general principles emerging from the Court's case-law on the issue of international abduction of children have been summarised in *X v. Latvia* ([GC], no. 27853/09, §§ 92-108, ECHR 2013), and *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131-40, ECHR 2010).

38. In the instant case, the primary interference with the applicant's right to respect for his family life may not be attributed to an action or omission by the respondent State, but rather to the action of the applicant's former partner and his child's mother, a private individual, who took their daughter to Russia. That action nevertheless placed the respondent State under a positive obligation 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 *Thompson v. Russia*, no. 36048/17, §§ 55-56, 30 March 2021, and *G.N. v. Poland*, no. 2171/14, §§ 47-48, 19 July 2016).

39. By the judgment of the District Court of 11 January 2018, upheld on appeal by the City Court on 22 March 2018, the applicant's request for his daughter's return to Switzerland was rejected. In the exercise of its task of European supervision, the Court will proceed with the assessment of whether the respondent State's domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of Article 8 of the Convention 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.

40. The determination of whether the applicant's daughter was to be returned to Switzerland depended on whether her removal from Switzerland

by her mother E. was wrongful within the meaning of Article 3 of the Hague Convention. This required the ascertaining of the following circumstances: (1) the State of the child's habitual residence immediately before her removal; (2) whether the applicant had custody rights in respect of the child under the law of that State immediately before the removal; and, if so, (3) whether the applicant actually exercised his custody rights in respect of the child at the time of the removal. The notion of "rights of custody" within the meaning of the Hague Convention includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 5 (a)).

41. Proceeding in accordance with the above test, the domestic courts established that Switzerland had been the child's habitual residence at the time of her removal, that such removal had not been in breach of the applicant's rights of custody under Swiss law (see paragraph 30 above) and, therefore, that it was not wrongful within the meaning of Article 3 of the Hague Convention. In particular, the District Court took into account the fact that at the time when E. left Switzerland for Russia, at 7.30 a.m. on 16 December 2016, the interim decision of 13 December 2016, divesting the applicant of his parental authority in respect of his daughter and forbidding him to have any contact with her, was in effect, and that was the case until 6 February 2017. During this period, therefore, E. exercised sole custody of M., which included the right to determine the latter's place of residence. The District Court noted that the subsequent interim decision of 16 December 2016, forbidding E. to change M.'s place of residence or to leave Switzerland, had been communicated at 7.26 p.m., that is after E. had already left Switzerland, and that it had not provided for the restoration of the applicant's parental authority and had not vested in him the right to determine the child's place of residence (see paragraphs 23, 26-27 above).

42. The Court notes, however, that regardless of their finding to the effect that the applicant's daughter's removal from Switzerland by her mother E. had not been wrongful in terms of the Hague Convention, which would exclude the application of the Hague Convention, the Russian courts proceeded as though the duty to return the child had been triggered and considered that they were not bound to order the return of the child in view of the exception provided by Article 13 (b) of the Hague Convention. The Court will therefore leave the issue of the wrongfulness of the child's removal open and focus its analysis on the reasons advanced by the Russian courts to refuse the applicant's claim for his daughter's return to Switzerland.

43. Under Article 13 (b) of the Hague Convention, the courts examining the application for return are not obliged to grant it "if the person, institution or other body which opposes its return establishes that ... 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". While the latter provision is not specific as to the exact nature of the "grave risk" – which

could entail not only "physical or psychological harm" but also "an intolerable situation" – it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13 (b) concerns only the situations which go beyond what a child might reasonably bear. Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation, requiring that an arguable allegation of a "grave risk" for the child in the event of return be effectively examined by the courts and their findings set out in a reasoned court decision (*X v. Latvia*, cited above, § 107).

44. Turning to the circumstances of the present case, the Court observes that the District Court addressed the arguments advanced by E. as to the existence of a grave risk that her daughter's return to Switzerland would expose her to physical or psychological harm (see paragraph 23 above) and dismissed the return application in a well-reasoned decision. The domestic courts were consistent in their findings that the incident of sexual abuse of the applicant's daughter's half-brother by the applicant's close friend S. while the children were in the applicant's care, and the related criminal proceedings against the alleged perpetrator on charges of sexual molestation and child pornography, were serious enough to be characterised as a "grave risk" and to qualify for an exception from the general obligation of the child's return under the Hague Convention. They took into account the fact that S. had been released on bail under an obligation to undergo mandatory psychiatric treatment, the risk of revenge or further criminal offences by S., established by the Criminal Court of Geneva on 10 July 2017, in view of the crimes previously committed by him, and the absence of any protective measures in respect of the applicant's daughter. The domestic courts further relied on the child's young age and her need for her mother's everyday care (see paragraphs 24-27 above).

45. In the light of the foregoing, the Court considers that the domestic courts carried out a genuine and objective evaluation of the alleged risk of the child's return and gave sufficiently reasoned decisions justifying the application of the exception to the child's return in the application of Article 13 (b) of the Hague Convention.

46. Having regard to the circumstances of the case as a whole, the Court concludes that, aside from the issue of the wrongfulness of the applicant's daughter's removal which the Court decided to leave open in the particular circumstances of the present case, the interpretation and application of the provisions of the Hague Convention by the domestic courts secured the guarantees of Article 8 of the Convention, particularly taking into account the child's best interests, and that the refusal to return the applicant's daughter to Switzerland did not amount to a violation of the applicant's right to respect for his family life under Article 8 of the Convention.

47. There has accordingly been no violation of Article 8 of the Convention.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 3 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Milan Blaško<br>Registrar | Georges Ravarani<br>President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Serghides;
(b) concurring opinion of Judge Krenc.

G.R.
M.B.

# CONCURRING OPINION OF JUDGE SERGHIDES

1. I voted in favour of both points of the operative part of the judgment and my only disagreement is with the decision to *leave open* the question whether the removal of the applicant's daughter to Russia was wrongful within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, hereinafter the "Hague Convention" (see paragraphs 42 and 46 of the judgment). My opinion, which I will explain below, is that the child's removal to Russia by its mother was wrongful and therefore constituted an abduction under Article 3 of the Hague Convention.

## A. The need for harmonious interpretation of Article 8 with the Hague Convention *as a whole*

2. The judgment found that the guarantees of Article 8 of the Convention were secured merely because the domestic courts carried out a genuine and objective evaluation of the alleged risk of the child's return to the country of its habitual residence (see paragraphs 42, 44-46). Although I am in agreement with this finding, I nevertheless entirely disagree that the Court should come to examine the issue of defences under Article 13 (b) of the Hague Convention, as the judgment did in the present case, without first establishing whether there has been a wrongful removal or retention (in the present case wrongful removal) under Article 3 of the Hague Convention.

3. Just as the Convention provisions must be interpreted and applied harmoniously between themselves according to the principle of internal harmony or coherence (systemic interpretation), which is an aspect or dimension of the principle of effectiveness[1], the same must apply in respect of the Hague Convention's provisions. There is an additional reason for the harmonious interpretation of Article 3 with Article 13 (b) of the Hague Convention, the first being a *sine qua non* requirement or condition for the latter (an *indispensable* prerequisite). I would therefore point out that there should not be any discussion of the issue of a defence under Article 13 (b) of the Hague Convention without establishing whether there has been a wrongful removal, i.e., an international abduction, in the first place. To examine under the Hague Convention the existence of a defence without first establishing that there has been an abduction is analogous in criminal law to examining a defence without first having shown that an offence is made out.

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[1] On this aspect or dimension of the principle of effectiveness, see Daniel Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*", in 79 (2010) *Nordic Journal of International Law*, 245, at pp. 267-271; see also Georgios A. Serghides, *The Principle of Effectiveness and its Overarching Role in the Interpretation and Application of the ECHR: The Norm of all Norms and the Method of all Methods,* Strasbourg, 2022, at pp. 606-637, 777-781.

4. The European Convention on Human Rights is part of international law and must be interpreted harmoniously with the provisions of other international treaties in accordance with the principle of external harmony or coherence (the broader form of systemic interpretation), which is again an aspect or function of the principle of effectiveness[2]. One of the best examples of treaties with which the Convention should be interpreted harmoniously is indeed the Hague Convention. However, that convention should not be interpreted and applied piecemeal, either by domestic courts or by the Court, when it is considered for the purposes of Article 8 of the Convention. It is submitted that there is no harmonious interpretation of Article 8 with the Hague Convention when the Court leaves open the issue of an indispensable requirement of its application, that is, whether there had been an abduction. In other words, the interpretation of Article 8 in relation to the Hague Convention is not harmonious when the Court examines a defence under the latter, i.e., the "grave risk" exception under Article 13 (b), without first establishing the legal substratum or requirement, namely, the existence of wrongful removal or retention, which is indispensable for *triggering* any defence under that convention.

5. The reason given in paragraph 42 of the judgment as to why it left open the issue of the removal's wrongfulness is that, regardless of the Russian courts' finding that the child's removal had not been wrongful in terms of the Hague Convention, which would exclude the application of that convention, those domestic courts nevertheless proceeded as though the duty to return the child had been *triggered* and considered that they were not bound to order the child's return in view of the exception provided for in Article 13 (b) of the Hague Convention. However, with all due respect, this reason is not valid since, as has been explained above, an Article 13 (b) exception cannot be triggered unless the finding of the domestic courts is that there has been a wrongful removal or retention.

6. Since the present judgment expressly *left open* the issue of the wrongfulness of the child's removal to Russia, one may be allowed to suppose that the removal could have been either wrongful or lawful. But if it were the latter – and that was indeed the decision of the domestic courts – what would be the point of the Court, in the present case, engaging in the task of examining the issue of an abduction defence and considering it in the light of Article 8 of the Convention? If there was no abduction, the Hague Convention would not be applicable and there would be no need for the Court to interpret Article 8 in conjunction with the Hague Convention. Consequently, the Court should not have left open an issue which was *necessary* for its decision.

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[2] On this aspect or dimension of the principle of effectiveness, see Daniel Rietiker, *op. cit.* at pp. 271-275; and Georgios A. Serghides, *op. cit.*, at pp. 637-663, 777-781.

7. My view in finding that there had been a wrongful removal of the child by its mother to Russia is consistent with the harmonious interpretation of Article 8 of the Convention in relation to the Hague Convention as a whole (as a unity, in its integrity) and does not suffer from the fundamental conceptual and practical defects to be found in the present judgment.

8. Regrettably, as has been said above, the Russian domestic courts also erroneously approached the Hague Convention by deciding an issue of defence under Article 13 (b), whilst having first established that there had been no wrongful removal or retention under that convention. The fact that the domestic courts found that the removal to – and retention in – Russia were lawful is evident from the facts as set out in paragraphs 24-27 of the judgment and is also clearly referred to by the Court in its assessment (under the "Court's assessment") in paragraph 41. The Russian domestic courts, having found that the removal to Russia was not wrongful, should have dismissed the application under the Hague Convention without examining any issue of defence. Thus they fell into a fundamental conceptual and practical flaw regarding the interpretation and application of the Hague Convention. On the other hand, the Court, as has been suggested above, should not *so lightly* have left open the issue whether or not the removal was wrongful, since there was a decision of the domestic courts not allowing them to examine further any issue under the Hague Convention, and that flaw could have been addressed if the Court had decided to disagree with the domestic court on the issue of the lawfulness of the removal.

### B. Why the removal to Russia was wrongful

9. I will now explain why, in my humble view, the child's removal to Russia by its mother was wrongful.

10. The decision of the Geneva Adult and Child Protection Court of 13 December 2016 divesting the applicant of his parental authority in respect of his daughter and forbidding him all contact with her was of *a temporary nature*, having effect only for the duration of the custody proceedings between the applicant and the child's mother.

11. Article 3 of the Hague Convention does not explicitly provide for such situations and the issue has been raised here for the first time to the best of my knowledge[3]. It is submitted that Article 3 must be interpreted in a *constructive and effective manner* so *as not to permit* parents exercising sole custody of a child *on a temporary basis to take important decisions* in respect of the child that would *unavoidably lead to permanent implications* for the latter and the left-behind parent. To hold otherwise would go against the scope and spirit of the Hague Convention and would allow a parent to act

[3] Compare, in a different factual and legal context, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010.

unilaterally and arbitrarily circumvent the said treaty. The main aim of the Hague Convention, as indicated in its preamble, is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence". It is not its aim to deal with the question as to which parent will have custody of a child. In this connection, Article 19 of the Hague Convention provides that "[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". On this topic, Eliza Pérez-Vera in paragraph 71 (at p. 36) of her *Explanatory Report* on the Hague Convention explains (emphasis added):

> "Now, 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 with 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*."

In the present case, the child's mother was not prevented from taking unilateral action resulting in an important change of circumstances for the child and its left-behind father, and nor did the domestic courts or this Court find that there had indeed been an abduction in terms of the Hague Convention, to the great discontent of the applicant.

12. I further submit that the removal of the child by its mother was to be considered wrongful given that at the time of the removal, the applicant retained a right to have his child's place of residence determined by the domestic courts, for which he had filed a petition, which was pending. Article 5 (a) of the Hague Convention provides that "[f]or the purposes of this Convention – a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, *the right to determine the child's place of residence*" (emphasis added). The child's mother could not remove the child to another country without either the father's consent or the filing and approval of an application for relocation decided by the domestic courts after the father had first been heard. The facts subsequent to the removal, as stated in paragraph 21 of the judgment, can shed light upon this point and can also show how easily an interim order granting the residence of a child to one parent can be changed, with its terms completely varied in transferring rights from one parent to another. In particular, on 21 November 2017 the Geneva Adult and Child Protection Court gave a decision to withdraw the mother's *de facto* custody of the child, as well as the right to determine its place of residence (in Switzerland); the said court ordered the child's placement with

the applicant; it ordered the mother to take the child to Switzerland; it granted the mother the right to maintain contact with the child, without leaving Switzerland (every other weekend, one day during the week and half of all holidays). That decision was immediately enforceable.

13. In view of the above, I disagree with the findings of the domestic courts that the child's removal or retention had not been wrongful for the purposes of the Hague Convention. Since, in my view, the removal itself was wrongful, no question of wrongful retention would then arise.

14. To conclude: (a) I disagree with the judgment that the issue whether or not the child's removal was wrongful should have been left open; (b) I maintain that the child's removal was wrongful; and (c) I agree with the judgment that the application was admissible and that there had been no violation of Article 8 of the Convention for the reasons explained in paragraphs 45 and 46 of the judgment.

# CONCURRING OPINION OF JUDGE KRENC

1. This case is difficult, as are all cases concerning international removals of children.

2. I hesitated for a long time as to whether the domestic judicial decisions were sufficiently reasoned (§§ 24-27), especially in view of the decisions given previously by the Geneva courts on 6 February 2017 (§ 19) and 21 November 2017 (§ 21). I ultimately joined all my colleagues in finding no violation of Article 8 of the Convention, given that in the present circumstances the Court did not have strong enough reasons to substitute its own view for that of the domestic courts (see, regarding the Court's scrutiny in this sphere, *X v. Latvia* [GC], no. 27853/09, §§ 92-108, ECHR 2013, and *S.N. and M.B.N. v. Switzerland*, no. 12937/20, §§ 97-100, 23 November 2021).

3. I would, however, emphasise that to my mind the present judgment cannot be understood as implying or condoning the breaking-off of all contact between the applicant and M. In their observations to the Court, the Government pointed out that by decision of 25 December 2019, the Vasileostrovsky district court in St Petersburg had authorised the applicant to communicate with his daughter by Internet, but that the applicant had had scant recourse to that option. The latter replied in his observations that the paucity of the communications had been due to obstruction on the part of E. Without pronouncing on that point, I think it should be stressed that a parent's right to maintain personal relations with his or her child is an integral part of the right secured under Article 8 of the Convention (see, among other authorities, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 136, ECHR 2010), respect for which must be ensured by the States by means of appropriate measures (see *Hromadka and Hromadkova v. Russia*, no. 22909/10, §§ 165-169, 11 December 2014). The present judgment does not call into question that right which is undisputed by the Government.