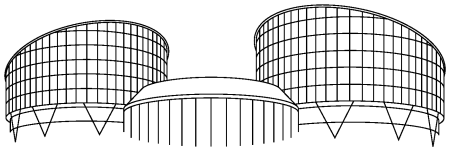

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ADŽIĆ v. CROATIA

(Application no. 22643/14)

JUDGMENT

STRASBOURG

12 March 2015

FINAL

12/06/2015

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

In the case of Adžić v. Croatia,

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

Isabelle Berro, *President*,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 February 2015,

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

PROCEDURE

1. The case originated in an application (no. 22643/14) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the United States of America, Mr Miomir Adžić ("the applicant"), on 12 March 2014.

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

3. The applicant alleged, in particular, that by failing to act expeditiously in proceedings for the return of his son the domestic courts had failed to secure his right to respect for his family life.

4. On 28 May 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

6. On 7 June 2008 the applicant married Ms K.A., a Croatian national, in Sarajevo (Bosnia and Herzegovina). On 29 November 2008 K.A. gave birth to their son, N.A. In May 2009 she moved to the United States of America to join her husband.

7. In June 2011 the applicant's wife and son spent their summer holidays in Croatia. They were supposed to return to the United States on 31 August 2011. Instead, the applicant's wife sent him an e-mail, informing him that she and their son were to remain in Croatia and that she had brought a civil action against him there, seeking a divorce (see paragraph 51 below).

A. Non-contentious proceedings for return of the child

1. The principal proceedings

8. On 7 September 2011 the applicant's legal representative sent an e-mail to the Ministry of Health and Social Welfare (*Ministarstvo zdravstva i socijalne skrbi*, hereafter "the relevant Ministry"), as the Croatian Central Authority within the meaning of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention", see paragraph 61 below). She asked the Ministry to urgently contact the applicant's wife and take other appropriate measures to seek the voluntary return of the child until the receipt of the official request under the Hague Convention from the United States Central Authority.

9. On 15 September 2011 the Ministry forwarded the applicant's request to the competent local social welfare centre with a view to establishing his wife's intentions regarding their son and the possibility of a voluntary return to the United States. The centre immediately invited her for an interview. During the interview of 26 September 2011 she stated that while living in the United States she had been subjected to constant psychological abuse by the applicant. She did not oppose the applicant's having contact with their son, but insisted that any contact take place under the supervision of a child welfare professional.

10. On 3 October 2011 the Ministry received an official request from the United States Central Authority under the Hague Convention for the return of the applicant's son.

11. On 13 October 2011 the Ministry forwarded the request for return to the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*) and thus instituted non-contentious proceedings for the return of the applicant's son. The court received the request the next day.

12. On 24 October 2011 the court invited the local social welfare centre to submit a report on the applicant's wife's social and financial situation, the reasons for her taking the child to Croatia, the child's general and psychological condition, and the potential effects on his mental development of any decision to return him to the United States. On the same day the court also invited the applicant's wife to respond to her husband's request for the boy to be returned.

13. In her response of 15 November 2011 the applicant's wife opposed his request for the return of their child, with or without her. She submitted

in particular that the applicant had agreed to her trip to Croatia and that his consent was not time-limited. She also stated that the applicant had expressly forbidden her to return to their flat in the United States, that he had been abusing her, and that there, unlike in Croatia, she had been completely dependent on him in every way (financially, economically, and in terms of accommodation). Lastly, she claimed that no significant changes had occurred in the care the child was receiving, given that she had been the one taking care of their son thus far, which was the reason why the child was very emotionally attached to her.

14. On 30 November 2011 the court reiterated its request of 24 October 2011 to the local social welfare centre.

15. On 13 December 2011 the local social welfare centre submitted its report and supplemented it, at the court's request, six days later. The report stated that the applicant's wife was taking adequate care of their son and recognised his needs, that she was emotionally positively focused on him and that he was affectionate towards her. The report also stated that she did not undermine the applicant's role as a father, and that she encouraged the child to have contact with him, but that she felt the need to protect him from the applicant's possible irrational behaviour, which concern the centre considered credible. The child was mentally stable, showed no signs of trauma due to the separation from his father, and had adapted well to the new situation. The report noted that the child was emotionally attached to his mother, with whom he had spent every day since birth, and that separation from her and returning him to his father would be traumatic. The centre therefore considered that returning the child to the United States would not be in his best interest.

16. On 22 December 2011 the applicant submitted to the court a certified copy of the decision of a court in North Carolina of 26 October 2011 granting him interim custody of his son.

17. In her submissions of 28 December 2011 his wife argued that the report of the social welfare centre suggested that returning her son to the United States would expose him to psychological harm or place him in an intolerable situation within the meaning of Article 13 paragraph 1 (b) of the Hague Convention (see paragraph 62 below). She therefore invited the court to dismiss the applicant's request for return on that ground.

18. On 18 January 2012 the relevant Ministry asked the court to inform it of developments in the case. The court delivered the requested information on 8 February 2012.

19. On 26 January 2012 the court invited the applicant's representative to submit rectified translations of the documents submitted on 22 December 2011, given that certain dates had been wrongly translated. The applicant did so on 9 February 2012.

20. In his submissions of 26 January and 17 February 2012 the applicant argued that the report and recommendation of the local social welfare centre

did not correspond to the objectives, spirit and purpose of the Hague Convention. He explained that the purpose of the Hague Convention was the prompt return of the child, and not an assessment of the child's adaptation to a new environment. The applicant further argued that his wife had not presented any evidence for her allegations of abuse, and that she had never intended to establish a permanent relationship with him. He averred that tolerating his wife's conduct in the proceedings constituted a violation of the European Convention on Human Rights, the Hague Convention and the Convention on the Rights of the Child.

21. In her submissions of 28 and 29 February 2012 the applicant's wife replied by contesting all the applicant's arguments, and submitted evidence in support of her allegations of abuse. In particular, she submitted a letter from the president and founder of the association for the protection of victims of domestic violence WISH, based in Charlotte, where she had sought help while living in the United States. She also stated that the applicant no longer lived in their matrimonial home in the United States and wondered where the child was supposed to return.

22. On 15 March 2012 the Zagreb Municipal Civil Court dismissed the applicant's request for the return of the child. The relevant part of that decision reads as follows:

> "... having regard to the fact that the separation of N.A. from his mother and from a safe environment would without a doubt have harmful and traumatic consequences for his psychological development, and that granting the applicant's request might cause psychological trauma to the child and place him in an unfavourable position within the meaning of Article 13 paragraph 1 (b) of the [Hague] Convention, and having regard to the mother's fear that the child would, upon his return to the United States, be subject to psychological and verbal abuse, which fear was deemed justified by the psychologist and the social worker of the social welfare centre ... and having regard to the fact that on 12 July 2011 proceedings for divorce of the parties were instituted, in which proceedings the court should decide on custody of the child and on the other parent's contact rights, the petitioner's request must be dismissed, without violating Article 8 of the European Convention on Human Rights or Article 9 of the Convention on the Rights of a Child, it was decided as in the operative part of this decision."

23. On 17 April 2012 the applicant appealed against that decision, alleging procedural errors, incomplete findings of fact, and misapplication of substantive law as grounds for appeal. In particular, the applicant argued that his wife's submissions of 28 and 29 February 2012 had been served on him together with the contested first-instance decision and thus in breach of the principle of equality of arms, that the court had not held a single hearing in the case, and that it had wrongly applied Article 13 paragraph 1 (b) of the Hague Convention.

24. On 2 July 2012 the Zagreb County Court (*Županijski sud u Zagrebu*) allowed the applicant's appeal, quashed the first-instance decision and remitted the case. The relevant part of that decision reads as follows:

> "... the first-instance court based [its] decision in part on undisputed facts, and in the relevant part on the arguments and the evidence submitted by the counterparty... even though it failed to give an opportunity to the petitioner to comment on them ... [T]herefore the petitioner's appeal had to be allowed, the first-instance decision quashed and the case remitted ..."

25. On 27 August 2012 the decision of the Zagreb County Court was served on the Zagreb Municipal Civil Court.

26. In the resumed proceedings, on 17 October 2012 the applicant sought the withdrawal of Judge M.S.B., the first-instance court judge sitting in the case, for alleged bias on her part in favour of his wife. On 21 January 2013 the President of Zagreb Municipal Civil Court granted the application for the judge's withdrawal, and on 30 January 2013 assigned the case to another judge.

27. In his submissions of 28 January 2013 the applicant invited the court to review recordings of his conversations with his son via Skype, and asked for a provisional measure ordering the seizure of his son's passport with a view to preventing his wife from removing him from Croatia.

28. On 4 February 2013 the court invited the applicant to submit certificates from the relevant United States authorities on his son's habitual residence in that country and the social background of the child within the meaning of Article 13 paragraph 3 of the Hague Convention (see paragraph 62 below). On 22 February 2013 the applicant submitted documents on his permanent residence and his son's habitual residence in the United States, and on 19 March 2013 he submitted information on the social background of the child.

29. On 14 February 2013 the applicant urged the court to schedule a hearing.

30. On 28 February 2013 the court ordered the local social welfare centre to promptly assess whether the child was settled in his new environment in terms of Article 12 paragraph 2 of the Hague Convention (see paragraph 62 below).

31. In submissions she made on the same day, 28 February 2013, the applicant's wife reiterated that she believed that the evidence showed that the applicant was abusive, and in that respect pointed to the opinion of the psychologist from the local social welfare centre, who had indicated that the applicant's communication with his son via Skype constituted emotional blackmail and amounted to emotional abuse. She emphasised that she could not return to the United States, because her green card had expired and she did not have any means of supporting herself there.

32. On 26 March 2013 the local social welfare centre submitted the opinion of its psychologist prepared on the basis of interviews with the applicant's wife and son. The psychologist stated that the child's physical and mental development was normal and that he had adapted well. She emphasised that owing to his age and his mother's constant care for him

since birth the child was emotionally primarily attached to her; separating them would therefore be traumatising for him.

33. In his submissions of 8 April 2013 the applicant argued that the psychologist's opinion was flawed, unprofessional and arbitrary. He therefore proposed that his son be examined by independent experts, namely an institution with no role in the proceedings. The court eventually agreed to the applicant's proposal, and on 30 September and 31 October 2013 decided to obtain an opinion from a forensic expert in psychiatry (see paragraph 39 below).

34. In submissions made on 15 and 26 April 2013 the applicant's wife commented on the documents on the child's social background submitted by the applicant (see paragraph 28 above). She stated that those documents were not relevant, because they had not been provided by the competent authorities of the United States but by a private law firm lacking in professional competencies and jurisdiction for issuing such documents. She stated, *inter alia*, that the lawyer who had compiled the report did not speak Croatian and thus could not possibly have understood the applicant's conversations with his son and make an assessment.

35. In his submissions of 3 May 2013 the applicant argued that his wife's conduct in the proceedings amounted to abuse of process and warned the court that the resultant delay was operating in her favour.

36. On 6 May 2013 the court invited the applicant to submit evidence that his wife, as his son's mother, could return to the United States, in particular that she would be provided with a visa, accommodation and a work permit. The applicant did so on 29 May 2013; his wife made further comments on 1 July 2013.

37. In his submissions of 27 September 2013 the applicant stated that the way the court had conducted the proceedings was unacceptable in view of their nature and the State's obligation under the Hague Convention. He further submitted that his rights under Article 8 of the European Convention on Human Rights had also been violated.

38. On 22 October 2013 the applicant's wife responded to his submission, also citing Article 8 of the Convention. She also reiterated that she could no longer return to the United States, because her green card had expired.

39. On 5 December 2013 the forensic expert in psychiatry (see paragraph 33 above) submitted her expert opinion and report on whether the return to the United States would expose the child to psychological harm. The opinion and report were prepared after conducting two interviews with the applicant's son on 20 and 27 November 2013, the first in the presence of the mother and the second in her absence. She stated that: (a) the child was well adapted to his new environment, (b) he was showing no signs of trauma, (c) the applicant's wife did not have a negative influence on the child regarding his relationship with the applicant as his father, (d) the

separation from his mother as primary caregiver and "safe base" would traumatise him, (e) transferring the child into a different environment would also constitute a trauma, but that he would be able to overcome it if his mother lived with him and if he lived in a harmonious environment, (f) the relationship between the child and his mother was positive, enabling him to develop a "secure attachment" to her, (g) the relationship between the child and his father could not be assessed, as the father had not been subjected to an expert assessment. As regards this last point the expert nevertheless made the following observations:

> "N. is a boy who is securely attached to his mother but also has a positive attitude towards his father, which means that the mother did not influence him [in that regard] by expressing negative views, stories, and so on ... One important factor is that the boy talks with his father, which he mentioned during the assessment, and in this way forms an opinion about him. What is most important however is that the parents coordinate their [behaviour] towards the child in order not to confuse him, which could jeopardise his normal mental development. During the assessment of the boy I did not find that such an issue was present ... [The child] does not object to going to America, but accepts it only if it is temporary and his mother can come along ... He does not show, verbally or non-verbally, any aversion to his father. It is therefore assumed that the mother influences him positively in that regard."

40. On 2 January 2014 the relevant Ministry invited the Municipal Civil Court to speed up the proceedings and again submit a progress report (see paragraph 18 above). The court submitted the requested report on 14 February 2014.

41. In his submissions of 22 January 2014 the applicant commented on the expert report and opinion. He argued that the report suggested that his son had good memories of him and a positive attitude towards him, and that it was therefore evident that his return to the United States would not expose him to the risk envisaged in Article 13 paragraph 1 (b) of the Hague Convention. As regards the expert's finding that the child's return would be a traumatic experience for him, the applicant submitted that this would not have been the case had the domestic courts ordered his return within the time-limit set forth in Article 11 paragraph 2 of the Hague Convention. In any event, the evidence he submitted had suggested that his wife could accompany his son on his return to the United States, which according to the expert would have eliminated the risk of trauma.

42. On 31 January 2014 the applicant's wife commented on the expert report and opinion by endorsing it. She argued that they, together with the previous opinions and reports of the local social welfare centre, suggested that it was evident the child should not be returned, as he would thereby suffer psychological trauma. The conditions set forth in Article 13 paragraph 1 (b) had therefore been met.

43. By a decision of 21 May 2014 the Zagreb Municipal Civil Court dismissed the applicant's request for his son to be returned. It first held that the applicant's wife's removal of their son from the United States to Croatia

was "wrongful" within the meaning of Article 2 of the Hague Convention (see paragraph 62 below). It then held, relying exclusively on the opinion and report of the local social welfare centre of 13 December 2011 and the opinion of the forensic expert in psychiatry of 5 December 2013 (see paragraphs 15 and 39 above), that the applicant's son's return to the United States would expose him to risk envisaged in Article 13 paragraph 1 (b) of the said Convention, but only if he returned without his mother. However, since the applicant had not proved that she could freely return to the United States and get a job there, the court concluded that the conditions for refusing the return of the child set forth in that Article had been met.

44. On 11 June 2014 the applicant appealed against that decision. He referred to procedural errors, incomplete findings of facts, and misapplication of the substantive law as grounds for appeal. In particular, the applicant submitted that the first-instance court had, in breach of the principle of adversarial hearing, not held a single hearing in the case, and that it had not informed him of its decision to obtain an opinion from a forensic expert in psychiatry, thus preventing him from objecting to the choice of the expert. He further complained that he had not been involved in the expert's assessment, even though he had previously expressed willingness to make himself available for such an assessment. The applicant also stated that the court had required him to prove that his wife could return to the United States and find a job there, instead of asking her to prove that she could not. It had thereby unjustifiably shifted the burden of proof to him as regards those matters. Moreover, as regards those matters the court had drawn the wrong conclusions from the evidence presented, and had embarked on an interpretation of foreign law it was not familiar with. Lastly, the applicant argued that the first-instance court had wrongly applied Article 13 paragraph 1 (b) of the Hague Convention.

45. By a decision of 22 October 2014 the Zagreb County Court dismissed the applicant's appeal and upheld the first-instance decision.

46. On 29 December 2014 the applicant lodged a constitutional complaint against the second-instance decision. It would appear that the proceedings are currently pending before the Constitutional Court (*Ustavni sud Republike Hrvatske*).

2. Proceedings following the applicant's request for protection of the right to a hearing within a reasonable time

47. Meanwhile, on 17 January 2013 the applicant lodged a request for protection of the right to a hearing within a reasonable time (*zahtjev za zaštitu prava na suđenje u razumnom roku*) with the Zagreb County Court about the length of the above proceedings. He argued that the proceedings had lasted for one year and four months without a scheduled hearing or a decision rendered, contrary to Article 11 of the Hague Convention (see

paragraph 62 below) and Article 8 of the European Convention on Human Rights.

48. By a decision of 15 June 2014 the Zagreb County Court dismissed the applicant's request. It held that the proceedings complained of had thus far lasted some two years and eight months, which could not be considered excessive, especially as there had been no substantial periods of inactivity.

49. On 9 September 2014 the applicant appealed against that decision.

50. By a decision of 20 November 2014 the Supreme Court (*Vrhovni sud Republike Hrvatske*) dismissed the applicant's appeal and upheld the first-instance decision of 15 June 2014.

B. Civil proceedings for divorce and custody

51. Meanwhile, on 12 July 2011 the applicant's wife brought a civil action against the applicant in the Zagreb Municipal Civil Court seeking a divorce and custody of their son.

52. On 18 July 2011 she asked the court to issue a provisional measure granting her interim custody of N. until delivery of the final judgment in those proceedings.

53. In his submissions of 3 July 2012 the applicant argued that the Croatian courts lacked international jurisdiction in the case, and submitted a certified translation of the decision of a court in North Carolina of 27 April 2012 granting him sole custody of his son.

54. At the hearing held on 9 July 2012 the court dismissed the applicant's objection regarding lack of jurisdiction.

55. By a decision of 15 October 2012 the court issued the provisional measure requested by the applicant's wife and awarded her interim custody of their son.

56. On 21 November 2012 the applicant appealed against that decision to the Zagreb County Court.

57. On 24 April 2014 that court returned the case file to the Zagreb Municipal Civil Court, warning it that under Article 16 of the Hague Convention the judicial or administrative authorities of the State to which the child had been removed were not entitled to decide on the right of custody of the child until it had been determined under the Hague Convention that the child was not to be returned (see paragraph 62 below). Accordingly, it instructed the Municipal Civil Court to ascertain whether a final decision had been given in the proceedings for the return of the child. If no such decision was adopted, the County Court further instructed the Municipal Court to stay the proceedings until the delivery of such a decision.

II. RELEVANT DOMESTIC LAW

A. The Constitutional Court Act

58. Section 63 of the Constitutional Court Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette of the Republic of Croatia no. 99/1999 with subsequent amendments– "the Constitutional Court Act"), reads as follows:

Section 63(1)

"The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted ... if the contested decision grossly violates constitutional rights and it is completely clear that the complainant may risk serious and irreparable consequences if the constitutional court proceedings are not instituted."

B. The Family Act

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

JUDICIAL PROCEEDINGS

I. COMMON PROVISIONS

Section 263

"(1) The provisions of this part of the Act determine the rules by which the courts shall proceed in special civil [contentious] and non-contentious proceedings and special enforcement and security proceedings when deciding in matrimonial, family and other matters regulated by this Act.

(2) Proceedings referred to in paragraph 1 of this section shall be urgent." ...

Section 265

"In special [contentious] civil and, where appropriate, non-contentious proceedings referred to in section 263 paragraph 1 of this Act, the first hearing must be held within fifteen days of the date the statement of claim or the petition was received in court, unless this Act provides otherwise."

Section 266

"The second-instance court shall issue and dispatch a decision on any appeal against a first-instance decision rendered in cases referred to in section 263 paragraph 1 of this Act, within sixty days of the date on which the appeal was received."

C. The Courts Act

60. The relevant provisions of the Courts Act (*Zakon o sudovima*, Official Gazette no. 150/05, with subsequent amendments), which was in force between 29 December 2005 and 13 March 2013, as in force at the material time, read as follows:

III. PROTECTION OF THE RIGHT TO A HEARING WITHIN A REASONABLE TIME

Section 27

"(1) A party to judicial proceedings who considers that the relevant court has failed to decide within a reasonable time on his or her rights or obligations or as regards a suspicion or accusation of a criminal offence may lodge a request for protection of the right to a hearing within a reasonable time with the immediately higher court.

(2) If the request concerns proceedings pending before the High Commercial Court of the Republic of Croatia, the High Court for Administrative Offences of the Republic of Croatia or the Administrative Court of the Republic of Croatia, the request shall be decided by the Supreme Court of the Republic of Croatia.

(3) The proceedings for deciding on a request referred to in paragraph 1 of this section shall be urgent. The rules of non-contentious procedure shall apply *mutatis mutandis* in those proceedings, and in principle no hearing shall be held.

(4) Requests for protection of the right to a hearing within a reasonable time shall be decided by a single judge."

Section 28

"(1) If the court referred to in section 27 of this Act finds the request well-founded, it shall set a time-limit within which the court before which the proceedings are pending must decide on a right or obligation of, or as regards a suspicion or accusation of a criminal offence against, the person who lodged the request, and shall award him or her appropriate compensation for the violation of his or her right to a hearing within a reasonable time.

(2) The compensation shall be paid from the State budget within three months of the date on which the party's request for payment is lodged...

(3) ...

(4) The immediately higher court shall decide on a request for protection of the right to a hearing within a reasonable time within six months.

(5) An appeal, to be lodged with the Supreme Court within fifteen days, lies against a decision on a request for protection of the right to a hearing within a reasonable time. Against the Supreme Court's decision an appeal may be lodged with the panel of the Supreme Court.

(6) The panel referred to in paragraph 5 of this section shall be composed of three judges of the Supreme Court. The members of the panel shall be appointed by a plenary session of the Supreme Court..."

IV. RELEVANT INTERNATIONAL LAW

The Hague Convention on the Civil Aspects of International Child Abduction

61. The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") was concluded on 25 October 1980 and entered into force on 1 December 1983. It entered into force in respect of Croatia, by notification of succession, on 1 December 1991. The purpose of the Hague Convention is set out in its preamble as follows:

> "...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 ..."

1. Relevant provisions

62. The relevant provisions of the Hague Convention read 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 2

"Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."

Article 3

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

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

b) at the time of the 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 5

"For 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;

b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Article 7

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) ...;

b) ...;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

..."

Article 10

"The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."

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 ..."

Article 12

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

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

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

Article 13

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

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

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

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

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

Article 16

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

Article 18

"The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

Article 20

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

2. Explanatory Report to the Hague Convention

63. The relevant part of the Explanatory Report to the Hague Convention by Elisa Pérez-Vera (hereafter "the Explanatory Report"), published by the Hague Conference on Private International Law (HCCH) in 1982, reads as follows:

Article 11 – The use of expeditious procedures by judicial or administrative authorities

104. The importance throughout the Convention of the time factor appears again in this article. 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, 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.

3. Conclusions and Recommendations of the Special Commission to Review the Operation of the Hague Child Abduction Convention

64. The relevant part of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Child Abduction Convention (hereafter "the Special Commission"), adopted at its meeting held between 22 and 28 March 2001, reads as follows:

"*Speed of Hague procedures, including appeals*

3.3 The Special Commission underscores the obligation (Article 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures.

3.4 The Special Commission calls upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.

3.5 The Special Commission calls for firm management by judges, both at trial and appellate levels, of the progress of return proceedings."

4. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

65. In 2003 the HCCH published Part II of the "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction". Although primarily intended for the new Contracting States and without binding effect, especially in respect of the judicial authorities, this document seeks to facilitate the Convention's implementation by proposing numerous recommendations and clarifications. The Guide repeatedly emphasises the importance of the Explanatory Report to the 1980 Convention, known as the Pérez-Vera

Report, in helping to interpret coherently and understand the 1980 Convention (see, for example, points 3.3.2 "Implications of the transformation approach" and 8.1 "Explanatory Report on the Convention: the Pérez-Vera Report"). In particular, it emphasises that the judicial and administrative authorities are under an obligation, *inter alia*, to process return applications expeditiously, including on appeal (point 1.5 "Expeditious procedures"). Expeditious procedures should be viewed as procedures which are both fast and efficient: prompt decision-making under the Convention serves the best interests of children (point 6.4 "Case management").

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. The applicant complained that the domestic authorities had failed to secure his right to respect for his family life guaranteed by Article 8 of the Convention in that they had not acted expeditiously in the non-contentious proceedings for the return of his son under the Hague Convention. He also complained that the length of those proceedings was incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention and under Article 13 that he had not had an effective remedy for his Convention complaints. The relevant part of those Articles reads as follows:

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his ... family life ....

Article 6

Right to a fair trial

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

Article 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

67. The Government contested those arguments.

68. The Court, being master of the characterisation to be given in law to the facts of the case, and having regard to its case-law on the subject (see, for example, *Mikulić v. Croatia*, no. 53176/99, § 73, ECHR 2002-I; *Karadžić v. Croatia*, no. 35030/04, § 67, 15 December 2005; and *Gobec v. Slovenia*, no. 7233/04, § 105, 3 October 2013), considers in the circumstances of the present case that the applicant's complaints under Articles 6 § 1 and 13 of the Convention must be regarded as absorbed by his complaint under Article 8 thereof. The case thus falls to be examined only under the last-mentioned Article.

A. Admissibility

1. The parties' arguments

(a) The Government

69. The Government disputed the admissibility of the application by arguing that the applicant had failed to exhaust domestic remedies.

70. In their initial observations of 25 September 2014 the Government argued that the application was premature because the proceedings following the applicant's request for protection of the right to a hearing within a reasonable time – a remedy that had been considered effective for the length-of-proceedings complaints in Croatia (see *Pavić v. Croatia*, no. 21846/08, § 36, 28 January 2010) – were at that time still pending before the Supreme Court (see paragraphs 49-50 above). In their comments of 17 December 2014 on the applicant's reply to their observations and to his claim for just satisfaction, the Government did not pursue this argument because the Supreme Court had delivered its decision in the meantime.

71. However, both in those observations and in their comments, they argued that the applicant should have (also) lodged a constitutional complaint under section 63 of the Constitutional Court Act (see paragraph 58 above) especially because he had complained that the passage of time had had irremediable consequences for his family life. However, he had not done so. In reply to the applicant's argument that such constitutional complaint could only be lodged against a decision and that at the time he had lodged his application with the Court there had been no decision to complain against, the Government stated that he could have complained against the first-instance decision of 15 March 2012 (see paragraph 22 above), which was adopted before he had lodged his application.

(b) The applicant

72. The applicant submitted that the proper remedy to be used in respect of his complaint concerning the excessive length of the proceedings for the return of his son was a request for protection of the right to a hearing within a reasonable time, to which he had resorted.

73. As regards the Government's argument that he should have lodged a constitutional complaint under section 63 of the Constitutional Court Act (see paragraph 71 above), the applicant noted that the provision in question stipulated that such a complaint could be lodged against a decision which grossly violated constitutional rights. However, at the time he lodged his application with the Court on 12 March 2014 a first-instance decision had not yet been adopted in the proceedings for the return of the child.

2. The Court's assessment

74. The Court reiterates that a request for protection of the right to a hearing within a reasonable time was, at the time the applicant lodged his application with the Court, an effective remedy under Article 13 of the Convention (see *Pavić*, loc. cit.) and thus had to be exhausted for the purposes of Article 35 § 1 before the complaints concerning excessive length of proceedings in Croatia were brought before the Court.

75. The Court further notes that the applicant lodged such a request on 17 January 2013 and that the proceedings thus instituted ended on 20 November 2014, when the Supreme Court dismissed his appeal against the first-instance decision of 15 June 2014 refusing that request (see paragraphs 47-50 above). It therefore considers that the applicant made full use of that remedy.

76. As regards the Government's argument that the applicant could have lodged a constitutional complaint under section 63 of the Constitutional Court Act (see paragraph 71 above), the Court reiterates that in cases where several potentially effective remedies are available, an applicant is only required to pursue one of them (see, for example, *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (extracts), and *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004‑V). Therefore, even assuming that a constitutional complaint lodged under section 63 of the Constitutional Court Act was an effective remedy for the purposes of Article 35 § 1 of the Convention, the Court considers that the applicant, who had lodged a request for protection of the right to a hearing within a reasonable time, was not required to lodge such constitutional complaint as well in order to comply with the requirements of that Article.

77. It follows that the Government's objection as regards non-exhaustion of domestic remedies must be dismissed.

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

B. Merits

1. The parties' arguments

(a) The Government

79. The Government argued that, having regard primarily to the complex and sensitive nature of the case, it could not be said that the domestic authorities had not acted expeditiously enough in the proceedings complained of and thus failed to discharge the positive obligation they owed to the applicant under Article 8 of the Convention.

80. In this connection the Government first submitted that even before the formal institution of the proceedings for return on 14 October 2011, the domestic authorities had reacted promptly to the situation and had taken steps to secure a voluntary return of the applicant's son and to otherwise facilitate future proceedings (see paragraph 9 above).

81. The Government admitted that the case was important for the applicant. However, it was of such complexity that it was difficult for the domestic courts to comply with the short time-limit set forth in Article 11 paragraph 2 of the Hague Convention (see paragraph 62 above). In particular, those courts were first required to determine the exact circumstances of the removal of the child and establish whether it was wrongful within the meaning of the Hague Convention, as well as to examine whether all the conditions for the return of the child to the United States under that Convention had been satisfied. That had entailed collection of relevant information and obtaining a number of documents from the United States, which had inevitably complicated and delayed the proceedings. Nevertheless, the first-instance court had acted promptly and had taken the necessary steps to obtain the required information and documents without delay.

82. Most importantly, the domestic courts in the applicant's case could not order the prompt return of his son to the United States without examining in detail the allegations concerning his abusive character and the possible harm his son would have been exposed to if returned. In this connection the Government referred to the Grand Chamber judgment in the case of *X v. Latvia* ([GC], no. 27853/09, § 118, ECHR 2013), in which the Court held that while Article 11 of the Hague Convention indeed provided that judicial authorities must act expeditiously in proceedings for the return of children, that obligation did not exonerate them from the duty to undertake an effective examination of arguments relying on one of the exceptions to return expressly provided for in the said Convention (such as that in Article 13 paragraph 1 (b) in that case). What is more, the Court has found that in such situations Article 8 of the Convention imposed a procedural obligation requiring that arguable allegations of "grave risk" to a child in the event of return be effectively examined by the courts and their

findings set out in a reasoned decision (see *X v. Latvia*, cited above, §§ 106-107 and 115). It had further held that in that context it was also necessary to establish whether it was possible for abducting parents to follow their children to the country to which the children were being returned and to maintain contact with them (see *X v. Latvia*, cited above, § 117).

83. Therefore, instead of automatically and mechanically ordering the return of the applicant's son, the domestic courts had in the present case attempted to reconcile their two obligations under Article 8 of the Convention, namely the positive obligation they had to the applicant to act expeditiously and the procedural obligation they had to his wife to effectively examine arguable allegations that returning the applicant's son to the United States would expose him to psychological harm. The arguable nature of those allegations was supported by the opinions of the local social welfare centre and the independent expert, which had both stated that return to the United States and separation from his mother would be traumatic for him (see paragraphs 15 and 39 above). Those, and the related allegations by the applicant's wife that she could no longer return to the United States (see paragraphs 31 above), had therefore required detailed and time-consuming examination by the domestic courts, which had been necessary in order to reach a decision achieving the requisite balance between all the competing interests at stake, the best interests of the child being a primary consideration.

84. In the Government's view, the parties to the proceedings had also contributed to their length by constantly raising complaints against each other and against the domestic authorities. In particular, the applicant had repeatedly complained of lack of impartiality and incompetence on the part of the first-instance court; he also called into question the legality of its actions in the proceedings, while simultaneously accusing his wife of abuse of process. The Government emphasised that the seriousness of those complaints warranted examination, and that their frequency had necessarily protracted the proceedings. More specifically, the first-instance court had to deal with, and eventually granted, the applicant's request for withdrawal of the single judge sitting in the case, and his request for an independent psychological assessment of his son, which was motivated by his doubts as regards the impartiality of the local social welfare centre. As regards the request for withdrawal of the judge, the Government emphasised that it had been granted only because the judge had not opposed it in order to remove any suspicion about her impartiality.

85. Lastly, the Government pointed out that the applicant had maintained regular contact with his son via Skype and that he was not prevented from seeing him in person. Therefore, the applicant's relationship with his son had not been disrupted, but was continuing to develop. Moreover, the relevant domestic authorities and the child's mother had been willing to enable their direct meetings in a manner agreed with the

applicant, given the geographical distance between them. However, the applicant had not come to Croatia to see his son, nor had he ever expressed the wish to do so.

86. In the light of the foregoing, the Government invited the Court to find that there had been no violation of Article 8 in the present case.

(b) The applicant

87. The applicant submitted that from the facts of the case it was evident that despite the geographical distance he had responded promptly to every request by the first-instance court, and that he had not contributed to the length of the proceedings in any way. While it was true that he had requested withdrawal of the judge sitting in the case, the applicant pointed out that his request had apparently been justified, as it had been granted. He further emphasised that it had taken the first-instance court more than three months to decide on that request, during which period it had not taken any action in the proceedings, even though in those circumstances the domestic law entitled it to take those (urgent) actions delay in which would have been prejudicial to the interests of justice.

88. According to the applicant, the excessive length of the proceedings was mainly attributable to the domestic courts. In particular, it could not be argued, as the Government did, that the first-instance court had acted promptly and taken the necessary steps to obtain the required information and documents without delay (see paragraph 81 above). In this connection the applicant pointed out that the first-instance court had decided to obtain information and documents concerning his son's habitual residence and social background only after its first-instance decision of 15 March 2012 had been quashed and the case remitted.

89. The applicant further submitted that the issue of whether the domestic courts had acted expeditiously should not be judged only by looking into how fast they had been obtaining information or into the frequency of, and the intervals between, their procedural actions. What was important was whether their actions had been efficient. In that connection the applicant averred that the domestic courts were not well versed in the application of the Hague Convention and thus, being insufficiently competent, had often sought to obtain irrelevant information, thereby unnecessarily protracting the proceedings. In addition, they had not prevented the applicant's wife's dilatory manoeuvres. Therefore, by pointing to the incompetence of the domestic courts the applicant had not contributed to the length of the proceedings, but had tried to reduce it by preventing further extensive debate on irrelevant issues.

90. Lastly, as regards the Government's reliance on the Court's judgment in the case of *X v. Latvia*, the applicant, without calling into question the Court's findings in that case, submitted that the domestic courts could have examined the exception set out in Article 13 paragraph 1 (b) of

the Hague Convention in a much shorter time. By failing to comply with the six-week time-limit set forth in Article 11 paragraph 2 of the Hague Convention (see paragraph 62 above), and thus unnecessarily protracting the proceedings, the domestic courts had disturbed to his disfavour the requisite balance that had to be achieved between their positive obligation to act expeditiously and the procedural obligation to effectively examine arguable allegations of grave risk of harm in the event of the return of the child. In that way the sensitive balance sought to be established between all the competing interests at stake, including the best interests of the child, had also been severely upset and tipped in his wife's favour. The applicant asserted that from the reasoning of the domestic courts it was evident that there was a direct link between the delay in and the negative outcome of the proceedings, as it was clear that the attachment of his son to his mother had become so strong over the years the proceedings had been pending that separating them would have been traumatic for him. That could have been avoided if the domestic courts had observed the six-week time-limit to decide on his request for return of the child.

2. The Court's assessment

(a) Relevant principles

91. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 59, Series A no. 130, and *Gluhaković v. Croatia*, no. 21188/09, § 54, 12 April 2011).

92. Even though the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, among other authorities, *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *Gluhaković*, cited above, § 55). These include an obligation on the national authorities to take measures with a view to reuniting parents with their children and to facilitate such reunions (see *Gluhaković*, cited above, § 56).

93. Given that effective respect for family life requires future relations between parent and child to be determined solely in the light of all the relevant considerations and not by the mere passage of time (see *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 177, 27 September 2011), ineffective, and in particular delayed, conduct of judicial proceedings may give rise to a breach of positive obligations under Article 8 of the Convention (see *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 127, 1 December 2009, and *S.I. v. Slovenia*, no. 45082/05, § 69, 13 October 2011), as procedural delay may lead to a *de facto* determination of the matter at issue (see *H. v. the United Kingdom*, 8 July 1987, § 89,

Series A no. 120). Therefore, in cases concerning a person's relationship with his or her child there is a duty to exercise exceptional diligence, in view of the risk that the passage of time may result in a *de facto* determination of the matter. This duty, which is decisive in assessing whether a case has been heard within a reasonable time as required by Article 6 § 1 of the Convention, also forms part of the procedural requirements implicit in Article 8 (see, for example, *Süß v. Germany*, no. 40324/98, § 100, 10 November 2005, and *Strömblad v. Sweden*, no. 3684/07, § 80, 5 April 2012).

94. The Court further reiterates that in child abduction cases the positive obligations which Article 8 of the Convention imposes on the Contracting States with respect to reuniting parents with their children must be interpreted in the light of the Hague Convention (see, for example, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I, and *Karadžić*, cited above, § 54). What is decisive is whether the national authorities have taken all such necessary steps to facilitate reunion as can reasonably be demanded in the special circumstances of each case (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A). In such cases, the adequacy of a measure is also to be judged by the swiftness of its implementation as they require urgent handling given that the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see, for example, *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 60, 24 April 2003).

95. The Hague Convention recognises this, because it provides for a range of measures to ensure the prompt return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention (see paragraph 62 above) requires the judicial or administrative authorities concerned to act expeditiously to ensure the return of children, and any failure to act for more than six weeks may give rise to a request for explanations (see, for example, *Shaw v. Hungary*, no. 6457/09, § 66, 26 July 2011).

(b) Application of the above principles to the present case

96. In order to establish whether in the present case the domestic courts acted in conformity with their positive obligations under Article 8 of the Convention, the Court must examine whether, having regard to Croatia's international obligations arising in particular under the Hague Convention, those courts took such necessary steps which could have been reasonably demanded of them as regards the return of the applicant's son (see paragraph 94 above).

97. In the applicant's case the domestic courts rendered the final decision after more than three years. Even though the six-week time-limit in Article 11 paragraph 2 of the Hague Convention – which applies both to

first-instance and appellate proceedings (see paragraph 64 above) – is non-obligatory (see paragraph 63 above), the Court considers that exceeding that time-limit by more than 151 weeks cannot be viewed as being in compliance with the positive obligation to act expeditiously in proceedings for the return of children (see, *mutatis mutandis*, *Shaw*, cited above, §§ 71-72). The Government's arguments to the contrary (see paragraphs 79-86 above, and in particular paragraphs 82-83), which would in view of the Court's case-law in different circumstances be capable of dispensing the courts of the duty to strictly observe the six-week time-limit (see *X v. Latvia*, cited above, § 118), cannot in the given circumstances sufficiently explain such a substantial delay. It follows that the time it took for the domestic courts to adopt the final decision in the present case failed to meet the urgency of the situation (see *Iosub Caras v. Romania*, no. 7198/04, § 39, 27 July 2006).

98. The Court further notes that section 266 of the Family Act provided that in proceedings in family matters any appeal against a first-instance decision had to be decided within sixty days of receipt of the appeal (see paragraph 59 above). In the present instance the applicant's appeal of 11 June 2014 was decided four months and eleven days after it had been lodged (see paragraphs 44-45 above). It is therefore evident that, by disregarding that specific time-limit in the applicant's case and not extending the application of the procedural rule contained in section 266 of the Family Act to the proceedings concerning the return of the child, the domestic courts did not use the most expeditious procedure (see Article 2 of the Hague Convention in paragraph 62, and the Explanatory Report thereto in paragraph 63 above).

99. Consequently, the Court finds that those courts did not take such necessary steps which could have been reasonably demanded of them in the given circumstances to facilitate the reunion between the applicant and his son (see paragraphs 94 and 96 above). There has accordingly been a violation of the State's positive obligations under Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

102. The Government contested that claim.

103. The Court finds that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, the Court awards him EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

104. The applicant also claimed 19,500 Croatian kunas (HRK) for costs and expenses incurred before the Court.

105. The Government contested that claim.

106. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,310 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

107. 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 Croatian kunas at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,310 (two thousand three hundred and ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 12 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro
Registrar	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.

I.B.L.
S.N.

DISSENTING OPINION OF JUDGE DEDOV

I regret that I cannot subscribe to the conclusion of my colleagues who found a violation of Article 8 of the Convention in the present case. Apart from the complex and sensitive nature of the case, I agree with the Government's observations in which they state that any delay in the proceedings was not caused by the authorities, but rather by the applicant himself (see paragraphs 78-83 of the judgment), and that there was no interference with the applicant's right to respect for his family life (see paragraph 84 of the judgment). If the national court finds that the return would be harmful to the child, so that the decision is not in favour of the applicant, then the time factor does not matter. The positive obligations should not be limited to the expeditious return of the child; it takes time to be sure that the child's return is not harmful in order to avoid mistakes like the ones which were made in the case of *X v. Latvia* ([GC], no. 27853/09, ECHR 2013).

In general, I believe that the legal mechanism envisaged by the Hague Convention on the Civil Aspects of International Child Abduction is not suitable for the assessment of rights under Article 8 of the Convention, as the Hague Convention does not provide a comprehensive approach to the conduct of the return proceedings. Let me clarify some aspects of my last point.

The Explanatory Report (referred to in paragraph 63 of the judgment) explains in paragraph 11 that the Hague Convention applies to situations where "the child is taken out of the family and social environment in which its life has developed ... The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother." If the Hague Convention concerns "the father or mother", who have perhaps failed to create a family, why is this sensitive issue not addressed by the Hague Convention at all? Does not each of them separately represent the family for the child, in which case the first sentence in the Report above contradicts the second one?

If one of the parents seeks a divorce, then the family does not exist anymore. However, the Hague Convention is not adapted to this new situation. It does not ensure a balance in the protection of the rights of both parents. On the contrary, it automatically places the "injured" partner in a privileged position as the ultimate holder of custody rights and it considers the other partner as an abductor without any right of custody. I cannot see how this is fair. From the point of view of common sense it is hard to understand how a mother could wrongfully abduct her own child.

Undoubtedly, both parents have the right of custody, and the separation cannot be considered as "wrongful abduction". The Hague Convention was created to establish the national jurisdiction of authorities to decide on the

issue of custody of the child after divorce. However, this document does not take into account the serious vulnerability of a mother who is completely dependent on her husband, or the vulnerability of a minor (especially a boy of less than three years old, as in the present case) for whom the separation from his or her mother would lead to distress.

I have personally come to the conclusion that the Hague Convention is not suited to situations relating to the end of family life, and hence to the situation which this text was initially aimed to address, namely, as stated in its preamble: "...to protect children ... from the harmful effects of their wrongful removal..." It appears that the national authorities acted in the best interests of the child. They took into account the fact that the wife had been completely dependent on the applicant in every way (financially, economically, and in terms of accommodation (see paragraph 13 of the judgment)); that, owing to the age of the child and his mother's constant care of him since birth, the child was emotionally primarily attached to her; and that separating them and returning and transferring the child to a different environment would be traumatising for the child for the purposes of Article 13 (b) of the Hague Convention (see paragraphs 32, 39, 41 and 43 of the judgment). In general, the establishment of a risk of psychological harm under Article 13 prevails over the expeditious return requirement under Articles 11 and 12 of the Hague Convention.

Although this idea requires further explanation, it should not be forgotten that the national court established the risk within seven months after removal of the child, that is to say, expeditiously in terms of Article 12. Time does not matter in the present case also because the boy was emotionally attached to his mother from birth. It is important to note that the Hague Convention does not satisfy the proportionality test as it makes no distinction between different stages of a minor's life. Children up to seven years old are usually emotionally attached to their mothers (as in the present case); the environment does not matter to them, and separation would lead to distress and trauma. This means that a "risk" within the meaning of Article 13 always exists for such children. Between the ages of seven and thirteen the environment becomes more important and a return therefore becomes more realistic, unless there is a "risk" which should be considered as really "grave". Hence, the threshold for a non-return decision should increase with the development of the child. And lastly, children older than, say, thirteen should have the right to decide for themselves and express their own opinion. The Hague Convention does not provide for any of the above options.

It is important to note that the wife of the applicant in this case was in an extremely vulnerable position in that she had no prospect of obtaining custody of her son in the United States. The United States authorities first granted the applicant interim custody (see paragraph 16) and then sole custody of the child (see paragraph 53). This situation is quite typical, but

the Hague Convention does not provide any guarantees for such vulnerable persons.

It should also be noted that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. For that reason, those best interests must be assessed in each individual case (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 138, ECHR 2010; see also *X v. Latvia,* cited above, §§ 98 and 101).

As a result, a contradictory rule gives rise to unstable court practice: few judgments are delivered without a dissenting opinion, and there is nothing to prevent national courts from coming to opposite conclusions in similar situations regarding the applicability of Article 13 of the Hague Convention to the return of a two-year-old child (compare the circumstances in the present case and, for example, those in *Phostira Efthymiou and Ribeiro Fernandes v. Portugal*, no. 66775/11, 5 February 2015).