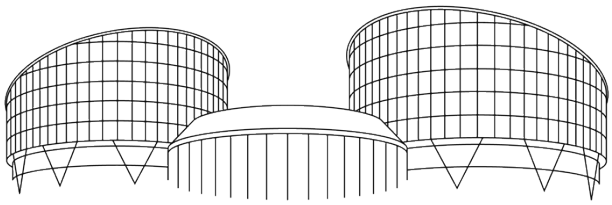

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF DIAMANTE AND PELLICCIONI v. SAN MARINO

(Application no. 32250/08)

JUDGMENT

STRASBOURG

27 September 2011

FINAL

08/03/2012

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

In the case of Diamante and Pelliccioni v. San Marino**,**

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

Corneliu Bîrsan, *President,*
Josep Casadevall, ad hoc *judge,*
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Luis López Guerra,
Nona Tsotsoria, *judges,*

and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 30 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 32250/08) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 7 July 2008 by Ms Augusta Diamante, an Italian national born in 1973, who is also acting on behalf of her child, Ms Greta Pelliccioni, who has dual nationality, Italian and San Marinese, and was born in 2004 ("the applicants").

2. The applicants were represented by Mr E. Borghesi, a lawyer practising in Rimini. The San Marino Government ("the Government") were represented by their Agent, Mr Lucio Daniele, and their Co-Agent, Mr Guido Bellatti Ceccoli.

3. The applicants alleged a violation of Articles 6 and 8 of the Convention, on account of the decisions delivered by the domestic courts in the custody and contact proceedings. The second applicant further alleged a violation of Article 2 of Protocol No. 4 to the Convention.

4. On 14 June 2010 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The Government of Italy, who had been notified by the Registrar of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 (a)), indicated their intention to do so.

6. The applicants and the Government each submitted observations. Observations were also received from the Government of Italy and the *Associazione Pro Bimbi*, an independent non-profit organisation, which had

been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court).

7. Ms Kristina Pardalos, the judge elected in respect of San Marino, was unable to sit in the case (Rule 28). Accordingly Judge Josep Casadevall was appointed to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, while resident in San Marino, had a relationship and was cohabiting with Mr X. in San Marino.

9. On 9 December 2004 the second applicant was born of this relationship, in Rimini, Italy. She was granted dual nationality, Italian and San Marinese. The family lived in X.'s villa in San Marino.

10. Mr X. left the villa in July 2006 and allegedly stopped sending the applicants any financial allowances.

A. The custody proceedings

11. On 8 November 2006 Mr X. lodged a request with the San Marino Tribunal for sole custody and restitution of the villa.

12. Following a deferral request by Mr X., the first hearing was held on 4 December 2006, the date when the first applicant intervened in the proceedings, and demanded custody of the child, the right to remain living in the family home and maintenance.

1. The first custody decree

13. By a decree of 4 December 2006, the relevant court, namely the *Commissario della Legge* of San Marino, granted custody to the first applicant. Mr X. was entitled to visiting rights as follows: Mondays and Wednesdays from 2 p.m. to 9 p.m. and one day (Saturday or Sunday) on alternate weekends from 10.30 a.m. to 6 p.m. It refused to decide on maintenance, inviting the parents to reach an agreement. It further ordered the intervention of the "*servizio minori*" (children's services) to verify each parent's aptitude and the quality of the relationship with the child.

2. The decisions on the respect of contact rights, maintenance, schooling and the second custody decree

14. On 14 December 2006 the first applicant requested children's services to decide on the transfer of the second applicant to a kindergarten in Rimini, Italy. The aim of this request was to allow the applicants to live with the second applicant's grandmother for economic reasons, since Mr X. had allegedly failed to pay them any allowances.

15. On 18 December 2006 Mr X. requested an urgent hearing, complaining that for the last two weekends the first applicant had denied him contact rights and had changed the arrangements. Consequently, the *Commissario della Legge*, considering that the father had a right to see his daughter every weekend, requested children's services to intervene in order to ensure that contact rights were respected.

16. On 21 December 2006 the first applicant reiterated that on 4 December 2006 the court had ordered visits on the Saturday or Sunday of alternate weekends, and not every weekend as interpreted on 18 December 2006.

17. On 22 December 2006 the first applicant requested to take the child on a five-day holiday. The *Commissario della Legge* ordered the relevant notification.

18. On 1 March 2007 the *Commissario della Legge* ordered children's services to consider whether transfer to the Rimini institution would be in the interest of the minor.

19. On 15 March 2007 children's services filed their first report, stating that it was important to consider the needs of the child who "will probably reside in San Marino". The report noted that the institution in Rimini hosted older children, and that Mr X. showed his availability to pick up the child from school if it were in San Marino. It advised that attending a nursery in San Marino would allow better monitoring on the part of the children's services.

20. On 10 April 2007, in view of the announced holiday, children's services temporarily amended the visiting schedule, in agreement with the parties.

21. On 12 April 2007 the first applicant informed the *Commissario della Legge* that she had found a job in Rimini, where she planned to move, and therefore she was ready to leave the villa.

22. On 17 April 2007 the *Commissario della Legge*, having regard to the children's services' report (above) and after soliciting further reports, held that, until children services gave different advice, the child should remain in San Marino. It referred the case back to children's services.

23. Following further submissions, on 5 May 2007 the first applicant requested an urgent hearing as she was having difficulty taking care of the child since Mr X. was not paying the maintenance due.

24. On 18 May 2007 the *Commissario della Legge*, having regard to the economic situation of the parents and to the fact that the first applicant remained living in the villa, decided that Mr X. had to pay the applicants maintenance amounting to 500 euros (EUR), as from November 2006.

25. On 31 May 2007 children's services drew up another report, finding that although conflict between the parents persisted, the father had an excellent relationship with the daughter. It advised that there be joint custody of the child, who should be placed prevalently with the mother in view of her tender age; it proposed two possible contact schedules, both eventually including two overnight stays per week. It further suggested maintaining the current schooling situation.

26. On 14 June 2007 the first applicant, having signed a lease agreement for an apartment in Rimini the previous month, informed the *Commissario della Legge* that she intended to move there with her daughter, while maintaining their official residence in San Marino.

27. On 21 June 2007 the first applicant made further submissions. It appears that the applicants moved to Rimini on the same day.

28. By a decree of 25 June 2007 the *Commissario della Legge* granted joint custody, holding that the child should remain living in Rimini, where she was settled with the mother, and should continue to attend the Rimini kindergarten for the following school year, as this appeared to be in the best interests of the child. It further ordered children's services to monitor the situation. This decision was based on the children's services report of 31 May 2007 (see above).

3. The residence order

29. On 9 August 2007 children's services submitted a new report, which found that the first father-child visits were held in an untroubled atmosphere and that Mr X. was spending all the appropriate time with the child. It noted that between 13 and 16 July the first applicant went on holiday with the child without informing Mr X. of the destination and that thereafter she had frequently informed children's services that visits could not take place because of her or her daughter's alleged illnesses or because she refused to give up the daughter.

30. In August 2007 Mr X. lodged various submissions, including a complaint that the first applicant was denying his rights to visit their daughter and requesting that the relevant orders be executable in the Italian State.

31. By an order of 20 August 2007 the *Commissario della Legge* specified that the order of 25 June 2007 must be considered "provisionally executable".

32. On 22 August 2007 children's services drafted a report, which found that the first applicant was obstructing visiting arrangements which had not

been previously arranged and was refusing to cooperate with children's services.

33. Both parties continued to make regular submissions.

34. By an order of 21 September 2007, the *Commissario della Legge* held that unilateral changes to scheduled visits had no effect, since the arrangements had been established by prior orders, which were subject to alteration by future court orders. It held that Mr X. had the right to have his child by his side, unsupervised, and that the child should maintain residence in San Marino. It further explained that residence meant "a situation of permanent stay in a territory".

35. A children's services report of 17 October 2007 related that the first applicant was failing to take the second applicant to children's services and that monitoring had become difficult since 9 August 2007.

4. The order regarding the court's competence and the third custody decree

36. On 24 October 2007 the first applicant challenged the competence of the San Marino Tribunal, namely the *Commissario della Legge*, in so far as proceedings were pending before the Tribunal of Bologna, Italy (see below). The parties informed the tribunal that the relevant *ex parte* counsellors had been appointed and meetings had started.

37. On 12 November 2007 the *Commissario della Legge* rejected the objection. It held that the first applicant had accepted the San Marino jurisdiction throughout all the proceedings and various decrees; in effect this request had been made out of time.

38. On the merits of the pending case, the *Commissario della Legge* found no reason to alter the current custody order. Joint custody had been opted for to protect the child from the unhappy situation in which the mother excluded the father from any decision-making. Joint custody and support from children's services allowed the creation of an educational programme for the parents to allow for the growth and well-being of the child. This was what the parents had to aim for during the current joint custody regime. Welcoming the appointment of *ex parte* experts/counsellors, it reiterated the need for supervision by children's services. Only upon further reports by children's services and experts would the tribunal be able to establish whether any modifications to the regime were necessary or whether schooling in San Marino would be more appropriate.

5. The fourth custody decree

39. On 15 November 2007 Mr X. requested that the child be returned to San Marino, offering the mother lodgings with the daughter. On 9 January

2008 Mr X. enrolled the child in a nursery in San Marino, notwithstanding that she was still living in Rimini.

40. On 24 January 2008 Mr X. made a request for sole custody and for the child to be moved to a school in San Marino.

41. On 28 January 2008 the *Commissario della Legge* requested children's services to draw up a report on the merits of schooling in San Marino.

42. The ensuing report of 8 February 2008 considered that Mr X. was having difficulty seeing the child, as for a while the mother had unilaterally interrupted the father's visits (for example, nine out of fourteen overnight stays with the father had not occurred and six consecutive Sunday visits had been missed), and that the mother was not cooperating with children's services. Consequently, the establishment of an educational programme had not been successful. It found on the one hand that the first applicant's anger towards the father was persistent and involved the child. On the other hand the father had shown consideration and put the needs of the child first. He sincerely loved his daughter and was cooperating with children's services. The father and the child had a warm and caring relationship, and the child felt comfortable and happy in his presence. It appeared however that the child might have fears of losing her loved ones, probably due to the various moves, which had also detached her from members of her extended family. The report therefore advised the grant of temporary sole custody to the father, with regular supervised visits by the mother, until this could be reversed. It concluded that schooling should be in accordance with the custody decision, as this would be favourable to the child's emotional stability, notwithstanding the unfortunate moves of house. It also advised psychotherapeutic and parental education support for the parents, together with further monitoring by children's services.

43. On 12 February 2008 the *Commissario della Legge* ordered that an extraordinary hearing of the parties (*comparizione delle parti*) be held on 19 February 2008. The order was notified on 14 February 2008. The next day the first applicant's main lawyer communicated his inability to attend and requested an adjournment. The opposing party opposed this request, but no notification reached the first applicant's legal counsel.

(a) A period of absence

44. On 13 February 2008 Mr X. collected the child and did not return her. On the same day Mr. X's lawyer sent the first applicant a fax informing her that the child would not return home to the mother as the father was availing himself of the time accumulated from the missed visits. The child could, however, be contacted by telephone at specific times.

45. On 15 February 2008 the first applicant's representatives requested X.'s lawyers to inform them where the child had been taken, the date of return, and arrangements as to the handing over of the child. X.'s lawyers'

reply was immediate but inconclusive, in that, no details had been given. Thus, the first applicant's representatives informed children's services about what had happened and complained about the father's lawyers. In reply, Mr X.'s lawyers explained that the child was on holiday with her father and that they did not know where they had gone. On the same day, the first applicant's lawyers requested that the hearing set for 19 February be deferred due to the inability of her regular lawyer, who had dealt with the relevant experts, to attend the hearing for professional reasons. Mr X.'s lawyers opposed this, however, it appears that no notification of this opposition took place.

46. The following day, the first applicant lodged written submissions, reiterating that in accordance with the decree of 25 June 2007 the child had been placed with the mother for the school year. Complaining about Mr X.'s actions and those of children's services, she requested the tribunal to restore the *status quo ante*.

47. On 18 February 2008, while the child was still missing, Mr X.'s representatives requested that the minor be placed in San Marino. They emphasised that the second applicant's presence outside San Marino limited the San Marino courts' power over the second applicant's rights abroad. The first applicant objected, maintaining that the child should return to Rimini. She further insisted that any missed paternal visits in the summer of 2007 had not been malicious but had been the result of physical circumstances.

(b) The custody decree of 19 February 2008

48. On 19 February 2008 a substitute judge sat as the *Commissario della Legge*. The first applicant, through her co-lawyer, referred to their request for a brief postponement in view of the absence of the habitual judge and her habitual co-lawyer, who was more aware of the case details. Moreover, there had been a lack of collaboration on the part of children's services and counsellors, her counsellors had not been summoned, and the child had been kidnapped by the father. Her request was refused without detailed reasons. The substitute judge considered it opportune to take a decision urgently. Consequently, the first applicant's co-lawyer withdrew from the case. A further request by the first applicant for a short suspension in order for another lawyer to be appointed was refused.

49. The case was therefore heard without representation for the first applicant. Mr X. was represented by his lawyers and enjoyed the assistance of a counsellor. After the cross-examination was over, the substitute judge delivered his decision on the same date.

50. He found that, in view of the report by children's services of 17 October 2007 and 8 February 2008, the child risked being denied the benefit of her father's presence, as the first applicant had prevented the father's visits and obstructed children's services' meetings. Any argumentation by the first applicant presented in her written pleadings had

not been persuasive. Consequently, while upholding joint custody, it was ordered that the child live with her father in San Marino and that she be transferred to the San Marino nursery from 20 February 2008. The mother was entitled to supervised visits from Monday to Friday from 13.15 to 15.00, or as children's services deemed opportune.

6. The continuation of proceedings

51. On 22 February 2008 the *Commissario della Legge*, acknowledging that there were no obstacles to acceding to the first applicant's request to spend a weekend with her daughter at the father's house, requested the children's services to draw up a new calendar of visits. On the same date, following Mr X.'s request for an authorisation ("*nullaosta*") for the child's passport, the tribunal solicited the first applicant's agreement, noting that expatriation of the minor would in any case require the tribunal's authorisation.

52. On 25 February 2008 children's services submitted a report stating that the child frequently reiterated her wish to stay with the mother and was showing a certain reluctance to be with the father. The report concluded that persistent pressure by the mother may lead to Parental Alienation Syndrome.

53. On 26 February 2008 the first applicant submitted that the unavailability of the child for certain paternal visits while she was in the mother's care was for medical reasons.

54. On 27 February 2008 Mr X. requested the suspension of the time-limits for appeal, pending friendly settlement negotiations. On the same day children's services reported that mother-child visits should take place at the father's house. It proposed a new schedule of visits, which would eventually include an overnight stay. It also included visits with the maternal extended family.

55. The following day, Mr X. pointed out that the first applicant had not been favourable to the return of the second applicant to San Marino. He alleged that she was in bad faith and reiterated that, according to The Hague Convention on the Civil Aspects of International Child Abduction ("The Hague Convention"), visits with a parent who had removed a child required special precautionary measures. On the same day children's services prepared a calendar of supervised visits up to August 2008, the date of the entry into force of The Hague Convention.

7. The appeal proceedings

56. On 6 March 2008 an appeal was lodged against the interim order of 19 February 2008 before the "*Giudice delle Appellazioni Civili*". Lamenting that in the absence of treaties safeguarding repatriation the child remained susceptible to removal by the mother, Mr X.'s representatives proposed a

favourable calendar for visits, namely Mondays, Wednesdays and Fridays from 6.30 p.m. to 9..30 p.m., alternate Saturdays from 4.30 to 7.30 p.m. and alternate Sundays from 9 a.m. to 12 noon, plus other visits by the extended family and in due course overnight stays by the mother. On the same day the first applicant accepted the proposed schedules, complaining that children's services were in practice reducing her visit times by half an hour and at times by one hour due to other engagements, but objected to the suspension of the proceedings. She further submitted one of the second applicant's passports to the court.

57. On 17 March 2008 the first applicant appealed, complaining of procedural irregularities pertaining to the interim decree of 19 February 2008. In particular she alleged a breach of her right to defence, since she had not been represented. Unlike her, Mr X. had had the benefit of counsel. Moreover, there had not been adequate notification, and therefore the hearing had not been in accordance with the law. Furthermore, the substitute judge should have abstained, as he had decided another case between the same parties.

58. On 19 March 2008 Mr X. cross-appealed.

59. On 27 March 2008 Mr X., in his cross-appeal, lodged a request for sole custody and contended that the first applicant had breached her judicial obligations, having allegedly taken the child away, and had attempted to evade San Marino jurisdiction. He emphasised that in view of Italy's delay in accepting San Marino's accession to The Hague Convention dated 14 December 2006, the latter had not yet entered into force between the two states. In accordance with the treaty, transfer of the minor to Italy would be unlawful.

60. On the same date the first applicant submitted that she was having difficulty visiting her daughter due to her working hours. On 22 April 2008 the first applicant's psychological counsellor wrote to children's services offering the first applicant as available for discussion and collaboration. She further requested children's services to provide her with a copy of the educational project to be undertaken and relevant information and video clips taken in respect of the child's supervision. On 23 April 2008 the mother again made a request for information and to see the relevant video recordings of her visits to her daughter.

61. On 24 April 2008 it was established that cross-examination was necessary for the purposes of the case.

62. On 30 April 2008 children's services informed the first applicant that her request had been sent to the relevant judicial authorities, since information about minors was covered by professional secrecy.

63. In the meantime various email exchanges took place between April and June in an attempt to negotiate an agreement so that the first applicant would agree to withdraw the pending criminal charges (see below) against Mr X. Meetings with counsellors and a psychologist were held.

64. Following a request from the first applicant, on 6 May 2008 the *Commissario della Legge* ordered the urgent transmission of the file to the appeal judge.

65. On 12 May 2008 the *Giudice delle Appellazioni Civili* remitted Mr X.'s appeal of 27 March 2008 to the *Commissario della Legge,* who was competent to revise the matter and give any other determination in respect of the placement of the child.

66. On 16 May 2008 the *primo termine probatorio* was opened in relation to the original appeal. Hearings and/or submissions were made on 23 October 2008, 12 and 19 March, 23 April, 18 and 13 June, 3 July and 26 October 2009 and 18 January 2010. Following the requests and the consequent submission of rogatory letters, it was established that the first applicant's lawyer had judicial engagements in Rimini, explaining his absence from the hearing in question.

67. The appeal proceedings against the decision of 19 February 2008 were eventually decided on 7 March 2011 (see paragraph 137 below).

8. Judicial and non-judicial isolation in San Marino

68. On 15 April 2008 the first applicant's representatives complained to children's services that the child was isolated, in that she was constantly supervised.

69. In a report dated 22 April 2008 children's services requested the judge to prohibit the legal representatives of the parties from attending the child's visits.

70. On 5 June 2008 the first applicant's lawyers made submissions in reply, highlighting the importance of re-establishing mother-child relations. On the same day Mr X. reiterated his request for temporary sole custody (see above 27 March 2008). Although not intending to travel with the child, he requested a San Marino passport for the second applicant.

71. On 6 June 2008 the *Commissario della Legge* noted that revision of the decree could only take place if new events took place subsequent to the decree, in order to avoid any overlap with the appeal judgment. He further requested the parties to agree on the mother's visiting schedule, on further cooperation for the benefit of the child, and lastly asked whether the mother agreed to the issue of a San Marino passport, which would be retained by the court together with the Italian passport, any travel having to be agreed by the parents or authorised by the court.

72. On 19 June 2008 Mr X. reiterated that the prohibition on the child's leaving the country needed to be maintained until the entry into force of the Hague Convention. He further requested a definitive judgment in favour of sole custody to be executable immediately on Italian territory.

73. In the meantime, further submissions were made, together with the reports of the parents' psychologists.

74. On 11 July 2008, in an apparently informal way, the *Commissario della Legge* confirmed that the child could not leave San Marino.

75. On 15 July 2008 the *Commissario della Legge* nominated an expert and ordered an expert opinion ("*consulenza tecnica d'ufficio"* – "CTU") in respect of: the child's relationship with the parents, the personal characters of the parents, their ability to take on parental functions, in particular *vis-a-vis* granting the other parent contact with the minor, and any proposals in respect of the situation.

(a) order related to video recordings

76. On 16 July 2008 the first applicant made an urgent request to be allowed to take her child to Italy before The Hague Convention entered into force, namely from 21 to 28 July 2008. She further requested the release of the information and related videotapes of mother-child meetings before the child services, and that children's services and the San Marino hospital issue a report on the psycho-physical health of the child.

77. Following a request by Mr X., by a decree of 17 July 2008, the *Commissario della Legge* noted that the second applicant's San Marino passport had been submitted to the authorities, and requested the first applicant to submit the latter's Italian passport. It further held that the decree of 19 February 2008 fell within the competence of the *Giudice delle Appellazioni Civili*. It then held that the CTU's opinion was required to define an educational project and the advice of children's services was necessary to determine the suitability of any permanent visiting schedule between the mother and child. It refused the pending request for the video recordings of their visits, on the basis that they had no right to such materials, children's services acting as an assistant to the judge in this connection and not as a court expert.

(b) Continued isolation

78. On 22 July 2008 the first applicant contacted children's services to inform them as regards her availability to discuss the forthcoming holiday calendar. The following day a new calendar of visits, together with a short report, was submitted to the judge by children's services.

79. On 23 July 2008 children's services presented another report in respect of the request relating to the period of 19 to 28 July 2008, during which the first applicant would have been on leave. They suggested daily visits from Tuesday 22 to Monday 28 July 2008, ranging from two to six hours per day, including hour-long visits with the extended family.

80. Following a request by the mother, on 24 July 2008 the CTU requested children's services to issue instructions for the period after 28 July 2008.

81. On 29 July 2008 children's services drafted a new calendar of visits, ranging from three to six hours per day (no visit on Saturday), until Sunday 3 August. The latter was acknowledged by the judge.

82. On 1 August 2008 the first applicant's submissions included a request for a continuous period of mother-child care to allow her to take the child on holiday, after she had been confined to San Marino for nearly six months. On the same day the *Commissario della Legge*, noting that children's services had not had enough time to deal with all the requests in view of their dates of submission and that the first applicant had for the third time altered the dates of her leave, ordered an immediate reply to the pending, urgent request for the extended period of the child's placement with the mother from 9 to 17 August 2008.

9. Release and period of agreement

83. By emails dated 1 July 2008 the first applicant requested children's service to allow a more flexible calendar of visits. On 8 August 2008 children's services issued a new calendar for the relevant period, only allowing one overnight visit and permitting most of the remaining visits to take place outside San Marino, but they had to be in the presence of the father. It suggested that changes should be made gradually. The latter was acknowledged by the judge.

84. Following the mother's objection, on 12 August 2008 the previous arrangement was reiterated by the judge.

85. On 18 August 2008 Mr X. gave his consent for an extended visit between mother and child. On the same date the *Commissario della Legge* asked for a report from children's services on the development of the visits in the preceding week, and for a new calendar to be issued.

86. On 19 August 2008 children's services reported that the visits had been regular, organised and fruitful. The child was happy to spend time with the mother and it was clear that she needed to be by the side of both parents. They issued a new calendar of visits, suggesting entire alternate weekends with each parent, with weekend intervals when each parent had the child for one day, together with overnight stays during the week at her mother's home.

87. By a decree of the same date the *Commissario della Legge* confirmed that, the disputes having been resolved, the visits should remain in accordance with the children's services report of the same day. Moreover, since Mr X. was able to visit the child in Italy, prohibition on the parents' taking the child outside the country remained valid only in respect of States other than Italy and San Marino.

10. Insight into medical conditions during the continuation of proceedings

88. By an order of 12 September 2008, a substitute judge for the *Commissario della Legge* held that the frequency of visits with the minor would be in accordance with the agreed specific indications submitted.

89. On 16 September 2008 the CTU met the parents' technical counsellors ("CTPs").

90. On 23 October 2008 Mr X. submitted that he was the subject of ongoing criminal proceedings in Italy (see below) and reiterated that the first applicant had not submitted the second applicant's Italian passport.

91. On 30 November 2008 psychological reports on both parents were drawn up. The report about the mother which, *inter alia*, mentioned depressive and impulsive attitudes, appeared less favourable than that of the father, although it appeared from the reports that Mr X. was immature.

92. Following further submissions, by a decree of 19 December 2008, the *Commissario della Legge* acknowledged that the second applicant would spend the week of 24 December to the morning of 31 December 2008 with the father and from the afternoon of 31 December 2008 to 7 January 2009 with the mother. Travel details had to be exchanged between the parents and the child had to be visited by a doctor to confirm that she was in good health and to determine whether there were any contraindications to her travelling. He further authorised the father to travel with the child during the relevant period and allowed the release of the passport.

93. According to a children's services report of 20 December 2008, the second applicant was having difficulty adjusting to (her parents') two different environments.

94. Negotiations between the parents continued: however, the first applicant refused to drop the pending criminal charges against Mr X.

95. On 22 December 2008, Mr X. requested to stop paying maintenance, stating that each parent should be financially responsible for the child for the period in which she was with them.

96. On 2 and 12 February 2009 the *Commissario della Legge,* confirmed the qualifications of the first applicant's CTP. On 24 February 2009 a meeting with the parties' CTPs took place.

97. A children's services report dated 25 February 2009 found that the second applicant's character had deteriorated compared to the previous year. She was less tranquil, naughtier and at times mischievous. She appeared to be more loyal to the mother and had difficulty in facing up to the conflict between her parents. Although the child had a good relationship with the father, she also showed hostility towards him which appeared to have been induced by the mother. If such psychological pressure persisted there existed the risk of Parental Alienation Syndrome.

98. Upon request, on 6 March 2009 the *Commissario della Legge* granted an extension to the relevant expert.

99. On 17 March 2009 the *Commissario della Legge* postponed a decision in respect of maintenance and ordered both parties to submit the second applicant's passport, reiterating the prohibition on the child's expatriation.

100. On 20 March 2009 the parties' experts submitted their report.

101. On 30 March 2009 the CTU finalised the report which had been commissioned on 15 July 2008 (see above). The report was a result of various meetings with the parties which had been recorded. The report concluded that there were no particular problems with the parent's diverse personalities or with their relationship with their child. However, it established that Mr X. was more aware of the second applicant's need to have adequate time with both parents, and was thus more likely to allow regular contact with the child by the mother, always under strict supervision by children's services. Moreover, the mother's intention of persisting with criminal proceedings against the father did not strike a note in her favour. It suggested psychological therapy to resolve the existing conflict and to allow them to fully assume their roles as parents.

102. On 16 April 2009 the first applicant made a request before the *Commissario della legge* for copies of the recordings of the meetings attached to the CTU's report.

103. On 23 April 2009 the same request was made by Mr X., who further requested copies of all relevant communications mentioned in the report, between the parties, their experts, the lawyers and children's services.

104. On the same day the court ordered those recordings and communications to be provided to the parties, subject to the payment of costs by those parties.

105. Following Mr X.'s request of 30 April 2009 to order a new report by children's services, in view of the psychological pressure to which the second applicant was being subjected by her mother, the *Commissario della legge* ordered the said report on 4 May 2009.

106. On 14 May 2009 further submissions were made by the mother, together with a report regarding the second applicant drawn up by the first applicant's CTP. It was reported that the second applicant's situation was stress-related; because of her young age she needed and wanted the presence of her mother. She was therefore suffering as a result of the mother's absence, and constant requests for the child to be removed from her mother could only worsen the child's situation. It was in favour of requesting specialised medical advice for the child.

107. On 18 May 2009 children's services submitted a report indicating that the child's psychological condition was deteriorating, that she was refusing to take part in games representing the family, and that she had

become more isolated at school. Moreover, the child had developed a tic and frequent belching, probably due to anxiety.

108. On the same day and on 25 May 2009 respectively, the first applicant requested the court to allow a specialised doctor to diagnose the child and to prescribe treatment, as well as a neuropsychiatric examination.

109. On 27 May 2009 and 1 June 2009 Mr X.'s expert submitted his report.

110. On 5 June 2009 Mr X. objected to the first applicant's requests. On the same day the *Commissario della legge* held, noting that Mr X. had suggested that another doctor (Mr C.) should conduct therapy with his daughter, that she was being carefully monitored by reliable experts from children's services, and that any psychological diagnosis should be included in the treatment already in place, which should be continued.

111. On 22 July 2009 the *Commissario della legge* held that the psychotherapy was to be conducted by Mr C., who should also verify whether the child was experiencing any discomfort.

112. On 5 August 2009 the court acknowledged two experts on behalf of Mr X. and authorised them to assist in the drawing up of the reports.

113. On 14 September 2009 Mr C. accepted his appointment.

114. Following further submissions, and the first applicant's complaints about Mr X.'s absences, on 24 November 2009 the *Commissario della legge* held that, when one of the parents could not take care of the child, it was for the other parent to so do and not the grandparents, and that the parents should collaborate when taking decisions regarding the minor.

115. On 2 February 2010 further reports were requested from the CTU.

116. Proceedings were still under way on the date of communication of the present application to the respondent Government.

B. Parallel proceedings

1. Proceedings instituted by the first applicant before the Bologna Juvenile Tribunal

117. By an application of 1 August 2007, the first applicant requested the Juvenile Tribunal of Bologna to intervene in the custody proceedings in favour of sole custody of the mother.

118. On 10 August 2007 the Public Prosecutor's Office advised against this action for lack of Italian jurisdiction. On 23 October 2007 the first applicant made a request for urgent measures.

119. By a decree of 29 October 2007, the Juvenile Tribunal suspended proceedings in view of the fact that proceedings were pending in San Marino.

2. Proceedings instituted by the father before the Bologna Juvenile Tribunal

120. It appears that in 2008 Mr X. requested the Juvenile Tribunal of Bologna to return the child to San Marino. The first applicant was not informed of these proceedings. On 14 March 2008 the Public Prosecutor's Office advised the court to refuse the request.

121. By a decree of 6 June 2008, the Juvenile Tribunal refused the request to return the child to San Marino. It noted that, as Italy had not yet accepted San Marino's adhesion to the Hague Convention that Convention could not apply to the present case.

3. Criminal Proceedings against the first applicant in San Marino

122. Mr X. pressed charges against the first applicant on 4 September 2007, for failure to make the child available for one of his visits. On 4 December 2007 it was considered that these proceedings should be archived since relevant certificates proving the child's illness at the time were submitted. The following day the case was archived by the *Procuratore del Fisco* (Attorney General). On 6 December 2007 the case was archived by the *Commissario della Legge*.

4. Criminal proceedings against Mr X. in San Marino

123. On 19 February 2008 the first applicant pressed charges against Mr X., with the *Gendarmeria di San Marino*, for international kidnapping.

124. Following the first applicant's testimony, on 29 May 2009 the *Commissario della Legge* held that there had not been the prerequisites for the accusation. Mr X. had not had the intention to kidnap the child. He could not be held responsible since he had only planned to take the child on a short holiday, which in some way or other could be said to have been agreed to by children's services, in order to allow the father to recover the unilaterally impeded and therefore lost visits. The case was therefore sent for an opinion to the *Procuratore del Fisco*. With the latter's agreement, on 10 June 2009 the *Commissario della Legge* ordered that the case be archived.

5. Criminal proceedings against Mr X. in Italy

125. On 10 May 2008 the first applicant pressed charges against Mr X. with the Rimini police headquarters for international kidnapping.

126. On 23 February 2009 the *Commissario della Legge* ordered the judicial police of San Marino to carry out the identification of Mr X.

127. By a summons of 19 July 2010 Mr X was informed that he was being indicted and that the trial would start on 24 October 2011.

6. Consular requests

128. Consular visits with the parties concerned were only successful in respect of the first applicant. Meanwhile diplomatic attempts by the Italian Government, seeking an adequate solution from the San Marino authorities, remained unfruitful.

C. The continuation of proceedings following communication of the application to the respondent Government.

129. Following notification of the pending application before the Court by the Government Agent, on 26 July 2010, by reason of the inferences as to the impartiality of the relevant judge in the application pending before the Court, the *Commissario della Legge* hearing the ordinary custody and contact proceedings withdrew.

130. Proceedings continued under a new judge appointed by the former judge. According to the applicants, this choice had been arbitrary, as the new judge, who did not usually practise in the civil sphere, was a professor at the same university as the former judge and X's legal counsel. This choice highlighted the former judge's partiality.

131. Submissions were made regarding several issues, *inter alia* the child's presence at Mr X.'s wedding, schooling, exclusive custody, and urgent measures related to the child's medical needs. Where necessary, decrees were delivered upon the information submitted by the parties, the experts and children's services.

132. Subsequently, on 13 September 2010 an updated CTU was submitted. The CTU acknowledged that his initial conclusions (of July 2008) had to be altered, having regard to the application lodged before the Court by the first applicant; as such the action reflected her contradictory behaviour. After hearing the parties he concluded that the second applicant should be placed with the father for the coming school year, that schooling should be in San Marino and that the mother should maintain her previously established visiting rights. The same was confirmed by a children's services report.

133. On 20 September 2010, following an adjournment because Mr X. was still on honeymoon, the first applicant made further submissions, focusing on the protection of her rights under Article 8 of the Convention. She submitted a favourable report by her CTP and requested that i) the child be placed with her, ii) the child be put into the Rimini elementary school, iii) a neuropsychiatric report be drawn up by the Rimini hospital iv) monitoring of visits be withdrawn, or in the alternative that San Marino children's services be replaced by neuropsychiatric services or that the psychologist be replaced.

134. Having heard all the relevant parties and submissions the *Commissario della Legge* delivered its decision on 21 September 2010. Noting the high level of conflict persisting between the parties and their representatives, it considered that the decision must be temporary and subject to further change. It ordered joint custody, that the child be schooled in San Marino, that she be placed with the father during the week and with the mother at weekends, that Christmas and Easter festivities would be spent with the mother with the exception of Christmas Eve, Epiphany and the weekend after, which would be spent with the father, and that the parents continue to follow psychotherapy for another twelve months. It further ordered children's services to continue monitoring the child's progress, the expert to submit information about the child-parent relationship, particularly in view of the father's remarriage, and any relevant medical needs.

135. Feeling aggrieved by the comments in the above-mentioned decision in relation to the parties' representatives, legal counsel for the first applicant gave up their mandate. Proceedings are still pending and the first applicant has no longer been represented during these proceedings.

136. Meanwhile, the appeal proceedings against the decision of 19 February 2008 continued and were decided on 7 March 2011.

137. The *Giudice per le Appellazioni Civili* rejected the first applicant's appeal. The court considered that Article 6 of the Convention had detailed provisions regarding criminal proceedings, but nothing in relation to civil proceedings. Thus, it was a matter subject solely to ordinary law. That being stated, he considered that in the instant case there had not been a breach of the right to defence or to the right to cross-examination (*contraddittorio*). Indeed, the first applicant had originally been represented at the opening of the hearing, thus, the prerequisites existed to hear the case and to cross-examine. It was only following the rejection of the request for an adjournment that the first applicant's co-lawyer forfeited her mandate. Moreover, when the latter forfeited her mandate she was not forfeiting her colleague's mandate, who therefore remained counsel to the applicant. The court further noted that there existed no law recognising a right to defer a case. The decision in relation to the existence of a legitimate impairment was subject to the judge's discretion after hearing the relevant arguments. In the present case, the results of the investigation and rogatory enquiry with the Rimini Tribunal could not lead to the existence either of a legitimate impediment or of an *ex post* one. The *Commissario della Legge* had according to his prerogatives considered it opportune to decide the case speedily in view of the urgency and gravity of the matter. Indeed, it shared the view that, there not being any legal and binding procedural requirements in this respect, in the urgent circumstances of the case the decision could have been taken even in the absence of one of the parties (*audi alteram partem*). Moreover, the appeal judge considered perplexing the fact that the

first applicant was contesting a situation she had created herself. Lastly, as to the impartiality complaint, the first applicant had not challenged or requested the withdrawal of the *Commissario della Legge* at the relevant time.

II. RELEVANT DOMESTIC LAW

A. The 1980 Hague Convention on the Civil Aspects of International Child Abduction "the Hague Convention"

138. The preamble of the Convention includes the following statement as to its purpose:

> " ...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, ..."

139. The object of such a return is that, following the restoration of the *status quo ante*, the conflict between the custodian and the person who has removed or retained the child can be resolved in the State where the child is habitually resident.

140. Article 3 of the Convention reads as follows:

> "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. ..."

B. Law of 17 June 2008 amending criminal procedure

141. Section 7 (1) of the law of 17 June 2008 amending criminal procedure "the Criminal Procedure Act") provided that an order that the case be archived must promptly be notified to the Attorney General (*procuratore del fisco*), the person charged, the victim, and the person who had pressed the charges. It must further be communicated to the executive magistrate ("*magistrato dirigente"*). An appeal can be lodged against such an order, by the person charged or the victim, within thirty days of its notification. The appeal shall be lodged with the *Giudice delle Appellazioni Civili*, who must be a different judge than the one who originally decided the merits of the cause. He or she should deliver a reasoned decision within thirty days. An order upholding the appeal application must require the

investigation stage to be reopened and the *magistrato dirigente* must assign the case file to a new investigating judge.

142. Its section 10 regarding transitional measures provided that this law was applicable to all criminal proceedings in which notice of the crime had reached the inquiring magistrate at a date following its entry into force. The law did not apply to proceedings pending at the date of its entry into force if they were published and archived within the following nine months of its entry into force.

THE LAW

I. PRELIMINARY OBJECTIONS

The Government's preliminary objection regarding the first applicant's standing also to act on her child's behalf

1. The parties submissions

143. The Government submitted that the second applicant did not have standing to act in the proceedings given her young age. In order to act on behalf of her child, the first applicant should have obtained the father's authorisation and/or that of the judge (*giudice tutelare*), but she had not done so. Awarding her that status could create a conflict situation in that even her father could lodge an application before the Court on her behalf. Moreover, certain aspects of her complaints, such as those relating to procedural aspects of the proceedings, could clearly have no effect on the second applicant, as she was not a party to the domestic proceedings.

144. Referring to the court's case-law, the applicants submitted that the second applicant had *locus standi*. This was even clearer, considering that the first applicant was not only the biological mother, but also had joint custody of the child and enjoyed parental rights.

2. The third-party Government

145. The Italian Government submitted that the second applicant had full *locus standi* in the proceedings, on the basis of the Court's case-law regarding representation by parents, particularly when the representing parent is in conflict with the authorities and is contesting their decisions in the light of the Convention provisions.

3. The Court's assessment

146. The Court points out that in principle a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and who criticises their decisions and conduct as not consistent with the rights guaranteed by the Convention. In the event of a conflict over a minor's interests between a natural parent and a person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his or her rights under the Convention. Consequently, even where a mother has been deprived of parental rights - and indeed that is one of the causes of the dispute which she has referred to the Court - her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the child's behalf, too, in order to protect his or her interests. Moreover, the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve purposes different from those contemplated by Article 34 of the Convention and, whilst those purposes may sometimes be analogous, they need not always be so (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, §§ 138-39, ECHR 2000-VIII).

147. The Court accordingly concludes that the first applicant, the natural mother who still has parental rights, the exercise/limitations of which she is disputing before the Court, has standing to act on behalf of her child, and therefore the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLES 8 AND 6 OF THE CONVENTION

148. The applicants complained under Article 8 about the custody proceedings, in particular about the order of 19 February 2008, and in general about the restrictions imposed on the applicants' visits. Under Article 6 they complained that the hearing leading to the latter decision had been unfair, and about the length of the entire proceedings.

The relevant Articles, in so far as relevant, read as follows:

Article 8

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 6

"In the determination of his civil rights and obligations ... everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law."

149. The Government contested that argument.

150. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). While Article 6 affords a procedural safeguard, namely the "right to court" in the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. In this light, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see *Iosub Caras v. Romania*, no. 7198/04, § 48, 27 July 2006, and *Moretti and Benedetti v. Italy*, no. 16318/07, § 27, ECHR 2010-... (extracts)).

151. In the instant case the Court considers that the complaint raised by the applicants under Article 6 is closely linked to their complaint under Article 8, and may accordingly be examined as part of the latter complaint.

A. Admissibility

152. The Government originally objected that the complaint against the decision of 19 February 2008 was inadmissible for non-exhaustion of domestic remedies since the appeal against that decision was still pending. However, pending these proceedings, the Government informed the Court that the proceedings had ended.

153. In this light the Court considers that the objection has been withdrawn, or in any event that it is to be dismissed. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' and third parties' submissions

(a) The applicants' submissions

154. The applicants complained that they had suffered a breach of their rights under Articles 8 and 6 and of the Convention, in particular in view of the decree of 19 February 2008, where the first applicant had not been duly represented and in which the judge had based his decision solely on statements by children's services and the father, notwithstanding the latter's abduction of the minor. As a result, the restrictions imposed on the first applicant, together with the six-month period of isolation in San Marino, were contrary to Article 8 and the entire proceedings were unreasonably lengthy, more than four years, and that no final decision had yet been taken, contrary to Article 6.

155. In the applicants' view, the judicial authorities and children's services were biased, as it appeared from, for example, social services' foregone conclusion that the second applicant would have resided in San Marino (paragraph 19 above), the decision of 18 December 2006, in favour of Mr X., containing an erroneous interpretation of a previously crystal-clear order (paragraph 15 above) and the decision of 19 February 2008 which had been arbitrary and discriminatory. They considered it inconceivable that an abduction planned with children's services would have been endorsed by the judge. Similarly, the restrictions placed on the mother on the basis of her alleged intention of removing the child were unfounded, as the first applicant had shown reasons, by means of the relevant certification, why the child could not attend certain visits with Mr X. As a result of the impugned decision which found for joint custody, the first applicant could only see her daughter for a few hours (up to 11 August 2008), having every time to make a trip to San Marino from Italy, and unlike the father she was not able to take the child on holiday for a few days.

156. The applicants explained that during the domestic proceedings the first applicant was represented by two lawyers, only one of whom was familiar with the meeting with children's services and the party's experts, while the other representative had withdrawn. They submitted that, bearing in mind the issue of the child's abduction and other evidence which came to light only after the date of the hearing had been fixed, of which the judge was made aware, it was crucial to have her lawyer present at that hearing. In the absence of that lawyer, the judge should at least have appointed a lawyer to represent her. Thus, the decision in question had been given in breach of the adversarial principle.

157. As to children's services the applicants submitted that the person responsible for their case file only had a degree in pedagogy and not in psychology, thus could not sign in that capacity, and could not properly assess the child's medical condition. Moreover, children's services had not acted in such a way as to foster joint parenting, and had repeatedly refused the first applicant's expert access to relevant documents and video recordings of meetings with the child. It followed that the domestic court did not exercise any supervision of the work of children's services in that respect. Another supposedly independent expert, the psychologist in charge of monitoring the meetings held at X.'s house, was the psychologist of a committee with which relatives of X. were involved. They further submitted that their expert, a psychological consultant for the Council of the Order of Psychologists of San Marino ("the Order"), had not been in accordance with the reports drawn up by children's services, which, in her view, had not been supported by scientific evidence. In this respect the expert complained to the Order, in particular about the procedures used by children's services, the lack of training, their omissions and lack of co-operation.

158. Lastly, the applicants submitted that the authorities' actions following the lodging of the application with the European Court of Human Rights had been inappropriate. The applicants contended that following the introduction of their case before the Court, the judge in charge of the domestic proceedings had refused to continue to hear the case. She had however appointed another judge, an action which in the applicants' view was not consonant with her refusal to hear the case. Indeed, the unusual choice of the judge who would have been her successor in hearing the case raised doubts as to his impartiality. They noted that once they became aware of the application to the court, the CTU's reports had been altered in their disfavour, and the content of the subsequent decrees had tastelessly made reference to the same.

(b) The Government's submissions

159. The Government submitted that the impugned decision of 19 February 2008, granting joint custody and holding that the second applicant should live with the father, was based on the fact that, as appeared from the expert evidence submitted by children's services, there was a high level of conflict between the parents and the mother was reluctant to allow contact with the father. The Government pointed out that in June 2007 the mother had taken the child to Italy, notwithstanding the decision of 17 April 2007, which held that the child should remain in San Marino (see paragraph 22 above), and from 2007 the first applicant had repeatedly refused to allow contact with the father, contrary to the decree of 25 June 2007 (paragraph 29 above). Thus, the impugned decision had been taken in the best interest of the child, having considered that the father was the parent who would have allowed contact with the other parent. The

court's conclusion had been based on the objective findings by children's services following their monitoring of the parent-child relationships, which repeatedly found that the mother was hindering the child's contact with the father, to the extent that in 2009 they feared the second applicant was suffering from Parental Alienation Syndrome (paragraph 97 above).

160. As to the child services, the Government submitted that according to law their function included providing residential care services (*assistenza domiciliare*) in all cases where there existed difficulties in parent-child relationships. They were judge auxiliaries/assistants, representing the institutional instrument allowing the court to acquire all the necessary elements to correctly evaluate any decision related to custody and adoption. Children's services, as public employees, were subject to Public Employment Law and to supervision by the Social Security Institute. Failure to abide by the duties imposed could lead to disciplinary sanctions as imposed by law through the Disciplinary Board. Children's services personnel were qualified individuals, with degrees in psychology and/or pedagogy with a two year specialisation course in Psychology or with at least five years' service in the health sector, who have been successful in a public competition and whose profession therefore guaranteed their independence and impartiality. Moreover, such qualities had often been confirmed by L.C., a court expert, whose authority in child therapy was indisputable. In reply to the third-party intervener, the Government considered that the dual role carried out by children's services was functional, enabling parents to reach agreements in the best interest of the child. Thus, the claims in that connection were completely unfounded and unsubstantiated.

161. The Government highlighted that the applicant had exercised all her contact rights punctually as ordered by the impugned decree, within the agreed arrangements, irrespective of her reluctance to allow contact with the father. Any cautionary measures adopted, such as the presence of the psychologist or children's services, had been deemed necessary to avoid any risk of child removal, bearing in mind the first applicant's prior behaviour. Such measures were in accordance with the Hague Convention on the Civil Aspects of International Child Abduction.

162. The Government further submitted that the proceedings leading to the decree had been duly notified and conducted in the presence of both parties, who were allowed to make all the relevant submissions, and the fact that one of the applicant's lawyers was not able to attend was irrelevant. They further noted that one of her lawyers, who had previously relinquished his mandate, had been reinstated. The lack of organisation of the first applicant's defence could not weigh against the judge's decision to proceed with urgency, as had been requested by the first applicant.

163. As to the alleged impartiality of the judge, the Government submitted that notification of the application to the domestic judge and the

attachment of the documents to the domestic case file served the purposes of a procedure for the abstention of the judge from the case. The judge appointed subsequently was an administrative judge, who in terms of law could also be assigned to civil cases, as also confirmed by the decision of the executive magistrate ("*magistrato dirigente*") of 1 December 2010. His impartiality was crystal clear, as could be seen from the fact that he even increased the time period during which the minor was to be placed with the mother. Moreover, according to the Government, no argument could be made in relation to the father's alleged kidnapping, since this issue did not appear from the children's services reports or any judicial decisions. Moreover, they insisted that the father had not abducted the child but was simply on holiday with her.

(c) The third-party Government's submissions

164. The Italian Government firstly noted that Mr X.'s behaviour amounted to kidnapping, in so far as his action to take away the child and not return her to her mother according to stipulated conditions had not been authorised by a judge. They further submitted that the allegation that the first applicant had attempted to kidnap the child was not substantiated, as it was clear from the decree of 25 June 2007 (see paragraph 28 above) that the applicants were authorised to reside in Rimini, Italy. In consequence, it could not be acceptable that the first applicant's contact rights were hindered by the application of the Hague Convention conditions, which did not apply to the first applicant's situation. Moreover, when Mr X. started requesting that these conditions apply (February 2008) the Hague Convention was not yet applicable to issues between the two states, as it had entered into force only on 1 August 2008.

165. The Italian Government considered it deplorable that the hearing leading to the impugned decision had taken place without legal representation for the first applicant, and that the refusal of the judge to grant an adjournment for this purpose raised issues as to the fairness of the proceedings under Article 6 § 1. They reiterated that the domestic jurisdictions had to make a detailed examination of the family's situation and take into consideration other elements, such as the emotional, psychological, material and medical needs of the child, as well as undertaking an overall assessment of the balance between competing interests, bearing in mind the best interests of the child. In their view a violation of Article 6 § 1 persisted, in that after nearly three years the appeal proceedings against the impugned decision had not yet been terminated. This delay was not understandable in view of the delicate situation, the best interest of the child and her rights under Article 8. Moreover, the Italian Government were of the view that the deterioration in the second applicant's health from 2009 onwards could have been due to incompetence on the part of children's services, as evidenced by the *Associazione Pro*

Bimbi's submissions (see below). They therefore requested the Court to examine the role played by children's services in so far as they appeared to have put aside the interests of the child in favour of those of the father.

166. Lastly, they considered that the first applicant must have suffered distress at seeing her child being moved from one place of residence to another. However, her good faith towards Mr X. had been evident even by her recent agreement to allow the child to attend Mr X.'s wedding. The Italian Government considered that a joint custody regime should have been accompanied by a decision to have the child reside with the mother, which according to child psychology studies was a fundamental period in children of such a young age. Moreover, bearing in mind that it appeared that the second applicant was often left in the care of her paternal grandparents, the Government had trouble understanding the choice of the San Marino authorities to order residence with the father.

167. In the light of the circumstances of the case the Italian Government was of the view that the San Marino Government had violated the applicant's rights under Article 8 in conjunction with Article 6.

(d) The third-party intervener's submissions

168. The *Associazione Pro Bimbi* provides, through its activities, support for parenting and the well-being of minors. It receives support from, *inter alia*, the Ministries of Public Instruction, Health, Justice, and Foreign Affairs. They submitted that in 2009 they had received a number of requests from separated parents in respect of their loss of parental rights and/or joint custody. Some of these cases had turned out to be extremely alarming from the point of view of the right to joint parenting and regular contact rights. These complaints mainly concerned children's services. During the association's discussions on child custody, strong criticisms of children's services were voiced by parents, in particular in respect of their lack of qualifications and ineffective support for parents. Many spoke about their distressing experiences in trying to see their children, particularly in cases of parents with dual nationality, who publicly complained that they had faced discriminatory treatment from the services. The association therefore invited children's services and the Council of the Order of Psychologists of San Marino ("the Council") to attend subsequent sessions. Unlike the Council, children's services did not send any representatives. The Council's representative, in reply to questions set, confirmed that in San Marino it sufficed to have a degree in pedagogy without a further professional qualification to be employed by children's services. Moreover, they were not subject to monitoring by the Council and were not bound by a code of conduct.

169. The association further cited a letter from children's services in which they acknowledged that, with a total of only seven staff members and a lack of resources and funding, they were not in a position to carry out

effectively their role of support for judges and protection of minors of 150 families, of whom fifty were cases of high-conflict separations which were often hard to mediate. The association also considered that it was anomalous for the staff of children's services to assume conflicting roles, namely the function of public officials reporting to judges and also as mediators providing support for families and children. Concerned about the above matter, the association had sent letters to the head of the Institute for Social Security, who was in charge of children's services. The latter responded that a commission of enquiry would be set up and investigations carried out. Up to the date of submissions no response had been received.

2. The Court's assessment

(a) General principles

170. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (see *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290). Family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty. Thus, the children in a school or other educational or recreational institution must abide by certain rules which limit their freedom of movement and their liberty in other respects. Likewise a child may have to be hospitalised for medical treatment. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8 (see *Nielsen v. Denmark*, 28 November 1988, § 61, Series A no. 144).

171. Domestic measures hindering enjoyment of family life such as a decision granting custody over children to a parent constitutes an interference with the right to respect for family life (see, for example, *Hoffmann v. Austria*, judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29, and *Palau-Martinez v. France*, no. 64927/01, § 30, ECHR 2003-XII).

172. Any such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *W. v. the United Kingdom*, 8 July 1987, § 60, Series A no. 121.)

173. Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see *Zawadka v. Poland*, no. 48542/99, § 53, 23 June 2005). The Court has repeatedly held that Article 8 includes a right for parents to have measures taken with a view to their being reunited with their children, and an obligation on the national authorities to take such measures. This also applies to cases where contact and residence disputes concerning children arise between parents (see *Kosmopoulou v. Greece*, no. 60457/00, § 44, 5 February 2004).

174. In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see *W. v. the United Kingdom,* cited above, § 59, and *Keegan*, cited above, § 49).

175. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation when deciding on custody (see, *inter alia*, *C. v. Finland*, no. 18249/02, § 53, 9 May 2006 and *Wildgruber v. Germany*, (dec.) nos. 42402/05 and 42423/05, 29 January 2008). However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of contact, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V (extracts).

176. Where the measures in issue concern parental disputes over their children, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact and residence disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance (see *Zawadka,* cited above, § 54, and *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A). Moreover, lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures to

reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child (see *Zawadka,* cited above, § 67) which, depending on their nature and seriousness, may override those of the parent (see *Hoppe v. Germany*, no. 28422/95, § 49, 5 December 2002).

177. Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on relevant considerations and is not one-sided, and hence neither is, nor appears to be, arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8 (see *W. v. the United Kingdom*, cited above, § 62 and 64 *in fine*). In conducting its review in the context of Article 8 the Court may also have regard to the length of the local authority's decision-making process and of any related judicial proceedings. An effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere passage of time (ibid., § 65; see also *H. v. the United Kingdom*, 8 July 1987, § 90, Series A no. 120).

178. It is of paramount importance for parents always to be placed in a position enabling them to put forward all arguments in favour of obtaining contact with the child and to have access to all relevant information which is at the disposal of the domestic courts (see *Sahin v. Germany* [GC], no. 30943/96, § 71, 8 July 2003, and *Kosmopoulou,* cited above, § 49). It is, moreover, for the authorities to show that there are compelling reasons for refusing a data subject's request to be provided with a copy of their personal data files (see *Tsourlakis v. Greece*, no. 50796/07, § 44, 15 October 2009).

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

179. In the present case the Court notes that in December 2006 the competent national courts granted sole custody of the child to the first applicant. Six months later, in June 2007 the domestic court ordered joint custody and that the child should live and attend school for the following school year in Rimini, Italy, where she had established herself with the mother. However, by an order of 21 September 2007 the domestic courts decided that the second applicant should reside in San Marino, as Mr X. had

the right to easy and unsupervised contact with his child. On 12 November 2007 joint custody was upheld as being in the best interest of the child. By a decision of 19 February 2008, the court, again upheld joint custody and ordered the child to be returned to San Marino to live with her father and to attend school there. This decision was confirmed on appeal three years later. In the meantime a number of orders had been issued on the matter, upholding joint custody and residence with the father, in San Marino.

180. The Court observes that from 2007 onwards, the first applicant's rights had diminished from full custody, to a right to supervised contact, to be held in San Marino, of nearly two hours per day. Subsequently, contact hours changed to three hours on alternate days, including an overnight stay, and remained subject to the same conditions up to August 2008. Following that date contact hours increased to two to six hours per day, overnight stays, and alternate weekends with the parents, up to entire weeks over the Christmas holiday period. Most of these visits were nevertheless supervised either by the father or his legal representatives, children's services or CTU experts, who videoed the meetings.

181. It has not been contested by the parties that the domestic decisions related to the applicants' custody and contact rights constituted interference with the applicants' family life which was in accordance with the law, and the Court considers that the measures pursued the legitimate aims of the protection of health or morals and/or the protection of the rights and freedoms of others, namely the child and her parents. It remains to be ascertained whether the measures were necessary in a democratic society.

182. The Court notes that in this sphere its review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced by the domestic courts were relevant and sufficient (see *Olsson v. Sweden (no. 1)*, 24 March 1988, § 68, Series A no. 130).

183. In reviewing whether the domestic courts based their decisions on relevant grounds, the Court observes that the domestic courts persistently reiterated the best interests of the child. They based their decisions on a number of further considerations, such as the relationship between the parents, the inherent problems of joint custody in such cases, particularly were it transpired that one parent was, for the most part, hostile towards the other and hindered contact rights, the attitude and availability of the parents and the specific environments involved. In each of their decisions they relied on detailed and complete reports from the children's services (see, for example, paragraphs 22, 28, 38, 50 and 77) which were drawn up following constant and specific requests by the domestic courts. These reports were a

result of the constant monitoring performed by the service. From 2007 onwards the courts further had the benefits of reports by *ex-parte* counsellors and experts, and from 2008 onwards also reports by the CTU. Moreover, the parties had regularly made written and oral submissions before the court and were allowed to air all their requests and concerns, which the courts undoubtedly took into consideration.

184. In this light, the Court finds it reasonable, that the courts considered it necessary - for the protection of the child's interests - not to maintain in place a sole custody order in favour of the first applicant but to award the parents' joint custody, neither does it appear illogical to have opted for residence with the father. It is also noted that the domestic courts did not exclude a change in regime if circumstances so required. Furthermore, the domestic courts took due care to recommend education programmes for the family and to foster the parents' reconciliation and co-operation in the best interest of their daughter.

185. As to contact rights, the Court has already observed the details of the regime applied (see paragraph 180 above). It reiterates that the national authorities having the benefit of direct contact with all the persons concerned are better placed than the international judge to assess such needs. The Court considers that the measures adopted do not appear manifestly arbitrary or unfair. In consequence, it is not for the Court to enter into a detailed assessment of the most appropriate contact arrangements. It suffices for the Court to note that these rights were not denied or suppressed at any moment, the applicants having maintained constant and regular contact with each other, and the first applicant having retained joint custody over the second applicant. While supervision and often limitation as to the venue of contact meetings (the father's residence), must have restricted the purpose of visits between mother and child, limiting to some extent their contact and the opportunity to develop their relationship - a matter which was in both of their interests and particularly the child's, whose interest is paramount - the Court considers that monitoring by the child services was necessary to allow the domestic courts to make informed decisions as to custody and contact rights. Moreover, such monitoring also served to ensure the child's well being. The Court is ready to accept that while there was no threat of violence or serious health issues (see, *a contrario*, *Gluhaković v. Croatia*, no. 21188/09, § 63, 12 April 2011) there could have been a risk of psychological abuse as evidenced by the suggestions that the child might develop Parent Alienation Syndrome, thus justifying the father's presence at meetings. This having been said, the Court refutes the Government's argument that such limitations were necessary as a precautionary measure against a possible abduction by the first applicant. The Court notes that when the first applicant moved to San Marino, she had informed the judge (see paragraph 26), similarly, when requested to submit the second applicant's passport she did so (see paragraph 56). While she appeared to be

more hesitant to submit the second passport, the Court notes that in the meantime it was Mr X. who had requested a second passport and who was allowed to travel with the child (see paragraphs 70 and 92). Moreover, it had been repeatedly stated by the courts that travel was banned unless authorised by it (see paragraphs 51, 70 and 99), a measure which in principle deterred unilateral decisions to take the child away. Furthermore, the Court notes that there is nothing in the case file which gives objective grounds for any fear of the applicants' absconding, particularly since the first applicant's family lived in Rimini, not far from San Marino, and indeed any mere suspicions or fears which Mr X. might have had had neither been substantiated nor confirmed by the courts. Lastly, the Court notes that the presence of the parties' lawyers had not been court ordered, and indeed it was the children's services that requested the court to prohibit such a practice (see paragraph 69 above). Thus, any discomfort caused in this respect could have easily been avoided by the parties' good will.

186. As to the applicants' contention that the children's services were biased and unqualified, the Court considers that quite apart from the submissions made by the third-party intervener association, the matter remains unsubstantiated, and in any event the Court has not discerned any proof of the lack of effectiveness of such a service, particularly where, as in the present case, the proposals made by the service do not appear to be manifestly arbitrary or discriminatory. While it is true that the domestic courts have a duty to exercise constant vigilance, particularly as regards action taken by social services, to ensure the latter's conduct does not defeat the authorities' decisions (see *Scozzari and Giunta v. Italy* [GC], cited above, § 179), the Court notes that in the present case, the applicants had ample possibilities to criticise and contest the children's services qualifications, actions and findings in the contentious proceedings, as in fact the first applicant had done in relation to the children's services failure to facilitate her contact rights (see paragraphs 46, 48 and 56 above). Moreover, when at issue, the domestic courts considered that the children's services were made up of reliable experts (see paragraph 110 above).

187. The Court reiterates that, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect for the interests safeguarded by Article 8. In assessing whether the domestic courts' reasons were also sufficient for the purposes of Article 8 § 2, the Court will notably have to determine whether the decision-making process, seen as a whole, provided the first applicant with the requisite protection of her interest.

188. The Court notes that, throughout the proceedings, the applicant, represented by counsel, had the opportunity to present her arguments in writing and orally. Indeed she had presented ample submissions to the domestic courts as evidenced by the voluminous documentation submitted

to the Court. As to the hearing of 19 February 2008 on the merits of her and Mr X.'s requests, the Court considers that given the fact that the first applicant's representative had been duly notified of the date of the hearing (see paragraph 43 above), that at the actual hearing she had originally been represented by co-counsel, and that she had had the opportunity to submit written pleadings, it cannot be said that her involvement had not been effective at that stage. This is more so in view of the fact that 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. In this light, and bearing in mind that the decision of 19 February 2008 only confirmed the retention of a joint custody regime which had previously been decided (see paragraphs 28 and 38 above) the Court finds reasonable the refusal of the domestic court to adjourn the hearing.

189. As to the applicants' complaint that the proceedings were unreasonably lengthy, while the Court finds reprehensible that the appeal against this decision took three years to be decided (6 March 2008 to 7 March 2011), it notes that various orders were delivered and arrangements made in the meantime, and that the first applicant's access rights have been regularly maintained, the calendar of visits being changed regularly by agreement of the parties and the assistance of children's services. As to the overall length of the proceedings the Court notes that the first applicant intervened in the custody and contact proceedings in December 2006 and the proceedings are to date still pending. However, it is evident from the facts of the case that there have not been any significant lapses of inactivity, or adjournments for reasons related to internal organisation (see, *a contrario Veljkov v. Serbia*, no. 23087/07, § 88, 19 April 2011 and *Wildgruber v. Germany*, nos. 42402/05 and 42423/05, § 61, 21 January 2010). Indeed it also transpires that the parties' requests for urgent hearings had been immediately followed up, with the domestic courts calling on extraordinary hearings of their own motion when necessary (see, for example, paragraph 43 above). Thus, although parallel proceedings and the fact that the courts had to decide a number of ancillary matters simultaneously must have detracted from the required speediness of custody proceedings, the Court considers that overall the domestic courts appear to have dealt with the proceedings with the requisite diligence.

190. In so far as the applicant argued that she had been denied access to the proper documentation, namely that by a decision of 17 July 2008, the first applicant was denied access to the video recordings of her visits with the second applicant, the Court considers that the information contained in those recordings was pertinent to the applicants' relationship and could have allowed the first applicant to become aware of any apparent negative points which could have influenced the judge against her and if necessary take them into account, in future, with a view to improving the relationship with

her child. The only reason given by the domestic court for such a refusal was that the applicant had no right to such materials, children's services being the judge's auxiliary (see paragraph 77 above). The Court is not persuaded by this reasoning and no other compelling reasons supporting their refusal to provide the video recordings have been put forward. However, it notes that nine months later the parties' requests for CTU recordings and all relevant documentation had been granted (see paragraph 104 above), thus, the first applicant could make use of such relevant information for the purposes of the proceedings which were still ongoing. Thus, the initial refusal cannot suffice to conclude that the State failed to comply with its positive obligations to ensure respect for the first applicant's private and family life.

191. Lastly, as to the claims, raised in the applicants' observations, regarding the impartiality of the relevant judges, the Court observes, as did the appeal court, that no request for the withdrawal of such judges had been made at the relevant time.

192. Having regard to the state's margin of appreciation in this sphere, and having considered the case as a whole, the Court is satisfied that the domestic courts' procedural approach provided adequate material on which to reach decisions based on relevant and sufficient reasons while adequately involving the first applicant in the decision-making process.

193. It follows that there has not been a violation of Article 8 of the Convention in respect of the applicants.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

194. The applicants complained that they did not have an effective domestic remedy in respect of the second applicant's abduction as a result of the tribunal's decision to archive the case against Mr X. They relied on Article 13 of the Convention, which reads as follows:

> "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."

A. The parties' submissions

195. The applicant's submitted that the law referred to by the Government which came into force on 1 September 2008, provided in its Article 10 of the transitional and final rules as follows –"the present law applies to all criminal proceedings for which notice of the crime reached the investigating judge in the period after the law came into force. The present law does not apply to cases pending on the date when it came into force if they are published and filed within the following nine months." In the

present case, the proceedings against Mr X. were filed on the last possible day, thus excluding any possibility of an appeal.

196. The Government submitted that the first applicant could have lodged an appeal before the Judge of Criminal Appeals (*Giudice delle Appelazioni Penali*), against the *Commissario della Legge*'s decision of 10 June 2009 to archive the case, which, if upheld, could order the reopening of the preliminary investigation and assign it to a different inquiring magistrate. Such an action was provided for by Article 135 of the Code of Criminal Procedure as amended in 2008 and which came into force on 1 September 2008. The latter provided the accused and the injured party with the possibility of lodging an appeal within thirty days of notification of the order that no further action would be taken. The Government further submitted that the transitional provisions mentioned by the applicants were not applicable to the case in question. However, even if this were so, the decision to archive the case was delivered several days after the expiration of the nine months from its entry into force.

197. The Italian Government supported the observations submitted by the San Marino Government.

B. The Court's assessment

198. The Court notes that the parties disagreed as to the application of the relevant law and they have not submitted any information as to the functioning of the legal amendment in practice. Nor did the Government give an explanation as to why the transitional measures did not apply to the present case. However, the Government contended that even if they had the applicants would still have been in time to appeal.

199. Indeed, the Court observes that the transitional provisions clearly stated that the new law, providing for a right to appeal, would not apply to cases which were archived within nine months of its coming into force. It notes that the amendment to the law came into force on 1 September 2008 and the case was archived on 10 June 2009, thus more than nine months after the entry into force of the amendment. It therefore appears that in principle an appeal was available to the applicants. In the present circumstances and in the light of the submissions on the matter, the Court considers that since the applicants failed to even attempt an appeal, it would be speculative to examine whether such a remedy would have been effective.

200. It follows that this part of the complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

201. The first applicant complained that from February to August 2008 the second applicant was not allowed to leave the State of San Marino, contrary to Article 2 of Protocol No. 4, which reads as follows:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

202. The Government contested that argument.

A. Admissibility

203. The Government submitted that the second applicant, as a minor, did not have an autonomous right to freedom of movement, and therefore could not be considered a victim.

204. The Court makes reference to its conclusion about the second applicant's victim status, above. Moreover, it notes that the rights guaranteed by this provision apply to any person, and not solely to adults. In the present case, the first applicant and Mr X. had joint custody over the second applicant. In consequence, they were in principle both authorised and capable of enabling the second applicant's travel, had it not been for any restrictions imposed by the national courts.

205. It follows that the Government's objection in this respect must be dismissed.

206. The Court further notes that this complaint is linked to the one examined above under Article 8 and must therefore likewise be declared admissible.

B. Merits

1. The parties' submissions

207. The applicants submitted that although the first applicant had joint custody the second applicant's movements were restricted as a result of the limitations imposed on her by the court. Indeed from 13 February 2008 up to 11 August 2008 the second applicant was confined to the territory of San Marino, for no legitimate reason. It was clear that such a measure had been granted in order to prevent Italian courts from having the jurisdiction to decide on the case.

208. The Government submitted that the applicant's restrictions arose from the court decisions ordering the child to be resident with the father in San Marino and the mother's contact rights to be exercised in San Marino and such a decision could not constitute a violation of the said provision.

209. The Italian Government considered that the limitations imposed on the second applicant's freedom of movement, namely prohibiting her from going to Italy, had the aim of distancing the second applicant from her mother and her maternal family. They stated that the reasons put forward by children's services and the CTU had been contradictory and no specific reasons had been given for the decision to keep the second applicant with the father and not with the mother, particularly in view of her tender age and needs. In consequence, in their view, there had been a violation of the second applicant's rights under Article 2 of Protocol No. 4.

2. The Court's assessment

210. The Court reiterates that the right of freedom of movement as guaranteed by paragraphs 1 and 2 of Article 2 of Protocol No. 4 is intended to secure to any person the right to liberty of movement within a territory and the right to leave that territory, which implies a right to leave for any country of the person's choice to which he or she may be admitted. Thus, freedom of movement prohibits any measure liable to infringe that right or to restrict the exercise thereof which is not "in accordance with the law" and does not satisfy the requirement of a measure which can be considered "necessary in a democratic society" in the pursuit of the legitimate aims referred to in the third and fourth paragraph of the above-mentioned Article (see *Baumann v. France*, no. 33592/96, § 61, ECHR 2001-V (extracts). As regards the proportionality of the interference, the Court has particular regard to the duration of the measure in question (see *Nikiforenko v. Ukraine*, no. 14613/03, § 56, 18 February 2010).

211. The Court reiterates that an obligation to ask the authorities permission to leave each time does not correspond to the sense of the concept "freedom of movement" (see *Ivanov v. Ukraine*, no. 15007/02, § 85, 7 December 2006). The Court considers that the series of domestic

decisions banning travel, and dispossessing the second applicant of her passport, in the present case, restricted the second applicant's right to liberty of movement in a manner amounting to an interference, within the meaning of Article 2 of Protocol No. 4 to the Convention (see *Roldan Texeira v. Italy* (dec.), no. 40655/98, 26 October 2000, and *Baumann*, cited above, § 62).

212. The parties did not dispute that the decisions banning travel from the territory of San Marino in the present case were compatible with domestic procedural law and had a basis in the national legal order.

213. As to the legitimate aim cited by the Government, the Court reiterates its earlier assessment that there were no objective grounds founding any fear of the second applicant being kidnapped by her mother. Nevertheless, bearing in mind that at the relevant time San Marino was not a party to the Hague Convention, the Court recognises that the domestic courts felt bound to issue directions which could provide alternative protection against any such eventuality. In these circumstances, the Court therefore is ready to accept that the measure pursued the maintenance of "ordre public" and the protection of the rights of others.

214. The Court observes that in the present case the second applicant was confined to the territory of San Marino from at least 22 February 2008 to 11 August 2008. Bearing in mind the short duration of the restriction, the Court considers that the measure at issue was proportionate to the aim pursued (see, *mutatis mutandis*, *Roldan Texeira,* (dec.), cited above).

215. Accordingly, there has not been a violation of Article 2 of Protocol No. 4 to the Convention.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

216. The applicants further complained that the circumstances created by the judicial authorities, the CTU and the children services amounted to inhuman and degrading treatment, particularly as a result of the period of isolation in San Marino. Indeed, as a result, the second applicant suffered psychological distress. Moreover, the first applicant had been pressured by these entities into withdrawing her complaints against Mr X., which were eventually archived. They cited Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

217. The Court reiterates that, to fall within the scope of Article 3, the treatment in question must attain a minimum level of severity. The assessment of that minimum level is, in the nature of things, relative, and depends on all the circumstances of the case, and in particular on the nature and context of the treatment, how long it lasted, the physical and mental effects and, in some cases, on the sex, age and state of health of the person

concerned. On this basis, it is not sufficient for the treatment to include some unpleasant aspects (see *Bove v. Italy*, (dec.) no. 30595/02, 18 November 2004).

218. The Court considers that, while the proceedings and related events have surely been a source of stress and anxiety to the applicants in the light of the circumstances of the present case, it cannot be said that they have reached the threshold proscribed by Article 3.

219. It follows that this complaint is inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

220. Lastly, the applicants complained under Article 1 of Protocol No. 1, about the amount of maintenance awarded by the order of 18 May 2007, which erroneously considered that the first applicant did not need to pay rent.

221. The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it can only deal with the matter if the relevant complaint is raised within a period of six months from the date on which the final decision was taken (see *Debono v. Malta*, (dec.) no. 34539/02, 3 May 2005). In the present case the final decision in relation to this complaint was delivered on 18 May 2007 and was therefore taken more than six months before the lodging of this application with the Court on 7 July 2008.

222. It follows that this complaint is inadmissible for non-compliance with the six-month rule set out in Article 35 § 1 of the Convention, and must be rejected pursuant to Article 35 § 4.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning Article 8 of the Convention and Article 2 of Protocol No. 4 to the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has not been a violation of Article 8 of the Convention;

3. *Holds* by five votes to two that there has not been a violation of Article 2 of Protocol No. 4 to the Convention.

Done in English, and notified in writing on 27 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada	Corneliu Bîrsan
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Ziemele joined by judge Tsotsoria is annexed to this judgment.

C.B.

S.Q.

DISSENTING OPINION OF JUDGE ZIEMELE

JOINED BY JUDGE TSOTSORIA

1. I do not share the opinion of the majority in this case. I note that the Court's case-law has crystallised the following principles that the national authorities have to follow in striking a balance between the competing interests of the child and the parents. First of all, in the balancing process particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents (see *Maumousseau* and *Washington v. France*, no. 39388/05, §§ 66 and 67, 6 December 2007, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 64, ECHR 2003-VIII). Secondly, the observance of the procedural requirements implicitly enshrined in Article 8 of the Convention means that the persons concerned must be guaranteed sufficient involvement in the decision-making process and that the domestic courts must conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature (see *Maumousseau and Washington*, cited above, paragraph 74, and more recently, *Neulinger and Shuruk*, [GC], no. 41615/07, § 139, 6 July 2010).

2. I note that while the applicant and the child had moved to Rimini in Italy with the permission of the relevant authorities in San Marino (paragraph 28 of the judgment), problems started to emerge in August 2007 which seem to have led to the adoption of the new order whereby San Marino was made the child's residence (paragraph 34). It is unclear how the parents' submissions were represented in these proceedings and the majority does not refer to this problem either (paragraph 179). In January 2008 Mr X asked for sole custody of the child. It is because of this request that a more extensive expert report on the situation was drawn up, noting also the state of mind of the child (paragraph 42). It appears to me that this was a particularly crucial moment in the proceedings. However, the first applicant's legal representation was not ensured since the immediate notification by her lawyer of his inability to attend the extraordinary hearing was not accepted. Furthermore, at that meeting the applicant's submissions were refused without detailed reasoning. In the meantime, Mr X had arbitrarily retained the child in San Marino (paragraphs 43, 44 and 48).

3. I do not share the view of the majority that the applicant's involvement in the above-mentioned crucial hearing was effective (paragraph 188). In my view, the domestic courts did not conduct an in-depth examination of the entire family situation.

4. Moreover, the child was taken away from the mother on 13 February 2008. When a year later, on 25 February 2009, a report on the child was drawn up, it was noted that her character had deteriorated (paragraph 97), and it continued to deteriorate (paragraph 107). The Court has repeatedly stated in similar cases that the domestic authorities should, above all, keep the best interests of the child in mind. I fail to see – and the medical reports seem to confirm this view – how the course of action taken by the San Marino authorities served the best interests of the child. Certainly, I do not see in the reasoning of the domestic authorities how the principle of the best interests of the child affected one decision or another. It is surprising that Mr X was allowed to effectively kidnap the child and that more in-depth reports on the child's well-being only appeared in the later stages of the proceedings.

5. I believe that the Court's case-law does not merely require abundant activity on the part of the domestic authorities in such sensitive cases. It actually requires that the State take the kind of steps capable of leading to a better appraisal of what is in the best interests of the child. I fail to see that this was the guiding principle behind the actions taken by the authorities in San Marino and for that reason I would have found a violation in this case.