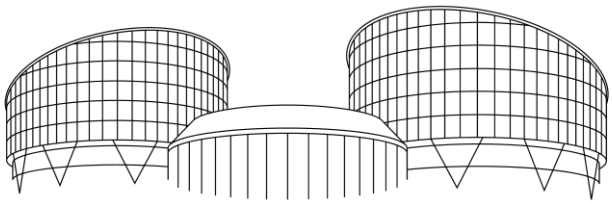

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF X v. LATVIA

(Application no. 27853/09)

JUDGMENT

STRASBOURG

13 December 2011

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 26/11/2013

This judgment may be subject to editorial revision.

In the case of X v. Latvia**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Kristina Pardalos, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 15 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 27853/09) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms X ("the applicant"), on 8 May 2009. On 8 September 2011 the President of the Third Section granted anonymity of the applicant (Rule 47 § 3 of the Rules of the Court).

2. The applicant was represented by Mr R. Strauss, a lawyer practising in Rīga. The Latvian Government ("the Government") were represented by their Agent, Mrs I. Reine.

3. The applicant alleged, in particular, under Article 6 § 1 of the Convention that the proceedings before the Latvian courts concerning the return of her daughter to Australia had not been fair in that the national courts arbitrarily interpreted and applied the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention").

4. On 23 March 2010 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a Latvian national who was born in 1974 and resides in Australia. In 2007 the applicant obtained Australian citizenship.

6. In early 2004 she met T. and they developed a relationship. The applicant moved into T.'s apartment at the end of 2004 when she was in a late stage of her pregnancy.

7. In February 2005 the applicant gave birth to a daughter. The birth certificate of the child does not state the name of her father and no paternity test had been carried out at the time the application was lodged with the Court. Since the birth of the child the applicant has been entitled to benefits under a single-parent support scheme.

8. It appears that the applicant's relationship with T. deteriorated and they decided to separate. The applicant continued to share the apartment with T. as a tenant.

9. On 17 July 2008 the applicant left Australia with the child and went back to Latvia.

A. The proceedings under the Hague Convention before the Australian authorities

10. On 19 August 2008, after the applicant arrived in Latvia, T. submitted an application to the Family Court of Australia to establish his parental rights in respect of the child. To support the claim T. testified in an affidavit before the Australian Family Court that he had been in a relationship with the applicant since 2004 and that the latter had always told him that he was the father of the child, even if he was not legally recognised as such. T. also stated that the mutual rent agreement was false and that he had submitted false declarations to the social security services in order to allow the applicant to receive a single-parent benefit. He asserted that the applicant had fled Australia with the child without his consent, thereby violating Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). T. alleged that the location of the applicant in Latvia was unknown to him. In support of his claims T. attached to his application e-mail correspondence between the applicant and his family members.

11. On 6 November 2008 the Australian Family Court, in the absence of the applicant, decided (1) that both T. and the applicant had had joint parental responsibility for their child since the day of her birth, and (2) that the case would be reviewed after the return of the applicant and the child to Australia.

12. It appears that the applicant was invited to attend the hearing or follow it by telephone via an e-mail and a text message. The decision of 6 November 2008 was not appealed against by the applicant.

B. The proceedings under the Hague Convention before the Latvian authorities

13. On 22 September 2008 the Ministry of Children and Family Affairs of the Republic of Latvia, which was the Central Authority responsible for implementing the Hague Convention, received from the Australian Central Authority a request from T. concerning the return of the child to Australia under the Hague Convention.

14. On 19 November 2008 the Rīga City Zemgale District Court examined the request in the presence of both the applicant and T. In the hearing the applicant contested the applicability of the Hague Convention alleging that she did not know who the father of her daughter was. She assumed that T. had initiated the proceedings so that they would serve as a mitigating element in criminal proceedings allegedly pending against him in Australia.

15. A representative of the Orphans' Court (*Bāriņtiesa*) argued that the claim should be dismissed because at the time of the child's removal from Australia the applicant had been a single mother, and that the child had developed ties with Latvia.

16. The lower court granted T.'s request, stating that pursuant to Articles 1 and 14 of the Hague Convention the decision by which the Australian Central Authorities had established T.'s parental responsibility for the child was not subject to review by the Latvian courts, as they could decide only whether there had been a wrongful removal and whether the child should be returned. When applying Article 13 of the Hague Convention the court relied on photos and transcripts of e-mails between the applicant and T.'s relatives. It concluded that even if the applicant and T. had communication and financial problems, the latter had taken care of the child prior to her removal to Latvia. The court dismissed as ill-founded the applicant's arguments that the return of the child to Australia might lead to her psychological detriment, stating that these were only assumptions.

17. As a result, the applicant was ordered to return the child to Australia immediately and in any event not later than six weeks from adoption of the decision. The decision also stated that if the applicant failed to respect the time-limit set by the court, then T. was authorised to return the child himself.

18. The applicant submitted an ancillary complaint in which she argued that she had been the sole guardian in law and in practice of the child at the time they had left Australia.

19. She also indicated that returning the child would expose her to psychological harm. She relied on the conclusions of a psychologist who examined the child on 16 December 2008:

> "[...] Although the results of the examination show that the child has developed an adequate level of knowledge and language, the girl cannot, due to her minor age, define her opinion about her place of residence [...]. Having regard to the child's age and close emotional ties with her mother, which is normal at this age, the emotional well-being of the child primarily depends on and is closely linked with the psychological balance of [the applicant]. [...] the child needs the daily presence of the mother and a permanent place of residence with [the applicant]. Having regard to the age of the child – three years and ten months – immediate termination of contact between the mother and the child should be ruled out, otherwise psychological trauma might be caused to the child in that the child's sense of security and personal confidence could be impaired".

20. The applicant also brought the appellate court's attention to the fact that Latvian was the native language of the child; that she attended pre-school activities in Latvia and that T. had ill-treated the applicant and the child. In addition, the applicant complained that the lower court had refused to request from the Australian authorities information of T.'s previous convictions and the criminal charges of corruption brought against him. She also contended that in Australia she would be unemployed and would not have resources to ensure the legal protection of herself and the child, and that the lower court had not assessed the child's social guarantees and safety if returned to Australia.

21. On 26 January 2009 the Rīga Regional Court (*Rīgas Apgabaltiesa*) upheld the decision of the lower court. It also dismissed the argument of possible psychological harm to the child:

> "[The court] dismisses ... the allegation that [T.] ill-treated [the applicant] and the child, as well as [the allegation] that he was facing a prison sentence concerning [criminal charges brought against him] as no evidence has been submitted which could, at least by implication, support the allegations.
>
> Neither can the conclusion of the [psychological assessment] of 16 December 2008 serve as evidence against the return of the child to the requesting state. Although the conclusion stated that the child was in need of her mother and that immediate termination of contact between the mother and the child should be ruled out, the issue raised before this court does not concern custody rights... . Pursuant to Article 19 of the Hague Convention, a decision under this convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.
>
> [The court] considers that...[the child]...has not reached an age or level of maturity which would allow her to formulate an opinion concerning a return to Australia.

22. During the hearing the representative of the Orphans' Court, *inter alia*, noted that there was no information as to the child's situation if she was returned to Australia. The appellate court noted in this respect:

> [The court] considers that there are no grounds to undermine the social protection and security of the child in Australia as, according to the [affidavit], Australian legislation provides, *inter alia*, for the security of children and [their] protection against ill-treatment within the family".

23. On 5 February 2009 a bailiff requested the applicant to comply with the return order by 19 February 2009, which she failed to do.

24. On 24 February 2009, in response to a request by the applicant, the prosecutor's office refused to reverse the decision adopted by the Rīga Regional Court.

C. Execution of the return order

25. On an unspecified date a bailiff lodged an application with the Rīga City Zemgale District Court for enforcement of the order to return the child. At the same time the applicant filed an application asking for suspension of the return order for a period of six to twelve months. The court scheduled a hearing of both applications on 16 April 2009.

26. On 6 March 2009 at T.'s request the Central Authority asked the Orphans' Court to verify the child's living conditions and inform the applicant of T.'s request to see the child.

27. On 14 March 2009 T. met the applicant and the child by chance near a shopping centre, from where T. took the child and drove to Tallinn, Estonia, in order to commence a trip back to Australia. Following a request from the Central Authority of Estonia concerning T.'s right to return the child to Australia, on 16 March 2009 the Central Authority of Latvia supplied the requested information.

28. On 15 March 2009, at the applicant's request, the State Police instituted criminal proceedings for abduction of the child, without bringing charges against any particular suspect. The Central Authority was informed thereof.

29. On 6 April 2009, referring to the problems of execution of the court order in the applicant's case, the Ministry of Justice set up a working group with the aim of proposing the necessary amendments to the laws concerning execution of court orders in similar cases.

30. In this connection the Ombudsman noted that in the absence of specific legal regulation concerning the execution of return orders, the execution should not take place in an arbitrary and violent manner, or in the absence of representatives of the Orphans' Court.

31. On 20 April 2009 Rīga City Zemgale District Court dismissed the applications of the bailiff and the applicant concerning the delay in the execution of the return order.

32. On 30 April 2009 following a request submitted by the applicant's representative, the Prime Minister of the Republic of Latvia ordered a

disciplinary investigation into the legality of the actions of the Central Authority of Latvia.

33. On 27 May 2009 the investigation reached the conclusion that the Central Authority of Latvia had acted within its competence. However, it noted that in Latvia there was not sufficient regulation in order to be able to avoid the violent and traumatic execution of court orders in similar cases. The investigation therefore proposed that a number of related issues be examined by the Ministry of Justice.

D. Custody proceedings before the Australian courts

34. In September 2009 the Family Court of Australia discharged all prior orders relating to the parents' rights and, *inter alia*, ruled that T. was the person with sole parental responsibility for the child, and that the applicant was restrained from discussing publicly any information referring to the child or T. It also ruled that the applicant could visit the child under supervision of a social worker, and that until the child reached the age of eleven the applicant was restrained from attending or communicating by any means with any child-care facility, pre-school or school attended by the child or with a parent of any other child attending the same institution. She was also prohibited from speaking to the child in Latvian.

II. RELEVANT LAW AND PRACTICE

A. Relevant domestic law

1. Law of Civil Procedure, as in force at the material time

35. Section 644.[19] regulates matters regarding the unlawful movement of children across borders to Latvia. It provides the following procedural safeguards for abduction proceedings.

36. A court shall adjudicate an application in a court hearing in which the parties shall participate. The court shall invite a representative of the Orphans' Court, as well as ascertain the point of view of the child if he or she can formulate it.

37. In adjudicating the application, the court shall request evidence of its own motion. The court shall use the most appropriate procedural means, as well as the quickest ways of acquiring evidence, in order for a decision to be taken within a period of six weeks after the submission of the application.

38. If the court determines that the child has been unlawfully moved to Latvia or detained in Latvia, it shall take a decision regarding the return of

the child to the State which is his or her place of residence, if one of the following cases applies:

1) the period after the unlawful movement of the child to Latvia or detention in Latvia does not exceed one year from the time the relevant person or institution found out about the whereabouts of the child; or
2) the period after the unlawful movement of the child to Latvia or detention in Latvia does exceed one year but the child has not adapted to life in Latvia.

39. A court may take a decision not to permit the return of the child to the State which is his or her place of residence, if it determines that the child has been unlawfully moved to Latvia or detained in Latvia and one of the following circumstances exists:

1) more than one year has passed since the relevant person has known or had the practical possibility of knowing the whereabouts of the child, but during this period he or she has not turned to the relevant institution to seek the return of the child to the State which is his or her place of residence;
2) the child has adapted to life in Latvia and his or her return is not in the best interests of the child.

40. The aforementioned paragraphs shall be applied in so far as it is in compliance with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and Council of the European Union Regulation no. 2201/2003.

2. Law on the Orphans' Courts

41. By virtue of section 17, the Orphans' Court defends the personal and property interests and rights of children and other persons lacking capacity to act.

B. Relevant International Law

42. The Hague Convention on the Civil Aspects of International Child Abduction:

Article 3

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

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

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

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

Article 4

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

Article 12

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

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

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

Article 13

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

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

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

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

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

Article 14

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

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 19

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

C. Relevant Australian Law

Family Law Act 1975 of the Commonwealth of Australia

43. Section 61B defines parental responsibility as "all the duties, power, responsibilities and authority which, by law, parents have in relation to children".

44. Section 61C provides that each of the parents of a child who is not 18 has parental responsibility for the child. It has effect subject to court orders.

45. Section 111B incorporates the provision of the Hague Convention and provides that for the purposes of the Convention:

(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and

(b) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to live under a parenting order; or

(ii) who has parental responsibility for a child under a parenting order;

should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to spend time under a parenting order; or

(ii) with whom a child is to communicate under a parenting order;

should be regarded as giving a right of access to the child.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

46. The applicant complained under Article 6 of the Convention that the proceedings before the Latvian courts concerning the return of the child to Australia had not been fair in that the national courts erred in interpreting and applying the Hague Convention. The applicant in particular complained that the national courts had disregarded the fact that at the time of the removal of the child from Australia the applicant was her sole guardian. In addition, the national authorities had relied solely on evidence submitted by the other party in the proceedings (namely the decision of the Australian court which was adopted in the absence of the applicant) and disregarded the evidence submitted by the applicant concerning, *inter alia*, the best interests of the child. They had also refused to obtain the evidence requested by the applicant, therefore allegedly infringing the principle of equality of arms.

47. The Court considers it appropriate to examine the complaint under Article 8 of the Convention (see, amongst other authorities, *Iosub Caras v. Romania*, no. 7198/04, § 41, 27 July 2006, and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II.), which reads as follows:

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

A. Admissibility

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

B. Merits

1. Arguments of the parties

(a) The Government

49. The Government invited the Court to conclude that the applicant has not suffered a disproportionate interference by the Latvian authorities with her right to respect for her family life.

50. Firstly, the Government dismissed the applicant's allegation that the removal of the child from Australia could not be considered as wrongful in the light of the Hague Convention. In this respect the Government relied on the decision of 6 November 2008 adopted by the Australian authorities (see paragraph **Error! Reference source not found.**, above) which confirmed that the applicant and T. had joint parental responsibility at the time when the child was removed from Australia. It also relied on the reasoning of the Australian and Latvian courts that T. had effectively exercised his parental responsibilities.

51. Secondly, they argued that the domestic court had examined a broad range of factors and assessed the interests of each person, therefore fulfilling the requirements set out in *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 139, ECHR 2010-...), and that the Court's finding should be contrary to that in the aforementioned case. In particular, with respect to the observance of the best interests of the child the Government emphasised the national court's finding that the true reasons behind the applicant's decision to leave Australia had been her personal disagreements with T., and that it could not be established that, if returned to Australia, the child would be subject to any harm. The Government also referred to the importance of cooperation on the part of all the concerned parties by noting that the applicant had failed to participate in the proceedings before the Australian authorities, prevented the representative of the Court from assessing the applicant's living conditions, and hindered contact between the child and T.

52. Likewise, the Government agreed that, unlike in *Maire v. Portugal* (no. 48206/99, § 77, ECHR 2003-VII), in the present case the domestic courts had been right in leaving out the issue of the child's integration into

the new environment as she had spent only few months in Latvia following her wrongful removal from Australia.

53. Finally, the Government contended that, in contrast to the factual situation in *Neulinger and Shuruk* (cited above), the applicant would not face any insurmountable difficulties if she returned to Australia in that she enjoyed there the fundamental rights concerning the freedom of movement, employment and social benefits.

(b) The applicant

54. The applicant maintained that she had been a single parent at the time of the child's removal from Australia and that the provisions of the Hague Convention had therefore been wrongly applied by the national courts. In addition, the applicant considered that when assessing the best interests of the child the Central Authority had failed to request additional information concerning T.'s criminal record.

2. The Court's assessment

55. It is not disputed between the parties that the contested decision of 19 November 2008, which came into force on 26 January 2009 (see paragraph **Error! Reference source not found.**, above), to return the applicant's child to Australia constituted an inference with the applicant's family life as protected under Article 8 of the Convention.

56. Such an interference constitutes a violation of Article 8 § 2 of the Convention unless the measure is adopted "in accordance with the law", pursues a legitimate aim in the light of Article 8 § 2 of the Convention and can be regarded as "necessary in a democratic society" (see, amongst other authorities, *Bronda v. Italy*, 9 June 1998, § 52, *Reports of Judgments and Decisions* 1998-IV).

57. Accordingly, the Court shall proceed with an assessment of the above-mentioned elements in the present case.

(a) In accordance with the law and pursuing a legitimate aim

58. The Court shall, firstly, assess the applicant's statement that the removal of the child from Australia could not be considered as wrongful. According to the applicant the national courts had no grounds to apply the provisions of the Hague Convention and, therefore, the contested measure was unlawful.

59. According to the Court's well-established case-law the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law and that the law in question should be accessible to the person concerned – who must moreover be able to foresee its consequences for him or her – and compatible with the rule of law (see, amongst other authorities, The Sunday Times *v. the United Kingdom*

(no. 1), 26 April 1979, § 49, Series A no. 30, and *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A).

60. The Court notes that the impugned measure was based on the provisions of the Law of Civil Procedure (see Relevant domestic law), which set out the procedure for implementing the Hague Convention. The provisions of the domestic law and the Hague Convention were sufficiently clear that in order to ascertain whether the removal was wrongful within the meaning of Article 3 of the Hague Convention, the Latvian courts had to decide whether it had been carried out in breach of the rights of custody attributed to a person under Australian law, which was the State in which the child was habitually resident immediately before her removal.

61. According to the facts of the case, the applicant and the child arrived in Latvia before the Australian authorities had adopted any decision with respect to T.'s parental responsibility. Following the decision of the Australian Family Court, which was adopted after the child's removal (see paragraph **Error! Reference source not found.**, above), the applicant and T. had had joint parental responsibility since the birth of the child by operation of the Australian Family Law Act (see paragraphs 42-44, above).

62. It must be recalled that it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Moreover, the national courts are entrusted to resolve problems of interpretation and application of domestic legislation as well as rules of general international law or international agreement (see *Maumousseau and Washington v. France*, no. 39388/05, § 79, 6 December 2007).

63. In assessing the lawfulness of the impugned measure the Court takes note of the Government's arguments. First, that by the decision of the Australian Family Court, T.'s parental responsibility had only been confirmed and not established as it was alleged by the applicant. Second, that the applicant had failed to appeal against the aforementioned decision of the Australian Family Court and substantiate her allegations that T. was not the biological father of the child. As can be seen from the materials submitted to the Court, the applicant was not prevented from participating in the proceedings in Australia leading to the aforementioned decision or from submitting an appeal (see paragraph 12, above). Furthermore, the applicant did not challenge before the national courts the evidence in support of the fact that T. was the father of the child.

64. In the light of the above, the Court shall assume that the Latvian court's decision of 19 November 2008, which came into force on 26 January 2009, for the child to be returned to Australia had a legal basis and that it was adopted in order to protect the rights of T. and his child, which is considered as a legitimate aim within the meaning of Article 8 § 2 of the Convention.

(b) "Necessary in a democratic society"

65. In order to determine whether the contested measure was "necessary in a democratic society", the Court has emphasised the national authorities' role in striking a fair balance between the competing interests of the child and the parents in matters of this kind (see, among other authorities, *Maumousseau and Washington*, cited above, § 62). 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, amongst other authorities, *Sommerfeld v. Germany* [GC], no. 31871/96, § 64, ECHR 2003-VIII (extracts)).

66. It leaves the Court to review, in the light of the Convention, the decision taken by the national authorities in the exercise of their power of appreciation (see, amongst other authorities, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and, more recently, *Neulinger and Shuruk*, cited above, § 138), including, *inter alia*, the observance of the procedural requirements implicitly enshrined by Article 8 of the Convention. In particular, the Court shall assess whether the decision-making process leading to the interference was fair and such as to afford due respect to the interests safeguarded by this Article (see *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, 6 December 2005). In other words – the interference cannot be regarded as having been "necessary' if, *inter alia*, (1) the persons concerned by the interference were prevented from being sufficiently involved in the decision-making process, seen as a whole (see, *mutatis mutandis*, *W. v. the United Kingdom*, 8 July 1987, § 64, Series A no. 121), and (2) the domestic courts failed to 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, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see *Maumousseau and Washington*, cited above, § 74, and, more recently, *Neulinger and Shuruk*, cited above, § 139).

67. In the present case the Court notes that the parties disagree as to whether the national court had due regard to the applicant's submission that in the present case the application of Article 13 (b) of the Hague Convention would serve the best interests of the child.

68. It is not the Court's task to take the place of the competent domestic authorities in examining whether there would be a grave risk of the child being exposed to psychological harm within the meaning of Article 13 of the Hague Convention. However, the Court is competent to ascertain whether the domestic court, in applying and interpreting the Hague Convention, secured the guarantees set forth in Article 8 of the Convention,

particularly taking into account the Court's findings in *Neulinger and Shuruk*, cited above.

69. In this connection the Court observes that before the national courts the applicant relied on several grounds in order to establish that the return of the child to Australia would not serve her best interests. In particular, the applicant relied on the risk of the child's exposure to psychological harm if separated from her mother and returned to Australia (see paragraph 19, above).

70. In this respect the Court notes the national court's omission to consider the psychologist's report. The report was ordered by the applicant after the lower court adopted its decision. The appeal court dismissed the allegation of a risk of psychological harm by considering that the assessment of the findings of the psychological report was part of a custody dispute which was not the subject of the proceedings in issue (see paragraph 21, above), and that the child's social protection and safety would be guaranteed in accordance with Australian legislation (see paragraph 22, above). The Court notes in this respect that in the case of *Maumousseau and Washington*, cited above, it explained that the concept of the child's "best interests" is also a primary consideration in the context of the procedures provided for in the Hague Convention (*Maumousseau and Washington*, § 68). The Court is thus not persuaded by the Rīga Regional Court's position regarding the Hague Convention proceedings.

71. Concerning the psychological report, the Court is aware that taking into account the domestic courts' margin of appreciation, they cannot be asked to always involve a psychiatric expert in this type of case (see, *mutatis mutandis*, *Sommerfeld*, cited above, § 71). This is even more the case in a situation where the child's wishes have been heard by the national court (ibid., § 72). In the present case, owing to the child's age, the child was not asked to express her opinion before the court, which in itself would not raise an issue as to the fairness of the decision-making process (see, amongst others, *Sahin v. Germany* [GC], no. 30943/96, § 73, ECHR 2003-VIII). The Court notes, however, that the Rīga Regional Court did not review the psychological report, disregarding its clear conclusions with respect to the particular ties between the mother and the child, and the risk of psychological harm in the event of separation, as well as disregarding the objections raised by the Orphans' Court (see paragraph 15, above). A similar omission was already noted as alarming in another case recently examined by the Court (see *Šneersone and Kampanella v. Italy*, no. 14737/09, 12 July 2011, § 95). Moreover, the national courts were not hindered from appointing a psychologist of their own choosing since, as stated above, under the domestic law national courts are to request evidence of their own motion.

72. Emphasising the paramount interests of the child in matters of this kind, the procedural fairness enshrined by Article 8 § 2 of the Convention

provides that national courts must pay due respect to the arguable claims brought by the parties in the light of Article 13 (b) of the Hague Convention. This is to ensure that a child's return is granted in his or her best interests and not as a purely procedural measure provided for by the Hague Convention, which is an instrument of a procedural nature and not a human rights treaty (see *Neulinger and Shuruk*, cited above, § 145, and, more recently, *Šneersone and Kampanella* , cited above, § 92).

73. In light of the duty to conduct an in-depth examination of the entire family situation and in view of the findings of the psychological report, the national court should have assessed whether there were other sufficient safeguards in place in order to render the child's return in her best interests (see *Maumousseau and Washington*, cited above, § 72). This assessment should have included at least the consideration whether the mother would be able to follow and maintain contact with the child if returned to Australia.

74. In addition, the Court also notes that in the present case there were no indications as to what would happen as regards the child's material well-being if returned to Australia. It can be seen from the materials brought before the national courts that T. had financial difficulties which had led him to give false declarations in order to obtain social benefits. Without prejudice to the outcome of such an assessment, the Court regrets that the national courts preferred to omit this element from their review by merely referring to the Australian welfare system.

75. Finally, the Court notes that, in contrast to the present case, the Latvian courts have previously assessed the aforementioned elements together with other risks in other Hague Convention proceedings (see *Šneersone and Kampanella,* cited above, § 94).

76. With respect to the Government's arguments concerning the applicant's lack of cooperation with the state authorities, the Court notes that apart from the fact that the national court did not pay any attention to this element, it was the Orphans' Court that argued against the return of the child.

77. The Court also takes note of the undeniably traumatic execution of the court order (see paragraphs 25-33, above) and the subsequent developments in the custody proceedings before the Australian courts. The Court is perplexed by the restrictions imposed to the applicant with respect to the rights to visit the child and the prohibition from speaking to the child in Latvian (see paragraph 34, above).

78. Taking into consideration the foregoing, the Court concludes that the Latvian courts' approach in granting the return order lacked in-depth examination of the entire family situation and of a whole series of factors, therefore rendering the interference disproportional within the meaning of Article 8 § 2 of the Convention.

79. There has accordingly been a violation of Article 8 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

80. The applicant alleged violations under various other Articles of the Convention.

81. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that the remainder of the application does not disclose any appearance of a violation of any of the above Articles of the Convention. It follows that these complaints are inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

83. The applicant did not claim pecuniary damage. She left the Court to decide on the amount of compensation for non-pecuniary damage.

84. Commenting on the applicant's claim for compensation in respect of non-pecuniary damage, the Government considered that the finding of a violation would in itself constitute adequate compensation in the present case. They contended that the applicant complained about a situation which had stemmed from her own unlawful actions. In addition, the Government noted that by adopting the judgment in *Neulinger and Shuruk* of 6 July 2010 (cited above), the Court's case-law had significantly changed and departed from its previous case-law, such as in *Maumousseau and Washington* (cited above). The Government contended therefore that at the time of adjudication of the applicant's case, the Latvian courts were under an obligation to comply with the principles laid down in the latter case, and therefore could not yet predict that the situation would give rise to a violation of Article 8 of the Convention.

85. The Court considers that the above argument is not pertinent to the assessment of the non-pecuniary damage sustained. Having regard to the character of the violation found in the present case and deciding on an equitable basis, the Court awards 9,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

86. The applicant also claimed EUR 4,631 (3,254.75 Latvian lati (LVL)) for the costs and expenses incurred before the domestic courts and before the Court.

87. The Government raised doubts as to the credibility of the applicant's claim. However, they accepted part of the claim in the amount of EUR 1,044 (LVL 733.71)

88. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,044 for the proceedings before the Court.

C. Default interest

89. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning Article 8 admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;

3. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Latvian lati at the rate applicable at the date of settlement:
      (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,044 (one thousand forty four euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

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

J.C.M.
S.Q.

JOINT DISSENTING OPINION OF JUDGES MYJER AND LÓPEZ GUERRA

We do not agree with the judgment rendered by the majority of the Section. In our opinion, the application of the general principles in this matter, derived from the Convention mandates and the case-law of this Court, should have led to a finding of no violation of the rights of the applicant recognised in Article 8 of the Convention.

As the Court has pointed out on previous occasions in relation to this type of claim, the task of assessing the best interests of a child belongs to the domestic authorities, which often have the benefit of direct contact with the persons concerned (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 138, 6 July 2010). It is not the job of this Court to take the place of the competent authorities in determining whether a decision concerning a child's residence would expose him to psychological harm (ibid., § 141). Our Court's function in such matters is merely to verify whether the national authorities followed adequate procedures and conducted a balanced and reasonable assessment of the respective interests of each person (ibid., § 139).

In the present case there is no indication that the Latvian courts disregarded the required procedures or arrived at unreasonable or arbitrary conclusions. As is clear from the case file, the national courts took into account all the relevant principles and, on the basis of the evidence examined, concluded that there was no reasonably-founded concern that the child's return to Australia would subject her to a risk of any kind.

The majority's reasoning criticises the Latvian courts' judgments for not having taken into account several factors (such as the financial difficulties of the presumed father) and having taken insufficient account of others (such as the psychological assessment conducted at the applicant's request or the material well-being of the child if returned to Australia). In the words of this Court (see paragraph 78), the Latvian courts' approach "lacked in-depth examination of the entire family situation and of a whole series of factors". As a result, according to the majority, the Latvian courts did not sufficiently assess the best interests of the child (see paragraphs 71-73). Thus, on the basis of the elements presented, the majority defines the relevant factors which it believes the national courts should have considered, as well as the importance that they should have had in those courts' final conclusions.

By doing so the majority has substituted its assessment concerning the best interests of the child for the assessment of the national courts in their reasoned and non-arbitrary judgments, but without having had (as did the national courts) the benefit of direct contact with the parties concerned or with the evidence examined in the proceedings. In our opinion, the majority has assumed a function going beyond the competence of this Court. In this

case, the Latvian courts duly assessed the behaviour – including the (lack of) cooperation with both the Australian and Latvian authorities by the applicant herself – and the personal circumstances of the parties, the relevant provisions of national and Australian law and the foreseeable consequences that returning to Australia would have on the child, as well as the position of the applicant if she likewise decided to return to Australia, with regard to her freedom of movement, employment and social benefits. We believe that the reasoning of the Latvian courts, based on a direct examination of the facts of the case, cannot be considered insufficient or unsatisfactory merely because the majority has a different opinion as to what should have been the relative weight and importance of the different factors comprising the Latvian courts' conclusions.

Our dissent is not affected by the considerations of the majority (paragraph 77) concerning the subsequent decisions of the Australian courts in these custody proceedings. Although it is surprising that the Australian courts should have prohibited the mother from speaking Latvian to her child, the Latvian courts cannot be blamed for a decision issued by an Australian court long after the child had returned to Australia.