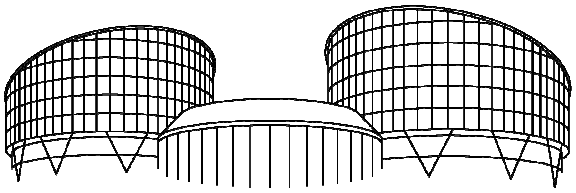

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ŠNEERSONE AND KAMPANELLA v. ITALY

(Application no. 14737/09)

JUDGMENT

STRASBOURG

12 July 2011

FINAL

12/10/2011

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

In the case of Šneersone and Kampanella v. Italy,

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

Françoise Tulkens, *President,*
David Thór Björgvinsson,
Dragoljub Popović,
Giorgio Malinverni,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque, *judges,*

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 21 June 2011,

Delivers the following judgment:

PROCEDURE

1. The case originated in an application (no. 14737/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Latvian nationals, Ms Jeļizaveta Šneersone and her son Marko Kampanella ("the applicants"), on 9 March 2009.

2. The applicants were represented by Ms A. Rektiņa, a lawyer practising in Rīga. The Italian Government ("the Government") were represented by their Agent, Mrs E. Spatafora, the Agent of the Government.

3. The applicants alleged, in particular, that the Italian Government had violated their right to respect for their family guaranteed by Article 8 of the Convention. They furthermore pointed out that the first applicant's absence from the hearing of the Rome Youth Court had rendered the decision-making process in the Italian courts unfair.

4. On 26 November 2009 the President of the Chamber to which the case had been allocated decided to give notice to the Italian Government of the part of the application concerning the procedural fairness of the proceedings in Italy, as well as the alleged interference with the right to respect for the applicants' family life.

5. The parties replied in writing to each other's observations. In addition, third-party comments were received from the Latvian Government, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)). The parties replied to those comments (Rule 44 § 6).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1973 and 2002 respectively and live in Rīga.

A. Events prior to the applicants' departure from Italy

7. In 2002 Marko was born to the first applicant in Italy. His father was an Italian national, who was never married to the first applicant but who has never disputed his paternity of Marko. In 2003 Marko's parents separated and the applicants moved to a separate residence in Cerveteri, Italy. The applicants allege that ever since Marko's birth he has in practice been in the exclusive care of his mother, and his father's participation in his upbringing has been minimal.

8. At the request of the first applicant, on 20 September 2004 the Rome Youth Court (*Tribunale per i minorenni di Roma*) granted custody of Marko to his mother because the ongoing conflict between the parents made joint custody unfeasible. However, the court held that the father had a right to have his son stay at his home on specified days of the week and also whenever the first applicant was travelling outside Rome for a length of time exceeding one week or outside Italy for any length of time. The decision came into force on the day it was adopted.

9. Marko's father appealed against that decision, requesting that joint custody be granted or that he be granted sole custody and that the first applicant be forbidden to take the child abroad or to change her place of residence without the father's prior approval. The Youth Section of the Rome Court of Appeal (*Corte d'appello di Roma. Sezione per i minorenni*) rejected his request in a decision of 1 March 2005, noting, *inter alia*, that the child was developing well and that it was impossible to ensure his development by granting sole custody to the father. Furthermore, it was noted that the father's concern that the first applicant might move to Latvia and take their son with her was unfounded because a judge in a guardianship hearing (*giudice tutelare, "the guardianship judge"*) had previously refused to issue a passport to Marko and also because his mother had strictly adhered to the ruling of the first-instance court and had left the child in his father's care when travelling to Latvia.

10. On 24 June 2005 the guardianship judge granted an authorisation to issue a passport to Marko. On 11 July 2005 Marko's father appealed against that decision. On 14 November 2005 the Rome Youth Court rejected Marko's father's appeal, because there was no evidence that the first applicant was planning to leave Italy with the child.

11. On 3 February 2006 the Court (*Tribunale*) of Civitavecchia ruled that Marko's father had to make child support payments. The decision noted, *inter alia*, that the father had previously avoided financially supporting his son. Marko's father failed to make the ordered payments and on 8 April 2006 the first applicant lodged a complaint about this with the Italian police.

B. The applicants' departure and the subsequent proceedings in Italy

12. It appears that because of Marko's father's failure to financially support the applicants their only income was money which the first applicant's mother was sending from Latvia. However, in December of 2005 the first applicant's mother informed her that she was no longer able to provide financial support. According to the applicants it was for that reason that they had no other choice but to return to Latvia in April of 2006. The applicants indicate that they subsequently continued to return to Italy for brief periods of time. According to the Italian Government, they have never been back.

13. On 7 February 2006 Marko was granted Latvian citizenship, since it was established that his mother's permanent residence at the time of his birth had been in Latvia. Subsequently, the first applicant registered Marko's permanent residence in an apartment in Rīga belonging to her.

14. On an unspecified date Marko's father requested the Rome Youth Court to grant him interim sole custody of Marko and to order his return to Italy.

15. On 5 June 2006 that court issued a decision in which it upheld the father's request. The decision noted that the first applicant's actions had been harmful to the child. The court further held that it did not have jurisdiction to order the child's return to Italy but indicated that Marko had to reside with his father. The decision finally provided that a hearing would be held on 25 October 2006 and that Marko's father had an obligation to inform the first applicant of the court's decision before 20 September 2006.

16. The applicants submit that the first applicant was not informed of the hearing that had been scheduled, nor did she receive a summons to it. The applicants further submit that Marko's father had never requested full custody, but instead had asked the court to re-establish his rights of contact with the child and to order his return to Italy. The first applicant alleges that she only learned about the adopted decision in March of 2007.

C. The Hague Convention proceedings in Latvia

17. On 16 January 2007 (by what appears to be a clerical error the document is dated 16 January 2006) the Italian Ministry of Justice, in its

capacity as the Central Authority under Article 6 of the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), issued a request for Marko to be returned to Italy.

18. After receiving the request, the Latvian Ministry of Child and Family Matters (*Bērnu un ģimenes lietu ministrija*), which is the Latvian Central Authority within the meaning of the Hague Convention, initiated civil proceedings against the first applicant in accordance with Article 7 of the Hague Convention. The Rīga City Vidzeme District Court, which had been allocated the case, requested the Rīga City Orphans' Court (*Rīgas bāriņtiesa*) to evaluate the applicants' residence and to issue an opinion concerning the possibility of returning Marko to his father in Italy. After visiting the applicants' residence, by a decision of 20 March 2007 the Orphans' Court established that the child's living conditions were beneficial for his growth and development. It further noted that Marko had adjusted to living in his mother's residence and that she was ensuring his full physical and intellectual development. Accordingly, the Orphans' Court concluded that the child's return to Italy would not be compatible with his best interests.

19. That conclusion was also supported by the findings of a psychologist, whose opinion had been requested by the applicants' lawyer. In a report dated 30 March 2007 the psychologist concluded that severance of contact between Marko and his mother was not to be allowed, in that it could negatively affect the child's development and could even create neurotic problems and illnesses.

20. By a letter of 6 April 2007, the Italian Central Authority attested to the Latvian Central Authority that if any of the circumstances mentioned in Article 13 (b) of the Hague Convention arose Italy would be able to activate a wide-ranging child protection network which could ensure that Marko and his father received psychological help.

21. On 11 April 2007 the Rīga City Vidzeme District Court issued a decision by which it refused the father's request to return Marko to Italy. That court based its decision on the Hague Convention and Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("the Regulation"). The court held that the removal of Marko had been wrongful within the meaning of the Hague Convention and the Regulation, since it had been carried out without his father's permission. It was further noted that it was not expedient to hear Marko's own opinion, since he was four years old at the time and was unable to form an opinion about which of his parents he should live with.

22. The court considered it necessary to assess whether the circumstances provided for in Article 13 (b) of the Hague Convention existed. Its conclusion was that those circumstances existed. It noted the ties

between Marko and his mother and the fact that he had settled well in Latvia and considered that his continued residence in Latvia was essential for his development. The Vidzeme District Court found that the provisions of Article 11 (4) of the Regulation had not been fulfilled, because it was financially impossible for the first applicant to follow Marko to Italy if he were returned there. Furthermore, the guarantees provided for by Italy could not ensure that the child would not suffer psychologically and that his mental health would not be prejudiced. Accordingly the court applied Article 13 (b) of the Hague Convention and refused the father's request.

23. On 24 May 2007 the Rīga Regional Court adopted a final decision, by which it rejected the father's appeal against the decision of the Vidzeme District Court. In substance the Regional Court agreed with the conclusions of the first-instance court, adding that the guarantees offered by the Italian Central Authority concerning the protection available to Marko after his potential return to Italy were too vague and non-specific. It was also mentioned that Marko's father had made no effort to establish contact with his son ever since the applicants' departure from Italy.

24. On 4 June 2007 the first applicant requested the Rīga City Vidzeme District Court to grant her sole custody of Marko. On 8 January 2008 the Rīga Custody Court issued an opinion in which it concluded that granting sole custody of Marko to his mother was in his best interests. The Custody Court indicated among other considerations the fact that Marko's father had not seen his son since 2006.

D. Proceedings based on the Regulation

25. On 7 August 2007 Marko's father lodged a request with the Rome Youth Court, which was based on Article 11 (4), (7) and (8) of the Regulation, to issue an immediately executable decision ordering Marko's return to Italy.

26. On 11 December 2007 the first applicant submitted her observations to that court, in which she acknowledged that she had left Italy because of an ongoing conflict with Marko's father and because of her difficult financial situation. She noted that Marko's father had never travelled to see his son in Latvia; however, she stated that the applicants were always available to come to Italy to meet Marko's father during school holidays. In conclusion, she requested that the court order child support payments in the amount of 700 euros (EUR) per month.

27. In the context of separate proceedings, on 11 January 2008 the Civitavecchia Court made a judgment concerning the first applicant's request for child support payments and ordered Marko's father to pay the first applicant EUR 4,800 plus interest, starting from 14 October 2004.

28. By a decision of 21 April 2008 the Rome Youth Court upheld the father's request. It considered that the only role left to it by Article 11 (4) of

the Regulation was to verify whether adequate arrangements had been made to secure the protection of the child from any identified risks within the meaning of Article 13 (b) of the Hague Convention after his or her return. After considering the first applicant's submissions, the court noted that the father had proposed that Marko would stay with him, while the first applicant would be authorised to use a house in Aranova for periods of fifteen to thirty consecutive days during the first year and subsequently for one summer month every other year (the first applicant would have to cover her own travel expenses and one half of the rent of the house in Aranova), during which time Marko would be staying with his mother, while the father would retain the right to visit him on a daily basis. Marko would be enrolled in a kindergarten which he had attended before his removal from Italy. He would also attend a swimming pool he had used before his departure from Italy. The father furthermore undertook to ensure that the child would receive adequate psychological help and would attend Russian-language classes for Russian children. The court considered such an arrangement adequate to fulfil the requirements of the Regulation and ordered an immediate execution of its decision to return Marko to Italy and to have him reside with his father. The court also pointed out that it would be preferable if the first applicant accompanied Marko on his way to Italy but, should that prove to be impossible, his return would be arranged by the Italian embassy in Latvia. Due to the urgent nature of the case, the decision was pronounced to be immediately executable.

29. On 18 June 2008 (in what appears to be a clerical error, the date indicated in the document is 18 June 2009) the first applicant lodged a request with the Youth Court to suspend the execution of its decision. She argued that Marko had not been heard by the tribunal and that the Youth Court had not taken into consideration the arguments which the Latvian courts had used in their decisions when applying Article 13 of the Hague Convention.

30. On 20 June 2008 the first applicant lodged an appeal against the decision of the Rome Youth Court of 21 April 2008. In her appeal she requested that the execution of that decision be suspended; that the appeal court hear Marko; that there be an order that she retain sole custody of Marko; and that Marko's father be ordered to pay EUR 700 per month in child support payments.

31. On 22 July 2008 the Rome Youth Court adopted a decision in which it rejected the first applicant's request to suspend the execution of the decision of 21 April. That court considered that it was not appropriate to question the child, taking into account his young age and the level of maturity. Furthermore, it considered that Article 42 of the Regulation did not oblige it to hear the parties in person. It remarked that all of the decisions taken by the Latvian courts had been duly taken into consideration. Finally, the court upheld the father's request to issue a return

certificate in accordance with Articles 40, 42 and 47 of the Regulation. The certificate was issued on 29 July 2008.

32. On 14 August 2008 the Italian Central Authority sent a letter to the Latvian Central Authority, forwarding the Youth Court's decision of 22 July 2008 and inviting it to advise the Italian side on "the initiatives that will be taken in order to enforce the return order made by the Youth Court in Rome".

33. On 27 August 2008 a psychologist issued another report on Marko's psychological state. The report concluded that the child had developed certain psychological problems in connection with his father's request to return him to Italy. It further reiterated the conclusion from the earlier report, that Marko had strong emotional ties with his mother, the severance of which was impermissible.

34. On 10 September 2008 the first applicant received information from the Latvian Central Authority about the request made by the Italian Central Authority. The first applicant was informed that Latvia had an obligation to enforce the 21 April 2008 decision of the Rome Youth Court.

35. On 13 February 2009 the first applicant submitted a request to the Rīga City Vidzeme District Court, requesting it to indicate interim measures and not to allow Marko's return to Italy "until he himself agrees to return to his father in Italy". Further, she requested the court to require the Rome Court of Appeal and the Rome Youth Court to surrender their competence to the Vidzeme District Court, since that court had already, on 4 June 2007, been allocated a still pending case concerning the granting of sole custody of Marko to his mother, and also because the child's permanent residence was in Latvia.

36. On 18 February 2009 the Vidzeme District Court adopted a decision in which it decided not to proceed with the first applicant's request concerning the question of Marko's custody, since it considered that the first applicant's appeal against the Rome Youth Court's decision of 21 April 2008, which was pending at the time before the Rome Court of Appeal, concerned the same subject matter, with the same parties involved.

37. On 21 April 2009 the Rome Court of Appeal adopted a decision concerning the first applicant's appeal against the Rome Youth Court's decision of 21 April 2008. The appeal court first of all observed that pursuant to Article 11 (8) of the Regulation (see below, paragraph 45) it had jurisdiction to decide the question of the child's return to Italy. It then went on to observe that the first-instance court had correctly implemented the procedure set out in Article 11 (7) of the Regulation (see below, paragraph 45), as attested by the reasoned opinion of the European Commission (see below, paragraphs 39-45). The court continued by observing that the decision to grant Marko's father sole custody had been motivated by the first applicant's behaviour when she had chosen to take the child to Latvia and by the father's undertaking to take care of the child in

Italy. The Court of Appeal therefore upheld the decision of the Rome Youth Court and ordered that after the child's return to Italy he be enrolled in a primary school.

38. On 10 July 2009 the bailiff of the Rīga Regional Court charged with the execution of the Rome Youth Court decision of 21 April 2008 invited Marko's father to provide assistance in the execution of that decision by re-establishing contact with his son. It appears that Marko's father has not responded to that request in any way.

E. Proceedings in the European Commission

39. On 15 October 2008 the Republic of Latvia brought an action against Italy before the European Commission in application of Article 227 of the Treaty Establishing the European Community. Latvia alleged, in particular, that the above-described proceedings in Italy (the decision adopted on 21 April 2008 and the issuing of the return certificate in July 2008) did not conform to the Regulation, in that neither of the applicants had been heard by the Rome Youth Court on 21 April 2008, and also that the Rome Youth Court had ignored the decisions of 11 April 2007 of the Rīga City Vidzeme District Court and of 24 May 2007 of the Rīga Regional Court.

40. On 15 January 2009 the Commission issued a reasoned opinion. It held that Italy had violated neither the Regulation nor the "general principles of the Community law". In so far as is relevant to the case before the Court, the Commission held as follows.

41. At the outset it reiterated that, given the particular circumstances of the case, where Latvia was disputing the legality of the actions of an Italian authority with a judicial function, the scope of the Commission's review was very limited. The Commission could only review matters of procedure, not substance, and it had to respect the decisions made by the Italian courts in the exercise of their discretionary powers.

42. Concerning the argument of the Republic of Latvia that the decision of 21 April 2008 had been adopted without attempting to obtain Marko's opinion, the Commission stressed that it followed from the Regulation, the United Nations Convention on the Rights of the Child ("the UN Convention"), the Hague Convention and the Charter of Fundamental Rights of the European Union that hearing a child's opinion with regard to questions concerning that child was a fundamental principle. However, that principle was not absolute. What had to be taken into account was the level of the child's development. That level was not and could not be defined in any international instruments, therefore the national authorities retained wide discretion in such questions. The Commission held that the Italian Central Authority had used that discretion and indicated in the certificate of return that it had not been necessary for the Italian courts to hear Marko.

Therefore, none of the international instruments that had been invoked by Latvia had been breached.

43. Latvia further criticised the fact that the decision of 21 April 2008 had been adopted without duly taking into account the position of the first applicant, and that the decision had been adopted without hearing either of the parties, including the first applicant, who was neither informed of the time of the forthcoming hearing nor invited to take part in it. The Commission noted that the decision of 21 April 2008 had been adopted in written proceedings, without hearing oral submissions of either of the parties, which was fully in conformity with the applicable Italian procedural legislation. The Commission interpreted Article 42 (2) (b) of the Regulation (see below, paragraph 51) in the light of the Court's case-law (referring in particular to *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 32, Series A no. 274), and considered that the use of written proceedings was permissible as long as the principle of equality of arms was observed. The Commission observed that the first applicant had been given an opportunity to submit written observations on equal grounds with Marko's father and thus neither the Regulation nor the UN Convention had been violated.

44. Lastly, Latvia criticised the decision of 21 April 2008 and the related return certificate for ignoring the Latvian authorities' reasons for refusing to order Marko's return to Italy. The Commission indicated that its role was not to analyse the substance of the Italian authorities' decisions – it was limited to appraising the compliance with the procedure which led to the adoption of those decisions with the procedural requirements of the Regulation. Nothing in the Regulation forbade the Italian authorities to come to a conclusion that was opposite to the one reached by the Latvian authorities. Quite to the contrary, the Commission considered that the Regulation gave the country of the child's residence prior to the abduction "the final say" in ordering the return, even if his or her new country of residence had declined to order the return. In this regard the Commission noted that the Rīga Regional Court, when adopting the decision of 24 May 2007 (see above, paragraph 23), had referred to the Law of Civil Procedure, section 644^{19} (6) (2) of which permits refusal to return a child if the child is well settled in Latvia and his or her return is not in his or her interests. The Commission questioned the Latvian court's alleged failure to invoke the "much more binding" Article 13 of the Hague Convention, which in their opinion demonstrated that the Latvian courts had devoted attention to Marko's situation in Latvia instead of the potential consequences of his return to Italy. In short, the Commission had "not discovered any indications" that life in Italy together with his father would expose Marko to physical or psychological harm or otherwise place him in an intolerable situation. What is more, the Commission considered that the Rome Youth Court in its decision of 21 April 2008 had directly addressed the Rīga Regional Court's concerns that the measures envisaged for Marko's

protection upon his return to Italy were too vague – the Italian court had set out specific obligations on the father which would allow for balanced development of the child and for him to have contact with both parents.

45. In conclusion the Commission conceded that the decision of 21 April 2008 did not contain a detailed analysis of either the arguments of the first applicant or of those of Marko's father. However, it considered that the Regulation did not require such an analysis. Therefore, the exact procedure to be followed in that respect was left to the national courts' discretion. Taking that into account, it was found that neither Latvia nor the Commission could dispute the particular formulation of the Italian court's decision.

II. RELEVANT INTERNATIONAL LAW

46. The Hague Convention, which has been ratified by Latvia and Italy, provides, in so far as relevant, as follows.

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 6

"A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. [..]"

Article 7

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

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

[..]

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access; [..]"

Article 11

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

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

Article 12

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

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

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 20

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

47. Paragraph 17 of the preamble of the Regulation explains its scope, in so far as it is relevant to this case, as follows:

"In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained."

48. With regard to jurisdiction in cases of child abduction, the Regulation, in Article 10, provides, in so far as is relevant, as follows:

"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

...

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

...

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."

49. Article 11, which is specifically singled out in the preamble, provides as follows:

"1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention [..], in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13 (b) of the [..] Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

[..]

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives [a copy of an order on non-return pursuant to Article 13 of the Hague Convention and of the documents relevant to that order] must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. [..]

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the [..] Hague Convention, any subsequent judgment which requires the return of the child issued by

a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

50. Pursuant to Article 40 (1) (b) of the Regulation, its Section 4 applies to "the return of a child entailed by a judgment given pursuant to Article 11 (8)"

51. Article 42 in Section 4 provides the following:

"1. The return of a child referred to in Article 40 (1) (b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11 (b) (8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40 (1) (b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention. [..]"

52. As concerns the enforcement of judgments requiring the return of a child, Article 47 of the Regulation provides the following:

"1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member Stat and [..] certified in accordance with [..] Article 42 (1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to [..] Article 42 (1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment."

53. Lastly, Articles 60 and 62 of the Regulation provide that the Regulation "shall take precedence" over the Hague Convention "in so far as [it concerns] matters governed by this Regulation" and that the Hague Convention continues "to produce effects between the Member States which are party thereto".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. The applicants complain under Article 8 of the Convention that the Italian courts' decisions ordering Marko's return to Italy were contrary to his best interests as well as in violation of international and Latvian law.

55. The applicants also complain under Article 6 of the Convention about the procedural fairness of decision-making in Italian courts. In particular, they are critical of the fact that the first applicant was not present at the hearing of the Rome Youth Court.

56. The applicants' complaints concerning the procedure followed by the Italian courts were communicated to the Government under Article 8 of the Convention, which, whilst it contains no explicit procedural requirements, requires that the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by that Article (see, *inter alia*, *Iosub Caras v. Romania*, no. 7198/04, § 41, 27 July 2006, and *Moretti and Benedetti v. Italy*, no. 16318/07, § 27, ECHR 2010-... (extracts)).

57. In so far as is relevant, Article 8 of the Convention provides as follows:

> "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."

A. Admissibility

1. Compatibility ratione personae

58. The Italian Government argued that the application, in so far as it related to the second applicant, was incompatible *ratione personae* with the Convention within the meaning of Article 35 §§ 3 (a) and 4 of the Convention. In that regard the Italian Government argued that the present case essentially concerned a conflict between the second applicant's two parents, and since both parents in principle have a right to respect for family life together with their son, allowing only one of the parents (in this case the mother) to represent the child's interests before the Court would disrupt this parental equality. The Government furthermore referred to *Moretti and Benedetti,* (cited above, § 32), and *S.D., D.P. and A.T. v. the United*

Kingdom (no. 23715/94, Commission decision of 20 May 1996, unreported) and indicated the possibility that a conflict of interests might exist, in particular considering that on 5 June 2006 the Rome Youth Court had granted interim sole custody to Marko's father (see paragraph 15 above).

59. The applicants argued that what was at stake were the interests of the child, the second applicant, as opposed to the interests of his father. Given the paramount importance of the interests of the child, there was no other choice than to have him as a party to the case before the Court.

60. The Latvian Government disagreed with the objection of the Italian Government. They referred to the Court's statement in *Iosub Caras,* (cited above, § 21) that

> "minors can apply to the Court even, or indeed especially, if they are represented by a parent who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. In such cases, the standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the child's behalf, too, in order to protect the child's interests."

They furthermore indicated that, since the proceedings in Italy had concerned an order to separate the first and second applicants, it was clear that what was being criticised were decisions inconsistent with Article 8 of the Convention (a reference was made to *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 90, ECHR 2010-..., and *Iosub Caras*, cited above, § 29).

61. The Court observes in the first place that both of the cases referred to by the Italian Government referred to the representation of a child not by their natural parent but instead by individuals not related to the children in question. However, even in such circumstances the Commission and the Court were careful to point out that a restrictive or technical approach in the area of representation of children before the Court was to be avoided. The Court cannot but agree with the Latvian Government that the facts in the present case are more reminiscent of those of the above-cited *Iosub Caras* and *Neulinger and Shuruk*. The Court does not see any reason to depart from the line of reasoning used in those cases. Therefore, the Italian Government's argument concerning the incompatibility *ratione personae* must be rejected.

2. Exhaustion of domestic remedies

62. The Italian Government noted that when the applicants first applied to the Court the first applicant's appeal against the decision of the Rome Youth Court of 21 April 2008 were still pending. It was only adjudicated upon on 28 September 2009. Therefore, the application had to be declared inadmissible for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

63. The applicants stated that they had a right to submit an application to the Court without waiting for the final adjudication in the Italian courts from the moment when the first applicant learned that Italy had officially requested the Latvian authorities to ensure Marko's return to Italy, since such a request was of a self-executing nature and was not subject to any additional review by the Latvian authorities.

64. The Latvian Government agreed with the applicants that, once the non-appealable certificate of return had been issued pursuant to Article 42 (1) of the Regulation, the applicants did not have an obligation to wait for the completion of adjudication in the Italian courts before petitioning the Court.

65. In response to the applicants and the Latvian Government the Italian Government emphasised that the concepts of "an enforceable judgment" within the meaning of Article 42 of the Regulation, and of a "final decision" within the meaning of Article 35 § 1 of the Convention, were not to be confused. The Italian Government pointed out in particular that the Regulation specifically stated that a certificate of return may be issued on the basis of a judgment which has not yet become final.

66. The Court observes that it is not in dispute between the parties that the adjudication in the Italian courts has now been completed. In other words, the Italian State has been afforded the opportunity of preventing or redressing the violation alleged against them (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The Court has previously held that in principle applicants are obliged to make a diligent effort to exhaust the domestic remedies before submitting an application to the Court. However, it has been deemed acceptable if the final stage of the exhaustion of the domestic remedies takes place after the application has been submitted but before the Court decides on its admissibility (see, for example, *Yakup Köse v. Turkey* (dec.), no. 50177/99, 2 May 2006). The Court thus dismisses the respondent Government's objection of non-exhaustion of domestic remedies.

3. Compliance with the six-month rule

67. In the alternative, the respondent Government pointed out that if the Court were to consider the Rome Youth Court decision of 21 April 2008 to be the final one, the application would be inadmissible according to Article 35 §§ 1 and 4 of the Convention for failure to comply with the six-month rule.

68. The applicants pointed out that it was only on 10 September 2008 that the first applicant had learned that a return certificate had been issued (see above, paragraph 34), which was therefore the date to be taken into account for calculating the six-month period within the meaning of Article 35 § 1 of the Convention.

69. In response to the applicants' argument, the respondent Government submitted that the applicants could not allege that they only became aware of the decision of 21 April 2008 after the return certificate had been communicated to them, since their lawyer in Italy had actively contested the decision of 21 April 2008. Since the applicant's representative in Italy had lodged an appeal against the above-mentioned decision on 20 June 2008, that date was the latest one from which to start counting the six-month period for complaining to the Court.

70. The Latvian Government pointed out that the measure that directly interfered with the applicants' family life was the return certificate, which the applicants received on 10 September 2008. Therefore, the time-limit for lodging an application with the Court started to run on that date. In the alternative, the Latvian Government argued that since the applicants were complaining about "a consistent policy adopted by the Italian authorities in dealing with their case", their complaints in effect concerned a continuing situation.

71. The Court notes that the respondent Government correctly observed that at the time the applicants lodged their application with the Court (on 9 March 2009), the proceedings were still pending before the Italian courts and were completed only on 21 April 2009 (see above, paragraph 37). Against that background, the Court dismisses the Italian Government's argument concerning the alleged non-compliance with the six-month rule.

4. Conclusion

72. The Court dismisses the respondent Government's arguments concerning alleged incompatibility *ratione personae*, failure to exhaust the domestic remedies and failure to comply with the six-month rule. The Court furthermore considers, in the light of the parties' submissions, that the applicants' complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring these complaints inadmissible has been established. The applicants' complaints of interference by the Italian authorities in their family life and of the procedural unfairness of the decision-making process in the Italian courts must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicants

73. The applicants emphasised that there existed very close emotional links between them. Marko's father had not developed any emotional link with the child because they had seen each other very rarely, even when the applicants still resided in Italy. Furthermore, Marko and his father did not have a common language. According to the applicants, the first applicant has issued repeated invitations to Marko's father to visit his son in Rīga. He has not responded to those invitations, which is just one of the many facts that had not been taken into account by the Italian courts. Against that background the applicants pointed out that if Marko were to be separated from his mother it would threaten his development and mental health. In this regard the applicants submitted that Marko was receiving systematic assistance from a psychologist in order to overcome the stress, anxiety and fear caused by the prospects of his separation from his mother and his being sent to Italy.

74. The applicants further submitted that when the Italian courts adopted decisions diametrically opposite to those adopted by the Latvian courts, they did not observe the principle of mutual trust between courts. The allegedly inadequately reasoned decisions adopted by the Italian courts furthermore did not take into account the available information concerning Marko's living arrangements in Latvia.

75. According to the applicants, the arrangements for the first applicant's visits with her son envisaged by the Italian courts were utterly inadequate, in particular taking into account the fact that she did not have the financial means to reside in Italy, where she was virtually unemployable since she did not speak any Italian. Furthermore, the "safety measures" suggested by the Italian authorities and accepted by the Italian courts did not guarantee the child's physical and psychological safety and were in direct contradiction with the psychologist's conclusions relied on by the Latvian courts. The applicants further pointed out that the Italian courts had failed to examine or to have examined the proposed residence of the child in Italy. According to the information available to the applicants, the building located at the address mentioned by the Italian courts contained offices. Lastly, the applicants criticised the Italian courts' failure to request and to take into account any information concerning Marko's father's income and property in order to assess whether he was capable of raising the child.

(b) The respondent Government

76. The Italian Government submitted that there had been no interference with the first applicant's rights under Article 8, since she herself was the one who had interfered with Marko's father's right to family life (in this respect a reference was made to *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX), and therefore could not argue that an interference arose as a result of the Italian authorities' legitimate but as yet unsuccessful attempt to re-establish the previously existing situation, which had been in full conformity with the law. In other words, the parent whose actions had been contrary to the law (the respondent Government observed that there was no dispute between the parties that Marko's removal from Italy had been wrongful) was not to be allowed to benefit from those actions. In any case, the Italian authorities had envisioned the possibility for the applicants' meetings after Marko's return to Italy. The respondent Government furthermore submitted that even if any interference with the applicants' rights had taken place, it had been in accordance with the law, namely, Article 11 of the Regulation, and it had also been necessary to eliminate the consequences of Marko's unlawful removal from Italy. In other words, the aim of the interference had been the protection of the rights and freedoms of the child.

77. As concerns the question of whether ordering Marko's return was "necessary in a democratic society", the respondent Government submitted that the Italian authorities had duly taken into account and weighed the best interests of the child. The Italian Government considered that the applicants' argument that Marko and his father could not communicate because of a language barrier was not appropriate as regards an eight-year-old child who has spent a large portion of his life in Italy, where he should not encounter any particular difficulties, in particular considering that both Latvia and Italy were member states of the European Union. To substantiate the argument that the alleged interference with the applicants' family life had been "necessary", the respondent Government once again referred to the guarantees offered by the Italian authorities (see above, paragraph 28). Lastly, they considered that the specific arrangements to be made in respect of Marko fell within Italy's margin of appreciation.

78. The respondent Government furthermore referred to the object and purpose of the Hague Convention within the meaning of Article 31 (1) of the Vienna Convention on the Law of Treaties, which, according to the Court's judgment *Maumousseau and Washington v. France* (no. 39388/05, § 69, ECHR 2007-XIII), was the deterrence of the proliferation of international child abductions. That goal could be achieved by avoiding the consolidation of *de facto* situations brought about by wrongful removals of children. For that purpose the *status quo ante* had to be restored as quickly as possible. As to the applicability in the present case of the exception to the general obligation to return a wrongfully removed child that is contained in

Article 13 (b) of the Hague Convention, the respondent Government analysed three possible justifications for non-return: firstly, the argument that Marko had settled in Latvia and adapted to life there and that his best interests required his continued residence with his mother; secondly, the allegation that the father had not had any contact with the child; and, thirdly, that because of the length of the Italian procedures the return of Marko to Italy and the restoration of the *status quo ante* was no longer possible.

79. Regarding the question of Marko's continued residence with his mother, the respondent Government underlined the first applicant's refusal to act in accordance with the decisions of the Italian courts. As to Marko's father's willingness to care for his son, the respondent Government pointed out that apart from short-lived disputes concerning child support payments, the father had always showed willingness to enjoy a stable family life with his son in Italy. The Government also underlined that the father was not an alcoholic, a drug addict or otherwise unfit to raise a child. Lastly, concerning the effect of the length of proceedings, the respondent Government emphasised that the Italian courts had dealt with the case in only ten months; therefore, the Italian authorities could not be held responsible for the length of time that Marko had spent away from his father.

80. In so far as the procedural fairness of the decision-making in the Italian courts was concerned, the respondent Government fully endorsed the findings of the European Commission (see above, paragraphs 39-45). More specifically, they pointed out that the proceedings in the Italian courts had been fair and both parties had been given an opportunity to make submissions to those courts, irrespective of the fact that the submissions had been made in writing. Furthermore, the first applicant had been represented by counsel.

81. The respondent Government sought to differentiate the facts forming the background to the recent Grand Chamber judgment *Neulinger and Shuruk v. Switzerland* (cited above, § 139) from the facts of the present case in that the former concerned the motivation for a refusal to return a child to the country of origin, while the present case concerned proceedings in the country of origin, and its purpose was not to justify the actions of the Latvian authorities.

(c) The third-party Government

82. The Latvian Government relied on *Neulinger and Shuruk* and criticised the Italian authorities' failure to conduct an in-depth examination of the entire family situation of the applicants and Marko's father. It was alleged that the Italian courts had failed to take into account the fact that the first applicant was and always had been Marko's primary caregiver. Marko's father had had only random contact with his son even while the applicants were still residing in Italy. Furthermore, Marko's father had not

made any attempt to contact his son during the more than four years that the applicants had been living in Latvia. In addition, it was pointed out that Marko had lived in Latvia much longer than he had resided in Italy. Lastly, the Italian courts had not assessed Marko's father's capacity to raise a child on his own and had not considered alternative solutions for ensuring their mutual contact (in this regard the Latvian Government referred to *Deak v. Romania and the United Kingdom*, no. 19055/05, § 69, 3 June 2008).

83. Concerning the procedural fairness of the decision-making in the Italian courts, the Latvian Government submitted that it was incorrect to rely on Articles 23 (b) and 42 (2) (a) of the Regulation in isolation, since those provisions had to be interpreted in harmony with the relevant rules of international law, namely the UN Convention and Article 8 of the Convention. This contextual interpretation clearly led to the conclusion that the applicants' procedural rights had been disregarded by the Italian courts.

2. Assessment of the Court

84. The Court will deal separately with the applicant's complaint about the order for Marko's return, and the complaint that the first applicant was not present at the hearing of the Rome Youth Court on 21 April 2008.

(a) General principles

85. In *Neulinger and Shuruk* (cited above, §§ 131-140, with further references) the Court articulated and crystallised a number of principles which have emerged from its case-law on the issue of the international abduction of children, as follows.

(i) The Convention cannot be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II).

(ii) The positive obligations that Article 8 of the Convention imposes on States with respect to reuniting parents with their children must therefore be interpreted in the light of the UN Convention and the Hague Convention (see *Maire v. Portugal*, no. 48206/99, § 72, ECHR 2003-VII, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I).

(iii) The Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8 (see, to that effect, *Bianchi v. Switzerland*, no. 7548/04, § 92, 22 June 2006, and *Carlson v. Switzerland*, no. 49492/06, § 73, 6 November 2008).

(iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of

public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington,* cited above, § 62), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré,* cited above, § 59).

(v) "The child's interests" are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to be allowed to develop in a sound environment (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006). The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.

(vi) A child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see, in particular, Articles 12, 13 and 20), based on considerations concerning the actual person of the child and his environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it (see *Maumousseau and Washington*, cited above, § 72).

(vii) The task to assess those best interests in each individual case is thus primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Kutzner v. Germany*, no. 46544/99, §§ 65-66, ECHR 2002-I; see also *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV; *Bianchi*, cited above, § 92; and *Carlson*, cited above, § 69).

(vii) In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII (extracts)). To that end the Court must ascertain whether the domestic courts conducted 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 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).

86. The Court will now apply those principles to the specific complaints raised by the applicants.

(b) The order for the second applicant to be returned to Italy

87. The Court reiterates that the second applicant's return to his father in Italy was ordered by the Rome Youth Court decision of 21 April 2008 (see above, paragraph 28), which was upheld on appeal by the decision of the Rome Court of Appeal adopted on 21 April 2009 (see above, paragraph 37). The return was ordered on the basis of sub-paragraphs (4), (7) and (8) of Article 11 of the Regulation. Article 11 refers to the procedure for the return of a wrongfully removed child. That procedure is set out in Articles 12 and 13 of the Hague Convention.

88. The respondent Government have argued that there has been no interference with the applicants' family life (see above, paragraph 76). The Court has previously found that an interference occurs where domestic measures hinder the mutual enjoyment by a parent and a child of each other's company (see, for example, *Raban v. Romania*, no. 25437/08, § 31, 26 October 2010). In the present case a psychologist, whose report was solicited by the applicants' representative, has confirmed that Marko is suffering psychological stress and anxiety in connection with his potential return to Italy (see above, paragraph 33). That cannot but have a significant impact on the applicants' enjoyment of their family life. Furthermore, the Court has more than once found that an order for return, even if it has not been enforced, in itself constitutes an interference with the right to respect for family life (see, for example, *Neulinger and Shuruk*, cited above, §§ 90-91, and *Lipkowsky and McCormack v. Germany* (dec.), no. 26755/10, 18 January 2011). In the present case there are no reasons requiring a departure from that approach. Accordingly, the Rome Youth Court's order to return Marko to Italy constituted an interference with the applicants' right to respect for family life.

89. Turning to the question of whether the interference complained of was "in accordance with the law" within the meaning of Article 8 § 2 of the Convention, the Court observes that in the present case the parties have not disputed that the first applicant's removal of Marko from Italy was wrongful within the meaning of Article 3 of the Hague Convention (compare with *Neulinger and Shuruk*, cited above, §§ 99-105). Article 12 of the Hague Convention requires the return of wrongfully removed children, subject to exceptions set out in Article 13 of that Convention. In such circumstances the Court does not doubt that the interference was ordered in accordance with the law, namely Article 11 of the Regulation in combination with Article 12 of the Hague Convention.

90. As to the question of whether the order to return Marko to Italy pursued one of the legitimate aims exhaustively listed in Article 8 § 2 of the Convention, the respondent Government advanced two theories: that the

interference was necessary to protect Marko's father's right to respect for family life, or to safeguard the best interests of the child. There is no real dispute between the parties that the decision of the Italian courts to return Marko to Italy pursued the legitimate aim of protecting the rights and freedoms of the child and his father. Consequently, the Court accepts that it was the case (see also *Neulinger and Shuruk*, § 106).

91. The Court must therefore determine whether the interference in question was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, interpreted in the light of the above-mentioned international instruments, the decisive issue being whether a fair and proportionate balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters (see paragraph 85 above, (iv)).

92. In that regard the Court emphasises that it is not its task to take the place of the competent authorities in examining whether there would be a grave risk that Marko would be exposed to psychological or physical harm, within the meaning of Article 13 of the Hague Convention, if he returned to Italy. However, the Court is competent to ascertain whether the Italian courts, in applying and interpreting the provisions of that Convention and of the Regulation, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests (see *Neulinger and Shuruk*, cited above, § 141). It is essential also to keep in mind that the Hague Convention is essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis (see *Neulinger and Shuruk*, cited above, § 145).

93. The Court cannot but observe that the reasoning contained in the Italian courts' decisions of 21 April 2008 (see above, paragraph 28) and 21 April 2009 (see above, paragraph 37) was rather scant (see also the opinion of the European Commission, above, paragraph 45). Even if the Court accepted the Italian courts' theory that their role was limited by Article 11 (4) of the Regulation to assessing whether adequate arrangements had been made to secure Marko's protection after his return to Italy from any identified risks within the meaning of Article 13 (b) of the Hague Convention, it cannot fail to observe that the Italian courts in their decisions failed to address any risks that had been identified by the Latvian authorities. Thus, for example, the conclusions contained in the Rīga Custody Court's report (see above, paragraph 18), the expert psychologist's report (see above, paragraph 19) and the Rīga City Vidzeme District Court's decision of 11 April 2007 (see above, paragraph 22) were not explicitly mentioned in either of the two decisions. It is therefore necessary to verify whether the arrangements for Marko's protection listed in the Italian courts' decisions can be in any case considered to have reasonably been taken into account his best interests.

94. The measures proposed by Marko's father and subsequently accepted as adequate by two levels of Italian courts are summarised in paragraph 28 above. The considerations identified by the Latvian authorities were that the child was well adjusted to living with his mother in Rīga (paragraph 18), that his separation from his mother would adversely affect his development and might create neurotic problems, illnesses or both (paragraph 19), and that strong ties had formed between Marko and his mother (paragraph 22). In addition, in their observations before this Court the applicants indicated that the first applicant was unable to accompany the child to Italy, since she did not have sufficient financial means to reside there and was essentially unemployable, since she did not know any Italian, and that the child and his father had no language in common, had never lived together without the mother, and had not seen each other for more than three years at the time when the Rome Court of Appeal dismissed the first applicant's appeal against the decision of 21 April 2008 (see also *Neulinger and Shuruk*, cited above, § 150). The Latvian judicial authorities in their decisions also found that it was financially unfeasible for the first applicant to return to Italy (the Rīga City Vidzeme District Court decision of 11 April 2007, see above, paragraph 22), confirmed that Marko's father had not seen his son since 2006 (the Custody Court's opinion of 8 January 2008, see above, paragraph 24) and had made no effort to establish contact with Marko in the meantime (the Rīga Regional Court decision of 24 May 2007, see above, paragraph 23).

95. The Italian courts did not refer to the two psychologists' reports that had been drawn up in Latvia pursuant to requests from the applicants' representative and then relied upon by the Latvian courts. Neither did the Italian courts refer to the potential dangers to Marko's psychological health that had been identified in those reports. Had those courts considered the reports unreliable, they certainly had the opportunity to request a report from a psychologist of their own choosing. However, that was not done either. As to the residence that Marko's father proposed as his accommodation after his return to Italy, no effort was made by any Italian authorities to establish whether it was suitable as a home for a young child. The house was not inspected, either by the courts or by another person of their choosing. Those conditions, taken cumulatively, leave the Court unpersuaded that the Italian courts sufficiently appreciated the seriousness of the difficulties which Marko was likely to encounter in Italy (see *Neulinger and Shuruk*, cited above, § 146, with further references).

96. As to the adequacy of the "safeguards" of Marko's well-being proposed by his father and accepted by the Italian courts as adequate, the Court considers that allowing the first applicant to stay with the child for fifteen to thirty days during the first year and then for one summer month every other year after that is a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible

severance of the close ties between mother and child. In the opinion of the Court, the order to drastically immerse a child in a linguistically and culturally foreign environment cannot in any way be compensated by attending a kindergarten, a swimming pool and Russian-language classes. While the father's undertaking to ensure that Marko receives adequate psychological support is indeed laudable, the Court cannot agree that such an external support could ever be considered as an equivalent alternative to psychological support that is intrinsic to strong, stable and undisturbed ties between a child and his mother.

97. Lastly, the Court observes, with the third-party Government, that the Italian courts had not considered any alternative solutions for ensuring contact between Marko and his father.

98. For these reasons the Court concludes that the interference with the applicants' right to respect for their family life was not "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention. There has accordingly been a violation of Article 8 of the Convention on the account of the Italian courts' order for Marko's return to Italy.

(c) The procedural fairness of the decision-making in the Rome Youth Court

99. So far as the fairness of the Italian decision-making process is concerned the applicants considered that the first applicant's absence from the hearing of the Rome Youth Court rendered it unfair and did not afford due respect to the interests safeguarded by Article 8 (see, *inter alia*, *Iosub Caras v. Romania*, cited above, § 41).

100. The Court finds that the procedural equality between the parties to the case was observed so far as the observance of the applicants' interests under Article 8 was concerned. The decisive procedural issue in the present case is whether the authorities charged with decision-making were placed in a position to duly respect and give force to the parties' rights under Article 8. Taking into account that both Marko's father and the first applicant submitted, with the aid of counsel, detailed written statements to two levels of Italian courts, the Court is satisfied that the procedural fairness requirement of Article 8 has been observed (see also the conclusions of the European Commission, above, paragraph 43). So far as the adequacy of those courts' reaction to the arguments submitted by the applicants is concerned, the Court refers to its conclusions above.

101. Accordingly there has been no violation of Article 8 on account of the first applicant's absence from the hearing of the Rome Youth Court.

II. OTHER COMPLAINTS

102. The applicants also complained under Article 6 § 1 of the Convention about the length and unfairness of the first set of proceedings in

the Italian courts and about the fact that Marko was not heard in person by any Italian courts.

103. However, 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 finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. 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

105. The applicants claimed EUR 10,000 in respect of non-pecuniary damage, approximately EUR 10 for each day of anxiety since the applicants first learned of Marko's father's request for Marko to be returned to Italy.

106. The respondent Government argued that the applicant had not submitted itemised particulars of that claim, as required by Rule 60 § 2 of the Rules of the Court.

107. The Court notes that the applicants have adequately explained the method used for arriving at the amount claimed in respect of non-pecuniary damage. In the light of the fact that the applicants must have demonstrated a clear link between the violation of Article 8 found by the Court and the non-pecuniary damage caused by the return order, the Court awards the applicants jointly EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

108. In respect of costs and expenses, the applicants claimed a total amount of EUR 13,610.69, calculated as follows: EUR 171 for the two psychological examinations of the second applicant, EUR 643 for translations of the documents sent by the Court, EUR 10,500 in legal fees for the first applicant's representation in the Italian courts, EUR 1,815 for the applicants' representation before the Court, EUR 371 for family psychotherapy for the applicants and EUR 110.69 for postal expenses.

109. The respondent Government argued that the applicant had not submitted itemised particulars of that claim, as required by Rule 60 § 2 of

the Rules of the Court. Furthermore, the applicants had not specified which documents from the Court had needed to be translated.

110. 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 to the applicants jointly the sum of EUR 5,000 covering costs under all heads.

C. Default interest

111. The Court considers it appropriate that the default interest 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. *Dismisses* by a majority the respondent Government's objection of non-exhaustion of domestic remedies;

2. *Declares* by a majority the complaints concerning the order to return the second applicant to his father in Italy and about the first applicant's absence from the hearing of the Rome Youth Court admissible;

3. *Declares* unanimously the remainder of the application inadmissible;

4. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention on account of the Italian courts' order for the second applicant to be returned to Italy;

5. *Holds* unanimously that there has been no violation of Article 8 of the Convention on account of the first applicant's absence from the hearing of the Rome Youth Court;

6. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 10,000 (ten thousand euros) jointly to the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 5,000 (five thousand euros) jointly to the applicants, plus any tax that may be chargeable to the applicants, 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;

7. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 12 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President

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

F.T.
S.H.N.

DISSENTING OPINION OF JUDGE POPOVIĆ

I find the application to be inadmissible in terms of Article 35 § 1 of the Convention, because, by failing to file a complaint with the Cassation Court, the applicants did not exhaust domestic remedies.