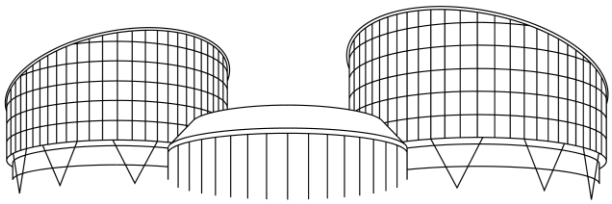

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 26755/10
by Daniela LIPKOWSKY and India Dawn McCORMACK
against Germany

The European Court of Human Rights (Fifth Section), sitting on 18 January 2011 as a Chamber composed of:

Peer Lorenzen, *President,*
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska,
Angelika Nußberger, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 7 May 2010,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having deliberated, decides as follows:

## THE FACTS

The first applicant, Ms Daniela Lipkowsky, is a German national who was born in 1972. The second applicant is the first applicant's daughter, Miss India Dawn McCormack, a German and Australian national who was

born out of wedlock on 16 April 2005 in Germany. They both live in Konstanz and are represented before the Court by Mr R. Romeyko, a lawyer practising in Donaueschingen.

## A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

### *1. The background of the case*

In 2003, in Thailand, the first applicant met the father of the second applicant, their daughter. From 2004 until June 2008 the first applicant lived some of the time in Germany and some of the time with the father in Australia. After the birth of the second applicant in April 2005 in Germany, she returned with the child to Australia in February 2006. From June to September 2006 and from January to June 2007 she lived with the child in Germany again. After the parents' separation in September 2007, the applicants lived in a women's refuge in Australia. The father deposited the applicants' passports with an Australian court and introduced custody proceedings with the Federal Magistrates Court of Australia. On 8 May 2008 the Federal Magistrates Court of Australia provisionally ordered joint legal custody and allowed the first applicant to leave Australia with her daughter for a journey to Germany on or about 25 June 2008 but ordered them to return not later than 15 October 2008. On 15 June 2008 the applicants left to Germany and did not return to Australia. At first, the first applicant submitted sickness certificates, the last of which was valid until 24 November 2008. The custody proceedings in Australia are still pending.

### *2. The proceedings before the German Courts*

#### a) The proceedings at Karlsruhe District Court

On 5 August 2009 the father made an application to Karlsruhe District Court for the return of the second applicant under the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ("the Hague Convention").

The father argued in particular that according to Australian law and the provisional order of 8 May 2008 of the Federal Magistrates Court of Australia they had joint legal custody rights and that he had agreed to the applicants' leaving Australia only until 15 October 2008. The second applicant had been habitually resident in Australia since February 2006, when the applicants had come to Australia to live there and there had always been merely temporary reasons for the first applicant to return to Germany with their daughter. After their separation and according to the decision of 8 May 2008 the second applicant had lived three days a week

with him and the rest of the week with her mother. He claimed that the first applicant's allegations that he had violence and drug problems were wrong. They had only had frequent relationship problems and had therefore started couple therapy. His relationship with the second applicant was good and no psychological harm for the child was to be expected in the event of a relocation to Australia.

The first applicant opposed the father's application and claimed that she had sole custody of the second applicant and that German law was applicable. She argued in particular that she and her daughter had never been habitually resident in Australia in the sense of the Hague Convention. From the child's birth until 9 October 2008 the child had lived 654 days in Germany and only 612 days in Australia. She had in fact only returned three times to Australia, to give them another chance as a family and due to empty promises by the father. In the end this had not worked out, *inter alia* due to his serious drug problems. He had also massively threatened her in front of their daughter. After their separation she had only remained in Australia because she was forced to, as the father had taken away their passports. The father had also never exercised any custody rights, nor had he bonded with the child. The child refused to return and was afraid of her father. An obligation to return would thus be detrimental to the child's well-being and would destroy her emotionally. Finally, she put forward that the child's therapist was also opposed to contact between the father and the child as long as the child refused such contact.

The District Court heard the parents, the Youth Office and the child's *curator ad litem* (*Verfahrenspfleger*). The Youth Office and the *curator ad litem* both reported that the child had fears in connection with the father and a possible relocation to Australia. The *curator ad litem* held that a relocation of the second applicant to Australia without the mother would endanger the child's well-being.

On 21 September 2009 the District Court ordered the first applicant to immediately return her daughter to Australia. In the event of non-compliance by 10 November 2009, the first applicant or any other person with responsibility for the child would be obliged to hand over the child to the father or to a person named by him for the return of the child. Moreover, it allowed direct enforcement (*unmittelbarer Zwang*), access to and search of the house in which the child would remain and the support of the police for the enforcement of the decision. It also threatened the first applicant with the payment of a coercive fine of up to 20,000 euros (EUR) or with coercive detention of up to six months.

In application of Articles 3 and 12 of the Hague Convention, the District Court found that a) even if the applicants had spent a bit more time in Germany up to the summer 2008, the child had been "habitually resident" in Australia at that time, that b) under Australian law the parents had joint custody, which followed from the Family Law Act 1975 and from the

decision of the Cairns Federal Magistrate Court of Australia of 8 May 2008, and that c) the first applicant had breached the father's custody rights in October 2008 by retaining their daughter in Germany and that therefore the first applicant was to be ordered to return the child to Australia. It also held that the first applicant had not established that there was a grave risk that her daughter's return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" in the sense of Article 13 of the Hague Convention. Firstly, the first applicant's allegation that the father had been violent and aggressive and that the daughter was afraid of him would not collide with the obligation to return the child as she could be expected to accompany her daughter, take care of her in Australia and await the outcome of the pending custody proceedings there. Secondly, the fact that in the meantime the child had settled very well in Germany could not be decisive, as taking such factors into account would render the Hague Convention futile. Thirdly, the fact that the first applicant could not make a living in Australia and would be dependent on social welfare would not conflict with the obligation to return either, as she was on social welfare in Germany as well.

**b) The proceedings before the Karlsruhe Court of Appeal**

The first applicant appealed against the decision of the District Court. She argued in particular that the Hague Convention was not applicable, as she and her daughter had never been habitually resident in Australia in the sense of that Convention, and submitted further details regarding the conditions and the reasons for their stays in Australia and Germany during the relevant time. Moreover, she argued that as she had left Australia in June 2008 with the intention of never coming back, more than one year had elapsed before the father made his application for the return of the child pursuant to the Hague Convention. Therefore, Article 12 § 2 and not § 1 of the Hague Convention was applicable. She also requested the Court of Appeal to obtain an expert opinion on the question whether it would harm the child's well-being if the child was forced to relocate to Australia. Furthermore, the applicant stressed that the father was still addicted to drugs and that he had already spent two and a half years in jail for drug trafficking. After she had pressed charges against him in October 2007 for taking away her passports, drugs were found in his house again and he received a further conviction. Finally, the first applicant argued that in the meantime she had been diagnosed with multiple sclerosis (MS) and that it was therefore impossible for her to live in tropical countries.

The father argued, *inter alia*, that the time-limit of one year according to Article 12 § 1 of the Hague Convention only started to run on 15 October 2008, the date the first applicant did not return to Australia as stipulated. He claimed that the first applicant's allegations that he had drug

problems were false. It was true that he had been convicted for using drugs in 1991, but he had been rehabilitated in 2003. Voluntary drug use screenings in December 2007 and April 2008 had been negative.

The second applicant's *curator ad litem* pointed out that the child was well integrated in Konstanz. The *curator ad litem* also referred to an expert opinion that had been obtained by the Australian court in 2008, which reported social isolation, the lack of a stable framework and lack of support from the father as regards integration. In this expert opinion it had been found that as early as April 2008 the development of the second applicant was at risk. In addition to these aspects it was the clear wish of the second applicant to remain in Germany. The father and the possible relocation to Australia caused anxiety to the second applicant. However, the *curator ad litem* was not sure if these aspects were sufficient to speak of a grave risk of harm in the sense of Article 13 of the Hague Convention. Having regard to the warm relationship between the second applicant and the father, as described in the expert opinion, it would be in the interests of the child to re-establish contact.

On 18 March 2010 the Karlsruhe Court of Appeal, after hearing the parents, the *curator ad litem* and the second applicant on 26 November 2009 and having obtained an expert opinion on the applicant's ability to return to Australia with regard to her illness, rejected the applicant's appeal and confirmed the District Court's decision.

The Court of Appeal firstly held that the second applicant had had "habitual residence" in Australia when the applicants left for Germany in June 2008. It pointed out that it was decisive where a person actually lived the central part of their life, and that habitual residence was in general established after a stay of six months. It found that it could not be said that the second applicant had been habitually resident in Australia before the applicants came back to Australia in June 2007. However, after the separation in September 2007, when the first applicant realised that she was unable to leave Australia because the father was in possession of the passports, she abandoned her apartment and domicile in Germany on 30 September 2007 and registered in Australia. Thereafter, regular contact took place between the father and the second applicant and the child was socially integrated through the father. Although the applicants had initially planned to stay in Australia only temporarily, they established a habitual residence there after a period of six months in April 2008. The fact that the applicant only remained in Australia because she was forced to do so was not decisive, because after abandoning her residence in Germany she no longer had any other home and she was also free to move and choose her residence within Australia.

The Court of Appeal secondly found that the first applicant had breached the father's custody rights by not returning to Australia with their daughter on 15 October 2008. It referred to Article 21 of the Introductory Act to the

German Civil Code (see relevant domestic law) and to the Federal Magistrates Court decision of 8 May 2008 provisionally ordering joint custody upon approval by both parties.

The Court of Appeal thirdly held that Article 12 § 2 of the Hague Convention was not applicable as the applicants' leaving Australia on 15 June 2008 was still covered by the Federal Magistrates Court's permission to leave "on or about 25 June 2008". The wrongful retention thus only began in October 2008 when the applicants did not return to Australia as stipulated.

The Court of Appeal fourthly found that the requirements for an exception according to Article 13 of the Hague Convention had not been met in the instant case. Contrary to the first applicant's allegations, the father had not tacitly agreed to the second applicant's staying in Germany. The mere fact that he initially kept up contact with the second applicant until he requested them to return to Australia for the first time explicitly in August 2009 could not be interpreted as approval. As regards Article 13 § 1 b) of the Hague Convention and the alleged existence of 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 Court of Appeal held that with regard to the purpose of that Convention this provision required a narrow interpretation. Referring to the expert opinion the Court of Appeal held that even if a rapid deterioration of the first applicant's state of health did happen, there were no grounds which made a return impossible. There was also no indication that it was not possible to adequately treat her condition in Australia. Hence, she was able to accompany her daughter and could thus not claim that the return of the second applicant to Australia would be harmful to the child's well-being.

Finally, with regard to the fact that one of the judges who had taken part in the oral hearing of 26 November 2009 had been replaced by a new judge, the Court of Appeal referred to Article 309 of the German Code of Civil Procedure (*Zivilprozessordnung*) and in particular to the relevant case-law. It underlined that its decision had to be taken by those judges who were competent to do so at the time of the decision and not at the time of the oral hearing.

**c) The proceedings before the Federal Constitutional Court**

On 8 April 2010 the Federal Constitutional Court refused to admit the applicants' constitutional complaint for adjudication, in which they had complained about their obligation to relocate to Australia, the first applicant's possible coercive detention and the Court of Appeal judge's non-attendance at the oral hearing. It also rejected their request for an interim injunction. It held that there was no appearance of a violation of the applicants' fundamental rights. These courts' decisions were based on an arguable interpretation of Article 12 § 1 of the Hague Convention, in so far

as they found that the provision allowed the person who has wrongfully removed or retained the child to be obliged to return the child personally. The hardships of such an interpretation for the parent being ordered to return the child had to be accepted as the consequence of the illegal abduction or retention.

#### d) The enforcement proceedings

On 19 July 2010 the Karlsruhe Court of Appeal after hearing the parents, the child's *curator ad litem* and the Youth Office, again pointed out to the first applicant the possible consequences of non-compliance, namely the imposition of a coercive fine or coercive detention or the direct enforcement of the obligation. Referring to Article 90 of the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (see Relevant domestic law), the Court of Appeal underlined that direct enforcement could be ordered in an explicit court decision, but that direct enforcement in respect of a child would be admissible only where this was justifiable with a view to the child's well-being and where no less restrictive measures were available to enforce the obligation.

## B. Relevant domestic and international law

According to Article 21 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*) "the legal relationship between a child and its parents is governed by the law of the country in which the child has his or her habitual residence".

According to Article 309 of the German Code of Civil Procedure (*Zivilprozessordnung*) "a judgment may be delivered only by those judges who were present at the proceedings upon which the judgment is based".

According to Article 90 § 1 of the German Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*) the court may order direct enforcement in an explicit court decision, if 1) compulsory measures remained unsuccessful; 2) compulsory measures have no prospects of success; 3) the immediate enforcement of a decision is imperatively necessary. Under Article 90 § 2 direct enforcement in respect of a child shall not be allowed, where the order is aimed at delivery of the child for the purpose of contact. Moreover, direct enforcement in respect of a child shall be admissible only where this is justifiable in due consideration of the child's well-being and where less restrictive measures are not available to enforce the obligation.

The relevant parts of Article 33 of the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*) are set out in the case of *Paradis v. Germany* (dec.) (no. 4065/04, 4 September 2007).

As regards the Hague Convention the relevant provisions are described in the Court's judgment in the case of *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 57, 6 July 2010.

## COMPLAINTS

The first applicant complained under Article 2 § 1 of the Convention that relocation to Australia would expose her to the risk of her health (because she is suffering from multiple sclerosis and depression) worsening significantly. She claims that heat and stress have strong negative effects in the case of multiple sclerosis.

The applicants complained under Article 2 § 1 of the Convention that a relocation to Australia would present a serious danger to the second applicant's physical and psychological well-being.

The first applicant complained under Article 5 § 1 that her right to liberty had been violated, as she was not free to choose her place of residence, because the domestic court decisions had obliged her to relocate to Australia. Moreover, her right to liberty had been violated by the fact that she could be subjected to coercive detention for a period of six months.

The applicants complained under Article 5 § 1 that their right to security had been violated, as relocation to Australia would take them away from their secure social and medical situation. Due to the first applicant's poor health and her poverty the establishment of such a secure social environment in Australia would be particularly difficult.

The applicants complained under Article 6 § 1 that one of the three Court of Appeal judges who took the decision of 18 March 2010 had not taken part in the oral hearing of 26 November 2009 and had thus never met the applicants.

The first applicant complained under Article 6 § 1 of the Convention about the obligation to relocate to Australia despite the fact that she had no financial means and was suffering from multiple sclerosis. She argued that the obligation was disproportionate, as she had already been living in Germany for two years and the father had applied for the return of the child only in August 2009.

The first applicant complained under Article 7 § 1 and Article 8 of the Convention about the imposition of coercive detention and argued that neither the Hague Convention nor German law allowed the imposition of such a measure against the mother of an abducted child.

The applicants complained under Article 8 § 1 of the Convention that their right to family life had been violated, because the District Court's decision allowed the second applicant to be taken away from the first applicant and taken to Australia alone.

Finally, the first applicant complained under Article 8 of the Convention that neither the Hague Convention nor German law provided for a legal basis to oblige her to return the child herself.

# THE LAW

## 1. The applicants' obligation to relocate to Australia

The applicants complained under different Articles of the Convention about different aspects of the domestic courts' decisions ordering them to relocate to Australia, in particular about 1) the obligation of the first applicant to personally return the second applicant to the father in Australia or – in case of non-compliance – to 2) hand over the child to the father or to a person named by him for the return of the child. Being the master of the characterisation to be given in law to the facts of the case (see *Mullai and Others v. Albania*, no. 9074/07, § 73, 23 March 2010), the Court considers that the applicants' complaints fall to be examined under Article 8 of the Convention, which reads as follows:

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

The Court observes at the outset that Article 8 is applicable in the present case (see, for example, *Neulinger and Shuruk*, cited above, § 90) and that it has no doubts that the said domestic decisions interfered with the applicants' rights under Article 8, be it due to the possible difficulties of continuing to live together or to the inherent obligation to relocate to another country (see *Mattenklott v. Germany* (dec.), no. 41092/06, 11 December 2006).

As regards the lawfulness of the interference, the Court observes that the domestic courts based their decisions regarding the applicants' obligation to relocate to Australia on the Hague Convention, which has been incorporated into German law. The second applicant's removal was examined by three domestic courts, which all concluded, in duly reasoned decisions, that the removal was wrongful within the meaning of the Hague Convention, and that the child had to be returned to Australia. The Federal Constitutional Court explicitly dealt with the question whether the decisions were based on an arguable interpretation of Article 12 § 1 of the Hague Convention as far as the courts had found that the provision allowed an order to be made

obliging the person who had wrongfully removed or retained the child to personally return the child. The Court reiterates that "it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or to international agreements. The Court's role is confined to ascertaining whether those rules are applicable and whether their interpretation is compatible with the Convention" (see *Neulinger and Shuruk*, cited above, § 100). As regards the first applicant's complaint that neither the Hague Convention nor German law provided for a legal basis to oblige her to return the child herself, it is pointed out that in the case of *Neulinger and Shuruk* (cited above, § 145) the Grand Chamber was prepared to accept that the forced return of mother and child together remained within the margin of appreciation afforded to national authorities in such matters. Moreover, in contrast to *Neulinger and Shuruk* (cited above, § 44 and § 144), where the last domestic decision had ordered the mother to secure the return of the child without any alternative, in the instant case the domestic courts ordered the mother's return together with her child only as a first option. As a second option, namely in the event of the first applicant's non-compliance with that obligation, the domestic decisions stipulated the obligation to hand over the child to the father or to a person named by him for the return of the child. Against this background the Court finds that the domestic courts' interpretation of the Hague Convention was compatible with the Convention and that the decisions thus had a legal basis in national law.

The domestic courts' decisions also pursued the legitimate aim of protecting the rights and freedoms of the second applicant and her father (see, on this issue, *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV, and *Bayerl v. Germany* (dec.), no. 37395/08, 13 October 2009).

It remains to be determined whether the interference with the applicants' rights was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

As regards the general principles relating to matters of international child abduction, the Court refers to the summary of its established case-law in the case of *Neulinger and Shuruk*, (cited above, §§ 131-140).

In the instant case, the domestic courts ordered the second applicant's return to Australia and, as a first option, obliged the first applicant to personally return her daughter to Australia.

The applicants complained that the first applicant was unable to relocate to Australia because she was suffering from multiple sclerosis. The first applicant invoked her suffering of multiple sclerosis before the Court of Appeal, which dealt with the issue in depth, heard her arguments and obtained an expert opinion in this respect. In the outcome, in particular relying on the expert's opinion, the Court of Appeal found that there were

no grounds which made her return impossible. The Court sees no reasons, nor did the first applicant put forward any compelling grounds, to depart from this finding. National courts, having the benefit of direct contact with the persons involved, are in general better placed to assess the evidence before them and must be accorded a reasonable margin of appreciation (see *Olsson v. Sweden (no. 2)*, 27 November 1992, § 90, Series A no. 250, and *Hokkanen v. Finland*, 23 September 1994, § 64, Series A no. 299-A). Moreover, it has to be kept in mind that the first applicant was obviously ordered to return the child personally in order to prevent any harm to the child's well-being. The Court has already considered the possibility of the abducting parent's accompanying the child an essential element in this context (see *Maumousseau and Washington v. France*, no. 39388/05, § 74, ECHR 2007-XIII). Against this background, in particular bearing in mind that the child's best interests must be the primary consideration (see *Neulinger and Shuruk*, cited above, § 134), the Court finds that the domestic courts cannot be said to have overstepped their margin of appreciation in ordering the first applicant to return her daughter.

The applicants further complained that relocation to Australia would take them away from their secure social and medical situation, and that the obligation was disproportionate, as they had already been living in Germany for two years and as the father had applied for the return of the child only in August 2009. The Court considers that these arguments in essence concern the question whether the domestic courts correctly applied the exceptions to the member States' obligation to return the child provided for in the Hague Convention (in particular Articles 12 and 13).

In this respect the Court reiterates that these exceptions must be interpreted strictly. The aim is indeed to prevent the abducting parent from succeeding in obtaining legal recognition, by the passage of time, of a *de facto* situation that he or she unilaterally created (see *Maumousseau and Washington*, cited above, § 73). It is also not its task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention. Nevertheless, the Court is competent to ascertain whether the domestic courts, in applying and interpreting the provisions of that convention, 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). Moreover, the Court observes that the time factor is an important element to be taken into account (see *Neulinger and Shuruk*, cited above, § 145). This is also reflected in Article 12 § 2 of the Hague Convention, according to which a judicial or administrative authority before which a case is brought after the one-year period provided for in Article 12 § 1 shall not order a child's return if it is demonstrated that the child is now settled in his or her new environment.

However, in the instant case, the domestic courts found that the case was brought within the one-year period and the second applicant arrived in Germany in June 2008 and has thus stayed in Germany for something over two years (compared to four years in the case of *Neulinger and Shuruk*, § 147). The domestic courts dealt speedily with the request for return, namely within eight months at three court levels. They duly examined the applicants' situation, taking into account the second applicant's best interests, and came to the conclusion that the child's return together with her mother would not be harmful to the child's well-being. Likewise, neither the Youth Office nor the *curator ad litem* had identified such risk.

The Court further notes that there is nothing to suggest that the decision-making process which led the domestic courts to order the impugned measure had not been fair or had not allowed the applicants to present their case fully (see *Tiemann*, cited above, and *Maumousseau*, cited above, § 76).

Against this background the Court finds that also in this respect the domestic courts cannot be said to have overstepped their margin of appreciation in ordering the applicants' return.

As a second option, namely in the event of the first applicant's non-compliance with the above-mentioned obligation to return the second applicant to Australia personally, the domestic courts' decisions stipulate the obligation to hand over the child to the father or to a person named by him for the return of the child.

The Court notes at the outset that it has held in its previous case-law that whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives (see *Neulinger and Shuruk*, cited above, § 140, and *Maumousseau*, cited above, § 83).

The domestic courts did not address in their decisions the question whether such measure would harm the child's well-being. They simply based their findings on the assumption that the first applicant could be expected to personally accompany her daughter in order to take care of her in Australia and thus ensure the child's well-being. In the light of Article 8 of the Convention such an omission would obviously represent a serious deficiency in the domestic proceedings if the second option could be directly enforced against the second applicant. However, on 19 July 2010, the Court of Appeal expressly pointed out that direct enforcement of the second option required an additional explicit court decision and would be admissible towards a child only where this was justifiable with a view to the child's well-being and where no less restrictive measures were available to enforce the obligation. The direct enforcement of the second option, that is the second applicant's obligation to return to Australia without her mother, therefore appears rather theoretical at the moment. The Court is persuaded that before ordering coercive measures against the applicant in this respect

and in particular before ordering the enforcement of the second applicant's obligation to return to Australia without her mother and in order to conform to their obligations under the Convention, the domestic authorities will duly examine whether this would be justifiable with a view to the child's well-being, notably whether such enforcement would endanger the child's well-being, in the sense of the relevant applicable national and international provisions.

Against the background of the above considerations the Court takes the view that, having regard to the margin of appreciation enjoyed by the authorities in such matters, the decision to return was based on relevant and sufficient grounds for the purposes of paragraph 2 of Article 8, considered in the light of the Hague Convention, and that it was proportionate to the legitimate aim pursued.

It follows that these complaints are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and must be rejected in accordance with Article 35 § 4 of the Convention.

To the extent that the first applicant's complaint that she was not free to chose her place of residence because the domestic courts had obliged her to relocate to Australia might fall to be examined under Article 2 of Protocol no. 4, the Court considers that, since the complaint is essentially the same as the complaints examined under Article 8 of the Convention, no separate issue arises under Article 2 of Protocol No. 4 to the Convention.

### 2. The first applicant's possible coercive detention

The first applicant complained under Articles 5, 7 and 8 of the Convention about the possible imposition of coercive detention against her and argued that neither the Hague Convention nor German law allowed the imposition of such a measure against the mother of an abducted child. The Court considers that the possible imposition of coercive detention may raise an issue under Article 5 and 8 of the Convention.

Article 5, as far as relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; ..."

The Court observes that the domestic decisions merely threatened the first applicant with coercive detention of up to six months. It is neither submitted that coercive detention had been enforced nor even that it had been ordered against her in an explicit court decision, as required by the relevant domestic legal provisions. The first applicant thus has neither been deprived of her liberty in the sense of Article 5 § 1 nor is she directly

threatened with deprivation of her liberty in a way that would be concrete enough, in particular regarding the length of detention and its specific circumstances, to enable the Court to assess whether such a measure was proportionate (see, *mutatis mutandis*, *Meyer-Falk v. Germany* (dec.), no. 47678/99, 30 March 2000).

It follows that the complaint under Article 5 is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

As regards Article 8 the Court considers that the threat of coercive detention might be regarded as interfering with the applicant's right to respect for private and family life. However, the question can be left open, since the complaint under Article 8 is in any event inadmissible for the following reasons.

In the instant case, the possible coercive detention was ordered by the domestic courts pursuant to Article 33 § 1 sentence 2 of the Act on Non-Contentious Proceedings, to ensure the first applicant's compliance with the domestic courts' order. The Court has already in its earlier case-law accepted that the provision constituted a sufficient legal basis (see *Paradis v. Germany* (dec.), no. 4065/04, 4 September 2007). Likewise, the Court has no doubt that the measure was also covered by the Hague Convention. The Court has held that proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling and that the Hague Convention recognised this fact. When difficulties appear, mainly as a result of a refusal by the parent with whom the child lives to comply with a decision ordering the child's prompt return, the use of adequate sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives (see *Neulinger and Shuruk*, cited above, § 140, and *Maire v. Portugal*, no. 48206/99, §§ 74 and 76, ECHR 2003-VII). Accordingly, the impugned measure had a sufficient legal basis.

The domestic courts' decisions also pursued the legitimate aim of protecting the rights and freedoms of the second applicant and her father.

As regards the proportionality of the impugned measure, the Court points out that it is called upon to assess the fact that the first applicant was only threatened of coercive detention. It reiterates that one of the aims of the Hague Convention is to swiftly return children to the country of their habitual residence, to prevent them from growing accustomed to their illegal retention (see *Paradis* (dec.), cited above). In the present case the second applicant had already been separated for about one year and three months when the District Court ordered the possible coercive detention. The coercive detention was intended solely for use in the event of non-compliance with the court's decision and, moreover, required an additional explicit court decision against which further remedies would be available. The first applicant also did not put forward any specific grounds why

coercive detention in her case would in any event have to be regarded as disproportionate. Having regard to the domestic authorities' obligation to act expeditiously as regards proceedings under the Hague Convention (see *Neulinger and Shuruk*, cited above, § 140) and thus to ensure the effectiveness of their decisions, the Court is persuaded that ordering coercive detention in the event of the first applicant's non-compliance with the court's decision was proportionate.

It follows that this complaint is likewise manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

### 3. The judge's non-attendance at the oral hearing

The applicants also complain under Article 6 § 1 that one of the three Court of Appeal judges who took the decision of 18 March 2010 had not taken part in the oral hearing of 26 November 2009 and had thus never met the applicants. Article 6, in so far as relevant, provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Court firstly points out that the Court of Appeal addressed the issue in its decision and, referring to different decisions from the domestic case-law, underlined that the composition of the court was in conformity with the applicable legislation and the relevant case-law. Secondly, the judge who had not participated in the oral hearing had the opportunity to find out about the content and the details of the oral hearing through the minutes and through the other two judges, who had been present at the hearing. Thirdly, the Court attaches significance to the fact, apparent from the Court of Appeal's reasoning, that the decision was not based on circumstances or considerations which could only be gathered from personal contact with the applicants.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President