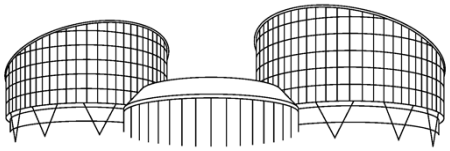

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF Y.S. AND O.S. v. RUSSIA

(Application no. 17665/17)

JUDGMENT

Art 8 • Family life • Domestic court failure genuinely take into account allegations of "grave risk" of harm or exposure to an intolerable situation in returning abducted child under the Hague Convention to a conflict zone in eastern Ukraine • Insufficient reasoning by domestic court falling short of procedural requirements inherent in Art 8

STRASBOURG

15 June 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Y.S. and O.S. v. Russia,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Lorraine Schembri Orland,
Ana Maria Guerra Martins, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian and Ukrainian national, Y.S. ("the first applicant"), on behalf of herself and her daughter, O.S. ("the second applicant"), who also has both Russian and Ukrainian nationality, on 7 March 2017;

the decision to give notice of the application to the Russian Government ("the Government");

the decision to grant the application priority under Rule 41 of the Rules of Court;

the decision not to have the applicants' names disclosed to the public under Rule 47 § 4 of the Rules of Court;

the decision to indicate an interim measure to the respondent Government under Rule 39 of the Rules of Court;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the Government of Ukraine and by the second applicant's father, A.S., who were granted leave to intervene by the President of the Section;

Having deliberated in private on 11 May 2021,

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

INTRODUCTION

1. The present case concerns the decision of the Russian courts to order the second applicant's return to Donetsk, Ukraine, under the Hague Convention on the Civil Aspects of International Child Abduction.

THE FACTS

2. The applicants, a mother and daughter, were born in 1976 and 2006 respectively and live in Nakhodka, Primorye Region, Russia. The

applicants, who had been granted legal aid, were represented by Mr A.N. Laptev, a lawyer practising in Moscow.

3. The Government were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

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

I. THE CIRCUMSTANCES OF THE CASE

A. Background information

5. On 28 April 2001 the first applicant married a Ukrainian national, A.S. The couple settled in Donetsk, Ukraine.

6. On 5 December 2006 their daughter, the second applicant, was born.

7. After the birth of the second applicant, relations between the first applicant and A.S. deteriorated, and in 2011 the first applicant left him and the second applicant. She moved to Nakhodka, Primorye Region, in the far east of Russia. The second applicant remained in Donetsk with her father. The applicants maintained contact with each other by telephone and Skype.

8. On 5 March 2012 the first applicant applied to the Primorye regional department of the Federal Migration Service of Russia ("the FMS") for a temporary residence permit in Russia.

9. On 23 April 2012 the FMS granted her request.

10. On 13 September 2013 the first applicant applied to the FMS for a permanent residence permit in Russia.

11. On 12 March 2014 the FMS granted her request and issued her with a residence permit valid until 12 March 2019.

12. In April 2014 armed groups started to take control of State facilities in Donetsk Region and announced the creation of a self-proclaimed entity known as the "Donetsk People's Republic" (the "DPR"). The situation escalated to an armed conflict between the Ukrainian authorities and the "DPR".

13. According to the first applicant, following the outbreak of hostilities in Donetsk Region and the proclamation of the "DPR", with its centre in Donetsk, she attempted to move the second applicant to a safe place in Russia, but A.S. blocked her attempts.

14. On 1 December 2015 the FMS issued a certificate attesting to the first applicant's participation in the State Programme to Assist Voluntary Resettlement of Compatriots Living Abroad to the Russian Federation. The second applicant's name featured in the "family members" column.

15. In January 2016 the first applicant arrived in Donetsk and, without obtaining A.S.'s consent or informing him of her intentions, took the second applicant to Nakhodka, where she applied for Russian nationality for herself and the second applicant. In compliance with the requirements of Russian

law, her application was accompanied by a document confirming that she had lodged a request with the competent Ukrainian authorities for renunciation of her and her daughter's Ukrainian nationality.

16. On 23 June 2016 the Primorye regional department of the Ministry of Internal Affairs granted the first applicant's application.

17. The applicants continue to live in Nakhodka.

18. Meanwhile, on 20 March 2016 A.S. began renting a flat in Kramatorsk, a city some 100 kilometres south of Donetsk, situated outside the conflict zone.

B. Proceedings in Ukraine

19. On 27 June 2012 the Budyonovskiy District Court of Donetsk dissolved the marriage between the first applicant and A.S. Both parents retained parental authority over the second applicant.

20. On 20 May 2013 the Budyonovskiy District Court held that the second applicant should continue to live with her father and ordered the first applicant to pay him child maintenance. The judgment was not appealed against and became final on 7 July 2013.

21. The first applicant lodged an application with the Budyonovskiy District Court, seeking an order that the second applicant live with her in Russia.

22. On 2 June 2014 the Budyonovskiy District Court ordered that the second applicant continue to live with her father. According to the first applicant, at that time the Budyonovskiy District Court was under the control of the "DPR". According to the Government, however, it was not until October 2014 that the Ukrainian judicial bodies stopped functioning in certain areas of Donetsk Region. The judgment was not appealed against and became final on 27 June 2014.

23. According to the first applicant, she did not appeal against the judgment of 2 June 2014, because the Constitution of the "DPR" abolished Ukrainian judicial bodies on the territory of the "DPR", including the Donetsk Regional Court of Appeal, which was replaced by the Supreme Court of the "DPR".

C. Proceedings in Russia

24. On 23 March 2016 A.S. submitted an application for the second applicant's return to Ukraine under the Hague Convention (see paragraph 38 below), to which both Russia and Ukraine are parties. The application was submitted to the Ukrainian Central Authority – the Ministry of Justice of Ukraine, which transmitted it to its Russian counterpart. In the application, he gave his address as being in Kramatorsk.

25. On 6 July 2016 A.S. lodged an application with the Tsentralniy District Court of Khabarovsk ("the District Court"), seeking the second applicant's return to Ukraine under the Hague Convention. He gave his address as being in Kramatorsk.

26. In her objections, the first applicant argued that A.S. had not been effectively exercising his custody rights at the time of the second applicant's removal, as the child had been living with her maternal grandparents and only occasionally with him. She further claimed that A.S. had neglected the child and mistreated her (by locking her up at home alone, preventing her from going for walks, applying physical force to her, feeding her a bad diet, humiliating her, buying her oversized clothes, and letting her drink beer and use the Internet so that she would not be in his way). The first applicant further argued that the child's return to Ukraine would put her physical and emotional well-being at risk in view of the ongoing military conflict in Donetsk. Furthermore, the child had already adapted to her new life in Russia and was not willing to go back to Ukraine. The first applicant asked the District Court to examine the case in her absence.

27. A.S. argued that the alleged reason for the first applicant's removal of the child – Donetsk being part of the ongoing military conflict – was far-fetched. It was two years after the outburst of hostilities in Donetsk Region that the first applicant had taken the child away. A.S. further alleged that no military actions had been ongoing in the part of Donetsk where he and the second applicant lived, which he confirmed by photographs and videos. At the time of her removal, the child had been in good health, which was confirmed by her medical records; she had been eating well and had never been subjected to physical force.

28. At the hearing of 3 August 2016 A.S. was asked to specify whether he lived in Donetsk or Kramatorsk as indicated in his application. He explained that he lived in Donetsk, and that the address in Kramatorsk was his work address.

29. In the course of the same hearing the prosecutor requested that the hearing be adjourned in order to set up a video link with the first applicant in Nakhodka and, if possible, to hear the child. The prosecutor's request was granted and the new hearing was scheduled for 16 August 2016. The first applicant was asked to appear and to ensure, if possible, the second applicant's appearance.

30. On 16 August 2016 the District Court resumed the examination of the case. The first applicant participated in the hearing by video link from the Nakhodka Town Court. However, she did not ensure the appearance of the second applicant arguing that she feared for her child's mental health.

31. By a judgment of the same day, the District Court established the following facts. A.S., a Ukrainian national, and the first applicant, a Russian and Ukrainian national, were married from 28 April 2001 to 27 June 2012 and had their daughter, the second applicant, on 5 December 2006 in

Donetsk, Ukraine. Their daughter had dual nationality. She was born and lived in Donetsk, where she had her registered place of residence and where she attended school and medical facilities. All issues related to the child's education and medical assistance were dealt with entirely by A.S. Before her removal to Russia, she was living with her father in Donetsk and had no other place of residence. On 20 May 2013 the Budyonovskiy District Court of Donetsk held that the second applicant should live with her father, and the first applicant was ordered to pay him child maintenance. On 2 June 2014 the same court again held that the second applicant should live with A.S., and the first applicant's request for the court to determine the second applicant's place of residence as being with her in Russia was dismissed. Contrary to the provisions of Ukrainian law (Articles 141 and 161 of the Family Code of Ukraine) and the Hague Convention, the first applicant took the decision to change the second applicant's habitual place of residence without A.S.'s consent, wrongfully taking the child from Ukraine to Russia and retaining her there. No circumstances capable of constituting an exception under Articles 13 and 20 of the Hague Convention to the general obligation to secure the child's return were detected by the District Court. The first applicant's arguments that A.S. had not actually been exercising his custody rights at the time of the second applicant's removal and had been mistreating and neglecting her were found to be unsupported and disproved by the evidence submitted by A.S. (certificates, receipts, photographs and videos). The first applicant's arguments that there was a "grave risk" that the second applicant's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation owing to the military conflict ongoing in Ukraine were also found to be unsupported by any objective and reliable evidence. The District Court considered that occasional military actions in various settlements in Ukraine did not as such constitute an exception relating to a very serious risk of harm to the child. That risk was not individual to the child, but rather a general consequence of living in a conflict zone. Besides, although the military conflict had been ongoing in Donetsk since April 2014, it was not until 2016 that the first applicant took the second applicant to Russia. She did not provide the District Court with any evidence that the alleged risk could not be addressed by the competent Ukrainian authorities. Nor did she provide proof that the second applicant's removal from her habitual place of residence was the only possible way of protecting her from the alleged risk. The District Court further refused to accept the first applicant's argument about the child's unwillingness to return to Ukraine. It took into account a report on an inspection of the first applicant's living conditions in Nakhodka prepared on 21 July 2016 by the chief inspector of the local childcare authority, which stated, amongst other things, that the second applicant was afraid to return to Donetsk because she feared gunfire and exploding bombs, and that she preferred to stay with the first applicant in Russia. The District

Court considered, however, that the report in question was more relevant to the determination of the issue of the child's residence, which was to be decided by the courts of her habitual place of residence. In view of the above, the District Court granted A.S.'s application and ordered the second applicant's return to the place of her habitual residence in Ukraine – Donetsk.

32. The first applicant appealed, claiming that she had not been stripped of her parental authority or banned by any judicial decision from taking her daughter to Russia. She further indicated that the psychological climate at A.S.'s place of residence had not been favourable for the child and that military actions were being carried out in Donetsk, which would put the second applicant's life and health at risk in the event of her return there. She further indicated that both herself and the child were Russian nationals and no longer had Ukrainian nationality, and that the child had been unwilling to return to her father.

33. During the examination of the case on appeal A.S. submitted that he could ensure the second applicant's safety upon her return to Donetsk, and could also move his home address as his work permitted him to do so. He further submitted that no military actions had been underway in Donetsk and that his flat in Donetsk was situated 25 km from the airport of Donetsk, which had been the scene of heavy fighting between separatist forces affiliated with the "DPR" and Ukrainian military in the period between September 2014 and January 2015.

34. On 12 October 2016 the Khabarovsk Regional Court ("the Regional Court") endorsed the reasoning of the judgment of 16 August 2016 and upheld it on appeal, following which it became enforceable. The Regional Court held, in particular, that the first applicant's argument to the effect that the child's return to her father in Donetsk would put her life and health at risk due to the military actions there had not been supported by admissible and relevant evidence. The first applicant's request to participate in the appeal hearing by video link was rejected owing to a lack of technical equipment.

35. On 5 May 2017 a judge of the Regional Court refused to refer the case for consideration by the Presidium of that court.

36. On 29 September 2017 a judge of the Supreme Court of Russia refused to refer the case for consideration by its Civil Division.

37. Meanwhile, on 7 March 2017 the applicants lodged their application before the Court. On 8 March 2017 the Court decided to indicate to the Government of Russia, under Rule 39 of the Rules of Court, that the applicants' request to suspend the enforcement of the second applicant's return to Donetsk was granted.

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980

38. The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") entered into force between Russia and Ukraine on 1 June 2012. It provides, in so far as relevant, as follows:

Article 1

"The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

..."

Article 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 8

"Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

..."

Article 11

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

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

..."

Article 13

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

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

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

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

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

Article 14

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

Article 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.

..."

B. Explanatory Report to the Hague Convention, Part II of the Guide to Good Practice under the Hague Convention

39. For a summary of the relevant parts of the Explanatory Report to the Hague Convention, prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982, and Part II of the Guide to Good Practice under the Hague Convention published by HCCH in 2003, see *X v. Latvia* ([GC] no. 27853/09, §§ 35-36, ECHR 2013).

C. Part VI of the Guide to Good Practice under the Hague Convention – Article 13 (1) (b) of the Hague Convention

40. Part VI of the Guide to Good Practice under the Hague Convention published by the HCCH in 2020, provides as follows:

> "29. The grave risk exception is based on "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.
>
> ...
>
> 34. The term "grave" qualifies the risk and not the harm to the child. It indicates that the risk must be real and reach such a level of seriousness to be characterised as "grave". As for the level of harm, it must amount to an "intolerable situation", that is, a situation that an individual child should not be expected to tolerate. The relative level of risk necessary to constitute a grave risk may vary, however, depending on the nature and seriousness of the potential harm to the child.
>
> 35. The wording of Article 13(1)(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child *upon return* and on whether those circumstances would expose the child to a grave risk.
>
> ...
>
> 40. As a first step, the court should consider whether the assertions are of such a nature, and of sufficient detail and substance, that they could constitute a grave risk. Broad or general assertions are very unlikely to be sufficient.
>
> 41. If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information gathered, and by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence. This means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established.
>
> 42. Once this evaluation is made:

– where the court is *not* satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it orders the return of the child;

– where the court *is* satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order the return of the child, which means that it is within the court's discretion to order return of the child nonetheless.

...

61. The grave risk analysis associated with the circumstances in the State of habitual residence must focus on the gravity of the political, economic or security situation and its impact on the individual child, and on whether the level of such impact is sufficient to engage the grave risk exception, rather than on the political, economic or security situation in the State generally. Assertions of a serious security, political or economic situation in the State of habitual residence are therefore generally not sufficient to trigger the grave risk exception. Similarly, (isolated) violent incidents in an unsettled political environment will typically not amount to grave risk. Even where the facts asserted are of such a nature that they could constitute a grave risk, the court must still determine whether protective measures could address the risk and, if so, the court would then be bound to order the return of the child.

...

91. In line with the relevant laws and procedures and where it is deemed appropriate in evaluating assertions of grave risk, courts can seek additional information through Central Authorities in order to better understand the legal framework or child protection system in place in the State of habitual residence, or to clarify certain assertions of facts. Courts may be able also to ask specifically for available information regarding the social background of the child through the Central Authorities. ...

95. As part of their responsibilities, Central Authorities also have a duty to cooperate with each other and to promote cooperation among internal authorities to secure the prompt return of the child (Art. 7(1)). In cases where the Article 13(1)(b) exception is raised, such cooperation may notably allow the Central Authorities to respond quickly to requests from the court to provide information on the availability of protective measures to protect the child from the grave risk, subject to the relevant laws. ..."

D. Application and Implementation by Ukraine of the Obligations under the Hague Convention on the Territory of "the DPR"

41. On 16 October 2015 Ukraine stated that its application and implementation of the obligations under the Hague Convention on the territory of the "DPR" was limited and not guaranteed as from 20 February 2014 onwards (accessible at: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=974&disp=resdn).

III. RELEVANT DOMESTIC LAW

A. Code of Civil Procedure of the Russian Federation

42. The procedure for the examination of applications for the return of children unlawfully removed to, or retained in, the Russian Federation, and for securing protection for rights of access in respect of such children in accordance with international treaties to which the Russian Federation is party, is governed by Chapter 22.2 of the Code of Civil Procedure.

43. The Code provides that an application for return must be submitted to a court by a parent or other individual who considers that his or her custody or access rights have been violated, or by a prosecutor. The application must be submitted to the Tsentralniy District Court of Khabarovsk if the child is within the territory of the Far Eastern Federal Circuit (Article 244.11).

44. The application for return is examined by the court with the mandatory participation of a prosecutor and the relevant childcare authority, within forty-two days of receipt, including the time for preparation for the hearing and the drawing-up of the judgment (Article 244.15).

45. The judgment taken in a case concerning the return of a child unlawfully removed to, or retained in, the Russian Federation must specify the reasons for the need to return the child to the State of his or her habitual residence, in accordance with international treaties to which the Russian Federation is party, or the reasons for refusing the application for return, in accordance with international treaties to which the Russian Federation is party (Article 244.16).

46. The judgment may be appealed against within ten days. The appeal is examined by the appellate court within one month of receipt (Article 244.17).

B. Family Code of the Russian Federation

47. A child is entitled to express her or his opinion on all family matters concerning him or her, including in the course of any judicial proceedings. The opinion of a child over ten years old must be taken into account, except where it is contrary to his or her interests (Article 57).

IV. OTHER RELEVANT INTERNATIONAL MATERIAL

A. Situation in Donetsk in 2016

48. The Council of Europe Parliamentary Assembly's Resolution 2133 (2016), entitled "Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities", was adopted on 12 October 2016. It reads as follows:

"6. ... in the conflict zone in the Donbas region, serious human rights violations have occurred, and are still occurring, as documented by numerous reports from, *inter alia*, the Council of Europe's Commissioner for Human Rights, the United Nations Human Rights Monitoring Mission in Ukraine, the Special Monitoring Mission to Ukraine of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), and leading Ukrainian and international non-governmental human rights organisations. These violations include extrajudicial executions, enforced disappearances, torture and inhuman and degrading treatment, unlawful detentions and disproportionate restrictions on the freedom of expression and freedom of information.

7. Victims of human rights violations have no effective internal legal remedies at their disposal:

7.1. As far as the residents of the "DPR" ... are concerned, local "courts" lack legitimacy, independence and professionalism; the Ukrainian courts in the neighbouring government-controlled areas, to which jurisdiction for the non-controlled areas was transferred by Ukraine, are difficult to reach, cannot access files left behind in the "DPR" ... and cannot ensure the execution of their judgments in these territories;

...

10. In the conflict zone in the Donbas region, the civilian population ... were subjected to violations of their rights to life and physical integrity and to the free enjoyment of property, as a result of war crimes and crimes against humanity including the indiscriminate or even intentional shelling of civilian areas, sometimes provoked by the stationing of weapons in close proximity.

11. Numerous inhabitants of the conflict zone in the Donbas, on both sides of the contact line, still suffer on a daily basis from numerous violations of the ceasefire that was agreed in Minsk. ... The inhabitants also suffer from the prevailing climate of impunity and general lawlessness due to the absence of legitimate, functioning State institutions, and in particular access to justice in line with Article 6 of the European Convention on Human Rights ..."

49. The report of the United Nations Human Rights Monitoring Mission in Ukraine ("the HRMMU") on the human rights situation in Ukraine covering the period from August to November 2016 states:

"4. Between 16 August and 15 November 2016, OHCHR recorded 164 conflict-related civilian casualties in Ukraine. Due to the renewed commitment to the ceasefire on 1 September, there was a 13 per cent decrease compared to the previous reporting period. In October, OHCHR recorded eight times more civilian casualties in armed group-controlled territories than in Government-controlled areas of the conflict zone, indicating that civilians in territories controlled by the armed groups continue to be particularly at risk of injury and death. OHCHR interviews with families of killed and injured civilians reveal the devastation and harm caused by the ongoing armed conflict in Donetsk and Luhansk region. The reported continued flow of weapons and ammunition to the conflict area, which results in serious human rights violations and abuses and violations of international humanitarian law, compounds their suffering. In total, from mid-April 2014 to 15 November 2016, OHCHR recorded 32,453 casualties, among Ukrainian armed forces, civilians and members of the armed groups. This includes 9,733 people killed and 22,720 injured.

..."

50. The Organisation for Security and Co-operation in Europe ("the OSCE") Special Monitoring Mission to Ukraine ("the SMM") published a thematic report entitled "Civilian casualties in Eastern Ukraine 2016", which states:

> "Between 1 January and 31 December 2016 the SMM documented 442 cases of civilian casualties in the areas affected by the conflict in eastern Ukraine: 88 civilians were killed ... and 354 were injured ...
>
> The vast majority of casualties were attributed to shelling, including from artillery and mortars with large caliber ...
>
> Incidents leading to civilian casualties mostly occurred in Donetsk region where the Mission confirmed 355 cases: 68 killed and 287 injured.
>
> ...
>
> On 5 September 2014, the Protocol agreed in Minsk called for an immediate cessation of the use of weapons. More than two years later the adherence to ceasefire is not respected and civilian lives are constantly under threat ..."

51. The relevant part of the "Amnesty International Report 2016/17 – Ukraine", states:

> "Sporadic fighting and exchange of fire between government and Russia-backed separatist forces continued. Gunfire, shelling and unexploded ordnance continued to cause civilian deaths and injuries. The UN Human Rights Monitoring Mission estimated that there were more than 9,700 conflict-related deaths, of which around 2,000 were civilians, and at least 22,500 conflict-related injuries since the beginning of the conflict in 2014."

52. The relevant part of Human Rights Watch's "World Report 2017" states:

> "The 2015 Minsk II Agreements significantly reduced hostilities, but frequent skirmishes and exchanges of artillery fire continued during the year.
>
> According to the [HRMMU], mortar, rocket, and artillery attacks between April 2014 and May 2016 killed over 9,000 people and injured more than 21,000—including civilians and combatants on all sides—in Donetsk and Luhansk regions. The HRMMU reported a 66 percent increase in civilian casualties from May to August compared to earlier in 2016, and documented 28 civilian deaths in the summer, many of which resulted from shelling and landmines."

B. Subsequent Evolvement of the Situation in Donetsk

53. The report of the HRMMU on the human rights situation in Ukraine covering the period from 1 August to 31 October 2020 states:

> "From 1 August to 31 October 2020, HRMMU recorded no civilian casualties resulting from active hostilities, nor damage to civilian objects ... The welcomed reduction in civilian casualties can be attributed to the introduction of a strengthened ceasefire adopted by the Trilateral Contact Group in Minsk, which took effect from 27 July.

However, civilian casualties resulting from mine-related incidents and handling of explosive remnants of war continued. From 1 August to 31 October, HRMMU recorded 24 such casualties: two killed (both men) and 22 injured (16 men, four boys and two women).”

54. The OSCE SMM’s thematic report “Civilian casualties in the conflict-affected regions of Eastern Ukraine”, covering the period between 1 January 2017 and 15 September 2020, states:

“Between 1 January 2017 and 15 September 2020, the SMM corroborated 946 civilian casualties, of which 161 were fatalities. In 2017, the number of confirmed casualties rose from 442 in 2016 to 486. While the number of casualties has declined every year in the reporting period, so far in 2020 (January to September) the Mission has confirmed 74 civilian casualties.

...

The vast majority of civilian casualties were due to shelling (518, including 66 fatalities) ...

While shelling caused the most civilian injuries and fatalities combined, it is important to note that the majority of civilian *fatalities* in 2017-2019 were caused by mines and other explosive objects.

...

Of the 946 civilian casualties corroborated during the reporting period, 750 occurred in Donetsk region ...

During the reporting period, the SMM has corroborated 100 child casualties (73 boys and 27 girls), with 43 casualties (21 boys and 22 girls) due to shelling. The majority of the shelling incidents where children were casualties occurred while they were in or near their homes or homes of family members with whom they were staying.

...

While the Mission recorded more than 400,000 ceasefire violations in Donetsk and Luhansk regions in 2017, the number of ceasefire violations steadily declined in subsequent years to some 130,000 ceasefire violations recorded in the first eight and a half months of 2020. The reduction in ceasefire violations has coincided with the reduction of civilian casualties due to shelling and SALW [small arms and light weapons]-fire.

On 22 July 2020, agreement was reached in the TCG [Trilateral Contact Group] on additional measures to strengthen the ceasefire. These measures took effect at 00:01 on 27 July. Since then, the Mission has recorded a significant reduction in the number of ceasefire violations along the contact line. In the 51 days between 27 July and 15 September, the Mission recorded in total just over 1,000 ceasefire violations and received only one report of a civilian casualty due to shelling or small-arms fire ... Despite the reduction in the reports of civilian casualties due to shelling and SALW-fire, between 27 July and 15 September, the Mission has confirmed and reported eight casualties, of which one was a fatality, due to mines and other explosive objects. This highlights the fact that even if the number of cease-fire violations decreases, mines and other explosive objects still pose a serious threat to the lives of civilians.

...

> The highest concentration of civilian casualties occurred in the settlements around Avdiivka and Yasynuvata and parts of Donetsk city (northern, central, and eastern areas), with 171 civilian casualties (20 killed and 151 injured) ..."

55. The relevant part of Human Rights Watch's "World Report 2020" states:

> "2019 saw a significant decrease in civilian casualties. The leading causes were shelling by artillery and mortars, fire from light weapons, landmines, and explosive remnants of war.
>
> Between January and May 2019, attacks on schools on both sides of the contact line tripled compared with the same period in 2018. Throughout six years of conflict, 147 children were killed."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

56. The applicants complained that the Russian courts' decision to return the second applicant to Donetsk under the Hague Convention had violated their right to respect for their family life. They further complained that they had not been granted a fair decision-making process in the above proceedings. The complaints fall to be examined under Article 8 of the Convention, which in its relevant part reads 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

57. The Government did not dispute that the first applicant had standing to lodge an application on behalf of her daughter. Given that the first applicant has parental authority over the second applicant, the Court finds that she has standing to act on her behalf (see, most recently, *Petrov and X v. Russia*, no. 23608/16, § 83, 23 October 2018, with further references).

58. The Government considered that the complaints were manifestly ill-founded for the reasons set out below (see paragraphs 66-70).

59. The Court does not consider that these complaints are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

60. The applicants submitted that the judgment of the District Court of 16 August 2016 ordering the second applicant's return to Donetsk had amounted to an interference with their right to respect for their family life under Article 8 of the Convention. They argued that the interference in question had not been in accordance with the law and had not been "necessary" within the meaning of Article 8 of the Convention. Firstly, they raised the issue of the applicability of Ukrainian law on the territory of the "DPR", from where the child had been removed. Secondly, they noted that the text of the District Court's judgment did not refer to any specific provisions of Ukrainian law obliging a parent travelling outside Ukraine with a child to obtain consent from the other parent. Even if such a provision existed, the applicants argued that by removing the second applicant from Donetsk to Russia the first applicant had complied with her obligation as a parent to protect her child from the dangers related to living in a military conflict zone.

61. The applicants went on to argue that the Hague Convention was not applicable in the circumstances of the present case. In this connection, they referred to the declaration made by the Ukrainian authorities on 16 October 2015 (see paragraph 41 above). The Russian authorities' reference to their non-acceptance of the above declaration by the Ukrainian authorities did not in any way affect the fact that the Ukrainian authorities had no control over the territory of the "DPR" and, accordingly, could not guarantee the applicability of the Hague Convention there.

62. The applicants further challenged the legitimacy of the judgment of the Budyonovskiy District Court of Donetsk of 2 June 2014. They referred to the fact that on 7 April 2014 the independence of the "DPR" had been declared, that on 30 April 2014 the acting President of Ukraine had recognised that the Ukrainian authorities had lost control over Donetsk and part of Donetsk Region, and that on 14 May 2014 the Constitution of the "DPR" had been adopted, which had established the Supreme Court of the "DPR" and other courts of the "DPR". Therefore, as no legitimate courts (or other authorities) existed on the territory of the "DPR", the first applicant could not have settled the issue of the second applicant's custody prior to her removal, and the parties would not be able to have this issue settled after the second applicant's return to Donetsk. Thus, ordering the return of the child to an armed conflict zone where neither the legitimate government institutions nor the European Convention on Human Rights were in force, had in itself been a denial of justice.

63. Referring to the second applicant's Russian nationality, the precarious human rights situation in Donetsk, A.S.'s alleged lack of care over the second applicant and the latter's wish to live with the first applicant, the applicants considered that the interference stemming from the judgment of the District Court of 16 August 2016 had not been necessary in a democratic society and had not been proportionate. In view of the specific circumstances of the present case, the Russian courts should have examined the custody issue on the merits with due regard to the best interests of the child rather than applied the mechanisms of the Hague Convention. The applicants further drew the Court's attention to the fact that the judgment of the District Court of 16 August 2016 was in any event unenforceable, since it ordered the second applicant's return to the place of her habitual residence in Donetsk, even though, as was apparent from her father's submissions to the Court, he no longer lived in Donetsk, but in Kramatorsk. The latter's assurances that he would be able to ensure the second applicant's safety in Kramatorsk therefore had no legal significance, since the subject matter of the present case was the child's return to Donetsk, not Kramatorsk.

64. The applicants further insisted that they had not been granted a fair decision-making process with due respect to the interests safeguarded by Article 8 of the Convention. In particular, the Russian courts had dismissed the first applicant's submissions about the risks that the second applicant might face in the event of her return to Donetsk, referring to the absence of any objective evidence in support of her allegations. They had refused to obtain evidence from the first applicant's parents regarding, in particular, the circumstances of the second applicant's life with her father as well as the situation in the zone of armed conflict. They had failed to take the necessary measures to verify the facts presented by the first applicant, such as enquiring with the Russian Ministry of Foreign Affairs about the security situation in Donetsk, consulting the website of the Crisis Management Centre of the Russian Ministry of Foreign Affairs, or examining the reports of international organisations closely following the situation in Donetsk. The Russian courts had further given no consideration to the possibility of the first applicant relocating with the second applicant. They had ignored the second applicant's opinion, reflected in the report of 21 July 2016 on the inspection of the applicants' living conditions in Nakhodka. This report had mentioned the childcare authority inspector's conversation with the second applicant, during which the latter had confirmed that she was unwilling to return to Donetsk as gunfire and bomb explosions scared her. Returning to the scene of an armed conflict clearly did not correspond to the best interests of the child and exceeded the level of stress which the child could reasonably bear. The Russian courts should have ordered a psychological examination of the second applicant, to evaluate whether returning her to her father would serve her best interests and whether breaking apart from the first applicant would amount to serious psychological trauma. The first

applicant further submitted that she had not been afforded an opportunity to participate in the appeal hearing of 12 October 2016.

65. The applicants concluded that there had been a violation of their right to respect for their family life under Article 8 of the Convention.

(b) The Government

66. The Government argued that the judgment of the District Court of 16 August 2016 ordering the second applicant's return to Donetsk, Ukraine, had not amounted to an interference with the applicants' right to respect for their family life within the meaning of Article 8 § 1 of the Convention. If, however, the Court were to find that there had been an interference with the applicants' right to respect for their family life, the Government considered that it had been in accordance with the law, namely the Hague Convention, and had pursued the goal of protecting the rights and freedoms of the child (the second applicant) and her father (A.S.), which was a legitimate aim within the meaning of Article 8 § 2 of the Convention. They further asserted that the applicants had been granted a fair decision-making process with due respect for the interests safeguarded by Article 8 of the Convention.

67. The parties in the present case did not dispute the fact that the first applicant had removed the second applicant without the consent of her father from Ukraine to Russia. This was done in violation of Ukrainian law and Article 3 of the Hague Convention. Article 12 of the Hague Convention provided for the return of children who had been unlawfully removed, except in the cases referred to in Articles 13 and 20 thereof. Based on the provisions of Article 13 (b) of the Hague Convention, it was the parent who opposed the return, that is to say the first applicant, who was to provide sufficient evidence of the existence of a "grave risk" within the meaning of that provision. The domestic courts had genuinely taken into account the circumstances raised by the first applicant as capable of constituting an exception to the second applicant's return in application of Articles 13 and 20 of the Hague Convention and dismissed them as unfounded. They had conducted a balanced and reasonable assessment of the relevant interests and had reached a conclusion which they had considered to be in the best interests of the child. At the time of the examination of the case, the second applicant had not yet reached the age of ten and the domestic courts had not therefore been required to take her views into account (see paragraph 47 above). They had noted the second applicant's desire to live with the first applicant in Russia and her unwillingness to return to Ukraine, but had considered those factors more relevant for the proceedings relating to the determination of the issue of the child's residence, which was to be decided by the courts in Ukraine.

68. As to the applicants' doubts regarding the legitimacy of the judgment of the Budyonovskiy District Court of Donetsk of 2 June 2014 upholding the residence order in favour of the second applicant's father, the

Government stated that the Ukrainian judicial authorities had not stopped operating in certain areas of Donetsk Region until October 2014 and that the judgment in question, delivered in the name of Ukraine, had therefore been legitimate. It remained open to the first applicant to appeal against it, either to the judicial authorities of the "DPR" or the Ukrainian judicial authorities exercising jurisdiction over the territory of Donetsk (see paragraph 73 below). The applicants' argument of a lack of fair administration of justice by legitimate judicial bodies in the conflict zone was therefore groundless. As to the applicants' argument that the Hague Convention was not applicable to the circumstances of the present case, the Government stated that the declaration made by the Ukrainian authorities on 16 October 2015 (see paragraph 41 above) could not lay the ground for Ukraine's failure to fulfil its obligations and take measures necessary for settling the issues affecting the implementation of residents' fundamental rights and freedoms. They relied on the response statement made by the Russian Federation on 19 July 2016 rejecting the statement made by Ukraine. Moreover, A.S.'s application concerning the second applicant's abduction had been sent to the Ministry of Education and Science of Russia (Russian Central Authority) via the Ministry of Justice of Ukraine (Ukrainian Central Authority), from which it was evident that Ukraine considered this case to be within the scope of the Hague Convention. A duly certified copy of the judgment of 2 June 2014 attached to A.S.'s application for the second applicant's return also showed that the Ukrainian authorities considered the judgment in question to have been issued by a competent Ukrainian court.

69. As regards the fairness of the decision-making process, the Government submitted that the Russian courts had ensured equal conditions for the parties submitting evidence in support of their arguments and claims, explained procedural rights to the parties in the proceedings, assisted them in the exercise of their procedural rights, and considered the parties' requests for obtaining evidence in accordance with the requirements of procedural law. The District Court had informed the first applicant in due time of the application submitted by her former husband, provided her with a copy of it and the materials annexed thereto, and invited her to raise arguments and objections and provide evidence in support of her arguments. Having examined the evidence submitted by the parties and in the absence of any objections from them or requests for further evidence, the District Court had concluded the consideration of the merits of the case and proceeded to the pleadings. There was therefore nothing in the case file to cast doubt on the fairness of the proceedings for the second applicant's return to Ukraine.

70. The Government further drew parallels between the present case and the cases *M.R. and L.R. v. Estonia* ((dec.), no. 13420/12, 15 May 2012) and *Mattenklott v. Germany* ((dec.), no. 41092/06, 11 December 2006). In those cases, the national courts did not establish that there was a grave risk that

the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation and ordered their return to the States of their habitual residence (Italy and the USA, respectively), and the Court found those applications manifestly ill-founded. The Government considered that a similar approach should be adopted by the Court in the present case.

2. Third-party interveners

(a) The Ukrainian Government

71. The Government of Ukraine confirmed at the outset that both applicants still had Ukrainian citizenship.

72. The Government further submitted that the removal of the second applicant from Ukraine to Russia by the first applicant had been wrongful within the meaning of the Hague Convention and that, in the absence of any circumstances capable of constituting an exception under Articles 12, 13 and 20 of the above-mentioned Convention to Russia's obligation to return the child, the Russian courts had reached the correct conclusion by ordering her return. However, the Russian courts had erred in ordering her return to Donetsk. In this connection, the Government submitted that they had no effective control over the territory of Donetsk (see *Tsezar and Others v.Ukraine*, nos. 73590/14 and 6 others, § 11, 13 February 2018), that the application and implementation of the Hague Convention on this territory was therefore limited and not guaranteed (see paragraph 41 above), and that they could not guarantee the second applicant's safety there. They drew the Court's attention to the fact that in his application for the child's return under the provisions of the Hague Convention, A.S. had asked for his daughter to be returned to Kramatorsk. Furthermore, in his application to the Tsentralniy District Court of Khabarovsk A.S. had sought the second applicant's return to Ukraine. The Ukrainian Government therefore considered that the Russian courts should have taken into account the fact that since March 2016 A.S. had been renting a flat and living in Kramatorsk, which had been under the control of Ukraine since July 2014, and should have indicated Kramatorsk and not Donetsk as the return location.

73. The Government further refuted the first applicant's statement that the issue of custody of the second applicant could not be settled prior to her removal, or following her return, owing to the absence of legitimate courts in Donetsk. They submitted that in August to September 2014 Ukrainian law provided for a change of territorial jurisdiction for cases within the jurisdiction of the courts located, *inter alia,* in Donetsk (see *Tsezar and Others*, cited above, § 34). It provided, in particular, that cases within the territorial jurisdiction of the Budyonovskiy District Court of Donetsk were to be examined by the Krasnoarmiysk Town Court of Donetsk Region.

(b) The second applicant's father A.S.

74. A.S. considered, with reference to the Hague Convention, that the Russian courts had reached a sensible decision by ordering his daughter's return to Ukraine: the judicial procedure had been transparent and fair and the courts' findings had been based on a thorough examination of all the pros and cons. As regards the first applicant's concern about the situation in Donetsk, where the second applicant was to be returned, A.S. submitted that Donetsk was indeed situated within the so-called anti-terrorist operation zone, which had been the scene of military actions since April 2014. However, since 15 February 2015 all military actions had stopped within the framework of the Minsk II agreements. According to OSCE reports, a stable ceasefire had been reached on 18 February 2015 and no heavy bombing of Donetsk had been recorded since that time. Furthermore, on 21 February 2015 the opposing parties had reached an agreement on mutual disengagement of forces from the frontline, and since 22 December 2016 they had also reached an agreement on a complete and unconditional ceasefire. As a direct eyewitness to the situation in Donetsk, A.S. could do nothing but confirm the conclusions of the above-mentioned reports. All these factors, in his opinion, were reflected in the judgment of 16 August 2016 of the District Court, which had thoroughly examined the current situation in Donetsk and taken into account all the possible risks before ordering the child's return to the place of her habitual residence in Donetsk. In any event, in order to ensure the second applicant's safety following her return to Ukraine, on 20 March 2016 he had begun renting a flat in Kramatorsk, located outside the conflict zone. He provided a copy of his rental agreement, which was valid until 20 March 2017.

75. A.S. claimed that the first applicant had left the second applicant in 2011 and had only come back in 2016 to kidnap her, expressing his deep concern regarding the second applicant's well-being with the first applicant in Russia. He referred to the Court's decision of 8 March 2017 to indicate to the Government of Russia, under Rule 39 of the Rules of Court, not to enforce the second applicant's return to Donetsk pending the proceedings before it as well as the first applicant's strong unwillingness to allow him to communicate with the second applicant, submitting that his family ties with his daughter were under threat of completely breaking down, thus violating his right to family life and leaving the issue to be resolved over time.

3. The Court's assessment

(a) General principles

76. In *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131-40, ECHR 2010) and *X v. Latvia* ([GC], no. 27853/09, §§ 92-108, ECHR 2013) the Court articulated a number of principles, which have

emerged from its case-law on the issue of the international abduction of children, as follows.

77. In the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention and those of the Convention on the Rights of the Child of 20 November 1989, as well as the relevant rules and principles of international law applicable in relations between the Contracting Parties.

78. The decisive issue is whether a fair balance has been struck between the competing interests of the child, of the two parents, and of public order, within the margin of appreciation afforded to States in such matters, taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child".

79. There is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the *status quo* by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13 (b)).

80. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.

81. In the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 (a)) and the existence of a "grave risk" (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). This task falls in the first instance to the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested

parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation which, however, remains subject to European supervision. Hence, the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8.

82. A harmonious interpretation of the European Convention and the Hague Convention can be achieved, provided that the following two conditions are observed. First, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to ascertain that those questions have been effectively examined. Secondly, those factors must be evaluated in the light of Article 8 of the Convention.

83. Lastly, Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this regard: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted, is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

(b) Application of these principles to the present case

84. The Court reiterates that in January 2016 the first applicant, who since 2011 had been living in Nakhodka, Russia, arrived in Donetsk, Ukraine, where the second applicant, aged nine, was living with her father. She then took her to Russia without A.S.'s knowledge or consent and never returned. Following an application lodged by A.S., on 16 August 2016 the District Court delivered a judgment finding the second applicant's removal from Ukraine, the State of her habitual residence, unlawful and ordering her return to Donetsk (see paragraph 31 above). That judgment was upheld on appeal by the Regional Court on 12 October 2016 (see paragraph 34 above).

85. The Court reiterates that a parent and child's mutual enjoyment of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see *Edina Tóth v. Hungary*, no. 51323/14, § 49, 30 January 2018).

86. The respondent Government argued that there had been no interference with the applicants' right to respect for their family life. 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 and that an order for return, even if it has not been enforced, constitutes in itself an interference with the right to respect for family life (see *Šneersone and Kampanella v. Italy*, no. 14737/09, § 88, 12 July 2011, with further references). Therefore, in the absence of any circumstances requiring a departure from that approach, the Court concludes that the District Court's judgment of 16 August 2016 ordering the return of the second applicant to Ukraine – Donetsk – constituted an interference with the applicants' right to respect for their family life.

87. The interference with the applicants' right to respect for their family life found above will be considered to be in breach of Article 8 unless it satisfies the requirements of paragraph 2 of that provision. It thus remains to be determined whether the interference was "in accordance with the law", pursued one or more legitimate aims as defined in that paragraph and was "necessary in a democratic society" to achieve them.

88. The Court observes that the decision to return the second applicant to the place of her habitual residence in Ukraine – Donetsk – was taken by the District Court under the Hague Convention, which entered into force between Russia and Ukraine on 1 June 2012, and Chapter 22.2 of the Code of Civil Procedure of the Russian Federation, which governs the procedure for the examination of applications for the return of children unlawfully removed to, or retained in, the Russian Federation, in accordance with international treaties to which the Russian Federation is a party (see paragraphs 38 and 42 above).

89. The applicants argued that the Russian courts had had no grounds for applying the provisions of the Hague Convention in the circumstances of the present case. They submitted, in particular, that the removal had been carried out from the "DPR", a territory over which Ukraine had no effective control and where the application and implementation of Ukraine's obligations under the Hague Convention had been "limited and not guaranteed". The applicants further challenged the conclusions of the Russian courts as to the wrongfulness of the second applicant's removal, drawing the Court's attention to the alleged non-applicability of Ukrainian law on the territory of the "DPR" and the illegitimate nature of the judgment of the Budyonovskiy District Court of Donetsk of 2 June 2014 maintaining that the second applicant's residence should be with her father (see paragraphs 60-62 above).

90. The Court notes that the first applicant never raised these arguments before the domestic courts. In any event, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention: it is for the domestic courts to resolve problems of interpretation and application of domestic legislation, and of rules of general international law and international treaties (see *X v. Latvia*, cited above, § 62, with further references). On the basis of the evidence in their possession, the domestic courts established that A.S. had actually been exercising his rights of custody over the second applicant at the time of her removal by the first applicant, and that the change of the second applicant's habitual residence had been carried out by the first applicant without his consent and had therefore been unlawful, triggering the duty under the Hague Convention to return the second applicant to Ukraine.

91. In the light of paragraphs 88-90 above, the Court finds that the impugned interference was "in accordance with the law" within the meaning of Article 8 of the Convention. It further finds that it had the legitimate aim of protecting the rights and freedoms of the child (the second applicant) and her father (A.S.).

92. 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 relevant international instruments, and whether when striking a balance between the competing interests at stake, appropriate weight was given to the child's best interests, within the margin of appreciation afforded to the State in such matters. In this connection, whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by this Article (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007).

93. In the present case A.S. submitted an application to the Russian authorities for the second applicant's return under the Hague Convention within a short period of two months after the latter's departure from Ukraine (see paragraph 24 above), and the judgments of the District Court and the Regional Court were delivered seven and nine months respectively after the applicants arrived in Russia. It follows that both the submission of the application for return to the Russian authorities and the domestic proceedings for the child's return took place within the period of less than one year referred to in the first paragraph of Article 12 of the Hague Convention, which provides for an immediate return in such cases.

94. The Court notes, however, that the first applicant opposed the second applicant's return to the place of her habitual residence in Ukraine – Donetsk – arguing that it would constitute "a grave risk" for the child within the meaning of Article 13 (b) of the Hague Convention. She claimed, in

particular, that A.S. had been mistreating and neglecting the second applicant. She also argued that the child's return to Ukraine would put her physical and emotional well-being at risk in view of the ongoing military conflict on the territory of the "DPR" of which Donetsk was a part (see paragraph 26 above). It was therefore for the domestic courts to carry out meaningful checks, enabling them to either confirm or exclude the existence of a "grave risk". The Court must therefore ascertain whether the first applicant's objections to her daughter's return were genuinely taken into account by the domestic courts, whether the decisions on this point were sufficiently reasoned, and whether the courts satisfied themselves that adequate safeguards and tangible protection measures were available in the country of return (see *Andersena v. Latvia*, no. 79441/17, § 118, 19 September 2019).

95. Under Article 13 (b) of the Hague Convention, the courts examining the application for return are not obliged to grant it "if the person, institution or other body which opposes its return establishes that ... there is a grave risk". It is the parent who opposes the return who must, in the first place, adduce sufficient evidence to this effect. Furthermore, the Court notes that while the latter provision is not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" – it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13 (b) concerns only the situations which go beyond what a child might reasonably bear.

96. The Court further reiterates that it is not its task to take the place of the competent authorities in examining whether there would be a grave risk that the second applicant would be exposed to psychological or physical harm, within the meaning of Article 13 of the Hague Convention, if she returned to Donetsk. However, as outlined in the general principles above (see paragraph 81 above), the Court is competent to ascertain whether the Russian 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, most recently, *Vladimir Ushakov v. Russia*, no. 15122/17, § 96, 18 June 2019).

97. Turning to the circumstances of the present case, the Court observes that the District Court addressed the arguments advanced by the first applicant. It found the allegations of neglect and improper treatment of the child by A.S. unsubstantiated and refuted by the evidence in its possession (certificates, receipts, photographs and video materials). As regards the alleged existence of a "grave risk" associated with the place to which the child was to be returned in the State of her habitual residence – the ongoing military conflict in Donetsk – the District Court took the view that occasional military actions there did not as such constitute an exception

relating to a very serious risk of harm to the child. The District Court considered that the alleged risk was a general consequence of living in a conflict zone and not individual to the child. In this connection, the District Court noted that, although the military conflict had been ongoing in Ukraine since April 2014, it had not been until 2016 that the first applicant had taken the second applicant to Russia. It further considered that she had not provided any evidence that the alleged risk could not be addressed by the competent Ukrainian authorities and that the second applicant's removal from her habitual place of residence was the only possible way of protecting her from the alleged risk. The Regional Court endorsed the above reasoning of the District Court and held that the first applicant's argument to the effect that the child's return to her father in Donetsk would put her life and health at risk due to the military actions there had not been supported by relevant and admissible evidence.

98. The Court notes that the reasoning of the District Court related to the assessment of the gravity of the security situation in the place of the second applicant's habitual residence in Ukraine – Donetsk – was rather scarce. So was the District Court's assessment of the impact of this general security situation on the second applicant and of whether the level of such impact was sufficient to engage the "grave risk" exception under Article 13 (b) of the Hague Convention. In reaching the conclusion as to the absence of "a very serious risk of harm to the child", the District Court did not take into account or rely on any Government reports, official documents from international organisations closely following the situation in Donetsk and/or travel advice detailing the security situation there at the material time. The Court cannot but observe at the same time that the situation in Donetsk could be easily ascertained by a wide number of sources, which unanimously attested to serious human rights violations and abuses in eastern Ukraine of which Donetsk was part, including thousands of conflict-related civilian casualties and deaths counting both adults and children, the vast majority of which had been caused by shelling, including from artillery and large-caliber mortars (see paragraphs 48-52 above). Nor did the District Court assess whether or not the circumstances pertaining in Donetsk at that time had been more than isolated incidents in an unsettled political environment to reach the threshold for "grave risk". It failed to consider the views of the second applicant expressed in the report of 21 July 2016 by the chief inspector of the local childcare authority, which mentioned, in particular, that she was afraid to return to Donetsk because she feared gunfire and exploding bombs (see paragraph 31 above), and therefore supported the argument that she would be at risk in the place where she was to be returned. Furthermore, the text of the District Court's judgment remained silent on the availability of adequate and effective measures in the State of the second applicant's habitual residence – Ukraine – to prevent or mitigate the alleged "grave risk" upon the child's return,

whether the parent left behind, A.S., could provide safety measures and whether the first applicant would have timely access to justice and court proceedings following the second applicant's return.

99. Having regard to the foregoing, the Court considers that the "grave risk" allegation capable of constituting an exception to the second applicant's return in application of Article 13 (b) of the Hague Convention was not genuinely taken into account by the Russian courts and that their decisions dismissing the first applicant's objections were not sufficiently reasoned in order to enable the Court to ascertain that those questions were effectively examined and evaluated in the light of Article 8 of the Convention.

100. For these reasons, the Court concludes that the applicants suffered a disproportionate interference with their right to respect for their family life in that the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 of the Convention, the District Court having failed to carry out an effective examination of the applicants' allegations under Article 13 (b) of the Hague Convention. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 2 AND/OR 3 OF THE CONVENTION

101. The applicants complained that the second applicant would face a risk of being subjected to treatment in breach of Article(s) 2 and/or 3 of the Convention if the judgment of the Tsentralniy District Court of Khabarovsk of 16 August 2016 ordering her return to Donetsk, Ukraine, was enforced. The first applicant further complained that this would also amount to a violation of her right not to be subjected to treatment proscribed by Article 3 of the Convention. The relevant part of Article 2 of the Convention reads as follows:

> "Everyone's right to life shall be protected by law..."

Article 3 reads as follows:

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

102. The Government submitted that the second applicant would not face a risk of being subjected to treatment in breach of Article(s) 2 and/or 3 of the Convention if the judgment ordering her return to Donetsk was enforced. Nor would enforcement of the judgment in question amount to a violation of the first applicant's right not to be subjected to treatment proscribed by Article 3 of the Convention. The Government noted the absence of any evidence to the contrary. In this connection, they relied on the fact that in March 2016 A.S. had begun renting a flat outside the conflict zone, in Kramatorsk, where he intended to live with the second applicant

following her return to Ukraine. The Government concluded that the applicants' complaint should be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

103. Referring to reports by the United Nations regarding the civilian casualties in South-Eastern regions of Ukraine (Donetsk and Luhansk Regions) since the beginning of the military conflict in 2014 and by United Nations International Children's Emergency Fund regarding the serious psychological trauma experienced by children in those regions because of the scale of violence they had witnessed, the applicants submitted that the second applicant's return to Donetsk would put her physical and emotional safety at risk. They pointed to the recommendation of the Crisis Management Centre of the Russian Ministry of Foreign Affairs "to take into account the risks associated with the armed confrontation in the South-Eastern regions of Ukraine (Donetsk and Luhansk Regions)" and "to avoid visiting the areas of past or present military conflict" as well as similar recommendations issued by other States, including, but not limited to, the United Kingdom, the United States of America and Canada. In such circumstances, the Russian courts' conclusion that "occasional military actions in various settlements in Ukraine [did] not as such constitute an exception relating to a very serious risk of harm to the child" was arbitrary, as was their conclusion to the effect that the "risk [was] not individual to the child, but rather a general consequence of living in a conflict zone". The applicants submitted that when it came to warfare or civil unrest, it was neither necessary nor possible to draw any distinction between a direct risk to a particular individual and the risk to which the relevant population is generally exposed. The applicants therefore considered that the insufficient analysis by the Russian courts of the circumstances involving alleged risks under Article(s) 2 and/or 3 of the Convention and their failure to give due consideration to international and domestic sources regarding the realities of life in Donetsk had in itself amounted to a breach of those provisions with respect to the second applicant. They further argued that the awareness of the risks and hardships the second applicant would be subjected to in Donetsk following her return, the feeling of helplessness caused by the inability to help her, and the anxiety and stress associated with this would inevitably cause serious psychological suffering to the first applicant, in breach of Article 3 of the Convention.

104. The Court notes that these complaints are linked to the one examined above under Article 8 of the Convention and must therefore likewise be declared admissible.

105. The Court further notes that it has already examined the principal arguments raised under Articles 2 and 3 of the Convention in relation to the second applicant in its considerations under Article 8. Having regard to its findings with respect to Article 8 (see paragraphs 94-100 above), it does not

find it necessary to examine separately the complaints under Articles 2 and 3 in respect of the second applicant.

106. In so far as the first applicant complained that the second applicant's return to Donetsk, Ukraine, would cause her serious psychological suffering in breach of Article 3 of the Convention, the Court notes that this complaint is inextricably intertwined with her complaint under Article 8 of the Convention. Having regard to its findings with respect to Article 8 (see paragraphs 94-100 above), it does not find it necessary to examine the same issue under Article 3.

III. RULE 39 OF THE RULES OF COURT

107. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

108. It considers that the indication made to the Government under Rule 39 of the Rules of Court should remain in force until the present judgment becomes final or until the Court takes a further decision in this connection.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. 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

110. The applicants claimed compensation for non-pecuniary damage sustained as a result of the alleged violations of the Convention in an amount to be determined by the Court.

111. The Government considered that no award in respect of non-pecuniary damage should be made in the present case.

112. The Court considers that, in the circumstances of the present case, the finding of a violation of Article 8 of the Convention constitutes sufficient just satisfaction for the applicants.

B. Costs and expenses

113. The applicants also claimed 40,000 euros (EUR) for legal fees incurred before the domestic courts and the Court, representing 160 hours of legal work at the rate of EUR 250 per hour, split up as follows: EUR 10,000 for the services of Mr E.A. Mezak, and the remaining EUR 30,000 for the services of Mr A.N. Laptev. In support of this claim, the first applicant submitted a copy of a legal services agreement with Mr A.N. Laptev dated 10 February 2016, and a copy of a legal services agreement with Mr E.A. Mezak and Mr A.N. Laptev dated 11 November 2016, obliging the first applicant to pay, within three months of the judgment of the Court becoming final, legal fees in the amount of EUR 250 per hour. The amount in respect of legal fees was to be paid directly into the representatives' bank accounts. The applicants further claimed EUR 6 in postal expenses. They submitted the relevant receipt.

114. The Government considered that the applicants' claims were excessive and unsubstantiated. The case was not complex and the case file was not voluminous. An hourly rate of EUR 250 for the work of the applicants' representatives was unreasonable. Furthermore, it had not been shown that the costs and expenses claimed had been actually incurred.

115. According to the Court's case-law, an applicant is entitled to the reimbursement of his costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 130, ECHR 2016, and, more recently, *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, ECHR 2017). A representative's fees are considered to have been actually incurred if an applicant has paid them or is liable to pay them (see *Ždanoka v. Latvia*, no. 58278/00, § 122, 17 June 2004, and *Merabishvili*, cited above, § 372).

116. The Court notes that Mr E.A. Mezak did not seek leave to represent the applicants after the notification of the case to the Government, in accordance with Rule 36 §§ 2 and 4 (a) of the Rules of Court. The Court therefore rejects the applicants' claim for legal fees in respect of Mr E.A. Mezak (see *Terentyev v. Russia*, no. 25147/09, § 32, 26 January 2017).

117. Having regard to the documents in its possession, the criteria outlined in paragraph 115 above, and bearing in mind that the applicants were granted EUR 850 in legal aid for their representation by Mr A.N. Laptev, the Court considers it reasonable to award the sum of EUR 4,150 covering costs under all heads. The award should be paid directly into the bank account of Mr A.N. Laptev.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by four votes to three, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by four votes to three, that there is no need to examine the complaints under Articles 2 and 3 of the Convention in respect of the second applicant;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 3 of the Convention in respect of the first applicant;

5. *Decides*, by six votes to one, to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to enforce the second applicant's return to Donetsk, Ukraine, until such time as the present judgment becomes final or until further notice;

6. *Holds*, by four votes to three, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

7. *Holds*, by four votes to three,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,150 (four thousand one hundred and fifty euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid to the bank account of Mr A.N. Laptev;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Schembri Orland;
(b) Joint dissenting opinion of Judges Lemmens, Dedov and Elósegui.

P.L.
M.B.

CONCURRING OPINION OF JUDGE SCHEMBRI ORLAND

1. I was among the majority who voted to find a violation of Article 8 in respect of the applicants in this case. As one would expect, the case at hand, like others which have been addressed by this Court, raises an issue concerning the interplay between the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), and Article 8 of the European Convention on Human Rights (ECHR). However, it is my opinion that the conclusion of a violation reached by the Court is fully in keeping with the spirit and letter of the Hague Convention and with the need to ensure the child's best interests as part of the fair balance assessment required by Article 8 of the ECHR.

2. This case gave the Court the opportunity to examine the obligations of a member State under Article 8 of the ECHR in the context of the Hague Convention. In the particular circumstances of this case, the child was to be returned to a zone of military conflict in eastern Ukraine (Donetsk). Against such a background, the best interests of the child must be of primary consideration, and the Hague Convention objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child".

3. As in all Hague child abduction cases, there is a presumption that a speedy return to the country of habitual residence is in the child's best interests, unless the exceptions set out in Articles 12, 13 and 20 of the Hague Convention subsist. The Hague Convention thus contemplates several situations where domestic authorities may refrain from ordering the return of the child. One such situation is where 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 (Article 13(b)).

4. The facts of the case are relatively simple and are set out in the judgment in a straightforward manner. What sets this case apart from others which have been brought before our Court in such matters is the circumstance of military conflict, which at the relevant time (2016[1]) was prevalent in eastern Ukraine, a region which included Donetsk, the child's place of habitual residence prior to her abduction. The situation revealed by the international reports and recommendations is not restricted to a few sporadic sorties, isolated incidents, or even to the targeting solely of military and/or non-civilian targets, but concerns "serious human rights violations and abuses in eastern Ukraine of which Donetsk was part, including thousands of conflict-related civilian casualties and deaths counting both adults and children, the vast majority of which had been caused by shelling,

[1] The Regional Court gave judgment on 12 October 2016 whilst the Regional Court and the Superior Court refused to refer the case for further consideration on 5 May 2017 and 29 September 2017 respectively.

including from artillery and large-caliber mortars" (see paragraph 98, referencing paragraphs 48-52, of the judgment).

5. The question therefore presented itself as follows: was the return order made by the Russian domestic courts in applying and interpreting the Hague Convention in breach of Article 8 of the ECHR given that the return would effectively place the child in a zone of military conflict? Examined through the ECHR lens, this question is one of judicial review whereby the court seised of the return procedures must be deemed to have genuinely taken into account the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention. The returning court must then also have taken a decision that is sufficiently reasoned on this point, in order to enable the Court to ascertain that those questions have been effectively examined. Furthermore, a balancing exercise must have been carried out regarding the separate interests of the father, mother and child, ensuring that the best interests of the child, to ensure self-development in a sound environment, are evaluated as part of this balancing exercise[2].

6. There is no doubt that the mother wrongfully abducted her daughter who, at the time, was 10 years old. There is also no doubt that two years had elapsed since the conflict had commenced and, although she unsuccessfully attempted to reverse the original custody order in 2014, she waited a further 18 months before unlawfully removing the child without the father's consent to Russia.

7. No further significance should be attached to this apparent (unexplained) inaction on the part of the first applicant other than an evidential one, being part of the evidence which should be evaluated in the examination of the *grave risk* plea. However, such inaction cannot, and should not of itself, be the decisive proof which absolves the returning court of its obligation to ascertain the seriousness of the risk posed to the child.

8. Indeed, whilst the procedural rules on the burden of proof are relevant, the primacy of the child's best interests imposes on the reviewing court a greater responsibility to secure guarantees for the child's protection in situations where the gravity of the risk is self-evident due to regional conflict. The child cannot speak in his/her own defence, and the often conflicting interests of both parents should not make them the ultimate interlocutors as regards the child's interests. The court, on the other hand, is responsible as *parens patriae* to act for the child, and to do so diligently to secure the child's protection.

9. This is not in conflict with the principles and aims of the Hague Convention. Perhaps it can be argued that the military situation in Donetsk was sufficiently considered by the domestic courts when they determined that "the occasional military actions in various settlements in Ukraine did

[2] See, in particular, *Vladimir Ushakov v Russia* at §§ 82 and 83.

not as such constitute an exception relating to a very serious risk of harm to the child. That risk was not individual to the child, but rather a general consequence of living in a conflict zone"[3]. The Regional Court, on appeal, upheld the judgment on the basis of a lack of admissible and relevant evidence that the child's life and health would be put at risk.

10. It is true that the domestic courts are better placed to appraise the evidence in the case before them. However, this case does not concern the evaluation of witness testimony, or the credibility of the facts. Rather the issue is one capable of objective evaluation. The conclusion reached by the domestic courts is therefore quite surprising given the international reports, quoted in the judgment, which depict a very precarious situation of high civilian casualties, uncertainty and human rights violations. Thus shown, a serious risk of harm to a general population in such a zone of regional military conflict should constitute clear and convincing evidence of the risk to the child.

11. The oft quoted US appellate judgment in *Friedrich*[4] comes to mind, where it was held *inter alia* that a grave risk could only exist when the return would put the child in imminent danger prior to the resolution of a custody dispute. The relevance of the judgment lies in the pronouncement of the *Friedrich* court, which specifically listed "a zone of war, famine or disease" as conditions that would constitute a grave risk of harm. This *dictum* has been widely referenced. The refusal to return a child to a war zone is, and should be, perfectly compatible with the Hague Convention principles as it falls squarely within the exception of Article 13 (b) even in a narrow construction.

12. In a sense, it could be argued that the father implicitly acknowledged that risk when he informed the court he was willing to move away from the conflict zone[5]. Yet the domestic courts did not make any further demands for specific guarantees of the child's safety, for example, by issuing a specific order for her relocation and monitoring of the same, not even by engaging the intervention of the competent central authority to ensure the security of the child on her return to a safe haven. The *ex parte* evidence produced by the father could not, on its own, have been sufficient to dispel the doubts which even a superficial objective examination of the situation would have raised.

13. The ECHR case-law requires that we must ascertain whether the first applicant's objections to her daughter's return were genuinely taken into account by the domestic courts, whether the decisions on this point were sufficiently reasoned, and whether the courts satisfied themselves that

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[3] Paragraph 97 of the judgment.

[4] *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996), [INCADAT Reference: HC/E/USf 82].

[5] The father stated he lived in Donetsk and worked in Kramatorsk (paragraph 28). He subsequently stated he could move from Donetsk (paragraph 33).

adequate safeguards and tangible protection measures were available in the country of return (see *Andersena v. Latvia*, no. 79441/17, § 118, 19 September 2019). It is the finding of the Court that the domestic courts failed to meet this threshold by failing to weigh in the balance the public reports of human rights violations, conflict and abuses in the Donetsk region. These facts were well known at the time and fall within the authority of domestic courts, which can take judicial cognisance of them *ex proprio motu.*

14. This is compatible with a Hague-friendly approach. Since 1980, the legal landscape has changed with the United Nations Convention on the Rights of the Child 1989 (UNCRC), specifically Article 3 of that Convention, which talks of the paramount interests of the child (see Article 3 § 1 UNCRC[6]) The challenge is to interpret the conventions harmoniously and to achieve a balance which would not relegate the Hague Convention to a dead letter. I do not believe this judgment will present such a peril for the Hague Convention in view of the very specific factual background to the case.

15. The very suggestion of ordering the return of a child to a war zone, or zone of military conflict, is an odious one, and should awaken even the most detached of observers to the immediacy of ensuring a secure environment for that child. It is to be recalled that Article 13 (b) of the Hague Convention lists a third exception to the child's prompt return, where the grave risk would "otherwise place the child in an intolerable situation". I would say without hesitation that living in a military conflict zone would qualify for the application of this third exception.

16. I fully endorse the Court's findings and conclusions in the judgment. The ostrich-like approach of the Russian domestic courts to the events in eastern Ukraine, constituting a zone of military conflict with serious human rights violations and indiscriminate risks for civilians, represents a failing on their part to apply the standards and guarantees imposed by both the Hague Convention and the ECHR, for the protection of the best interests of the child – nay, for the very safety of the child.

[6] "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

JOINT DISSENTING OPINION OF JUDGES LEMMENS, DEDOV AND ELÓSEGUI

1. To our regret, we are unable to agree with the majority's finding of a violation of Article 8 of the Convention. In our opinion, the domestic courts applied the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") in a way that is fully compatible with Article 8 of the European Convention on Human Rights (the "Convention").

2. Like the majority, we start from the premise that the order to return the second applicant constituted an interference with the applicants' right to respect for their family life (see paragraph 86 of the judgment).

The majority further find that the interference was in accordance with the law and pursued a legitimate aim (see paragraphs 88-91 of the judgment). We agree.

3. We also agree with the general principles relating to the "necessity" of the interference, set out in paragraphs 76-83 of the judgment.

In particular, we would refer to paragraph 83, which deals with the procedural obligation imposed by Article 8 on the domestic authorities in the context of an application for return made under the Hague Convention and in the presence of an allegation that such return would expose the child to a "grave risk" within the meaning of Article 13, first paragraph (b), of the Hague Convention: the domestic courts "must not only consider arguable allegations of a 'grave risk' for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case" (quoted from *X v. Latvia* [GC], no. 27853/09, § 107, ECHR-2013).

In our opinion, the Russian courts complied with that obligation, as we shall try to demonstrate below.

4. As far as the allegations of a "grave risk" are concerned, the majority focus on the first applicant's objection based on the general security situation in the Donetsk region, due to the ongoing military conflict in that region (see paragraphs 26 and 32 of the judgment). According to the majority, the applicant's allegations "were not genuinely taken into account by the Russian courts" and the courts' decisions dismissing the applicant's objections to the return of her daughter "were not sufficiently reasoned" (see paragraph 99 of the judgment).

It is on this point that we disagree with the majority.

5. The District Court dismissed the first applicant's argument on the ground that it was not supported "by any objective and reliable evidence" (see paragraph 31 of the judgment).

It held in the first place that "occasional military actions in various settlements in Ukraine did not as such constitute an exception relating to a very serious risk of harm to the child", and that the alleged risk "was not individual to the child, but rather a general consequence of living in a conflict zone" (ibid.). We find this a reasonable answer to the first

applicant's argument. Not every risk constitutes a legitimate reason for not ordering the return of the child. As the majority acknowledge, the exception provided for in Article 13, first paragraph (b), of the Hague Convention "concerns only the situations which go beyond what a child might reasonably bear" (see paragraph 95 of the judgment, repeating what the Court stated in *X v. Latvia*, cited above, § 116). It is therefore necessary to assess the impact of the security situation on the health and well-being of the second applicant, or in other words to examine whether she ran an "individual" risk.

In fact, the dismissal of the first applicant's argument should be read in the light of the counter-argument made by A.S., the father of the child. He argued that no military actions had been ongoing in the part of Donetsk where he and his daughter had lived, and he illustrated the peaceful and quiet life in that place by photographs and videos (see paragraph 27 of the judgment). The District Court thus dismissed the first applicant's argument, which was based on the *general* situation in the region, by taking into account the *specific* situation prevailing in the place to which the child would return.

Moreover, the District Court relied on other grounds as well to dismiss the first applicant's objection to the return of her daughter: the first applicant had waited two years before taking her daughter from Ukraine to Russia (which was an indication of the exaggerated character of the alleged gravity of the risk); the first applicant did not demonstrate that the Ukrainian authorities could not address the alleged risk; the first applicant did not demonstrate that the removal from her daughter from Ukraine to Russia was the only possible way of protecting her from the alleged risk (see paragraph 31 of the judgment). Again, these were arguments based on an assessment of the concrete situation in the place of residence of A.S.

6. Before the Regional Court, the first applicant reiterated her argument that the military actions in Donetsk "would put the second applicant's life and health at risk" (see paragraph 32 of the judgment).

A.S. repeated that no military actions had been underway in Donetsk and that his flat in Donetsk was situated 25 km from the place which had been the scene of heavy fighting. He was, moreover, prepared to move his home address even further away (see paragraph 33 of the judgment).

The Regional Court endorsed the reasoning of the District Court, confirming that the first applicant's argument about the risk to her daughter's life and health "had not been supported by admissible and relevant evidence" (see paragraph 34 of the judgment).

7. From the point of view of the procedural obligation imposed by Article 8 on the domestic courts (see paragraph 3 above), we conclude that the first applicant's argument was duly examined by the District Court, whose decision was endorsed by the Regional Court.

In this respect, it should be noted that before the domestic courts the first applicant only made general allegations about the security situation in Donetsk, without producing any concrete evidence. The international reports and the travel advice from the Russian Ministry of Foreign Affairs, which she has now produced before the Court (see paragraph 64 of the judgment), were not submitted before the domestic courts.

The majority consider that the domestic courts should have gone further. They blame the courts for not having relied on any national or international sources concerning the security situation in Donetsk, and therefore for not having taken into account the fact that there had been "thousands of conflict-related civilian casualties and deaths" (see paragraph 98 of the judgment).

We respectfully disagree with this reproach. In proceedings for the return of a wrongfully removed child the objective is "to secure the prompt return" of the child (Article 1 (a) of the Hague Convention). The Court has accepted that this objective corresponds to a "specific conception" of "the best interests of the child", as stated in the explanatory report on the Hague Convention (*X v. Latvia*, cited above, § 95). In order to meet this objective, the competent authorities "shall act expeditiously" (Article 11, first paragraph, of the Hague Convention). Moreover, the return "shall" be ordered (Article 12, first paragraph, of the Hague Convention), unless "the person, institution or other body which opposes [the child's] return establishes" that one of the exceptions to the principle of return applies (Article 13, first paragraph, of the Hague Convention). These provisions thus not only put the burden of proof ("establishes") on the opposing party, in this case the first applicant, but also oblige the courts to decide the case "expeditiously". For the courts to decide that there would be a "grave risk", they must therefore be able to rely on evidence adduced by the opposing party. To oblige the courts to look on their own initiative for other evidence would not be compatible with the nature of return proceedings.

8. We are further of the opinion that the domestic courts rejected the first applicant's argument relating to the military conflict in Ukraine on the basis of a concrete assessment of the alleged risk to the child's physical and emotional well-being. They gave specific reasons in the light of the circumstances of the case.

In particular, we observe that the domestic courts did not deny that there was a conflict situation in Donetsk. However, they did not take into account the general situation alone. They assessed the specific impact of that situation on the second applicant, on the basis of the evidence adduced by both parties. Their conclusion was that no "grave risk" of physical or psychological harm or other intolerable situation for the child had been established by the first applicant (see paragraph 31 of the judgment).

It is of course possible to disagree with the domestic courts' assessment of the risk. However, it is not for the Court to substitute its own assessment

for that of the domestic authorities, unless their assessment has been arbitrary or manifestly unreasonable (see, in particular, in the context of the assessment of an alleged risk in proceedings falling under the Hague Convention, *Raban v. Romania*, no. 25437/08, § 38, 26 October 2010; *B. v. Belgium*, no. 4320/11, § 60, 10 July 2012; and *Royer v. Hungary*, no. 9114/16, § 60, 6 March 2018). We do not believe that this is the case here.

9. To sum up, we are of the opinion that the domestic courts applied the Hague Convention in conformity with the principles developed in the Court's case law. The majority place on the domestic authorities an obligation which goes beyond what is required by Article 8 of the Convention and does not sit well with the specific nature of return proceedings under the Hague Convention.

In our opinion, by ordering the second applicant's return to Donetsk, the domestic courts did not violate Article 8 of the Convention.

10. As a consequence, we consider that it would be necessary to examine the complaints under Articles 2 and 3 of the Convention in respect of the second applicant. If we had to examine these complaints on the merits, we would conclude that there has been no violation of these Articles either.

11. We concur in the decision on the first applicant's complaint under Article 3. This is a complaint of a different nature from that of the above-mentioned complaint of the second applicant. Here, we can agree with the majority that, given the Court's decision on Article 8, there is no need to examine the first applicant's complaint separately.

12. With respect to the continued indication of the measure under Rule 39 of the Rules of Court, we have expressed different votes among ourselves. Judges Lemmens and Dedov agree with the majority that, given the Court's finding of a violation of Article 8, the Rule 39 measure should remain in force until the present judgment has become final. Judge Elósegui disagrees, on the basis of the minority's opinion that there has been no violation of Article 8 and of the ensuing need, in principle, for an expeditious enforcement of the judgment of the Regional Court.