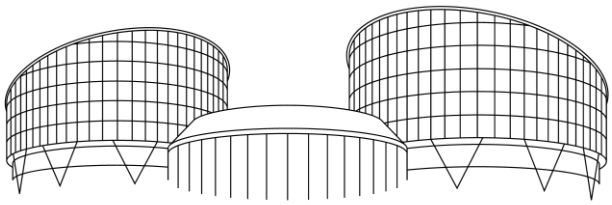

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF QAMA v. ALBANIA AND ITALY

(Application no. 4604/09)

JUDGMENT

STRASBOURG

8 January 2013

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 Qama v. Albania and Italy,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Guido Raimondi,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 4 December 2012,

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

PROCEDURE

1. The case originated in an application (no. 4604/09) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Albanian national, Mr Flamur Qama ("the applicant"), on 23 December 2008.

2. The Albanian Government ("the Government") were represented by their then Agent, Mrs E. Hajro and, subsequently, by Ms L. Mandia of the State Advocate's Office. The Italian Government were represented by their then co-Agent, Mr N. Lettieri and, subsequently, by Ms P. Accardo.

3. The applicant alleged, in particular, that there had been a breach of Articles 6 § 1 and 8 of the Convention on account of the Albanian and Italian authorities' failure to secure the right of contact with his child in Italy.

4. On 21 September 2009 the application was communicated to the respondent Governments. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Durrës. He has a son who was born on 25 August 1994. The son is currently 18 years old.

6. In September 1999 the applicant's late spouse, who was suffering from a serious disease, entered Italy irregularly, together with the son, in order to obtain medical treatment. On an unspecified date the applicant joined his spouse and son in Italy.

7. On an unspecified date in either August or September 2002, following disagreements with his in-laws, the applicant was expelled from Italy since he did not have a residence permit. His wife and son, whose situation had not yet been regularised, continued to remain in Italy. His wife died on 7 October 2002.

A. Custody proceedings in Italy

8. On 17 October 2002, the applicant's sister-in-law, Z., filed an action with the Ancona Youth Court ("the Italian court" - *tribunale per i minorenni*), seeking custody of the applicant's child.

9. On 30 December 2002 a report of the local social health centre stated that the child feared to return and live with the father because of his alleged ill-treatment of the deceased mother. The report further mentioned that the father had abandoned the child and the spouse without notice at a time when they needed him most.

10. On 4 June 2003 the Italian court granted Z.'s request. It entrusted Z. with the custody of the applicant's child, under the supervision of the Social Service of the city of Senigallia (*affida il minore alla zia ... sotto la vigilanza del Servizio Sociale del Comune di Senigallia...*). It further appointed the Mayor of Senigallia as the child's temporary guardian (*tutore provvisorio*). The court suspended the parents' parental rights (*dichiara sospesa la potestà dei genitori*) on the ground that they had allowed the child to leave Albania without addressing the serious difficulties that he would subsequently face. It further prohibited the child's removal from Italian territory. It assigned the International Social Service ("ISS" – an NGO) to conduct an investigation into the applicant's family situation. No provision was made as regards the applicant's visiting or contact rights in respect of his child.

11. On 25 September 2003 the ISS, after trying to contact the applicant, informed the Italian court that he refused to speak to them. He simply requested that the child be returned to him. Following contacts with his neighbours, the ISS declared that the applicant had re-married and his wife was expecting a child. Being unemployed, he was living on his spouse's income.

12. On 22 March 2004 the Italian social services provided the court with an update on the applicant's child. By that time, the child's status in Italy had been regularised and his situation appeared to be balanced.

13. On 4 April 2005 the Italian Ministry of Justice informed the applicant of the operative provisions of the decision of 4 June 2003 and

provided him with an update on his child as of 6 November 2004. The applicant was further informed of the possibility of lodging an appeal with the Italian court, through a lawyer, against that decision.

14. On 21 December 2005 the letter was translated and certified, in the applicant's presence, by an Albanian notary public.

15. In a statement of 15 January 2007 before the Italian court the applicant's child stated that he had not been in contact or seen the applicant for a number of years. He did not wish to speak to the applicant on the telephone because he had allegedly been ill-treated by him in the past.

16. On 7 December 2007 the applicant's child confirmed to the Italian court the statement made on 15 January 2007.

B. Applicant's efforts to contact his child in Italy

17. In a letter of an unspecified date, which was sent by registered mail and was registered with the Italian court's registry on 22 January 2007, the applicant stated that his in-laws had abducted his child and that he had no contact with him. He stated that the child's custody had been entrusted to his aunt without the applicant's prior consent and that he sought the Italian authorities' assistance in re-establishing contact with the child.

18. In a letter, which was sent by registered mail and was registered with the Italian court's registry on 22 February 2007 and signed by the applicant's Albanian lawyer, the applicant requested that his right of access to his child pursuant to the Durrës District Court's decision of 30 June 2006 (see paragraph 26 below) be enforced by the Italian authorities. As he could not travel to Italy, he requested the Italian court to allow his child to travel to Albania, as indicated in the Albanian court's decision. He stated that he earned a monthly income of 700 euros, that he lived in a flat measuring 70 sq. m which offered appropriate accommodation, that he had a clean criminal record, that his feelings and affection for his child had neither changed nor ceased and that his efforts to contact the child had been met with the aunt's obstinate refusal. The applicant further stated that his request was aimed at exercising the right of contact as established by the Albanian court on 30 June 2006, including unobstructed telephone contact with his child, or in any other manner deemed appropriate by the Italian court. He further requested that the child's custody be entrusted to the Italian social services. However, he did not seek the child's permanent return to Albania. No power of attorney was submitted to the Italian court's registry.

19. It would appear that on 15 November 2007 the applicant, relying on the Hague Child Abduction Convention and the Hague Jurisdiction Convention (see paragraphs 36-43 below), requested the Italian Ministry of Justice to institute proceedings for the validation of the Albanian court's judgment of 30 June 2006 and the enforcement of his right of contact with his child.

C. Proceedings concerning the return and wrongful retention of the applicant's child in Albania

20. On 27 November 2002 the applicant lodged a criminal action with the Durrës District Court ("the District Court") pursuant to Article 127 of the Criminal Code ("CC") and Article 59 of the Code of Criminal Procedure ("CCP"), requesting the return of his child who had allegedly been wrongfully retained in Italy.

21. On 13 January 2003 the District Court decided to discontinue the case (*vendosi pushimin e çështjes*) on the ground that the applicant's action was unsubstantiated.

22. On 7 October 2003 the applicant filed another action with the District Court accusing his in-laws of wrongful retention of the child contrary to Article 127 of the CC.

23. On 29 December 2004 the District Court found the applicant's in-laws guilty as charged and sentenced them, including Z., to a fine. This decision was upheld by the Court of Appeal and the Supreme Court in 2005 and 2007 only in respect of Z. The proceedings took place in the absence of Z., who apparently was represented by a lawyer. No reference was made to the Italian court's decision of 4 June 2003 (see paragraph 10 above).

24. On 11 April 2008, following another action filed by the applicant pursuant to Article 127 of the Criminal Code and Article 59 of the CCP, the District Court rejected the action. Having notified Z. of the proceedings through the Italian Ministry of Justice, the court found that she had been tried once and found guilty of the same offence, in respect of which she had benefitted from an amnesty (see paragraph 23 above). Relying on the Italian court's decision of 4 June 2003, the District Court ruled that Z. had not been involved in any wrongful removal of the child.

25. However, on 3 March 2009 the District Court found Z. guilty of the criminal offence of wrongful retention of the child in accordance with Article 127 of the CC and sentenced her to a fine. The decision stated that even though Z. returned to Albania every summer, she deliberately refused to bring the applicant's child, in breach of that court's decision of 30 June 2006 (see paragraph 26 below), in order to sever the links completely between the applicant and his child. The proceedings took place in the absence of Z., who was represented by a lawyer of her own choosing.

D. Proceedings concerning the establishment of contact with the child in Albania

26. On 30 June 2006, following the applicant's civil action, the District Court granted the applicant's request to meet with his child. It ordered Z. to allow the applicant to see his child at least twice a year, between 1 and 15 August and between 27 December and 6 January. The proceedings were

conducted in the absence of Z., who had been notified of them by way of public notice. No reference was made to the Italian court's decision of 4 June 2003 (see paragraph 10 above). The relevant parts of the decision read as follows:

> "The claimant was informed that the child is being treated very well by the aunt, the defendant [in this set of proceedings]; the child attends school and has obtained good results. Motivated by paternal feeling, he initially and unwittingly lodged the action seeking the return of his child from the defendant.
>
> During the proceedings, putting the child's interest first, he limited his action to requesting the court to rule on the right to have contact with his child. He submitted before the court that he earns a good salary, that he has founded a new family and that he has a home and a child from his second marriage.
>
> Pursuant to Article 155 of the Family Code, the court sought the opinion of a social worker. Having regard to Article 255 of the Family Code, the claimant's action should be accepted and his right to meet with the child, who is being cared for by the aunt, should be enforced during the school holidays."

27. On 27 November 2006 an execution writ was issued in respect of the District Court's decision. The local bailiff was entrusted with its enforcement.

28. On 24 July 2008 the District Court rejected the applicant's action to have the decisions of 29 December 2004 and 30 June 2006 recognised pursuant to the Hague Child Abduction Convention and the Hague Jurisdiction Convention on the ground that those decisions were directly enforceable in Albania.

29. On 3 March 2009 the District Court ordered Z. to allow the applicant to meet with his child. The decision stated that the applicant could not be denied such a right in so far as his parental responsibility had not been revoked. However, it further stated that the applicant should find the legal means to secure the enforcement of this judgment, the court being unable to ensure that he would obtain a visa for Italy and be able to go there. It discontinued the proceedings as regards the applicant's claim for the return of his child, the applicant having withdrawn that claim.

E. Applicant's correspondence with Albanian institutions

30. From 2003 to 2009 the applicant sought the assistance of the relevant Albanian authorities (the Ministry of Interior, the Ministry of Justice, the Ministry of Foreign Affairs, the Ombudsperson (*Avokati i Popullit*), the Prime Minister's Office, the President's Office) in enforcing his right of contact with his child.

31. On 6 July 2005 the General Prosecutor's Office sought the assistance of the Italian Interforce Police Liaison Office in Albania ("the Interforze"), as regards the status of the applicant's child in Italy. On 8 July 2005 the

Interforze informed the General Prosecutor's Office of the Italian court's judgment of 2003.

32. In September 2006 the Ministry of the Interior stated that it was beyond its jurisdiction to secure the return of the child to Albania or the fulfilment of other requests made by the applicant in so far as the child's custody had been entrusted to Z. on the basis of the Italian court's decision.

33. In 2002, 2006 and 2008 the Ministry of Foreign Affairs informed the applicant that the Albanian consulate in Milan had been asked to follow his case.

34. On 29 January 2009, following a request for information made by the Ombudsperson on the applicant's case, the Ministry of Justice responded, in so far as relevant, as follows:

> "The Ministry of Justice has been in intensive contact with [Mr Qama] and have expressed their wish to resolve his problem. He has asked the Ministry of Justice to enforce the Durrës District Court's decision of 30 June 2006. The Ministry of Justice, together with the Bailiff Office Directorate, have repeatedly informed Mr Qama that there exists no legal basis to request the Italian authorities to recognise and enforce an Albanian civil court's decision, since Albania is not a party to any international agreements which govern the recognition and enforcement of Albanian civil court decisions. ... The Ministry of Justice has proposed that Mr Qama enquire with the Ministry of Foreign Affairs (*e ka orientuar Z. Qama që t'i drejtohet Ministrisë së Punëve të Jashtme*).

35. On 16 February 2009 the applicant was informed of the response of the Ministry of Justice.

II. RELEVANT INTERNATIONAL LAW

A. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Child Abduction Convention")

36. The Hague Child Abduction Convention entered into force in respect of Albania on 1 August 2007 and in respect of Italy on 1 May 1995. Under Article 1, its objects are twofold, namely:

> "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."

37. Under Article 5 "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence and, "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

38. The duties under the Hague Child Abduction Convention are discharged by a Central Authority in accordance with its Article 6. The Ministry of Justice, Department of Juvenile and Family Law, has been designated as the Central Authority in respect of Albania and the Ministry of Justice, Department of Juvenile Justice (*Dipartimento per la Giustizia Minorile*) is the Italian Central Authority.

39. Under Article 7, either directly or through any intermediary, the Central Authority is tasked with taking the following measures towards achieving the objects of the Hague Child Abduction Convention:

> "a) to discover the whereabouts of a child who has been wrongfully removed or retained;
>
> b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
>
> c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
>
> d) to exchange, where desirable, information relating to the social background of the child;
>
> e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
>
> f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
>
> g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
>
> h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
>
> i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

40. Article 8 recognises a person's right to make an application for the return of a child, who has been removed or retained in breach of custody rights, to the Central Authority of the child's habitual residence or of another Contracting State.

41. Article 21 recognises a person's right to make an application for the effective exercise of rights of access in the same way as an application for the return of the child. It states that:

> "An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
>
> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

> The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

42. As regards Article 21, the Explanatory Report by Ms Elisa Pérez-Vera on the drafting of the Hague Child Abduction Convention, which is to be found at http://www.hcch.net/upload/expl28.pdf, states, in so far as relevant, the following:

> "...it must be recognised that the Convention does not seek to regulate access rights in an exhaustive manner; this would undoubtedly go beyond the scope of the Convention's objectives. Indeed, even if the attention which has been paid to access rights results from the belief that they are the normal corollary of custody rights, it sufficed at the Convention level merely to secure co-operation among Central Authorities as regards either their organisation or the protection of their actual exercise."

B. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the Hague Jurisdiction Convention")

43. The Hague Jurisdiction Convention entered into force in respect of Albania on 1 April 2007. Italy signed the Hague Jurisdiction Convention on 1 April 2003, no ratification having taken place to date. Its aim is to establish common provisions in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children.

C. Council of Europe Convention on Contact Concerning Children ("the Contact Convention – CETS No. 192)

44. The Contact Convention entered into force in respect of Albania on 1 September 2005. Italy signed the Contact Convention on 15 May 2005, no ratification having taken place to date. Its object is to determine general principles to be applied to contact orders, to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact and to establish co-operation between central authorities, judicial authorities and other bodies in order to promote and improve contact between children and their parents, and other persons having family ties with children.

III. RELEVANT DOMESTIC LAW

A. Albanian domestic law

1. Constitution of Albania

45. Article 122 states that an "international agreement, which has been ratified, is part of the domestic legal order...". Such international agreement is directly applicable and prevails over domestic legislation with which it conflicts.

46. Article 142 § 3 provides that "State bodies shall comply with judicial decisions."

2. Family Code

47. Article 218 of the Family Code provides that "parents may request the court to secure return of their minor child, when he does not leave with them or is being unjustly retained by other persons."

3. Criminal Code

48. Article 127 of the CC sanctions the wrongful removal of the child from, *inter alia*, the person who exercises the parental authority as a petty offence (*kundërvajtje penale*) punishable by a fine or a term of six-months' imprisonment.

4. Code of Criminal Procedure (CCP)

49. Article 59 of the CCP establishes that a victim (*i dëmtuari akuzues*) may bring a private prosecution and seek damages from an individual who has committed one of the offences referred to therein.

50. Article 467 of the CCP stipulates that court decisions which order the payment of a fine shall be executed by the bailiff's office.

B. Italian domestic law

1. Civil Code

51. Article 330 of the Civil Code provides:

> "The court may declare parental rights forfeit if the parents do not perform or neglect the obligations inherent in their parental role or abuse the powers related thereto causing serious detriment to the child.
>
> In such eventuality, the court may, if there are serious grounds for so doing, order the child's removal from the family home."

52. Article 332 of the Civil Code reads:

"The judge may restore parental authority when the reasons justifying its forfeiture have ceased to exist and there is no risk of harm to the child."

53. Law no. 149 of 28 March 2001 has amended certain provisions of Book I, Part VIII, of the Civil Code and of Law no. 184/1983. Article 333 of the Civil Code, as amended by section 37(2) of Law no.149/2001 provides:

"Where the conduct of one or both parents is not such as to give rise to their parental rights being declared forfeit under Article 330, but is nonetheless detrimental to the child, the court may adopt any measure that is appropriate in the circumstances and may even order the child's removal from the family home or the removal of the parent or partner who has been ill-treating or abusing the child.

These measures may be revoked at any time."

54. Article 336 of the Civil Code, as amended by section 37(3) of the same Law, provides:

"The measures indicated in the preceding Articles shall be adopted following an application by the other parent, a family member or the public prosecutor and, where prior decisions are being revoked, also by the parent concerned. The court shall deliberate in private session and give a reasoned decision after having gathered information and heard representations from the prosecutor's office. If the measure is being sought against one of the parents, that parent must be heard. In cases of emergency, the court may adopt, even of its own motion, interim measures in the interests of the child.

In respect of the decisions referred to in the preceding paragraphs, the parents and the child shall be assisted by a lawyer, remunerated by the State in cases provided for by law."

55. Article 337 of the Civil Code reads:

"The guardianship judge shall supervise compliance with the conditions imposed by the court for the exercise of parental authority and for the administration of assets."

56. Decisions of the youth courts made in accordance with Articles 330 and 333 of the Civil Code are rendered in non-contentious proceedings (*volontaria giurisdizione*). They are not final decisions and can therefore be revoked at any time. No appeal lies against these decisions, but either party concerned may lodge an application (*reclamo*) with the Court of Appeal for a review of the situation giving rise to the decision.

2. Code of Civil Procedure

57. Article 125 of the Code of Civil Procedure reads as follows:

"Save as otherwise provided for by law, a statement, a claim, a plea, a counter-plea or an order must state the name of the court to which it is addressed, [full details of] the parties, the object of and reasons for the request, the submissions or the claims, and the original, as well as the copies to be served, must be signed by the party, if the latter decides to appear before the court in person, or by the lawyer."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

58. The applicant complained that the Albanian and Italian authorities did not secure his right of contact with his child in breach of Articles 6 § 1 and 8 of the Convention.

59. As the master of the characterisation to be given in law to the facts of the case, the Court considers it appropriate to examine the applicant's complaints under Article 8 of the Convention alone. Whilst that Article contains no explicit procedural requirements, it requires that the decision-making process leading to measures of interference must be fair and afford due respect to the interests safeguarded by that Article (see *Šneersone and Kampanella v. Italy*, no. 14737/09, § 56, 12 July 2011).

60. Article 8 of the Convention reads as follows:

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

A. Admissibility

1. In respect of Italy

61. The Italian Government argued that the applicant had not exhausted domestic remedies. In the first place, he should have lodged an action for the nullity of, or an appeal against, the Italian court's decision of 4 June 2003 in accordance with Article 125 of the Code of Civil Procedure and Articles 332, 333 and 336 of the Civil Code. Secondly, in so far as the applicant could complain about the guardian's refusal or his child's refusal to have contact with him, he should have lodged a civil action with the guardianship judge in accordance with Article 337 of the Civil Code.

62. The applicant did not make any comments.

63. An applicant must comply with the applicable rules and procedures of domestic law, failing which an application lodged with the Court is likely to fall foul of the condition laid down in Article 35 (*Ben Salah Adraqui and Dhaime v. Spain* (dec.), no. 45023/98, 27 April 2000). In the instant case, the Court considers that the applicant's letters of 22 January and 22 February 2007 cannot amount to a legal action seeking either the nullity of the Italian court's decision of 4 June 2003 or an appeal against that decision. Furthermore, those letters failed to comply with the domestic law

requirements, particularly Article 125 of the Italian Code of Civil Procedure. They were signed by an Albanian lawyer, who did not appear to have a power of attorney issued by the applicant (see paragraph 18 above).

64. In these circumstances, the applicant's complaint against Italy should be rejected for non-exhaustion of domestic remedies in accordance with Article 35 §§ 1 and 4 of the Convention. The Court, however, observes that nothing prevents the applicant from availing himself of the legal remedies under the Italian law, having regard to the fact that decisions of Italian youth courts are not final and can be revoked at any time (see paragraph 56 above).

2. In respect of Albania

(a) Compliance with the six-month rule

65. The Albanian Government argued that the application had been submitted out of time, the last decision having been taken on 30 June 2006.

66. The applicant did not make any comments.

67. Under Article 35 § 1 of the Convention "the Court may only deal with the matter...within a period of six months from the date on which the final decision was taken." The six-month rule does not apply to situations which give rise to a continuing violation of Convention rights (see, *inter alia, Iordache v. Romania*, no. 6817/02, § 50, 14 October 2008).

68. In the instant case, the applicant is still seeking to enforce his right to have contact with his child, as recognised by the Albanian court. Between 2006 and 2009 he repeatedly requested the enforcement of the decision of 30 June 2006 by enlisting the assistance of competent Government and other institutions (see paragraphs 32-35 above). In view of the above and having regard to the particular circumstances of this case, the Court considers that no issue arises as regards compliance with the six-month time-limit and, accordingly, dismisses the Government's objection.

(b) Compliance with the requirement to exhaust domestic remedies

69. The Albanian Government argued that the applicant did not exhaust domestic remedies. He failed to lodge an action in accordance with Article 59 of the Code of Criminal Procedure ("CCP") or to exhaust the remedies as required by the Contact Convention and the Hague Child Abduction Convention.

70. The applicant did not make any comments.

71. The Court notes that an applicant is required to have recourse to remedies which are sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Bajrami v. Albania*, no. 35853/04, § 39, ECHR 2006-XIV (extracts)).

72. In the instant case, the applicant unsuccessfully lodged two actions under Article 59 of the CCP (see paragraphs 20 and 24 above). Having regard to the fate of his previous legal actions, the Court considers that any further action under Article 59 of the CCP, as argued by the Government, would have had no reasonable prospects of success.

73. Furthermore, assuming that the Hague Child Abduction Convention and the Contact Convention provided a domestic legal basis for another action by the applicant, the Court notes that, when one remedy has been pursued, exhaustion of another remedy with essentially the same objective is not required (see, *inter alia*, *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009). In the instant case, the applicant had already obtained a final Albanian court decision in his favour as regards his right of contact with his child (see paragraph 26 above).

74. It follows that the applicant's complaint cannot be rejected for non-exhaustion of domestic remedies and that the Albanian Government's objection should therefore be dismissed.

(c) Conclusion

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

B. Merits

1. The parties' submissions

(a) The applicant

76. The applicant submitted that there had been a breach of Article 8 of the Convention on account of the Albanian authorities' failure to secure the exercise of his right of contact with his child.

(b) The Government

77. The Albanian Government initially submitted that, having regard to the parents' joint decision to go to Italy in September 1999 together with their child, no unlawful abduction of the applicant's child had taken place. In the domestic proceedings in Albania, while accepting that the child should continue to remain in his aunt's custody, the applicant had requested the domestic court to enforce his right of access to his child. The authorities had taken all procedural steps, notably through diplomatic means, to secure that right. The enforcement order had been registered with the bailiff, but its execution was objectively impossible since the child was outside Albania's jurisdiction. The authorities had tried to obtain information about the child's

location and welfare in 2004. They invited the applicant to make a request to the Central Authority pursuant to the Hague Child Abduction Convention.

78. As regards the decision of 3 March 2009 the Albanian Government stated that the domestic courts gave a two-year time-limit to the defendant to comply with that decision. Since the time-limit had not lapsed by the time they had submitted their observations on 6 November 2009, they contended that no issue of non-enforcement arose. Moreover, the domestic legislation offered other legal means, namely mediation and reconciliation, for the solution of such cases.

2. The Court's assessment

79. The Court notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, *inter alia*, *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 125, 1 December 2009).

80. Even though the primary object of Article 8 is to protect the individual against unjustified interference by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, amongst others, *Maumousseau and Washington v. France*, no. 39388/05, § 83, 6 December 2007). In both contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the community as a whole; in both contexts the State enjoys a certain margin of appreciation (see, amongst others, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I).

81. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, for example, *Sommerfeld v. Germany* [GC], no. 31871/96, § 64, ECHR 2003-VIII (extracts); and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 134, ECHR 2010).

82. Turning to the facts of the present case, on 30 June 2006 the Albanian court accepted the applicant's request to see his child twice a year. The court ordered Z. to comply with the Albanian court's decision. An execution writ was issued and the bailiff was ordered to secure its enforcement. The Court notes that, while the Albanian court's decision of 30 June 2006 lacked clarity as regards the modalities of contact between the applicant and his child, its effects are to be understood to extend solely within the jurisdiction of Albania within the meaning of Article 1 of the Convention.

83. It has not been disputed by the parties that the applicant has been unable to see his child subsequent to the delivery of the Albanian court's

decision. The issue in the present case, therefore, is the scope of the Albanian authorities' positive obligations, if any, to enforce the applicant's right of contact in respect of his child.

84. In this connection, the Court notes that the custody of the child was awarded to the child's aunt, Z., by virtue of an Italian court's decision in 2003. At no stage has the applicant asked the Italian court to modify the 2003 custody decision, let alone to grant him contact or visiting rights.

85. Furthermore, the applicant does not allege that the child was abducted or unlawfully retained in Italy. Although the Albanian courts found that Z. had unlawfully retained the child, it is questionable whether they appreciated the true nature and scope of the custody decision already taken by the Italian court, since no reference was ever made to it.

86. Moreover, in cases where an applicant's child was not within a respondent State's jurisdiction and, irrespective of whether proceedings under the Hague Child Abduction Convention had been instituted by the applicant and whether custody rights have been awarded, the Court has found that that applicant was required to bring proceedings for the exercise of his access, contact or visiting rights in the respondent State within whose jurisdiction the child was to be found. For example, in *Deak v. Romania and the United Kingdom*, no. 19055/05, 3 June 2008, where the applicant instituted proceedings under the Hague Child Abduction Convention in Romania and the United Kingdom concerning the unlawful removal of the son by the child's mother from Romania to the United Kingdom, the Court found that in so far as the proceedings before the Romanian courts did not directly determine the question of the applicant's access rights, which had previously been upheld by a Romanian court decision, the applicant, who did not have the custody of the child, could have applied to the English courts for an extension of his access rights or for a modification of the manner in which they were exercised (paragraph 69). In *Stenzel v. Poland* (dec.), no. 63896/00, 28 February 2006, even though the Polish courts did not divest the applicant of his parental rights, in the absence of proceedings brought under the Hague Child Abduction Convention, the Court found, in respect of the applicant's access rights, that he had never applied under that Convention to the German authorities for assistance in securing the right to visit his child in Germany.

87. In the light of the above case-law and having regard to the particular circumstances of the present case, Article 8 cannot be understood as extending to an obligation for a respondent State to secure an applicant contact when the child has moved to another jurisdiction and is outside that State's jurisdiction (see, for example, *Stenzel*, cited above). Moreover, Article 8 of the Convention, read in the light of the Hague Child Abduction Convention, does not impose on national authorities positive obligations to secure the return of the child if the applicant holds only contact or visiting rights (see *R.R. v. Romania (no. 1)*, no. 1188/05, § 164, 10 November 2009;

contrast *Bajrami*, cited above, where the respondent State had positive obligations to secure the enforcement of a custody judgment given in the applicant's favour; contrast *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, 1 December 2009 and *Siemianowski v. Poland*, no. 45972/99, 6 September 2005, in which the respondent States' positive obligations to secure the enforcement of the access arrangement, which had not been ordered within the framework of the Hague Child Abduction Convention, lay entirely within their jurisdiction).

88. The Court therefore concludes that, in so far as both parents willingly agreed to travel with the child to Italy and in so far as the child remained in Italy on the strength of the lawful order given by an Italian court which did not award the applicant custody rights, there was no positive obligation on Albania to take steps to secure the enforcement of the applicant's contact rights with his child as recognised by an Albanian court decision. The applicant should have lodged an action with the Italian court to obtain contact or visiting rights in respect of his child.

89. There has accordingly been no breach of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* admissible the complaint under Article 8 of the Convention in respect of Albania and the remainder of the application concerning Italy inadmissible;

2. *Holds* that there has been no violation of Article 8 of the Convention in respect of Albania.

Done in English, and notified in writing on 8 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı, Deputy Registrar	Ineta Ziemele President