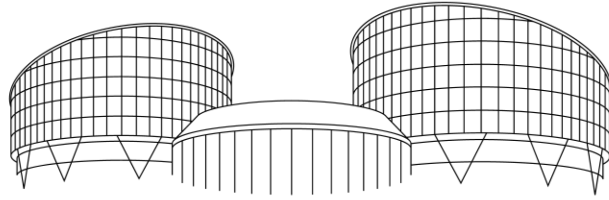

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF RABAN v. ROMANIA

(Application no. 25437/08)

JUDGMENT

STRASBOURG

26 October 2010

FINAL

11/04/2011

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

In the case of Raban v. Romania**,**

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

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 5 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 25437/08) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Israeli and Dutch national, Mr David Raban (the first applicant), in his name and on behalf of his children, Ela and Ilan Matzliah Raban (the second and third applicants), on 28 May 2008.

2. The applicants were represented by Mr E. Freedman, a lawyer practising in Tel Aviv. The Romanian Government ("the Government") were represented by their Agent, Mr. Razvan-Horatiu Radu, of the Ministry of Foreign Affairs.

The Dutch Government, to whom a copy of the application was transmitted under Rule 44 § 1 (a) of the Rules of Court, did not exercise their right to intervene in the proceedings.

3. The first applicant, acting in his own name and in his capacity as the legal representative of his children (the second and third applicant), alleged, in particular, that there had been a violation of Articles 8 and 6 of the Convention.

4. On 11 February 2009 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Mr David Raban, is an Israeli and Dutch citizen, who was born in 1957 and lives in Yehud, Israel. The second and third applicants are his children, Ela Raban, born in 2003, and Ilan Matzliah Raban, born in 2004. They currently live in Romania with A.R., their mother.

6. The first applicant and A.R. got married in 2002 in Cyprus. The two had already lived together as a couple in Israel for six months before the wedding. In 2003 and 2004 respectively, their two children, Ela and Ilan Matzliah, were born in Israel. Their last place of residence in Israel was Bat Hefer.

7. In 2006, as explained by the applicant, the couple, who had joint custody of the children, agreed that the mother and the two children would visit the mother's family in Romania for six months. On 27 April 2006, the mother and the children left for Romania; according to their roundtrip airline tickets, they were scheduled to be back on 24 October 2006.

However, they never returned to Israel; on 3 November 2006, A.R.'s mother informed the first applicant that A.R. and the children would remain in Romania.

8. Subsequently, the first applicant filed for the return of his children, under the Hague Convention (proceedings described under no. 1 below), while A.R. filed for divorce and custody of the children with the Romanian courts (proceedings described under no. 2 below).

A. Proceedings for the return of the children lodged under the Hague Convention

9. On 8 November 2006 the first applicant filed a request for the return of his children under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). The request was submitted through the Israeli Ministry of Justice to the Romanian Ministry of Justice ("the Ministry"). The first applicant claimed that his wife was wrongfully retaining their children in Romania, without his consent.

On 14 February 2007 the Ministry, acting as the Central Authority for the purpose of the Hague Convention, instituted proceedings on behalf of the first applicant before the Bucharest District Court of the Fourth Precinct.

10. On the basis of the evidence adduced in the case, which included a "psychological evaluation of the children", the District Court found on 11 October 2007 that the retention of the children in Romania was illegal

under Article 3 of the Hague Convention, as at the time of the retention the father had lawful custody rights. It also held that the allegations of A.R. according to which the first applicant had agreed that the children should remain in Romania as his financial situation in Israel was precarious, confirmed by the witness M.-A. T., who stated that neither the applicant, nor A.R. had a job in Israel, were however unsubstantiated, as the first applicant had proved that he had made attempts to rent a house for the family, had enrolled the children in a local kindergarten and was regularly in contact with the children by phone.

The defence raised by A.R. under Article 13 § 1 b) of the Hague Convention was also dismissed by the court; it considered that the "state of insecurity" invoked and the "general threat of terrorist attacks" arising in Israel had not proved to be an obstacle to the family living in Israel for more than five years prior to the children's removal, and could not be regarded as having developed to a dangerous degree at that time. The court ordered that the children be returned to their habitual residence in Israel no later than three weeks after the judgment became final.

11. A.R. filed an appeal against this decision, which was allowed by the Bucharest Court of Appeal in a final judgment of 7 January 2008. Out of the panel of three judges, Judge M.H. gave a dissenting opinion, favouring the reasoning of the first-instance court.

The majority's decision was based on two conclusions: firstly, that Article 3 of the Hague Convention was not applicable to the case, in so far as the children, Romanian citizens, had left Israel and remained in Romania upon the agreement of the parents; secondly, that in any event, the exception provided for by Article 13 1 b) of the Convention was substantiated, as it had been proved that, if returned to Israel, the children would risk exposure to physical or psychological harm.

12. The appellate court thus found that the children had left Israel and remained in Romania with the consent of their father, due to the worsening of his financial situation. The agreement between the parents was for the children to stay in Romania until the first applicant's financial situation improved –in that respect, even the fact that they had bought roundtrip tickets, which were cheaper than one-way tickets, only underlined the financial difficulties the family was undergoing; however, as time passed, the evidence showed that this situation had kept worsening, since the first applicant had sold the house where they had lived as a family, after the departure of A.R. with the children, and gone to live with his mother. Also, the first applicant had not produced any evidence to support his claim that he had sent money to his children.

The court further held that the first applicant had not proved that he had maintained contact with his children; in the file there was only evidence of one visit paid by the first applicant to his children, on 3 October 2007; the phone calls allegedly made by the first applicant to his children in Romania

had been made from the house of the first applicant's mother, which was interpreted as meaning that the conversations had been between the children and their paternal grandmother.

Hence, the agreement between the spouses regarding the children remaining in Romania proved to be real and such an agreement could by no means be regarded as breaching Article 3 of the Hague Convention.

13. Moreover, the evidence in the file showed that the two children had integrated into the Romanian community successfully – they had good results at kindergarten and positive psychological evaluations – arguments which supported a dismissal of the first applicant's action. The court also held that “the evaluation of the children carried out by the General Department for Social Assistance and Child Protection in the presence of a counsellor revealed that no assessment could be made of the possible effects of the separation of the father from his children, insofar as there was insufficient information with regard to the father-children relationship”.

14. The defence under Article 13 § 1 b) of the Hague Convention, namely, that there was a grave risk of exposing the children to intolerable physical harm if returned to Israel, was also allowed. The court based their reasoning, *inter alia*, on “the reports produced by Amnesty International”, which stated according to the court, that Bat Hefer was located in a conflict area, where citizens feared for their safety. At the same time, the court based its reasoning on travel advice issued in January 2008 by the US State Department, in which warnings were allegedly made about “potential conflicts which could arise between the Israelis and the Palestinians”, and “signs of possible terrorist attacks in the area” were referred to.

In a dissenting opinion to the judgment, Judge H.M. underlined that the above-mentioned documents “did not actually refer specifically to Bat Hefer, but to other regions of Israel”.

15. The applicant was never given a copy of the above-mentioned reports. In a certificate issued by the Ministry of Justice on 29 May 2008 to the applicant it was mentioned that neither the Amnesty International reports, nor the US State Department release were to be found in the domestic case file.

B. Divorce and custody proceedings lodged under Romanian law

16. On 6 March 2007, A.R. filed for divorce, custody of the children and maintenance before the Bucharest District Court of the Fourth Precinct.

17. On 24 September 2008 the first applicant (defendant), represented by an appointed lawyer, presented his observations in reply to A.R.'s claims. He contended that the Romanian courts did not have general jurisdiction in such proceedings, in so far as the marriage was registered in Cyprus, the defendant was an Israeli and Dutch citizen, the couple's children were Israeli citizens, and the last marital home had been in Israel.

He also lodged counterclaims asking the courts to either grant him full custody of the two children, or to order their return to their habitual residence in Israel.

18. On 18 November 2008, the court rejected the first applicant's plea regarding the lack of jurisdiction, considering that "the Romanian courts did have full jurisdiction in such cases, pursuant to Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility".

19. In its judgment of 19 December 2008, the district court granted A.R a divorce on the grounds of exclusive fault by the first applicant.

Based on the conclusions of a social enquiry report on the children's concrete situation, which held that they were well taken care of and benefited from a good standard of living, and taking into consideration their ages (5 and 4, at that time), the court awarded custody of the children to the mother. The court found that it was in their best interest to remain with their mother, her care and presence being a psychological factor which was absolutely essential for their intellectual, moral and physical development.

In the absence of any proof regarding the first applicant's employment and/or income, the court referred to the national minimum wage scale and ordered him to pay monthly maintenance in the amount of 90 RON in respect of each child, starting on 6 March 2007 and until they reached the age of majority.

Neither the first applicant, nor A.R. have lodged any appeals against this judgment, which thus became final and enforceable.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

20. The relevant legal provisions of the Hague Convention on the Civil Aspects of International Child Abduction are to be found in *Iosub Caras v. Romania*, no. 7198/04, 27 July 2006 and *Deak v. Romania and the United Kingdom*, no. 19055/05, § 58, 3 June 2008.

The Hague Convention was ratified by Romania by Law no. 100 of 16 September 1992.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 8 OF THE CONVENTION

21. The applicants complained that the right to respect for their family life had been violated by the appellate court that dealt with the Hague Convention proceedings. They thus complained about the outcome of the proceedings, which they considered to be contrary to the Hague Convention. Moreover, as the domestic court had based its final reasoning on documents that were not available to the parties (see paragraph 15 above) and in so far as that court had misinterpreted both the applicable legal provisions and the evidence before it, the whole trial had allegedly been unfair. They relied on Articles 8 and 6 § 1 of the Convention, which read as follows:

Article 6 § 1

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

Article 8

> "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

22. The Court firstly notes that the first applicant lodged this case also on behalf of his two children, the second and third applicants. According to the Court's extensive case-law, the standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the children's behalf, too, in order to protect the children's interests (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 138, ECHR 2000-VIII, *Sylvester v. Austria* (dec.), nos. 36812/97 and 40104/98 (joined), 26 September 2002 and *Iosub Caras*, cited above, § 21).

23. Secondly, the Court finds that the complaints raised by the applicants are essentially directed against the merits of the impugned decision, concerning the issue of an alleged international abduction of

children. The Court thus estimates that the main legal issue raised by this application concerns the applicants' right to a family life, as provided for by Article 8 of the Convention. It therefore considers that its examination should exclusively address the issue raised under Article 8 of the Convention, and that therefore it is not necessary to examine whether there has also been a violation of Article 6 § 1 of the Convention (*mutatis mutandis*, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *Amanalachioai v. Romania*, no. 4023/04, § 63, 26 May 2009; *Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, § 67, 22 April 2010).

The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 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

24. The Government contended that the judgment given on 7 January 2008 was in compliance with the provisions of the Hague Convention, considering the particular circumstances of the case. In particular, the appellate court found that the removal of the children with the consent of the father fell outside the scope of the Hague Convention, in accordance with its Articles 3 and 14; it further considered that the mother, A.R., had proved that the children were settled and integrated in their new environment.

Moreover, on 19 December 2008 the domestic courts allowed the divorce claim lodged by A.R., giving her full custody of the two children (the second and third applicants).

25. However, if the Court were to find that there had been an interference with the applicants' right to family life, the Government considered that, for the reasons enumerated below, the interference was prescribed by law, had a legitimate aim and was not excessive:

The interference had a legal basis in the Hague Convention, namely in Article 13 § 1 b). The legitimate aim of the measure was the protection of the minors' rights and interests, in so far as, when giving the impugned judgment, the appellate court took into account the actual standard of living the children would have had if they returned to Israel to live with their father (see, *mutatis mutandis*, *Bianchi v. Switzerland*, no. 7548/04, §§ 78, 80, 22 June 2006).

The measure imposed was proportionate and necessary in a democratic society, with a view also to the fact that the Bucharest Court of Appeal found Article 3 of the Hague Convention not to be applicable to the circumstances of the case.

26. The first applicant disagreed with the Government's point of view. Firstly, he underlined that the consent given to the second and third applicants travelling to Romania was not the equivalent of consent to them relocating, which meant that Article 3 of the Hague Convention, regulating both the unlawful removal and retention of children, was applicable.

Furthermore, Article 12 of the Hague Convention provided that the courts could look into arguments regarding children's settlement in a new environment only if one year had passed between the date of the alleged abduction and the commencement of the proceedings under the Hague Convention. The applicant, however, had lodged his claims within one year of the abduction, which meant that the respective defence argument used by the domestic courts and by the Government was inadmissible.

27. At the same time, the applicant alleged that, according to the Hague Convention, the best interests of the child were served by deterring abductions and insuring the prompt return of those who had been abducted, the courts in Hague Convention proceedings being charged with determining the jurisdiction which would resolve the issue of the best interests of the child.

Moreover, the applicant contended that under Article 17 of the Hague Convention, a subsequent custody decision could not constitute grounds for refusing a return, nor could the economic circumstances of the petitioner be such a ground.

2. *The Court's assessment*

(a) General principles

28. In its recent ruling in *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, §§ 131 – 140, 6 July 2010, with further references) the Court articulated and summarized a number of principles that have emerged from its case-law on the issue of the international abduction of children, as follows:

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

(ii) The positive obligations that Article 8 of the Convention imposes on the States with respect to reuniting parents with their children must therefore be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (*Maire v. Portugal*, no. 48206/99, § 72, ECHR 2003-VII and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I).

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

(iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, ECHR 2007-XIII), bearing in mind, however, that the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX).

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

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

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

(vii) In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.),

no. 14600/05, ECHR 2005-XIII (extracts)). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see *Maumousseau and Washington*, cited above, § 74).

29. Moreover, as already stated in *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 164, ECHR 2009-...:

> "in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention".

(b) Application of the general principles to the present case

30. The Court notes, firstly, that it is common ground that the relationship between the applicant and his children, the other two applicants, falls within the sphere of family life under Article 8 of the Convention.

31. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (see *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005, and *Iosub Caras*, cited above, § 29).

32. The events under consideration in the instant case amounted to an interference with the applicants' right to respect for their family life, as it restricted the enjoyment of each other's company.

33. The Court must accordingly determine whether the interference in question was "necessary in a democratic society" within the meaning of the second paragraph of Article 8 of the Convention, interpreted in the light of the above-mentioned international instruments, the decisive issue being whether a fair and proportionate balance between the competing interests at stake – those of the children, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters (see paragraph 27 above, (iv)).

34. Under Article 3 of the Hague Convention, the removal or retention of a child is to be considered "wrongful" where it is in breach of rights of custody attributed to a person under the law of the State in which the child was "habitually resident" immediately before the removal or retention.

In the present case, the children were born and raised in Israel, which should therefore be regarded as their "habitual residence" for the purposes of the Hague Convention. The first applicant and his wife exercised jointly, under Israeli law, parental responsibility and rights of custody over their children.

However, based on the evidence freely adduced in the domestic case-file, the appellate court found it to be proved that the first applicant had given his consent for the children's removal to and retention in Romania until the improvement of his financial situation, which rendered Article 3 of the Hague Convention inapplicable in such circumstances (see paragraph 12 above).

35. Furthermore, the inapplicability of Article 3 of the Hague Convention was not the sole argument that led the national jurisdiction to refuse to order the return of the children. The other arguments put forward by the appellate court, based on the children's best interests and the proof, provided by the mother and the domestic social institutions, that they had integrated into their new environment successfully, were contrasted with the existing evidence of their being exposed to a "grave risk or psychological harm" if taken back to Israel, which made the exception provided for by Article 13 § 1 b) of the Hague Convention applicable (see paragraph 14 above).

36. The Court reiterates that the concept of the child's best interests should be paramount in the procedures put in place by the Hague Convention. Consideration of what serves best the interests of the child is therefore of crucial importance in every case of this kind. In this context, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned, it being for the court hearing the case to adopt an *in concreto* approach to it (see also paragraph 27 above).

37. In the present case, the Court sees that the appellate court did take into consideration the parties' arguments concerning the consent given by the father to the retention, and they also provided reasoning for their interpretation of the provisions of Articles 3 and 13 § 1 b) of the Hague Convention.

Evidence was included in the file on behalf of both parties to the proceedings. Relying on the documents submitted by the parties, on the psychological evaluation of the children, and on the testimonial statements in the file, the domestic court evaluated the factual circumstances of the case; it found that the father in fact gave his consent to the relocation, in so far as his financial situation was perilous; the court also found that the children were very well integrated into their new social environment and that they were well taken care of by their mother, it also having been established that the first applicant had not visited his children but on one occasion (paragraph 12) and that he had not sent them any money for support.

These findings were reiterated, *mutatis mutandis*, in the subsequent proceedings regarding divorce and custody matters (see the conclusions of the domestic court summarized in paragraph 19 above), and in this context it is to be noted that the first applicant has not in any way challenged the findings of the domestic court, nor has he formulated any civil action concerning his visiting rights or rights to have personal relations with his children.

38. As the Court has already held many times, it cannot question the assessment of the domestic authorities, unless there is clear evidence of arbitrariness (see, among others, *Perlala v. Greece*, no. 17721/04, § 25, 22 February 2007, and *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 89, ECHR 2007-II).

No such clear evidence of arbitrariness appears in the present case; on the contrary, the appellate court has examined the case and given a judgment paying particular consideration to the principle of the paramount interests of the children– who were very young (3 and 2 respectively) at the time of their departure from Israel, and who now appeared to be very well integrated in the new environment (see, *mutatis mutandis, Neulinger and Shuruk* cited above, §§ 145, 148).

The Court finds therefore no imperative reason to depart from the domestic court's findings in the case (see also *Iosub Caras*, cited above, §37).

39. The Court concludes that, having particular regard to the State's margin of appreciation in the matter and to the *in concreto* approach required for the handling of cases involving child-related matters, the Bucharest Court of Appeal's assessment of the case in the light of the Hague Convention requirements did not amount to a violation of Article 8 of the European Convention (see, conversely, *Monory*, cited above, §§ 81-83), as it was proportionate to the legitimate aim pursued.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

Done in English, and notified in writing on 26 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President