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**Date:** 07/03/2018

**DH-DD(2018)242**

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Meeting: 1310<sup>th</sup> meeting (March 2018) (DH)

Item reference: Action report (02/03/2018)

Communication from Austria concerning the case of M.A. v. Austria (Application No. 4097/13)

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Réunion : 1310<sup>e</sup> réunion (mars 2018) (DH)

Référence du point : Bilan d'action

Communication de l'Autriche concernant l'affaire M.A. c. Autriche (requête n° 4097/13)  
**(anglais uniquement)**

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## Execution of Judgments of the European Court of Human Rights

### ACTION REPORT

**M.A. v. Austria**

**Application number 4097/13**

Judgment final on 15/04/2015

DGI

02 MARS 2018

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

Updated Information submitted by Austria on 27/02/2018

### **CASE SUMMARY**

The applicant is an Italian national whose partner removed their daughter from Italy, where the family lived, to Austria in February 2008. In July 2009, following an application by the applicant under the Brussels IIa Regulation, the competent Italian court ordered the child's return to Italy and issued a certificate of enforceability. The Austrian district court which was asked to enforce this order refused on the grounds that a return without the mother would entail a grave risk of harm for the child. The matter ultimately came before the Austrian Supreme Court which directed the district court to enforce the return order on receipt of evidence that suitable accommodation would be available for the mother and child in Italy. In November 2011 the Italian court awarded the applicant sole custody and ordered the child's return to Italy to reside with the applicant. The Austrian district court initially sought to instigate a negotiated solution between the parents before going on to order the child's return. Following an unsuccessful attempt of enforcement in July 2013, the proceedings before the Austrian courts were stayed pending the outcome of an application by the mother to the Italian courts for a stay of the enforcement of the return order and for awarding her sole custody. The proceedings were still pending when the Court delivered its judgment.

The Court came to the conclusion that the Austrian authorities had failed to act swiftly, in particular in the first set of proceedings, and the procedural framework had not facilitated the expeditious and efficient conduct of the return proceedings. In sum, the applicant had not received effective protection of his right to respect for his family life (violation of Article 8 of the Convention).

### **INDIVIDUAL MEASURES**

#### **Just satisfaction:**

The amount of EUR 26.000 was paid to the applicant on 02/07/2015; thereof EUR 20.000 for just satisfaction (non-pecuniary damage) and EUR 6.000 for costs and expenses including taxes.

#### **Other measures:**

The Italian social services provided a report to the Italian Youth Court according to which the applicant is reported to have conceded that an enforced return to execute

his right of custody would expose the child to psychological harm. According to information of the Italian Ministry of Justice of 16/09/2015 the Juvenile Court of Venice decided on 11/09/2015 to repeal its previous decision of 23/11/2011 ordering the child's return to Italy and restored to the mother full parental responsibility. The Juvenile Court also specified periods when the applicant is entitled to spend time with his child in Italy and visit his child in Austria. Moreover the Juvenile Court charged the Family Advisory Centre to conduct family mediation between the parents.

With regard to the habitual residence of the child in Austria, the Austrian Courts are now competent to regulate the contact rights between the minor and the applicant in a way which corresponds to the best interests of the child.

On 11/05/2016 the child's mother filed an application at the District Court of Baden requesting to re-examine the contact rights between the applicant and the child. This application has been served on the applicant on 15/09/2016 asking him for comments. Furthermore, the District Court of Baden offered to nominate an Italian speaking accompanying person for the meetings between the applicant and the child. The applicant has not reacted to this request within the time limit set by the court. Subsequently, the District Court of Baden took a fully reasoned decision on 19/12/2016, in which it provided for a visiting right of the applicant in Austria once per month, accompanied by an Italian speaking person.

As to the objection that the applicant could not travel to Austria because of pending legal proceedings with regard to maintenance claims, no concrete information about such a claim is currently available. However, in general in most cases it seems normal for a child in this situation to have maintenance claims against the other parent with which it does not reside; maintenance proceedings do not, however, influence the determination of contact rights.

## GENERAL MEASURES

The Court's judgment has inspired Austrian legislation which led to a new Federal Act. The Law on the Return of Children (*Kinder-Rückführungsgesetz 2017*) was published in the Federal Gazette I No. 130/2017 on 01/08/2017 and entered into force on 01/09/2017. This Act incorporated the procedural rules for abduction cases into the Non-Contentious Proceedings Act (*Außerstreitgesetz*) as an important part of child-centred proceedings. The new Act simplifies and accelerates the return of wrongfully removed or retained children. In particular it stipulates the immediate enforceability of the return order and the concentration of proceedings (no hiatus between ordering and enforcing the return; no exceptions in the enforcement stage unless there is a change of circumstances). In order to avoid the alienation between the child and the left behind parent, contact has to be (re)established during the return proceedings, unless this would jeopardise the child's best interest.

As further measure the Family Court's Assistance Services (*Kinder- und Jugendhilfeträger*) have been tasked to foster an agreement between the parties during the return proceedings.

Austria has assumed a proactive and constructive role in the Brussel IIa recast, which is also dealing with the improvement, in particular the acceleration of return proceedings.

The judgment has been discussed in a training course on fundamental rights for judges and candidate judges.

Furthermore the Ministry of Justice acting in the Capacity of Central Authority and therefore in charge of assisting judges in the handling of child-abduction cases will - in future cases - focus on the implications of the ECHR's judgment, in particular regarding the necessity of swift and expeditious enforcement proceedings.

Having in mind that it is necessary to handle abduction cases by specially trained judges in a swift and efficient way, the Central Authority also organizes seminars on a regular basis and keeps all relevant information on the Ministry's homepage updated. Austrian judges also have and appreciate the possibility to consult the staff of the Central Authority to discuss – respecting the judicial independence – questions of strategy and case-management in abduction cases. This way experience is shared and the unification of legal practice and legal certainty promoted.

### **Publication and dissemination**

The judgment has been disseminated to the Federal Chancellery, the Ministry of Justice and the Ministry for Europe, Integration and Foreign Affairs on 19/01/2015.

The case was analysed in a Circular Note of the Federal Chancellery which was sent to the Parliament, all Federal Ministries, the Constitutional Court, the Administrative Court, the Supreme Court, the Federal Administrative Court, the Federal Financial Court, the regional Administrative Courts, the Ombudsman Board, the governments of all nine Austrian *Länder*, the Liaison Office of the *Länder* with the federal authorities and all human rights co-ordinators at the Federal Ministries. It has also been published on the homepage of the Federal Chancellery (now the Federal Ministry for Constitution, Reform, Deregulation and Justice),

Furthermore, the case was analyzed in the *Newsletter Menschenrechte* (1/2015), March 2015.

An analysis of the case was published in the *Interdisziplinäre Zeitschrift für Familienrecht* 2015/81.

Given the direct effect of the European Convention in Austria, publication and dissemination of the European Court's judgment should be sufficient to guarantee that the requirements of the Convention and the case-law of the European Court will be taken into account in the future, in order to prevent new, similar violations.

### **State of execution of judgment**

Austria considers that the measures adopted have fully remedied the consequences for the applicant of the violations of the Convention found by the European Court in this case, that these measures will prevent similar violations and that Austria has thus complied with its obligations under Article 46 § 1 of the Convention.

On the basis of the information above the Government considers that all necessary measures have been taken and the case should be closed.