Children and the European Court of Human Rights

An overview of the jurisprudence

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Introduction

The Sixth Annual Regional Rule of Law Forum for South East Europe is the latest in a series of events aimed at promoting the implementation of the European Convention on Human Rights, encouraging regional cooperation and assisting the process of EU integration. It will be dedicated to the critical issue of the rights of the child in the case law of the European Court of Human Rights. It will focus on the approach taken by the European Court of Human Rights to the key principles: the primacy of the best interests of the child, including the importance of hearing the child, and to their application to the State's obligations to children in a range of scenarios.

A robust system for the promotion and protection of children's rights is a key feature of any nation claiming to be democratic. Without it, a society cannot be said to uphold the rule of law. Children are amongst the most vulnerable members of society and as such require special protection and consideration in law and practice.

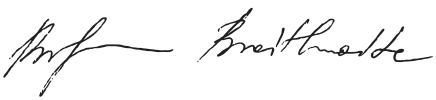
2019 is the 30th anniversary of the adoption of the UN Convention on the Rights of the Child (UNCRC). Article 53 of the ECHR imports the standards of the UNCRC into any decision made by the European Court of Human Rights. In consultation with members of the judiciary throughout the region and in Strasbourg, aspects of the European Convention on Human Rights of particular relevance to children have been identified: practical and effective recognition of the primacy of the best interests of the child, together with the requirement that the child should be heard; ensuring protection from harm (and proper investigation and redress if it has occurred); respect for the child's private and family life; access to court and the enforcement of judicial decisions; placements in secure accommodation and the rights of children in relation to the criminal justice system; relocation and abduction; child asylum seekers and children at risk of, or victims of, trafficking; and the right to education.

By identifying the European Court's relevant jurisprudence and providing summaries of selected relevant case-law, we hope that this publication, along with the other resources we are providing to the participants at the Forum, will assist in furthering the understanding, promotion and protection of the rights of the child – both substantively and procedurally.

It is our hope - and objective - that at the conclusion of this event, all those who have attended the Forum and have participated in the discussions, will feel better able to navigate the jurisprudence of the European Court with the assistance all of the materials provided, and to overcome the challenges currently facing the implementation of the Convention in respect of children in the region today.

We wish you all a successful Forum gathering and very much look forward to all our discussions!

Biljana Braithwaite
The AIRE Centre



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Dubrovnik, March 2019

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(1) INTRODUCTION

Children, by virtue of their age and inability to protect themselves, are particularly vulnerable members of society. They require our special care and protection.

Although the European Convention on Human Rights ("the ECHR") has only a few provisions expressly referring to children, the case law from the European Court of Human Rights ("the Court") covering children is extensive.

Many cases before the Court are brought by parents. Accordingly, the Court's jurisprudence can often focus on the rights of adults in respect of their children, rather than on the rights of the children themselves. This overview seeks to draw out the latter.

The following Articles, in particular, are regularly engaged in cases concerning children. They feature throughout this overview. All references to Articles and Protocols are to the ECHR, unless otherwise stated.

- Article 1: Obligation to respect human rights
- Article 2: Right to life
- Article 3: Prohibition of torture
- Article 4: Prohibition of slavery and forced labour
- Article 5: Right to liberty and security, in particular -
  - Article 5 § 1 (d): educational supervision and bringing a minor before the competent legal authority
- Article 6: Right to a fair trial
- Article 8: Right to respect for private and family life
- Article 13: Right to an effective remedy
- Article 53: Safeguard for existing human rights
- Article 2 of Protocol No. 1: Right to education

Two provisions are of key significance: Article 1 and Article 53.

Article 1 provides that the High Contracting Parties to the ECHR shall secure to everyone in their jurisdiction the rights and freedoms in Section 1 of the ECHR. A State is responsible for all acts and omissions of its organs. States have clear binding positive, as well as negative, obligations, including towards children.

Article 53 provides:

> "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or any other agreement to which it is a party."

As such, the ECHR must be interpreted in harmony with the general principles of international law. Account should be taken of "any relevant rules of international law applicable in the relations between the parties" and in particular the rules concerning the international protection of human rights.[1]

(2) GENERAL PRINCIPLES

(a) Definition of a child

The ECHR does not contain a definition of "child". The Court has adopted the definition set out in the United Nations Convention on the Rights of the Child 1989 ("the CRC"). The CRC is the primary international instrument governing the rights of children. It has been almost universally ratified, including by all Council of Europe member States. The Court has stated that the CRC has binding force under international law on the Contracting States to the ECHR.[2]

Article 1 of the CRC defines a child as:

> "every human being **below the age of eighteen years** unless, under the law applicable to the child, majority is attained earlier."
>
> *(emphasis added)*

Older children, such as those who are 16 or 17, are still children and must be treated accordingly.

1 *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010, no. 41615/07, (included as a summary in this publication).

2 *Çoselav v. Turkey*, judgment of 9 October 2012, no. 1413/07, § 36.

(b) The best interests of the child

In all actions concerning children, the Court will always consider the best interests of the child in question. The importance of this stems from the second principle of the Declaration of the Rights of the Child, adopted by the United Nations in 1959.

The best interests of the child are varyingly considered to be:

(a) "the paramount consideration" (the Declaration of the Rights of the Child 1959, Principle 2; the CRC Article 21, in respect of adoption);
(b) "of paramount importance" (Hague Convention on the Civil Aspects of International Child Abduction 1980);
(c) "a primary consideration" (for example, the CRC Article 3 § 1, in matters other than adoption; CRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration; CRC General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child; Hague Convention 1996 on Parental Responsibility and Measures for the Protection of Children).

The practical significance of these differences in wording has been discussed endlessly. Where the Court is looking at provisions of the ECHR taken together with those of another international treaty, it must ensure that it does not interpret the ECHR so as to limit or derogate from the formulation found in whichever international treaty is applicable in the case before it. If the formulation is "primary consideration" that must be respected, but it does not mean that the ECHR cannot raise the level of protection by treating the interests as paramount. However, where the other instrument says "paramount", that is the standard the Court must apply.

CRC General Comment No. 5 sets out that Article 3 § 1 of the CRC (which requires the best interests of the child to be a primary consideration in all actions concerning children) requires active measures throughout the government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's interests are, or will be, affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

CRC General Comment No. 14 sets out that the child's best interests is a threefold concept:

(a) **A substantive right:** The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children, or in general. Article 3 § 1 of the CRC creates an intrinsic obligation for States, is directly applicable (self-executing), and can be invoked before a court.
(b) **A fundamental, interpretative legal principle:** If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the CRC and its Optional Protocols provide the framework for interpretation.
(c) **A rule of procedure:** Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child requires procedural guarantees. The justification of a decision must show that the right has been explicitly taken into account. State parties shall explain how the right has been respected in the decision, that is: what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighted against other considerations, be they broad issues of policy or individual cases.

General Comment No. 14 § 39 makes clear that the child's interests being "a primary consideration" means that the child's interests have high priority and are not just one of several considerations. A larger weight must be attached to what serves the child best even if those interests are not "paramount".

The Court has issued the following guidance on the meaning of the "best interests" of the child:

(a) The best interests of the child must be assessed in each individual case.[3]
(b) The child's best interests do not coincide with those of either the father or mother, except in so far as they may have in common various assessment criteria related to the child's individual personality, background and specific situation.[4]

3 *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010, no. 41615/07, §§ 138, 146, (included as a summary in this publication).

4 *X v. Latvia*, Grand Chamber judgment of 26 November 2013, no. 27853/09, §§ 100, (included as a summary in this publication).

(c) The child's ties with its family members must be maintained, unless the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. Family ties may only be severed in very exceptional circumstances and everything must be done to preserve personal relations and, if and when appropriate, to rebuild the family[5]:
(d) As a primary consideration, the Court has held that "crucial importance" and "particular importance" must attach to the best interests of the child which may, depending on their nature and seriousness, override those of the parents.[6]
(e) A parent cannot ever be entitled under Article 8 to have measures taken which would harm the child's health and development.[7]
(f) The task of assessing the best interests of the child is primarily one for domestic authorities. Domestic authorities often have the benefit of direct contact with the persons concerned. They enjoy a margin of appreciation, which remains subject to European supervision whereby the Court reviews, under the ECHR, decisions that domestic authorities have taken.[8]
(g) It may be necessary for psychological expert evidence to be adduced in order to evaluate statements made by a child.[9]

(c) Hearing the child

Children have a right to be heard by judicial and administrative authorities:

In any judicial or administrative proceedings affecting children's rights under Article 8, children capable of forming their own views should be sufficiently involved in the decision-making process and be given the opportunity to be heard and to express their views in all matters that affect them (Article 12 of the CRC and CRC General Comment No. 12, § 32; see also General Comment No. 14, §§ 53 and 54; The Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice).[10]

5 *Gnahoré v France*, judgment of 19 September 2000, no. 40031/98, § 59.

6 *Sahin v. Germany*, Grand Chamber judgment of 8 July 2003, no. 30943/96, §§ 64 and 66, (included as a summary in this publication).

7 *Sahin v. Germany*, Grand Chamber judgment of 8 July 2003, no. 30943/96, § 66 (included as a summary in this publication); *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96, § 64; *Elsholz v Germany*, Grand Chamber judgment of 13 July 2000, no. 25735/94, § 50).

8 *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010, no. 41615/07, §§ 137 to 138, (included as a summary in this publication).

9 *Elsholz v. Germany*, Grand Chamber judgment of 13 July 2000, no. 25735/94, § 52.

10 *N. TS. and Others v. Georgia*, judgment of 2 February 2016, no. 71776/12, § 78, (included as a summary in this publication); *M. and M. v. Croatia*, Judgment of 3 September 2015, no. 10161/13, §§ 180 to 181, (included as a summary in this publication).

The views of children are not necessarily immutable.[11] A child might not be sufficiently mature, or may be caught in a conflict of loyalties between parents, such that his or her opinion may not be sufficiently independent.[12] Further, the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children, even where they are aged 12 or more, without any other factors being considered and an examination being carried out to determine their best interests.[13]

(d) Avoiding delay and ensuring the enforcement of judgments

Time takes on a particular significance in cases concerning children as there is always a danger that any procedural delay will result in a *de facto* determination of the issue before the courts.[14] Situations in which delay is caused by resistance from a parent, or indeed from a child, are addressed below.

(e) State responsibility to guard against harm

The ECHR imposes positive obligations to protect children under Articles 2, 3 and 8, taken in conjunction with Article 1.

(a) In circumstances in which authorities knew, or ought to have known, at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and the authorities failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, a violation of Article 2 will be found.[15]
(b) Similarly, when a State fails to take reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge, a violation of Article 3 will be found.[16]

11 *Raw and Others v. France*, judgment of 7 March 2013, no. 10131/11, § 94.

12 *Gajtani v. Switzerland*, judgment of 9 September 2014, no. 43730/07, §§ 107 and 111.

13 *C. v. Finland*, judgment of 9 May 2006, no. 18249/02, § 58.

14 *Plaza v. Poland*, judgment of 25 January 2011, no. 18830/07, § 74; *V.A.M. v. Serbia*, judgment of 13 March 2007, no. 39177/05, (included as a summary in this publication).

15 *Branko Tomašić v. Croatia*, judgment of 15 January 2009, no. 46598/06, § 51, (included as a summary in this publication); *Osman v. the United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94, § 116, (included as a summary in this publication).

16 *Z. and others v. the United Kingdom*, Grand Chamber judgment of 10 May 2001, no. 29392/95, § 73, (included as a summary in this publication).

(c) Positive obligations, in some cases under Articles 2 or 3, or in other instances under Article 8, taken alone or in combination with Article 1, may include a duty to put in place and apply an adequate legal framework affording protection against acts of violence by private individuals.[17]

(d) Positive obligations in Articles 2 and 3 require that the State should set in place an efficient and independent judicial system by which a cause of death or injury can be established, and the guilty parties punished. There is a requirement of promptness and reasonable expedition.[18]

(e) Article 8 encompasses the positive obligation to adopt measures designed to secure respect for private life even in the sphere of relationships between private individuals.[19]

(f) The choice of the means calculated to secure compliance with Article 8 in the sphere of private relationships falls within the margin of appreciation of a State. Where a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed.[20]

(g) The legal framework required under Article 8, might also consist of civil law remedies.[21]

(h) Where serious acts such as the rape and sexual assault of children are in issue, States must ensure that efficient criminal law provisions are in place.[22]

(i) Children should be protected in situations that involve not only physical violence. In *K.U. v. Finland*, a 12-year-old child had been the subject of an advertisement of a sexual nature on an internet dating site. The advertisement mentioned his year of birth, physical characteristics, a link to a webpage he had, his picture, and his telephone number, which was accurate save for one digit. It was claimed that the child was looking for an intimate relationship. The Court found there was a potential threat to the child's physical "and mental" welfare. He had been made the target for approaches by paedophiles. Practical and effective protection of the child required the availability of a remedy enabling the offender to be identified and brought to justice.[23]

17 *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14, § 100.

18 *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14, § 99; *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08, § 83.

19 *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08, § 78.

20 *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08, § 79.

21 *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08, § 85.

22 *M.C. v. Bulgaria*, judgment of 04 December 2003, no. 39272/98.

23 *K.U. v. Finland*, judgment of 2 December 2008, no. 2872/02, §§ 41 to 49; *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08, § 84. See also the Council of Europe Convention on preventing and

(j) Children should also be protected from violence from other children. CRC General Comment No. 13 (2011) addresses the right of the child to freedom from all forms of violence including mental violence (§ 21) and violence among children (§ 27). Violence perpetrated by children can engage the positive obligation to protect the victim. In *Dordević v. Croatia*,[24] the applicant was a vulnerable adult, subjected to violence by children. A violation of Article 3 was found. This could be applied *mutatis mutandis* to situations in where a child is a victim of violence from other children.

(3) CHILDREN AND THE FAMILY

(a) Filiation and atypical families

Article 8 guarantees respect for family life. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. A wide margin of appreciation on matters of filiation applies.

The Grand Chamber has provided guidance on the types of relationships that fall under "private" and "family" life in *Paradiso and Campanelli v. Italy*,[25] a case concerning a child brought by the applicants from Russia to Italy. The applicants had no biological tie with the child. The child had been born through donated ova and sperm, through a surrogate, via assisted reproduction techniques, which were unlawful under Italian law. The child had been removed from the applicants and placed in the care of social services with a view to adoption. Ultimately, there was no violation of Article 8.

The review of the case law, and restatement of relevant principles, remains helpful. The Grand Chamber in *Paradiso and Campanelli v. Italy* set out the following in respect of relationships constituting "family life", ultimately finding that no family life existed:

(a) The existence or non-existence of "family life" is a question of fact depending on the existence of close personal ties.
(b) The notion of "family" in Article 8 concerns marriage-based relationships and also other *de facto* family ties where the parties are living together outside marriage or where other factors demonstrate that the relationship has sufficient constancy.

combating violence against women and domestic violence, "the Istanbul Convention", Articles 2 § 2, 3 § f, 13, and 56.

24 *Dordević v. Croatia*, judgment of 24 July 2012, no. 41526/10, §§ 146 to 148, (included as a summary in this publication).

25 *Paradiso and Campanelli v. Italy*, Grand Chamber judgment of 24 January 2017, no. 25358/12.

(c) Article 8 does not guarantee the right to found a family or the right to adopt. It presupposes the existence of a family, or at the very least, the potential relationship between, for example, a child born out of wedlock and his or her natural father; or the relationship that arises from a genuine marriage even if family life has not yet been fully established; or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis; or the relationship that arises from a lawful and genuine adoption.
(d) There can be *de facto* family life between adults and children in the absence of biological or legal ties, provided there are genuine personal ties.
(e) There can be family life between foster parents who have cared for a child on a temporary basis and the child in question, on account of the close personal ties between them, the role played by the adults and the time spent together (see e.g. *Moretti and Benedetti v. Italy*,[26] in which a one month old child had arrived in the family, and for 19 months the applicants shared the first important stages of the child's life. The child was integrated into the family and deeply attached to the applicants. The applicants had provided for the child's social development. See also *Kopf and Liberda v. Austria*,[27] in which a foster family had cared, over 46 months, for a child who arrived in their home at the age of 2. The applicants had a genuine concern for the child's well-being and an emotional bond had developed).
(f) In determining whether there is "family life", it is necessary to consider the quality of the ties, the role played by the applicants vis-à-vis the child, and the duration of the cohabitation between them and the child.

The Grand Chamber in *Paradiso and Campanelli v. Italy*[28] also considered which relationships would fall under the concept of "private life", finding that the facts of the case did fall within the applicants' private life:

(a) "Private life" is a broad concept which does not lend itself to exhaustive definition. It covers the physical and psychological integrity of a person and, to a certain degree, the right to establish and develop relationships with other human beings. It can sometimes embrace aspects of an individual's physical and social identity. It encompasses the right to "personal development" or the right to self-determination.
(b) There is no valid reason to understand the concept of "private life" as excluding the emotional bonds created and developed between an adult and a child in

26 *Moretti and Benedetti v. Italy*, judgment of 27 April 2010, no. 16318/07, § 48.

27 *Kopf and Liberda v. Austria*, judgment of 17 January 2012, no. 1598/06, § 37.

28 *Paradiso and Campanelli v. Italy*, Grand Chamber judgment of 24 January 2017, no. 25358/12.

situations other than the classic situations of kinship. This type of bond also pertains to individuals' life and social identity. In certain cases involving a relationship between adults and a child where there are no biological or legal ties, the facts may nevertheless fall within the scope of "private life".

The Court has also held the following, when considering the meaning of family, parents, and children:

(a) Article 8 applies to a "legitimate" family in exactly the same way as it does to an "illegitimate" family. Any distinction between the two concepts would not be consistent with the word "everyone" in Article 8. This is confirmed by Article 14, and its prohibition of discrimination grounded on "birth" (examples include: *Sahin v. Germany*,[29] which concerned an unmarried father; *Marckx v. Belgium*,[30] which concerned single women with children).
(b) Sporadic contact and disputed biological ties, or even a proven biological link, does not confer an absolute right to obtain parental rights. The best interests of the child will prevail.[31]
(c) Lawful adoption gives rise to family life even where adoptive parents have had minimal contact with the child.[32]
(d) Relations between adoptive parents and an adopted child receive equivalent protection to families in which adoption has not occurred.[33]
(e) "Kafala" adoption, an Islamic practice similar to adoption but not necessarily involving the severing of original family ties, has been considered by the Court. The Court held that refusal by French courts to allow adoption by the applicant of a child from Algeria who had been bestowed in her care according to kafala did not disclose a breach of Article 8. The decision had taken into account the law of the child's country of origin forbidding adoption, and the fact that kafala was recognised internationally and nationally as giving equivalent status and protection. The child's integration and family life rights were not prejudiced by lack of adoption.[34]
(f) In respect of surrogacy, a refusal by French courts to order the recognition of the parent-child relationship where surrogacy agreements were against the law and the applicant couple had arranged surrogacy in the USA was held to strike a fair balance in respect of the family life rights of the couple. However,

29 *Sahin v. Germany*, Grand Chamber judgment of 08 July 2003, no. 30943/96, (included as a summary in this publication).

30 *Marckx v. Belgium*, judgment of 13 June 1979, no. 6833/74.

31 *Yousef v. the Netherlands*, judgment of 5 November 2002, no. 33711/96.

32 *Pini and others v. Romania*, judgment of 22 June 2004, nos. 78028/01 78030/01.

33 *Kurochkin v. Ukraine*, judgment of 20 May 2010, no. 42276/08.

34 *Harroudj v. France*, judgment of 4 October 2012, no. 43631/09.

in respect of the child itself, the Court found differently. Crucial aspects of the child's identity were bound up in the refusal of the French authorities to acknowledge the child's link with her biological father, or attribute to the child nationality or succession rights.[35]

(g) On 16 October 2018, the Court received its first request for an advisory opinion since the entry into force of Protocol No. 16 on 1 August 2018. The question from the French Court of Cassation was one concerning surrogacy and whether France can refuse to enter in the civil register of births the birth of a child born abroad to a surrogate mother in certain circumstances.[36] This is currently under consideration by the Grand Chamber.

The right of a child to **birth registration** is protected under the CRC, Article 7. Birth registration establishes the key information required to determine the nationality of a child, including place and date of birth and identity of parents. Failure to register a birth heightens the risk of statelessness. Roma children, in particular, have been adversely affected by this issue.[37] Refusal of birth registration of children will raise issues under Article 8.

(b) Contact, custody, residence, adoption, fostering[38]

Contact, custody, residence

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even when the relationship between the parents has broken down.[39]

Steps regulating contact between parents and children, removal of custody, and residence decisions all *prima facie* constitute an interference with family life, requiring justification, under Article 8.[40]

35 *Labassée v. France*, judgment of 26 June 2014, no. 65941/11; see also *Menesson v. France*, judgment of 26 June 2014, no. 65192/11, §§ 78 to 79, (included as a summary in this publication).

36 https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-6269064-8165703%22]}

37 Roma Belong – Statelessness, Discrimination and Marginalisation of Roma in the Western Balkans and Ukraine, report by the European Roma Rights Centre in 2017, pa 34.

38 It is noted that the term "residency" is increasingly used, rather than "custody". Much of the relevant case law uses the term custody and as such, that term is used here.

39 *K. and T. v. Finland*, Grand Chamber judgment of 12 July 2001, no. 25702/94; *R.I. and Others v. Romania*, Committee judgment of 4 December 2018, no. 57077/16, § 53.

40 *K.T. v. Norway*, judgment of 25 September 2008, no. 26664/03.

Article 8 includes a right for parents and children to be reunited and an obligation on the national authorities to facilitate such reunions. This applies not only to cases dealing with the compulsory taking of children into public care, but also to cases where contact and residence disputes concerning children arise between parents or other family members. The State may be required to adopt measures designed to secure that right, including both the provision of a regulatory framework of adjudicatory and enforcement machinery, and the implementation of specific measures.[41]

The obligation on the national authorities to facilitate contact by, or reunion with, a non-custodial parent, of children after divorce is not absolute. It will depend on many factors including the best interests of the child.

Where the measure at issue concerns dispute between parents over their children, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact questions. Rather, the Court will review under the ECHR the decisions those authorities have taken in the exercise of their power of appreciation.[42]

The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. The Court has recognised that the authorities enjoy a wide margin of appreciation, in particular, when deciding on custody.[43]

Stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.[44]

Procedural fairness is key. Article 6, the right to a fair trial, will apply, as the questions concern the determination of civil rights. There are no explicit procedural

41 *Ignaccolo-Zenide v Romania*, judgment of 25 January 2000, no. 31679/96 § 94; *M. and M. v. Croatia*, judgment of 03 September 2015, no. 10161/13, § 177, (included as a summary in this publication); *R.I. and Others v. Romania*, Committee judgment of 4 December 2018, no. 57077/16, § 54.

42 *R.I. and Others v. Romania*, Committee judgment of 4 December 2018, no. 57077/16, § 55.

43 *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96, § 63.

44 *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96, § 63.

requirements in Article 8, however, there is an emphasis on fairness and due respect to interests to be safeguarded.[45] Relevant factors will include[46]:

(a) The opportunity to make submissions in person, or in writing, before decisions are made;
(b) Access to reports and documents relied on in decision making;
(c) The provision of legal representation;
(d) Expert reports including independent psychiatric reports.

Complaints about the non-enforcement of such decisions also fall within Article 8.[47] Ineffective and delayed conduct of custody proceedings may give rise to a breach.[48]

The adequacy of a measure is to be judged by the swiftness of its implementation. The passage of time can have irremediable consequences for relations between a child and a parent who do not cohabit. The duration of proceedings concerning children takes on a particular significance, because there is always a danger that any procedural delay will result in the *de facto* determination of the issues.[49]

What is decisive is whether the national authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case.[50]

Where children resist contact with one parent, Article 8 requires states to try to identify the causes of such resistance and address them accordingly. It is an obligation of means, not result, and may require preparatory or phased measures. Authorities must take measures to reconcile the conflicting interests, keeping in mind that the best interests of the child are a primary consideration. Only after such measures have been exhausted are the domestic authorities to be considered to have complied with their positive obligations under Article 8.[51]

45 *McMichael v. the United Kingdom*, judgment of 24 February 1995, no. 16424/90, § 87.

46 *P., C. and S. v. the United Kingdom*, judgment of 16 July 2002, no. 56547/00; *Elsholz v. Germany*, Grand Chamber judgment of 13 July 2000, no. 25735/94; *A.K. and L. v. Croatia*, judgment of 8 January 2013, no. 37956/11.

47 *Grujic v. Serbia*, judgment of 28 August 2018, no. 203/07, (included as a summary in this publication).

48 *Eberhard and M. v. Slovenia*, judgment of 01 December 2009, nos. 8673/05 9733/05, § 127, (included as a summary in this publication); *R.I. and Others v. Romania*, Committee judgment of 4 December 2018, no. 57077/16, § 56.

49 *Mitrova and Savik v. 'The Former Yugoslav Republic of Macedonia'*, judgment of 11 February 2016, no. 42534/09, § 77, (included as a summary in this publication); *R.I. and Others v. Romania*, judgment of 4 December 2018, no. 57077/16, § 56.

50 *Grujic v. Serbia*, judgment of 28 August 2018, no. 203/07, §§ 60 to 65, (included as a summary in this publication).

51 *K.B. and Others v. Croatia*, judgment of 14 March 2017, no. 36216/13, § 143 to 144 violation found (included as a

In *K. B and Others v. Croatia*,[52] the Court addressed the situation where an applicant was unable to regularly see her children as a result of the children's resistance. The Court stated:

(a) While children's views must be taken into account, those views are not necessarily immutable and their objections, which must be given due weight, are not necessarily sufficient to override the parents' interests, especially in having regular contact with their child.
(b) The right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being considered and an examination being carried out to determine the child's best interests.
(c) The child's best interests normally dictate that the child's ties with its family must be maintained, except in cases where this would harm the child's health and development.[53]
(d) Children may be palpably unable to form or articulate an opinion as to their wishes. This could be, for example, because of a loyalty conflict or exposure to the alienating behaviour of one parent. Were a court to base a decision on the views of children in such circumstances, such a decision could run contrary to Article 8.
(e) The reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned is always an important ingredient. [54]

Coercive measures to enforce the return of children to parents granted custody are not generally desirable, as this is a sensitive area. However, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live.[55] Even if it is possible that more severe sanctions would not have changed that parent's general stance, this does not exempt domestic authorities from their obligations to take all appropriate steps to facilitate contact.[56]

summary in this publication); *Nuutinen v. Finland*, judgment of 27 June 2000, no. 32842/96, § 128.

52 *K.B. and Others v. Croatia*, judgment of 14 March 2017, no. 36216/13, (included as a summary in this publication).

53 See also *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 06 July 2010, no. 41615/07, § 136, (included as a summary in this publication).

54 See also *R.I. and Others v. Romania*, judgment of 4 December 2018, no. 57077/16, § 57; *Kuppinger v. Germany*, judgment of 15 January 2015, no. 62198/11, §§ 103, 107.

55 *Hokkanen v. Finland*, judgment of 23 September 1994, no. 19823/92; *Mitrova and Savik v. 'The Former Yugoslav Republic of Macedonia'*, judgment of 11 February 2016, no. 42534/09, § 77, (included as a summary in this publication).

56 *R.I. and Others v. Romania*, Committee judgment of 4 December 2018, no. 57077/16, § 57; *Kuppinger v. Germany*,

Adoption and fostering

The Court addressed foster care and adoption in *Strand Lobben and Others v. Norway*[57] (please note that the Grand Chamber judgment is awaited in this case at the time of writing). The applicants complained that the domestic authorities' decision to let foster parents adopt a child had infringed their right to family life under Article 8.

The Court stressed that decisions taken by the courts in the field of child welfare are often irreversible. This is particularly when an adoption has been authorised. As such, there is a greater call than usual for protection against arbitrary interferences.[58]

Although authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, as stated above, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of children and parents to respect for family life. Such limitations entail the danger that the family relations between a young child and his or her parents are effectively curtailed.[59]

When a considerable period of time has passed since a child has been taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited.

On the question of replacing a foster home arrangement with adoption, entailing the deprivation of parental responsibilities and legal ties with a child, the Court's position is that "such measures should only be applied in exceptional circumstances and [can] only be justified if they [are] motivated by an overriding requirement pertaining to the child's best interests".[60]

judgment of 15 January 2015, no. 62198/11, §§ 103, 107.

57 *Strand Lobben and Others v. Norway*, judgment of 30 November 2017, no. 37283/13, (Grand Chamber judgment is awaited).

58 *Strand Lobben and Others v. Norway*, judgment of 30 November 2017, no. 37283/13, (Grand Chamber judgment is awaited), § 102.

59 *K. and T. v. Finland*, judgment of 12 July 2001, no. 25702/94, § 155; *Strand Lobben and Others v. Norway*, judgment of 30 November 2017, no. 37283/13, (Grand Chamber judgment is awaited), § 104.

60 *Strand Lobben and Others v. Norway*, judgment of 30 November 2017, no. 37283/13, (Grand Chamber judgment is awaited), § 106.

As to the decision-making process under Article 8, what has to be determined is whether, having regard to the particular circumstances of the case and the serious nature of the decisions, the parents have been involved in the decision-making process as a whole, to a degree sufficient to provide them with the requisite protection of their interests, and that have been able fully to present their case.

The Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation, in particular, of a factual emotional psychological, material and medical nature, and whether the courts made a balanced and reasonable assessment of the respective interests of each person with a constant concern for determining what would be the best solution for the child. In practice, there is likely to be a degree of overlap in this respect with the need for relevant and sufficient reasons to justify a measure in respect of the care of a child.[61]

That splitting up a family is an interference of a very serious order was emphasised in *X v. Croatia*.[62] The Court stated that local authorities should not be required to follow inflexible procedures but should be allowed a measure of discretion. However, predominant in any consideration must be the fact that any decisions may prove to be irreversible (as where a child has been taken away and freed for adoption). There will be an even greater call than usual for protection against arbitrary interference.[63]

The decision-making process of domestic authorities must be such as to ensure that the views and interests of the natural parents of a child are made known to, and duly taken into account by, the local authority. They must be able to exercise, in due time, any remedies available to them. The parents must have been involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as necessary within the meaning of Article 8.[64]

Parents normally have a right to be heard and to be fully informed, although restrictions on these rights could, in certain circumstances, find justification under Article 8 § 2. The Court is entitled to have regard to whether processes have been conducted in

61 *Strand Lobben and Others v. Norway*, judgment of 30 November 2017, no. 37283/13, (Grand Chamber judgment is awaited), § 107.

62 *X v. Croatia*, judgment of 17 July 2008, no. 11223/04.

63 *X v. Croatia*, judgment of 17 July 2008, no. 11223/04, § 47.

64 *X v. Croatia*, judgment of 17 July 2008, no. 11223/04, § 48.

a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8.[65] Again, Article 6 will also apply.

(c) Rights of parents to know the fate of their children

The rights of parents to know the fate of their children has arisen in the context of Article 2. Article 2 imposes a procedural obligation on the State to investigate the disappearance of family members, whether it is thought to occur at the hands of the State or owing to private or unknown individuals.[66]

(4) CHILDREN AND SOCIAL CARE

(a) Taking children into care

On the question of whether it is necessary to take a child into care, as stated above, the State is afforded a wide margin of appreciation. State authorities have the benefit of direct contact with all persons concerned, often at the stage when care measures are being envisaged or immediately after their implementation. [67]

The Court's task is not to substitute itself for State authorities. The Court will review under the ECHR the decisions that those authorities have taken in the exercise of their powers. The Court is not limited in its review just to the procedural steps taken by authorities but will also consider whether the reasons adduced by the authorities for their actions are "relevant and sufficient".

Where a child is taken into care, issues can arise in respect of all Articles listed at the outset of this overview, and others too, for example a failure to respect the religious affiliations of a child (Article 9).

Effective protection of children can require emergency measures to be taken, to remove them from harm.[68] However, again, the Court will consider carefully whether

65 *X v. Croatia*, judgment of 17 July 2008, no. 11223/04, § 49.

66 *Randelovic and Others v. Montenegro*, judgment of 19 September 2017, no. 66641/10, § 122, (included as a summary in this publication); *Varnava and Others v. Turkey*, Grand Chamber judgment of 18 September 2009, nos. 16064/90 16065/90 16066/90 16068/90 16069/90 16070/90 16071/90 16072/90 16073/90, § 200, (not specifically about children but contains guidance on disappearances); *Zorica Jovanovic v. Serbia*, judgment of 26 March 2013, no. 21794/08, § 70, (included as a summary in this publication).

67 *Johansen v. Norway*, judgment of 7 August 1996, no. 17383/90, § 64.

68 *Clemeno and Others v. Italy*, judgment of 21 October 2008, no. 19537/03, §§ 51 to 52.

any abrupt removal was indeed required, and whether authorities carried out a proper assessment of the impact of measures and the existence of alternatives.[69]

Mistaken judgments or assessments as to whether a child should have been taken into care do not *per se* violate the ECHR. What is key is whether State authorities – which can include medical and social institutions – had genuine and reasonably held concerns about the safety of the child.[70]

Again, stricter scrutiny is called for in respect of any further limitations, such as restrictions on parental rights of access, or measures taken with a view to the child being adopted because these limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed.[71]

(b) Children in educational supervision

Article 5 § 1 (d) provides an exception to the principle under Article 5 § 1 that "Everyone has the right to liberty and security". The exception is for:

> "the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority."

Educational supervision is not to be equated rigidly with classroom teaching but can include many aspects of the exercise by a local authority of parental rights for the benefit and protection of the child.[72]

States must ensure that educational supervision is the genuine reason for the child's detention, and that such supervision is occurring. Where detention concerns a child, an essential criterion for the assessment of proportionality is whether the detention was ordered as a last resort, was in the child's best interests, and was aimed at preventing serious risks for the child's development. Where the criterion is no longer

69 *K. and T. v. Finland*, judgment of 12 July 2001, no. 25702/94, § 166.

70 *A.D. and O.D. v. the United Kingdom*, judgment of 16 March 2010, no. 28680/06 § 84; *M.A.K. and R.K. v. the United Kingdom*, judgment of 23 March 2010, nos. 45901/05 40146/06, § 35.

71 *T.P. and K.M. v. the United Kingdom*, Grand Chamber judgment of 10 May 2001, no. 28945/95, § 71; *Johansen v. Norway*, judgment of 7 August 1996, no. 17383/90.

72 *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06, § 166; *P. and S. v. Poland*, judgment of 30 October 2012, no. 57375/08, § 147.

fulfilled, the basis for the deprivation of liberty ceases[73]:

(a) Where a 16-year old child was held in remand prison, the Court rejected the State's submission that the measure was part of an educational programme. There were no staff or facilities in the prison to carry out any educational aim.[74]
(b) Where two children who confessed to theft spent a month in a juvenile holding centre for unspecified purposes, and did not participate in any educational programme, this fell outside Article 5 § 1 (d). Criminal proceedings had not in fact commenced until after they had been released.[75]
(c) Placement of a pregnant teenager in a juvenile centre to separate her from her mother, and prevent an abortion, did not fall under Article 5 § 1 (d).[76]
(d) Detention of a 12-year old child in a detention centre of juvenile offenders in order to prevent him from committing further delinquent acts fell outside Article 5 § 1 (d).[77]

(c) Reuniting children with their families

Taking a child into care should normally be regarded as a temporary measure. The ultimate aim should be that of reuniting the child with his or her parents. This applies not only to cases concerning children taken into public care but also to cases where there have been contact and residence disputes between parents or other family members.[78]

As set out above, the obligation to take measures to reunite parents and children is not absolute. The State must take all necessary steps to facilitate reunion as can reasonably be demanded in the special circumstances of each case.

73 *D.L. v. Bulgaria*, judgment of 19 May 2016, no. 7472/14, § 74, (included as a summary in this publication).

74 *Bouamar v. Belgium*, judgment of 29 February 1988, no. 9106/80.

75 *Ichin and Others v. Ukraine*, judgment of 21 December 2010, nos. 28189/04 28192/04, §§ 37 to 39.

76 *P. and S. v. Poland*, judgment of 30 October 2012, no. 57375/08, § 148.

77 *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06, § 171.

78 *N.TS. and Others v. Georgia*, judgment of 02 February 2016, no. 71776/12, § 70, (included as a summary in this publication); *Mihailova v. Bulgaria*, judgment of 12 January 2006, no. 35978/02, § 80.

(5) CHILDREN AND THE CRIMINAL JUSTICE SYSTEM

It is stressed that a child is defined as "**every** human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (CRC, Article 1). Older teenagers are still children. They must be protected (See CRC General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence and also The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")).

The age of criminal responsibility varies across Europe, although there is a broad consensus that 14 is the lower limit. The Committee on the Rights of the Child is currently revising Draft General Comment No. 10 (2007) on children's rights in juvenile justice. The Draft Revised General Comment, § 33, is at present encouraging State parties to increase their minimum age to at least 14 and commends State parties that have a higher minimum age. The Committee recommends that State parties should under no circumstances reduce the minimum age of criminal responsibility if the penal law currently sets the minimum age at higher than 14.

The Grand Chamber, in a case in which the applicant, who was a 17-year-old child at the time of incidents in question, was investigated and prosecuted under criminal law, cited the following provisions of international instruments[79]:

(a) Where juveniles are detained in police custody, account should be taken of their status as a child, their age, and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent, legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor. (*The Recommendation of the Committee of Ministers concerning new ways of dealing with juvenile delinquency and the role of juvenile justice 2003*).

(b) Member States should review, if necessary, their legislation and practice with a view to reinforcing the legal position of children throughout the proceedings (including the police interrogation), by recognising, *inter alia*, the right of assistance of a counsel who may, if necessary, be officially appointed and paid by the State (*Recommendation of the Committee of Ministers on social reactions to juvenile delinquency 1987*).

79 *Salduz v. Turkey*, Grand Chamber judgment of 27 November 2008, no. 36391/02.

(c) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action (*CRC, Article 37*).
(d) The Committee on the Rights of the Child recommends that State parties set and implement time limits for the period between the communication of the offence and the completion of the police investigation, the decision of the prosecutor or other competent body to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time-limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected (*CRC General Comment No. 10 (2007)*).
(e) The Concluding Observations of the Committee on the Rights of the Child, Turkey, 2001 stated that juvenile offenders should be dealt with without delay, in order to avoid periods of incommunicado detention, and that pre-trial detention should be used only as a measure of last resort, should be as short as possible and should be no longer than the period prescribed by law. Alternative measures to pre-trial detention should be used whenever possible.

The Court has addressed the following principles, in respect of children in the criminal justice system, in its case law:

(a) **Access to lawyers:** There is a fundamental importance in providing access to a lawyer where the person in custody is a child (see *Salduz v. Turkey*,[80] a case concerning a 17-year old child; and *Blokhin v. Russia*,[81] concerning a 12-year-old child).
(b) **Fairness of the trial – understanding the proceedings:** It is not, *per se*, incompatible with Article 6 to try a child in an adult court but he or she must have a broad measure of understanding of the nature of the proceedings and what is at stake. The child should be dealt with in a manner taking full account of his or her age, level of maturity and intellectual and emotional capabilities. Adjustments should be made to facilitate his or her understanding of what is going on. The mere fact that he or she might be represented by a lawyer is not sufficient.[82]

80 *Salduz v. Turkey*, Grand Chamber judgment of 27 November 2008, no. 36391/02, § 62.

81 *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06 § 199.

82 *Adamkiewicz v Poland*, judgment of 2 March 2010, no. 54728/00 § 70; *Blokhin v. Russia*, Grand Chamber judgment

(c) **Exclusion of the public:** There are specified exceptions to the requirement under Article 6 that criminal proceedings be open to the public. These exceptions include the interests of juveniles, the protection of the private life of parties, and where publicity would prejudice the interests of justice.

(d) **The publication of the names of the accused children:** It is a minimum guarantee under Article 40 § 2 (b) of the CRC to children accused of crimes that they should have their privacy respected fully at all stages of proceedings. The Beijing Rules also state that the "juvenile's privacy shall be respected at all stages" and "in principle no information that may lead to the identification of a juvenile offender shall be published."

(6) CHILDREN ACROSS BORDERS: MIGRATION, ASYLUM, TRAFFICKING

(a) Children seeking asylum (accompanied, separated, unaccompanied)

Children have specific needs related to their age and lack of independence, which will be compounded if they are seeking asylum.

The term "unaccompanied minors" describes everyone under 18 who enters European territory without an adult responsible for them in the receiving State. The ECHR does not expressly contain provisions on unaccompanied minors. However, their treatment may be considered under provisions such as Article 5 § 1 (f), Article 8 or Article 2 of Protocol No. 1. The European Social Charter refers to children deprived of their family's support in its Article 17 § 1 (c).

The Court has observed that the CRC encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance whether he or she is alone or accompanied by his or her parents.[83] States have a responsibility to look after unaccompanied minors and not simply to abandon them when releasing them from detention.[84]

of 23 March 2016, no. 47152/06, § 195.

83 *Abdullahi Elmi and Aweys Abubakar v. Malta*, judgment of 22 November 2016, nos. 25794/13 28151/13, § 103; *Popov v. France*, judgment of 19 January 2012, nos. 39472/07 39474/07, § 91, (included as a summary in this publication); *S.F and others v. Bulgaria*, judgment of 7 December 2017, no. 8138/16, §§ 84- 92.

84 *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08, (included as a summary in this publication).

The European Committee of Social Rights, like the Court, has highlighted that States interested in stopping attempts to circumvent immigration rules must not deprive foreign children, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and any constraints imposed by a State's immigration policy must be reconciled.[85]

In view of the absolute nature of protection under Article 3, the Court has stressed that for an unaccompanied child, his or her vulnerability is the decisive factor in determining the course of action that should be taken. The State must take adequate measures to provide care and protection as part of its positive obligations.[86]

Under European Union (EU) law, specific provisions for unaccompanied minors are contained in the asylum instruments as well as in the Return Directive. Under the Dublin Regulation, No. 604/2013:

(a) Applications by unaccompanied minors are to be examined by the Member State in which family members, siblings or relatives are legally present (Article 8 of the Regulation);
(b) The child must be provided with a representative (Article 6 of the Regulation);
(c) The best interests of the child must be assessed (Article 6 § 3 of the Regulation);
(d) There are rules to avoid separation in case family members submit separate applications in one Member State (Article 11 of the Regulation);
(e) In the absence of a family member, sibling or relative, the Member State responsible is the State where the child has lodged his or her application for asylum provided that it is in the best interests of the child (Article 8 of the Regulation).

Unaccompanied minors seeking asylum must be provided with a representative as soon as they have applied for asylum. The representative must be given opportunity to discuss matters with the child before the asylum interview, and to accompany the child to that interview. Where a child had been registered as an unaccompanied minor but had no guardian who could act as his legal representative, this contributed to a finding of violation of Article 5 § 4. Even assuming that remedies would have been effective, the Court failed to see how the child could have exercised them. The child had been unable in practice to contact a lawyer, and the information brochure outlining the remedies had been written in a language he could not have understood although his interview was in his native language.[87]

85 ECSR, *Defence for Children International (DCI) v. the Netherlands*, judgment of 20 October 2009, Complaint no. 47/2008.

86 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03, § 55.

87 *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08, (included as a summary in this publication).

States are obliged to facilitate the family reunification of unaccompanied minors.[88] The importance of expeditious tracing of family members and family reunification has been underlined by the CRC Articles 22 § 2, 9 § 3, and 10 § 2, as well as General Comment No. 6, § 31. The UN High Commissioner for Refugees recommends the child's reunification with a parent be done at an early stage, before status determination (UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, §§ 5 and 7).

Families with children who are seeking asylum may not be expelled to another Contracting State where they risk precarious circumstances unless the State concerned provides specific and concrete guarantees of reception appropriate to their age.[89]

(b) Immigration detention of children

In the context of immigration detention too, a child's extreme vulnerability is the decisive factor. It takes precedence over other considerations that a State might apply to the treatment of people it classifies as illegal immigrants.[90]

A State's obligations concerning the protection of migrant children will be different depending on whether they are accompanied or not.[91] However, even where children have been held in custody with parents, pending immigration measures, breaches of Article 3 have arisen.[92]

The protection of the child's best interests involves keeping the family together as far as possible and considering alternatives so that the detention of children is only a measure of last resort.[93]

88 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03, § 85; *Johansen v. Norway*, judgment of 7 August 1996, no. 17383/90, § 78.

89 *Tarakhel v. Switzerland*, Grand Chamber, judgment of 4 November 2014, no. 29217/12, § 121 to 122, (included as a summary in this publication).

90 *Tarakhel v. Switzerland*, Grand Chamber, judgment of 4 November 2014, no. 29217/12, § 99, (included as a summary in this publication).

91 *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08, § 63, (included as a summary in this publication).

92 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03, § 55; *Popov v. France*, judgment of 19 January 2012, nos. 39472/07 39474/07, (included as a summary in this publication).

93 *Popov v. France*, judgment of 19 January 2012, nos. 39472/07 39474/07, §§ 140 to 141, (included as a summary in this publication); *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08, § 108, (included as a summary in this publication).

A measure of confinement must, under Article 8, be proportionate to the aim pursued by the authorities. The aim of the authorities in immigration cases is often the enforcement of a removal decision. Where families are concerned, the authorities must, in assessing proportionality, take account of the best interests of any children.

The Grand Chamber considered the acceptability of the living conditions of those seeking asylum in *M.S.S. v. Belgium and Greece*[94] (this case did not concern child applicants but provided helpful guidance on the overall issues). The Grand Chamber held that States are liable for how asylum seekers who were not held in detention fared. It emphasised the vulnerability of people seeking asylum, who often cannot understand the local language and are without means. In many instances, they have already suffered traumatic experiences. Proactive measures are required to inform asylum seekers of the infrastructure or sources of assistance available to them, and to keep in contact with them to facilitate such assistance and the speedy processing of their claims.[95]

Where children are detained, they must be kept in conditions suited to the needs of children. The effects of detention on children, and the conditions in which they are held, can amount to a breach of Article 3 even where this would not have been breached were they an adult.[96] The reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create … for them a situation of stress and anxiety, with particularly traumatic consequence".[97]

Violations of Article 3 were found in:

(a) *Popov v. France*, in which the children were of very young age (5 months, and three years), detained for 15 days, and confined in a detention centre in which there were no children's beds or play facilities, the furniture was metal, and there were automatically closing doors that posed risk of injury. Breaches of Articles 5 and 8 were also found.[98]

94 *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, no. 30696/09.

95 *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, no. 30696/09, §§ 249 to 263.

96 *Muskhadzhiyeva and Others v. Belgium*, judgment of 19 January 2010, no. 41442/07, (included as a summary in this publication).

97 *Tarakhel v. Switzerland*, Grand Chamber, judgment of 4 November 2014, no. 29217/12, § 119, (included as a summary in this publication).

98 *Popov v. France*, judgment of 19 January 2012, nos. 39472/07 39474/07, (included as a summary in this publication); see also *S.F and others v. Bulgaria*, judgment of 7 December 2017, no. 8138/16.

(b) *Muskhadzhiyeva and Others v. Belgium*, which concerned four young children who were held, accompanied by their mother, for one month pending removal. The Court took into consideration their young age (seven months to seven years), the duration of their detention and their health status. [99]
(c) *Rahimi v. Greece*, in which the conditions of detention of an unaccompanied child aged 15 were so poor they undermined the very essence of human dignity and could be regarded in themselves, without taking into account the length of detention (a few days) as degrading treatment. [100]

(c) Immigration exclusions of children

Where a child who previously lived apart from a parent, outside a Contracting State, is refused entry to join a family, a violation may arise.

Showing a sufficiently substantial existing family tie may be difficult where a child has lived at a distance for some time. In *Ahmut v. the Netherlands*,[101] a 15-year-old son left Morocco, where he had been brought up by relatives, to join his father in the Netherlands. The boy had lived most of his life in Morocco, and he had strong linguistic and cultural links there. There were other family members in Morocco. The separation was the conscious decision of his father to move, and there was nothing to stop them continuing there the degree of family life they had before. That the father might prefer to intensify his family links with his son in the Netherlands, the Court said, did not guarantee a right to choose the most suitable place to develop family life.

The situation can differ if a parent has succeeded in obtaining refugee status. The granting of refugee status should be recognised as an acknowledgment by the State that the parents simply cannot return.

It may also be decisive if the parents can show a greater degree of integration into the country. In *Sen v. the Netherlands*,[102] the parents had both obtained long standing and lawful resident status in the Netherlands, and two of their children had been born in that country. The Court gave weight to the consideration that the children had no links with Turkey and commented that the free choice of the parents to leave their

99 *Muskhadzhiyeva and Others v. Belgium*, judgment of 19 January 2010, no. 41442/07, § 63, (included as a summary in this publication).

100 *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08, § 108, (included as a summary in this publication); See also *S.F and others v. Bulgaria*, judgment of 7 December 2017, no. 8138/16.

101 *Ahmut v. the Netherlands*, judgment of 28 November 1996, no. 21702/93.

102 *Sen v. the Netherlands*, judgment of 21 December 2001, no. 31465/96.

eldest child in Turkey could not be regarded as an irrevocable decision that she should remain outside the family group.

(d) Immigration expulsions of children

Where children are concerned, the State must consider their best interests. Expelling a child from the country in which they have lived for most of their life, and where their close family lives, would rarely fit in with such an object.

Where a child has committed a very serious criminal offence, consideration of the best interests of the child will still apply. Where a 13-year-old had committed rape and was sentenced to four years' imprisonment, the Court found that the State had not shown he was reasonably expected to reoffend or cause disorder such as would render his expulsion necessary.[103] In *Jakupovic v. Austria*,[104] the Court stated that very weighty reasons had to be put forward to justify the expulsion of a 16-year-old particularly given the history of conflict in the country of origin, and given there was no evidence of close relatives remaining there. It gave close scrutiny to the boy's criminal record and found that expulsion would be a disproportionate interference with his right to respect for private and family life.

Very serious reasons are required to justify expulsion for a settled migrant who has lawfully spent all or the major part of his or her childhood in the host country, particularly where he or she committed any offences as a juvenile.[105] The key considerations are the extent of the links of the individual with the host State and receiving State. These will be balanced against the reasons for removal and an assessment of whether the interests of the prevention of crime or disorder outweigh the effect of removal on the applicant.

Where a second-generation applicant spent most of her formative life in a Contracting State and was refused renewal of a residence permit on technical grounds, a violation occurred. The 15-year-old daughter of Somali parents settled in Denmark had gone to Kenya to care for her grandmother. Her Danish residence permit expired due to failure to reapply within the time limit, and she was barred from returning to Denmark. The Court found that no fair balance had been struck under Article 8 between her interests and immigration control.[106]

103 *A.A. v. the United Kingdom*, judgment of 20 September 2011, no. 8000/08, §§ 53 to 77.

104 *Jakupovic v. Austria*, judgment of 06 February 2003, no. 36757/97.

105 *Maslov v. Austria*, judgment of 23 June 2008, no. 1638/03.

106 *Osman v. Denmark*, judgment of 14 June 2011, no. 38058/09, §§ 53 to 77.

Even where the expulsion of second-generation applicants has been largely justified, the Court has taken exception to the imposition of an indefinite measure of prohibition of return to the expelling country where most family connections still existed. [107]

The manner of implementation of expulsion of a child, or its effects, may be so traumatic that issues arise under Article 3:

(a) There was a lack of humanity, amounting to inhuman treatment, where Belgian authorities placed a five-year-old Congolese child in a closed adult centre, without facilities, counselling or educational assistance.[108]
(b) States must take adequate protections and make necessary arrangements to ensure that when expelling a child, there are appropriate family members or structures to care for them on arrival. Where Belgium sent a five-year-old Congolese child back to Canada, the Court found a lack of adequate preparation and supervision. The Belgian authorities had not arranged for the child to be accompanied on her flight and had not made sure that a family member would come to meet her at the airport. The Court held that the Belgian authorities had been under an obligation to facilitate the girl's reunion with her mother in Canada, and that in fact they had not only failed to assist, but their actions had also hindered this process. The authorities had not pursued the higher interest of the child; in particular by detaining her in an unsuitable adult centre rather than finding a more adapted structure.[109]
(c) The release of a child to fend for himself for 10 days without proper supervision and care was a breach of Article 3.[110]
(d) In exceptional circumstances, the conditions facing children on expulsion to another country may disclose treatment of such a severe nature as to inflict on them inhuman and degrading treatment contrary to Article 3. A high threshold is set for treatment to fall within Article 3. A mere change of environment and living standards is insufficient.[111]

107 *Yilmaz v. Germany*, judgment of 17 April 2003, no. 52853/99, § 48; *Keles v. Germany*, judgment of 27 October 2005, no. 32231/02, § 66.

108 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03.

109 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03.

110 *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08, §§ 81 to 94, (included as a summary in this publication).

111 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03.

A child cannot be blamed for the conduct of his or her adult relatives.[112] The removal of a parent from a Contracting State may be incompatible with the requirements of Article 8 where there is a child who is also in residence in that State.

The relevant factors will include:

(a) the extent to which family life is effectively ruptured;
(b) the nature and strength of the parent's links with the child;
(c) whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them;
(d) whether there are factors of immigration control;
(e) whether there are considerations of public order;
(f) the age and adaptability of children.

Where a non-national parent is being expelled and the children are in the custody of the other parent after separation or divorce, family links may arguably be ruptured between the non-national parent and child, since the child will not be accompanying that parent. This can create a paradox where a parent who has been divorced may derive a right to stay in order to have access to their child, whereas those who are in an ongoing married relationship may be expected to uproot every family member and leave.

(a) In *Berrehab v. the Netherlands*,[113] the application was brought by a father, ex-wife and child in respect of the proposed expulsion of the father after divorce which threatened to break ties between him and the child. The fact that the parents no longer cohabited was not decisive for the existence or otherwise of family life where the relationships arose out of a lawful and genuine marriage and the father saw the child four times a week, regular and frequent contact proving the strength of his ties. It was of relevance that the father had been lawfully resident in the Netherlands for many years, had a home and job, and the State had no cause for complaint against him. A balance had not been achieved between the interest of immigration control and the applicants' mutual interest in continuing family ties.
(b) In *Ciliz v. the Netherlands*,[114] the decision-making procedure concerning the father's expulsion disclosed a violation of Article 8 where the authorities prejudged the outcome of contact proceedings by expelling him during a period of trial contact sessions and he had not been convicted of any criminal offences warranting his removal.

112 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03.

113 *Berrehab v. the Netherlands*, judgment of 21 June 1988, no. 10730/84.

114 *Ciliz v. the Netherlands*, judgment of 11 July 2000, no. 29192/95.

(c) Decisions concerning the expulsion of a non-national parent must give proper regard to the best interests of the children. Where a mother, who had been the custodial parent of two girls, was put under order of expulsion and ban on re-entry for two years, the Court found that her aggravated breaches of immigration law did not justify the traumatic impact of separation from the two children who had been placed, by court order, under the care of their father due to the expulsion order.[115]

Where children, on return to a country, were at risk of being separated from their parents or kept in inappropriate accommodation, this was enough to disclose a potential breach of Article 3.[116]

As stated above, families with children who are seeking asylum may not be expelled to another Contracting State where they risk precarious circumstances unless the State concerned provides specific and concrete guarantees of reception appropriate to their age.[117]

(e) Abduction

As stated at the outset of this overview, under Article 53 the ECHR must be construed in a way that does not limit or derogate from the human rights and fundamental freedoms found in the relevant Hague, UN and EU instruments to which States are party.

This is particularly relevant in the area of international child abduction. The obligations that Articles 6, 8 and 13 impose on the Contracting States must be interpreted taking into account, in particular, the 1980 Hague Convention on the Civil Aspects of International Child Abduction,[118] the Convention on the Rights of the Child[119] and, where applicable the EU Reg 2201/2003 ("Brussels II bis") which applies in intra EU abduction cases.[120]

115 *Nunez v. Norway*, judgment of 28 June 2011, no. 55597/09.

116 *Tarakhel v. Switzerland*, Grand Chamber, judgment of 4 November 2014, no. 29217/12, (included as a summary in this publication).

117 *Tarakhel v. Switzerland*, Grand Chamber, judgment of 4 November 2014, no. 29217/12, § 121 to 122, (included as a summary in this publication).

118 *Iglesias Gil and A.U.I. v. Spain*, judgment of 29 April 2003, no. 56673/00, § 51; *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, no. 31679/96, § 95.

119 *Maire v. Portugal*, judgment of 26 June 2003, no. 48206/99, § 72.

120 *Šneersone and Kampanella v. Italy*, judgment of 12 July 2011, no. 14737/09, (included as a summary in this publication).

Valuable work on the issue of child abduction has been done, and continues to be done, by the Hague Conference on Private International Law[121], the UN Committee on the Rights of the Child, and the European Union.

The key question in cases involving abduction is whether a fair balance has been struck between competing interests at stake: those of the child, of the parents, and of the public order.[122] The child's best interests must be a primary consideration. In *X v. Latvia*,[123] the Court went further and found that there exists a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.[124] The Court considered that exceeding a time limit in the applicable Hague Convention by a significant degree, in the absence of any circumstances capable of exempting the domestic courts from the duty to strictly observe the time limit, meant that there was no compliance with the positive obligation to act expeditiously in proceedings for the return of children.

Two cases provide a particularly helpful elucidation of the various considerations in issue. The first case, *Neulinger and Shuruk v. Switzerland*,[125] concerned a situation where a child had been taken by his mother from Israel to Switzerland, as she feared his father would take him to a camp for religious indoctrination. The Court stated that it was not convinced that it would be in the child's best interests for him to return to Israel. As to the mother, she would sustain a disproportionate interference with her right to respect for her family life if she were forced to return with her son to Israel. Consequently, there would be a violation of Article 8 in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced. For these reasons the Court found a conditional violation of Article 8 – a violation only if the Swiss authorities enforced the existing return order for the child. The facts were examined through the prism of what was best for the child.

121 www.hcch.net.

122 *Maumousseau and Washington v. France*, judgment of 06 December 2007, no. 39388/05; *Rouiller v. Switzerland*, judgment of 22 July 2014, no. 3592/08.

123 *X v. Latvia*, Grand Chamber judgment of 26 November 2013, no. 27853/09, (included as a summary in this publication).

124 *X v. Latvia*, Grand Chamber judgment of 26 November 2013, no. 27853/09, § 96, (included as a summary in this publication).

125 *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010, no. 41615/07, (included as a summary in this publication).

The second case, *Oller Kaminska v. Poland*,[126] was one in which the Court confirmed the need for the rapid recognition and enforcement of child abduction and custody orders. This matter concerned an application made by a Polish national who alleged that she had suffered a violation of her right to respect for her family life, on account of the Polish authorities' inability to swiftly reunite her with her daughter, notwithstanding a series of return orders. The Polish State had failed to act promptly, and the Court considered whether that was tantamount to a violation of Article 8 rights. The extensive litigation arising out of the child's abduction created a maelstrom of competing applications, orders and appeals in both Poland and Ireland.

The Court noted that the mother of the child had initiated proceedings under the Hague Convention, that she had sought to enforce Irish court orders, that she had duly contacted the Irish and Polish Central Authorities, and that she had repeatedly requested that proceedings be accelerated and appealed where required. The Court reaffirmed that the norms set down in Brussels II bis and in the Hague Convention are based on the philosophy that in all decisions concerning children, their best interest must be paramount. When approaching the question of whether the State authorities had taken all measures that they could reasonably have been expected to take in order to ensure that the mother's family rights were recognised, the Court concluded that Poland had failed. During the lengthy proceedings, the mother had no contact with the child. Although there was some acknowledgement of the complexity of this matter, the Court was not impressed with an argument mounted by the State that this contributed to the delay.

(f) Relocation

Relocation cases are usually disputes about whether a parent or other main carer should be permitted to take their child to live in a new location as his or her main home. "Child relocation" refers to a change in the child's place of residence. Such disputes are amongst the most fraught parenting disputes, with high stakes for both sides and little room for compromise.

The Washington Declaration on International Family Relocation 2010 has been the product of discussions to harmonise international relocation law. It is a preliminary document, and contains a list of factors to consider in a relocation application. More recently, the Council of Europe published Recommendation 2015(4) which applies to situations where there is, or may be, a disagreement on the relocation of a child,

126 *Oller Kaminska v. Poland*, judgment of 18 January 2018, no. 28481/12, (included as a summary in this publication).

either within the jurisdiction of one member State[127] or abroad. This recommendation applies in particular to situations where, as a result of his or her relocation, a child would be at risk of losing contact, or of a significant disruption to contact, with one of his or her parents or with other holders of parental responsibilities.

It sets out three general principles saying that national laws should:

(a) offer sufficient certainty to prevent and resolve relocation disputes;
(b) provide sufficient flexibility to satisfactorily resolve disputes; and
(c) encourage the reaching of friendly agreements.[128]

Relocation may involve a forced change in the language spoken by the child, the practice of religion or a change in the circle of the child's friends and close relations. These are all factors which may affect the child's physical and psychological well-being, as protected under Article 8. The Court has not to date found admissible any complaint about either the refusal to relocate or the permission to relocate at the request of one parent. However, it has addressed the issue of the impact of relocation on the affected children in other contexts primarily in connection with state-forced relocation in immigration and expulsion and constructive expulsion cases and the application of the "adaptable age" principle.[129]

In respect of questions about the recognition of foreign birth documentation in relocation scenarios, the Court has had to consider the impact on the affected children who were born as the consequence of a judicially sanctioned surrogacy arrangement overseas where the socio-legal parents bring the children back to the country of their citizenship and seek to register them there. The Court ruled in both *Mennesson v. France*[130] and *Labassée v. France*[131] that Article 8 was applicable in its family life aspect because the intended parents acted as the parents of the children since they were born and they lived together in a way that formed family life.[132] There was a direct

127 Subject to Principle 7, see Recommendation 2015(4) for further information.

128 Recommendation CM/Rec (2014) of the Committee of Ministers to member States on preventing and resolving disputes on child relocation, adopted by the Committee of Ministers on 11th February 2015 at the 1219th meeting of the Ministers' Deputies.

129 See e.g. *Jeunesse v. Netherlands*, Grand Chamber judgment of 3 October 2014, no. 12738/10; *Biao v. Denmark*, Grand Chamber judgment of 24 May 2016, no. 38590/10.

130 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, (included as a summary in this publication).

131 *Labassée v. France*, judgment of 26 June 2014, no. 65941/11.

132 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, § 45, (included as a summary in this publication); *Labassée v. France*, judgment of 26 June 2014, no. 65941/11, §37.

relationship between the private life of children born after surrogacy and the determination of their legal affiliation. As an essential part of the identity of an individual was at stake, Article 8 was also applicable in its private life aspect.[133]

The refusal to accord legal recognition stemmed from a wish to discourage French nationals from having recourse - outside France - to a reproductive technique that was domestically prohibited. The alleged aim was to protect the children and the surrogate mother.[134] The Court found France had a wide margin of appreciation because in the sphere of decisions relating to surrogacy there is no European consensus and because of the difficult ethical issues involved. On the other hand, the margin was narrow because it concerned parentage, a key aspect of the existence or identity of an individual.[135]

With regard to the right to respect for the private life of the children, the Court found a breach of Article 8. The latter were confronted with legal uncertainty because of the non-recognition in the French legal order of the *de facto* bond of affiliation between them and the social/intended parents. This contradiction between the legal and social reality undermined the children's identity within French society. Consequently, it was uncertain if the children would receive French nationality.[136] In addition, the non-recognition had negative consequences for the children's rights of inheritance. In conclusion, the Court found that the deprivation of legal recognition of the biological reality, (the intended social father was their genetic father), was against the best interests of the children.[137] (As stated above, the issue of legal recognition of the mother is currently pending before the Grand Chamber in the first case brought under Protocol 16.)

The Hague Conference on Private International Law is currently conducting a project looking to adopt an instrument that will address the cross-border recognition of parentage.

133 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, § 46, (included as a summary in this publication); *Labassée v. France*, judgment of 26 June 2014, no. 65941/11, §38.

134 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, § 62, (included as a summary in this publication); *Labassée v. France*, judgment of 26 June 2014, no. 65941/11, §54.

135 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, § 77-80, (included as a summary in this publication); *Labassée v. France*, judgment of 26 June 2014, no. 65941/11, §56-59.

136 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, § 96-97, (included as a summary in this publication); *Labassée v. France*, judgment of 26 June 2014, no. 65941/11, § 75-76.

137 *Mennesson v. France*, judgment of 26 June 2014, no. 65192/11, § 99, (included as a summary in this publication); *Labassée v. France*, judgment of 26 June 2014, no. 65941/11, § 78.

(g) Trafficking and child labour

Article 4 expressly prohibits slavery, servitude, forced or compulsory labour. It is an absolute prohibition. Human trafficking also falls within the ambit of Article 4. It is without doubt a phenomenon that runs counter to the spirit and purpose of that provision (*Rantsev v. Cyprus and Russia*,[138] a significant case on trafficking albeit not one involving children).

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[139]

Servitude is a particularly serious form of denial of liberty. It involves an obligation to provide one's services that is imposed by the use of coercion. It is to be linked to the concept of "slavery". In addition to the obligation to perform services for others, the notion of servitude embraces the obligation for the "serf" to live on another person's property and the impossibility of altering his or her condition.[140] Servitude corresponds to aggravated forced or compulsory labour, the distinguishing factor being the victim's feeling that their condition is permanent and their situation is unlikely to change. The feeling would be based on the above, objective criteria, or brought about or kept alive by those responsible for the victim's situation.

Forced or compulsory labour means "work or service which is exacted from any person under the menace of any penalty, against the will of the person concerned and for which the said person has not offered himself voluntarily".[141]

Trafficking was defined by the Court in *Rantsev v. Cyprus and Russia* as the treatment of human beings as commodities, with close surveillance, circumscribing of movement, use of violence and threats, poor living and working conditions, and little or no payment.[142] While there is no express reference to trafficking in the ECHR, in assessing the scope of Article 4 the Court has stressed that sight should not be lost of the fact that the ECHR is a living instrument which must be interpreted in light of

138 *Rantsev v. Cyprus and Russia*, judgment of 07 January 2010, no. 25965/04, §§ 279 to 282, (included as a summary in this publication).

139 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, § 122.

140 *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09, §§ 89 to 90; *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, § 123.

141 *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09, § 71.

142 *Rantsev v. Cyprus and Russia*, judgment of 07 January 2010, no. 25965/04, §§ 279 to 282, (included as a summary in this publication).

present-day conditions. Trafficking in human beings has been noted by the Court to have increased significantly in recent years. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrates the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it.[143]

Article 4 imposes positive obligations as arise under Articles 2 and 3 (as set out in sections above), as well as the following:[144]

(a) States must take adequate measures to prevent businesses being used as a cover for trafficking;
(b) States must ensure that immigration rules cannot be suborned in such a way as to encourage, facilitate or tolerate trafficking;
(c) States must put in place a legislative and administrative framework to prohibit and punish trafficking, and to protect victims;
(d) The Anti-Trafficking Convention explicitly requires each member State to establish jurisdiction over any trafficking offence committed in its territory;
(e) States must cooperate effectively with relevant authorities in other States in investigating cross-border situations of trafficking. This duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in countries of origin, transit and destination.

(h) Age assessments and verification procedures

Age assessment in asylum proceedings refers to procedures through which authorities seek to establish, on the balance of probabilities, the chronological age of a person claiming to be a child, in order to determine which immigration procedures need to be followed.

Age assessment is a preliminary step to processing an asylum claim. This is because a number of procedural safeguards attach to asylum claims lodged by children[145] who should always be given the benefit of the doubt. It is essential that such procedures

143 The EU has also put in place a comprehensive and victim-centred legal and policy framework, the Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims.

144 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01; *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09; *Rantsev v. Cyprus and Russia*, judgment of 07 January 2010, no. 25965/04, § 288, (included as a summary in this publication).

145 *Mahamed Jama v. Malta*, 26 November 2015, no. 10290/13, § 150.

are concluded speedily so that those who entered the procedure as children, but were not treated as such, do not end up being over age by the time the age assessment is complete.[146]

The Court has not yet given guidance as to the requirements of an age assessment procedure in order for it to comply with the ECHR, though cases are currently communicated, such as *Darboe and Camara v Italy*.[147]

No method of age assessment currently exists that can determine age with certainty. A number of age assessment methods are invasive and may cause physical or mental harm to the person subject to them. The UNHCR has cautioned States on the use of age assessments in the asylum context. More than 20 cases alleging that age assessment procedures violate the UNCRC are currently pending before the UNCRC Committee.

The UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1 (A) (2) and 1 (F) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees, § 75, state that it is important that age assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity.

The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child. As age is not calculated the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Most importantly, before an age assessment procedure is carried out a qualified independent guardian must be appointed to advise the child and must advise in practice.

The consequences for a child being found, incorrectly, to be an adult, are serious. Articles 3 and 8 are likely to be engaged. The child will have been denied substantive and procedural rights to which they are entitled under international and European law, as well as appropriate social benefits. This can affect the outcome of a child's asylum claim. A clear and grave risk is the improper accommodation of children with unrelated adults. This can expose them to risk of abuse as well as to risk of being trafficked (see above section).

146 See https://rm.coe.int/age-assessment-council-of-europe-member-states-policies-procedures-and/168074b723

147 *Darboe and Camara v. Italy*, application no. 5797/17, communicated on 14 February 2017.

In the context of verification procedures for establishing family ties, children seeking leave to enter may find themselves required to prove the claimed relationships with persons in the country already. A fair opportunity needs to be given to present claims. There is a requirement of good faith on the part of the State.

In *Abdullahi Elmi and Aweys Abubakar v. Malta*,[148] the child applicants' complaint concerned the fact that they were detained despite claiming to be minors. Their claim was later found to be true. The Court reiterated that the necessity of detaining children in an immigration context must be very carefully considered. It was positive that in Malta, when an individual was found to be a child, they were no longer detained but placed in a non-custodial residential facility.

An issue could arise, however, in respect of a State's good faith, where the determination of age is taking an unreasonable amount of time. This lapse of time could result in a child attaining majority pending official determination.[149]

In *Abdullahi Elmi and Aweys Abubakar v. Malta*, the Court considered that despite the fact that "borderline" cases may require further assessment, and just because a large number of individuals per year were not children, this could not justify a duration of more than seven months to determine claims. The State had not explained why it was necessary for the first applicant to wait for five months to have the test and another for two and a half months for such a decision and his release under a care order.[150]

Even accepting that the detention was closely connected to the ground of detention relied upon (preventing unauthorised entry), in practice, to allow for the asylum claim to be processed with the required age assessment, the delays, particularly those subsequent to the determination of the children's age, raised serious doubts about the authorities' good faith. The situation was rendered even more serious by the fact that the applicants lacked any procedural safeguards as well as the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the children was a measure of last resort for which no alternative was available.[151]

148 *Abdullahi Elmi and Aweys Abubakar v. Malta*, judgment of 22 November 2016, nos. 25794/13 28151/13.

149 *Abdullahi Elmi and Aweys Abubakar v. Malta*, judgment of 22 November 2016, nos. 25794/13 28151/13, § 145.

150 *Abdullahi Elmi and Aweys Abubakar v. Malta*, judgment of 22 November 2016, nos. 25794/13 28151/13, § 145.

151 *Abdullahi Elmi and Aweys Abubakar v. Malta*, judgment of 22 November 2016, nos. 25794/13 28151/13, § 145 to 148.

(7) RIGHT TO EDUCATION

Article 2 of Protocol No. 1 provides for the right to education. Education is a wide concept. Elementary education in particular, has been underlined as being of great importance to a child's development. No specific standard of education is set out in Article 2 of Protocol No. 1.

One issue that commonly arises is the prejudicial treatment of children belonging to ethnic minorities. The Grand Chamber has considered the right to education, in conjunction with Article 14, the prohibition against discrimination, in *Oršuš v. Croatia*.[152] That case concerned Roma children who alleged that by being allocated to Roma-only classes during their primary education, their right to receive an education and their right not to be discriminated against was violated.

The Grand Chamber found the following:

(a) For the right to education to be effective, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed.
(b) The Roma have become a specific type of disadvantaged and vulnerable minority and require special protection. The applicants were children for who the right of education was of paramount importance.
(c) The vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.
(d) The schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group. As a result of the arrangements, the applicants were placed in separate classes where an adapted curriculum was followed, though its exact content remained unclear.
(e) Owing to lack of transparency and lack of clear criteria on transfer, the applicants stayed in Roma-only classes for substantial periods of time, sometimes even during their entire primary schooling.
(f) There were no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate

152 *Oršuš and Others v. Croatia*, judgment of 16 March 2010, no. 15766/03, (included as a summary in this publication).

aim said to be pursued was achieved and maintained. The placement of applicants in Roma-only classes at times during their primary education had no objective and reasonable justification.

(8) APPLICANTS WHO ARE CHILDREN

Article 34 of the ECHR sets out who is competent to bring a claim: those who have "victim status". Children may, through an appropriate representative, complain that their ECHR rights have been violated.

Parents may also generally bring applications on behalf of their children. Whether a natural parent has standing to act on his or her child's behalf is dependent on whether the party who opposes the natural parent, and is entitled to represent the child under domestic law, can be deemed to effectively protect the child's ECHR rights.[153]

One danger is that where there is conflict, some of the child's interests may never be brought to the Court's attention, leaving the child deprived of effective protection. Even though a parent has been deprived of parental rights, the standing of a natural parent suffices to afford him or her the necessary power to apply to the Court on the child's behalf too, in order to protect his or her interests.[154]

The Court has drawn a different conclusion concerning a dispute between a mother with custody and the child's natural father about the latter's access to the child. In cases arising out of disputes between the parents, it is the parent entitled to custody who is entrusted with safeguarding the child's best interests. In these situations, the position as natural parents cannot be a sufficient basis to bring an application on behalf of a child.[155]

153 *Eberhard and M. v. Slovenia*, 1 December 2009, nos. 8673/05 9733/05, § 86, (included as a summary in this publication).

154 *Scozzari and Giunta v. Italy*, Grand Chamber judgment of 13 July 2000, nos. 39221/98 41963/98, (included as a summary in this publication); *Eberhard and M. v. Slovenia*, 1 December 2009, nos. 8673/05 9733/05, § 87, (included as a summary in this publication).

155 *K.B. and Others v. Croatia*, judgment of 14 March 2017, no. 36216/13, § 109, (included as a summary in this publication); *Eberhard and M. v. Slovenia*, 1 December 2009, nos. 8673/05 9733/05, §88, (included as a summary in this publication).

(9) CONCLUSION

In all countries around the world, including in Europe today, there are children living in exceptionally difficult conditions. They are growing up without the care and assistance, without the atmosphere of happiness, love and understanding, and without the benefit of the peace, dignity, and freedom that should be taken for granted by all children. It is imperative that the State protects the rights of those most vulnerable in our society: those who cannot protect themselves.

The introduction above has highlighted some of the key issues in a State's obligation to protect children, ranging from the right to respect for family life, to children in the criminal justice system and the right to education. The focus has been in particular on areas relevant to the countries of the Western Balkans. What follows in the second section of this publication is a selection of summaries of key cases before the European Court of Human Rights, to illustrate and expand on the points and issues discussed in the introduction.

Case Summaries

Croatian authorities failed to protect the applicant against domestic violence by mentally-ill ex-husband

JUDGMENT IN THE CASE OF A. v. CROATIA

(Application no. 55164/08)
14 October 2010

1. Principal Facts

The applicant, A, a Croatian national born in 1979 was at the time of the European Court's judgment living in Z, in hiding from her ex-husband, B. They had a daughter together in 2001, and their marriage was dissolved in November 2006.

According to two psychiatric reports of December 2004 and January 2008, B, who was captured in 1992 during the Homeland War and detained in a concentration camp where he was tortured, suffered from severe mental disorders. The reports emphasised his tendency towards violence and impulsive behaviour, and recommended compulsory psychiatric treatment.

Between November 2003 and June 2006, the applicant's ex-husband subjected her to repeated violent behaviour. The violence was both verbal, including serious death threats, and physical causing injuries. B often abused the applicant in front of their daughter and, on several occasions, turned violent towards her too.

Between 2004 and 2009 the national courts and the applicant brought a number of separate proceedings against B (three sets of criminal proceedings and four sets of minor offences proceedings), in the context of which they ordered certain protective measures such as periods of pre-trial detention, psychiatric or psycho-social treatment, restraining and similar orders and even a prison term. Some protective measures such as pre-trial detention and restraining orders were implemented, whilst others were not, including the prison term, as the Z. Prison was full to capacity. B did not undergo the psycho-social treatment ordered during the latter proceedings either due to lack of qualified individuals or agencies in the domain.

B was arrested in September 2009 and was at the time of the European Court's judgment still in detention, following his conviction in October 2009 and sentencing to three years' imprisonment for making death threats against a judge (and her small

daughter) involved in one of the sets of criminal proceedings brought against him for domestic violence. It was not known where he was being held or whether he had been provided with any psychiatric treatment.

2. Decision of the Court

The applicant complained about the authorities' failure to adequately protect her against domestic violence. She relied on Articles 2, 3, 8 and 13. She also alleged that the relevant laws in Croatia regarding domestic violence were discriminatory, in breach of Article 14.

Article 8

At the outset, the Court found that the applicant would have been more effectively protected from her ex-husband's violence if the authorities had had an overview of the situation as a whole, rather than in numerous sets of separate proceedings.

Although the courts did order protective measures, many of them (such as periods of detention, fines, psycho-social treatment and even a prison term) had not been enforced, thus undermining the very deterrent purpose of such sanctions. Indeed, the recommendations for continuing psychiatric treatment, made quite early on, were complied with as late as in October 2009 and then only in the context of criminal proceedings unrelated to the violence against the applicant. In addition, it was uncertain whether B had undergone any psychiatric treatment.

Therefore, the authorities' failure to implement measures ordered by the national courts, aimed on the one hand at addressing B's psychiatric condition, apparently at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence, had left her for a prolonged period in a position in which her right to respect for her private life had been breached, in violation of Article 8. In view of that finding, the Court considered that no separate issue arose under Articles 2, 3 and 13.

Article 14

The Court found that the applicant had not given sufficient evidence to prove that the measures or practices adopted in Croatia against domestic violence, or the effects of such measures or practices, were discriminatory. The applicant's complaint under Article 14 was therefore declared inadmissible.

Article 41

The Court held that Croatia was to pay the applicant €9,000 in respect of non-pecuniary damage and €4,470 in respect of costs and expenses.

Not providing adequate medical care or educational supervision to a minor in a temporary detention centre violated Article 3 and Article 5, whilst questioning and proceedings violated Article 6

GRAND CHAMBER JUDGMENT IN THE CASE OF BLOKHIN v. RUSSIA

(Application no. 47152/06)
23 March 2016

1. Principal Facts

The applicant, Ivan Blokhin, was a Russian national born in 1992 and living in Novosibirsk (Russia). The applicant suffered from attention-deficit hyperactive disorder (ADHD) and enuresis. He was diagnosed in December 2004 and January 2005 after being examined by two specialists who prescribed him medication and regular consultation by a neurologist and psychiatrist.

On 3 January 2005, the applicant, who was 12 years old at the time, was arrested and taken to a police station. He was not told the reasons for his arrest, and alleged that he was put in a cell that had no windows and with the lights turned off. He stated that he spent an hour in the dark, after which he was questioned by a police officer. The officer told him that S. (the applicant's 9 year old neighbour) had accused him of extortion. According to the applicant, the police officer told him to confess, saying that if he did so he would be released, but if he refused he would be placed in custody. The applicant signed a confession statement. After the applicant's guardian, his grandfather, was contacted and came to the police station, he retracted his confession.

Relying on the applicant's confession along with the statements of the 9 year old neighbour and his mother, the prosecuting authorities found that his actions contained elements of the criminal offence of extortion. However, since he had not reached that age of criminal responsibility the authorities refused to open criminal proceedings. On 21 February 2005, a district court ordered his placement for 30 days in a temporary detention centre for juveniles to prevent him from committing further acts of delinquency; he was placed in the detention centre on the same day. After an appeal by the applicant's grandfather, stating that the detention was unlawful and incompatible with his grandson's health and that he had been intimidated and questioned in the absence of his guardian, the regional court quashed the detention order in March 2005. In May 2006 the same court, after re-examining the matter, held that the original detention order was lawful.

After being released from the detention centre on 23 March 2005, the applicant was taken to a hospital where he received treatment for enuresis and ADHD until 21 April 2005. According to the applicant he did not receive appropriate medical care during his time in the detention centre. He claimed access to the toilets was limited and that he had to endure bladder pain and humiliation, given he suffered from enuresis. He also claimed that he and the other juveniles detained at the centre spent the whole day in a large empty room which had no furniture. They were only allowed to go into the yard twice during the applicant's 30 day stay, and they were given lessons only twice a week for about three hours, where about 20 children all of different ages were taught together in one class.

2. Decision of the Court

Relying on Article 3, the applicant complained that the conditions in the temporary detention centre had been inhuman and that he did not receive adequate medical care. He also complained that his detention had been in breach of Article 5 (right to liberty and security). Lastly he claimed that the proceedings relating to his placement in the temporary detention centre had been unfair and violated Article 6 (right to a fair trial).

On 14 November 2013 a Chamber of the Court delivered a judgment in which it unanimously found a violation of Article 3, 5, and 6. The case was referred to the Grand Chamber under Article 43 at the Government's request.

Article 3

The Court reiterated that in order for treatment to come under the scope of Article 3, it must reach a minimum level of severity. The Court noted that Article 3 imposed an obligation on the State to protect the physical well-being of persons who are deprived of their liberty, by providing them, among other things, with the required medical care. However, assessing if the medical care is adequate is one of the most difficult elements to determine. As a result the authorities must ensure that a comprehensive record is kept concerning the detainee's state of health and their treatment while in detention. The State must ensure that the medical treatment provided within prison facilities are at a level comparable to that which the State provides to the public.

When dealing with children, the health of juveniles deprived of their liberty should be safeguarded according to recognised medical standards applicable to juveniles in the wider community. The authorities should always be guided by the child's best interests and the child should be guaranteed proper care and protection. This includes

a medical assessment of the child's state of health to determine if he/she should be placed in a juvenile detention centre. Where events lie in large part within the exclusive knowledge of authorities, as is the case of persons under their control or custody, strong presumptions of facts will arise in respect to injuries, damage, or death that occurred during detention. The burden of proof in such cases rests with the authorities to provide an explanation. In the absence of any sufficient explanation by the authorities the Court can draw adverse inferences.

In the present case the Court noted in particular the applicant's young age and his state of health as circumstances relevant in the assessment of whether the minimum level of severity had been attained. Despite the Government submitting documents as to the standards of the detention centre, the Court noted that the documents were all dated after the time when the applicant was placed there. The Court also found that the reports or certificates submitted by the Russian Government were of little evidentiary value as they lacked reference to original documentation held by the detention centre. The Court noted that the applicant's grandfather submitted medical certificates at the detention hearing to show that the applicant suffered from ADHD, to ensure that the authorities would be aware of his condition. The Court found this evidence sufficient to establish that the authorities knew about the applicant's medical condition upon his admission to the temporary detention centre. Furthermore, the fact that he had to be hospitalised after his release for almost three weeks, provided an indication that he did not receive the necessary treatment for his condition while at the centre.

The Court found that the Government had failed to show that the applicant received medical treatment required for his condition, and found a violation of Article 3. Having made this finding, the Court held it unnecessary to examine the remainder of the applicant's complaints under this provision.

Article 5

The Court confirmed that the detention of the applicant for thirty days at the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5(1). The Court found that the applicant's detention did not come within in the scope of Article 5(1)(a),(b), (c), (e), or (f), but examined whether or not the applicant's placement in the temporary detention centre was in accordance with Article 5(1)(d). Detention for education supervision, in the case of minors, must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements. This does not mean that the placement in such a facility must be immediate, interim placements are allowed in facilities which do not provide this,

however, the interim custody period must be followed in a short amount of time by the transfer to a centre that provides education supervision.

In the present case, the applicant was placed in the detention centre for the purpose of correcting his behaviour and not as a temporary hold before being transferred to a different centre. The Court found, contrary to the Government's claims, that the applicant's placement in the temporary detention centre could not be compared to a placement in a closed educational institution. As discussed above, placement in a temporary detention centre should be a short term solution, and the Court failed to see how any meaningful educational supervision, to change a minor's behaviour, could be provided during a maximum period of thirty days. The Court did not dispute that there was some schooling at the centre, however, the centre was characterised by a disciplinary regime rather than the schooling provided. Furthermore, none of the domestic courts stated that the applicant's placement was for educational purposes, instead they all referred to "behaviour correction", or to prevent him from committing further delinquent acts, neither of which is a valid ground covered by Article 5(1)(d).

The Court found that the applicant's placement in the temporary detention centre did not fall under Article 5(1)(d), and therefore violated Article 5(1).

Article 6

With regard to juvenile defendants, the Court held that criminal proceedings should be organised to respect the principle of the best interests of the child and that the child charged with an offence is dealt with in a way that takes into account his age and level of maturity, and that steps are taken to promote his ability to understand and participate in the proceedings. The child should not be deprived of important procedural safeguards, because the proceedings could result in the deprivation of his liberty. Although not absolute, the right under Article 6(3)(c) provides for everyone charged with a criminal offence to be effectively defended by a lawyer. The Court noted that the particular vulnerability of an accused at the initial stages of police questioning can only be properly balanced by the assistance of a lawyer. For a fair trial, Article 6(1) requires that access to a lawyer be provided as soon as a suspect is first questioned by police, unless there is a compelling reason based on the circumstances of the case that that right should be restricted. The Court stressed in particular the fundamental importance of providing access to a lawyer where the person in custody is a minor given their particular vulnerability.

Article 6(3)(d) enshrines the principle that before an accused can be convicted, all evidence against him must usually be presented in his presence at a public hearing. An

accused should be given adequate and proper opportunity to challenge and question witnesses against him. Where the conviction is based solely or decisively on the evidence of an absent witness, the Court must decide if there are sufficient counter-balancing factors in place to still permit a fair and proper assessment of the evidence. The Court further noted that there must be good reason for the non-attendance of a witness at trial, especially when the conviction is based solely on the deposition made by a person whom the accused had no opportunity to cross examine. The rights of the defence in that case could be considered so restricted that it would violate the rights under Article 6.

In the present case the applicant had a diagnoses of ADHD and was only twelve years old when the police questioned him at the station. He was also below the age of criminal responsibility set by the Criminal Code for the crime of extortion, which he was accused of. He was in need of special treatment and protection by the authorities and at a minimum he should have been guaranteed the same legal rights and safeguards as those provided to adults. The Court noted that there was no indication that the applicant was told that he had the right to call his grandfather, a teacher, or lawyer or any other person of confidence during the period he was held at the police station to come assist him during questioning. Furthermore, no steps were taken to ensure that he was provided with legal assistance during questioning. The fact that domestic law did not provide for legal assistance to a minor under the age of criminal responsibility when interviewed by police was not a valid reason for failing to comply with that obligation. The Court found that the absence of legal assistance during the applicant's questioning by the police affected his defence rights and undermined the fairness of the proceedings as a whole, and constituted a violation of Article 6(1) and (3)(c).

The Court noted that the District Court was provided with the results of the pre-investigation inquiry, which included the witness statements made by the alleged victim and his mother. Neither S. nor his mother were called to the hearing to give evidence and to provide the applicant with an opportunity to cross examine them, despite the fact that their statements were of decisive importance to the pre-investigation inquiry's conclusion that the applicant committed the act. Based on these facts the Court concluded that the applicant was not afforded a fair trial and found a violation of Article 6(1) and (3)(d).

Article 41

The Court awarded the applicant €7,500 with respect to non-pecuniary damage. The Court also awarded the applicant €1,910 in respect of costs and expenses.

The authorities had failed in their positive obligations to protect the lives of a mother and child killed by the former's partner in violation of Article 2

JUDGMENT IN THE CASE OF BRANKO TOMAŠIĆ AND OTHERS v. CROATIA

(Application no. 46598/06)
15 January 2009

1. Principal Facts

The applicants were Branko Tomašić, his wife, Đurđa Tomašić, and their three children, all Croatian nationals living in Čakovec, Croatia. The applicants were the relatives of M.T. and her child, V.T., born in March 2005, who were both killed in August 2006 by M. M., V.T.'s father.

M.T. and M.M. lived together in the home of M.T.'s parents until July 2005, when M.M. moved out after disputes with the members of the household.

In January 2006 M.T. lodged a criminal complaint against M.M. for making death threats both in person and over the phone. On 15 March 2006 the first instance court found M.M. guilty of repeatedly threatening M.T. that he would kill her, himself and their child with a bomb. He was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment during his imprisonment and afterwards as necessary. On 28 April 2006 the appeal court reduced that treatment to the duration of M.M.'s prison sentence. M.M. served his sentence and was released on 3 July 2006.

On 15 August 2006 he shot dead M.T. and their daughter, V.T., before committing suicide by turning the gun on himself. Before the shooting he was spotted by M.T.'s neighbour carrying an automatic gun and leaving his bicycle in the adjacent woods. The neighbour immediately called the police. The police arrived at the scene twenty minutes later, just after the tragic event.

2. Decision of the Court

The applicants complained, under Article 2 and Article 13, that the State had failed to take adequate measures to protect M.T. and V.T. and had not conducted an effective investigation into the possible responsibility of the State for their deaths.

Article 2

The Court reiterated that Article 2 enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. A positive obligation will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. In the present case, the findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that the threats made against the lives of M.T. and V.T. had been serious and that all reasonable steps should have been taken to protect them.

The Court noted, however, that no search of M.M.'s premises and vehicle had been carried out during the initial criminal proceedings against him, despite the fact that he had repeatedly threatened to use a bomb. In addition, although the psychiatric report drawn up for the purposes of those criminal proceedings had stressed the need for continued psychiatric treatment, the Government had failed to show that M.M. had actually been properly treated. Indeed, M.M. had not followed an individual programme during his prison term even though it had been required by law. Nor had he been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats against M.T. and V.T. once free.

The Court therefore concluded that no adequate measures had been taken by the relevant domestic authorities to protect the lives of M.T. and V.T., in violation of Article 2.

The Court held that there was no need to examine separately the complaint under Article 2 regarding the failure of the State to carry out a thorough investigation into the possible responsibility of its agents for the deaths of M.T. and V.T.

Article 13

Further, the Court held that there was no need to examine the applicants' complaint under Article 13 given that it had established the State's responsibility under Article 2.

Article 41

The Court awarded the applicants, jointly, €40,000 in respect of non-pecuniary damage and €1,300 for costs and expenses.

The Court allows an NGO to bring a case before it on behalf of a young mentally disabled man who died in a psychiatric hospital

GRAND CHAMBER JUDGMENT IN THE CASE OF CENTRE FOR LEGAL RESOURCES ON BEHALF OF VALENTIN CÂMPEANU v. ROMANIA

(Application no. 47848/08)
17 July 2014

1. Principal Facts

The application was brought on behalf of Valentin Câmpeanu, who was born in 1985 and died in 2004. Mr Câmpeanu was abandoned at birth and placed in an orphanage. In 1990, he was diagnosed at a young age as HIV-positive and as suffering from a severe mental disability.

In March 1992 he was transferred to the Craiova Centre for Disabled Children and at a later stage to the Craiova no. 7 Placement Centre ("the Placement Centre").

In September 2003, the County Child Protection panel ordered that Mr Câmpeanu should no longer be cared for by the State, on the grounds that he had reached the age of 18 and was not enrolled in any form of education.

In early February 2004, after successive refusals by a series of institutions to admit Mr Câmpeanu, he was eventually admitted to a medical and social care centre, which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition.

On 9 February, following a sudden outburst where Mr Câmpeanu allegedly acted aggressively, he was taken to Poiana Mare Neuropsychiatric Hospital ("PMH") for examination and treatment. However, he was returned to the medical and social care centre on the same day. On 13 February, Mr Câmpeanu was again taken to PMH for treatment, being placed in different psychiatric divisions.

On 20 February he was seen by a team of monitors from the Centre for Legal Resources (CLR) who reported that Mr Câmpeanu was left alone in an isolated and unheated room, with a bed but no bedding, scantily dressed in only a pyjama top and without the assistance he needed in order to eat or use the bathroom facilities, as the hospital staff allegedly refused to help him over fear of contracting HIV. The CLR

representatives stated that they had asked for him to be immediately transferred to the Infectious Diseases Hospital in Craiova, where he could receive appropriate treatment. However, the hospital's manager had decided against that request, believing that the patient was not an "emergency case, but a social case", and that in any event he would not be able to withstand the trip. On the same day, 20 February 2004, Mr Câmpeanu died.

Unaware of Mr Câmpeanu's death, the CLR drafted several urgent letters and sent these to a number of local and central officials highlighting his extremely critical condition and the fact that he had been transferred to an institution that was unable to provide him with appropriate care. The CLR further criticised the inadequate treatment he was receiving and asked for emergency measures to be taken to address the situation. It further stated that Mr Câmpeanu's admission to the CMSC and subsequent transfer to the PMH had been in breach of his human rights, and urged that an appropriate investigation of the matter be launched.

On 22 February 2004 the CLR issued a press release highlighting the conditions and the treatment received by patients at the PMH, making particular reference to the case of Mr Câmpeanu and calling for urgent action.

2. Decision of the Court

In response to the many complaints lodged by the CLR and following the subsequent criminal investigation into Mr Câmpeanu's death, the CLR alleged that Mr Câmpeanu's rights under Article 2, 3, 5, 8, 13 and 14 had been violated.

Admissibility

The Court dismissed the objection by the Romanian Government that the CLR did not have standing to lodge the complaint on behalf of Valentin Câmpeanu, as it could neither claim to be a victim of the alleged violations of the Convention itself, nor was it Mr Câmpeanu's valid representative. The Court emphasised that the Convention guarantees rights, which are practical and effective, not theoretical and illusory, and that bearing in mind the serious nature of the allegations, it had to be open to the CLR to act as Mr Câmpeanu's representative. Hence the application was admissible.

Article 2

The Court stated that the Romanian authorities' decision to transfer Mr Câmpeanu, to place him in the medical and social care centre and subsequently transfer him to

PMH had been determined mainly by which establishment was willing to accommodate him rather than where he would be able to receive appropriate medical care and support. Noting that the medical and social centre was not adequately equipped to handle mental health patients, they transferred him to PMH, despite the fact that that hospital had previously refused to admit him, and was subsequently placed in a department with no psychiatric staff.

The transfers from one establishment to another had taken place without any proper diagnosis and aftercare and in complete disregard of Mr Câmpeanu's actual state of health and most basic medical needs. Of particular note was the authorities' failure to ensure he received antiretroviral medication.

The Court paid particular attention to Mr Câmpeanu's vulnerable state, and the fact that for his entire life Mr Câmpeanu had been in the hands of the authorities, which were therefore under an obligation to account for his treatment. By deciding to place Mr Câmpeanu in that hospital, even though they were aware of the appalling conditions in the psychiatric hospital, the authorities had unreasonably put his life in danger. The failure to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death. The Court hence concluded that the Romanian authorities had breached Article 2 by failing to ensure the necessary protection of Mr Câmpeanu's life.

Furthermore, the Court found a violation of Article 2 as regards the procedural requirements under that Article, as the authorities had failed to clarify the circumstances of Mr Câmpeanu's death and identify those responsible for it.

Article 13 in conjunction with Article 2

A breach was found of Article 13 in conjunction with Article 2, as the State had failed to provide an appropriate mechanism for redress to people with mental disabilities claiming to be victims under Article 2.

In view of its findings under Articles 2 and 13, the Court held that it was not necessary to separately examine the complaints under Article 3, taken alone and in conjunction with Article 13, Articles 5, 8 and 14.

Article 46

The Court held that the respondent State should take necessary general measures to ensure that mentally disabled persons in comparable situations were afforded

independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body.

Article 41

The CLR had not submitted any claims in respect of pecuniary or non-pecuniary damages, so no such award was made. The Court held that Romania was to pay €10,000 to the CLR and €25,000 to the organisation Interights, which acted as advisor to counsel for the CLR, for costs and expenses.

Lack of judicial review and monitoring of telephone calls of a minor placed in an educational centre violated Article 5(4) and Article 8 of the Convention

JUDGMENT IN THE CASE OF D.L. v. BULGARIA

(Application No. 7472/14)
19 May 2016

1. Principal Facts

The applicant, D.L., was a Bulgarian national born in 1999, living in Pleven, Bulgaria. On 2 August 2012, aged 13, she was placed in a "centre for children in crisis" on the basis of a decision by the director of social services for the municipality of Pleven. This measure was requested by her mother on the basis that she did not feel equipped to adequately care for her child. The decision was confirmed by the Pleven District Court on 1 October 2012. The applicant's time spent in this centre was extended by the court on several occasions.

On 3 April 2013, a local committee for combatting anti-social behaviour in minors requested that the applicant be placed in a closed education accommodation institution. Such centres had been established as an element of Bulgaria's programme to combat "antisocial behaviour" and were regulated under the Penal Code, not the family or child law regime. However the law did not require there to have been any criminal proceedings to trigger them. The scheme and the institutions had already been severely criticised, including by the United Nations Committee of the Rights of the Child and the Bulgarian Ombudsman.

The committee's request was refused by the court because of the potential negative impact it could have on the psychological and social development of the applicant, given the acknowledged unfavourable environment of these institutions. On 17 May 2013, the local committee requested again that she be put in a closed institution, arguing that the lack of an appropriate family environment had led to the applicant running away from home and becoming involved in delinquent groups who encouraged her to provide sexual services. She had had to be brought back on several occasions by the police and acted aggressively towards the staff.

On 10 June 2013, the criminal division of the district court held a hearing at which the applicant's mother was present and successfully demanded that the applicant should be represented by a court appointed lawyer. Statements from several social workers and other competent individuals were heard. The court ordered her to be placed in the

Podem secure educational institution. It held that despite the previous judgment that adopted a less harsh solution, i.e. the extension of her time in the "centre for children in crisis", this was no longer sufficient and thus the order for her to be placed in closed educational supervision was in the best interests of both the applicant and society.

The applicant's appeal against the measure was unsuccessful. Whilst in the institution the applicant's communications with the outside world were monitored.

2. Decision of the Court

The applicant complained that her placement in a closed educational institution did not conform with Article 5(1) of the Convention (the right to liberty and security of person) and that the decision was not reviewed at regular intervals by a tribunal as required by Article 5(4). She also argued that both the automatic and indiscriminate supervision of her mail and her phone calls was contrary to Article 8 (the right to respect for private and family life).

Article 5(1)

The Court first examined whether D.L.'s placement in the Podem centre was in conformity with Article 5(1)(d), which authorises the detention of minors for the purpose of educational supervision. In order to do this, the Court needed to determine whether the detention of the applicant was arbitrary, and whether or not it was "for the purpose" of her educational supervision.

On whether or not the decision was arbitrary, the Court noted that the Bulgarian law on antisocial behaviour of minors did not enumerate the acts that would be considered as 'antisocial' for the purposes of the legislation. However, the Court referred to older case law to indicate that it had previously considered prostitution and running away as antisocial acts that would be susceptible to lead to educational supervision. The Court then pointed to the fact that the decision was made by judicial authorities, in public, during which several people concerned, including the applicant, were heard. The authorities examined in detail the elements of the applicant's case and concluded that given her current living situation, and the fact that all other measures had been exhausted, there was no alternative to her placement in the Podem centre. The Court thus concluded that the requirement of being "prescribed by law" was satisfied and the decision was not arbitrary.

The Court then moved to examine whether the nature of the deprivation of her liberty was "for the purpose" of her supervised education. To this end, the Court noted

that the applicant was able to follow a school curriculum, that she achieved results that enabled her progress to a higher class and that she received a professional qualification. The Court concluded that the decision of the authorities was not punitive; it was designed to put her in an educational environment and was not arbitrary, and hence the measure conformed with Article 5(1)(d).

Article 5(4)

The Court recalled that the rationale behind the requirement that detention be reviewable is that the initial reasons for justifying detention can cease to exist; a particularly pertinent consideration for the case at hand was the possibility of the behaviour of the applicant to evolve during her period of detention. The Court acknowledged that the parties agreed that there was the possibility of judicial appeal built into the decision. However, the question for the Court was whether the applicant had the right to demand a revision, and if yes, was this offered to her.

The Court held that she should have benefited from automatic periodic judicial control, and that she should have been entitled to initiate, at reasonable intervals, such review. The legislation applicable did not authorise minors to demand a re-examination of their detention, it only permitted the local committee to do so. Thus, the Court concluded that there was a violation of Article 5(4) as there was no judicial avenue available to the applicant.

Article 8

The Court stated that an interference with an individual's Article 8 right will fail to comply with Convention standards unless it is "prescribed by law", is in pursuit of a legitimate aim, and is "necessary in a democratic society". The Court observed that the first two criteria were satisfied as the measures were prescribed by the Podem's internal rules and because monitoring the correspondence and telephone calls of minors prevented danger to the minor's health and a disruption of order. On whether the control of correspondence was "necessary in a democratic society", however, the Court observed that the internal rules provided for automatic and blanket monitoring of all correspondence of minors placed in centres. Thus, even the applicant's correspondence with her lawyers and NGOs, which should in principle be privileged correspondence, was subject to the general monitoring measures. Furthermore, the authorities were not required to give reasons for the control or stipulate the duration of the measure. The Court concluded that the regime of supervision of phone calls that was imposed on the applicant, that did not make an exception for contact with family or NGOs, and that was not based

on a personalised analysis of the risks or needs, was not founded on pertinent and sufficient motives to justify such an interference. Thus, neither regime could be considered to be in compliance with Article 8.

Article 41

The Court held that Bulgaria was to pay the applicant €4,000 in respect of pecuniary damage and €2,500 in respect of costs and expenses.

Croatia's failure to protect a vulnerable person from repeated and violent harassment violated Articles 3 and 8

JUDGMENT IN THE CASE OF ĐORĐEVIĆ v. CROATIA

(Application no.41526/10)
24 July 2012

1. Principal Facts

The first applicant Dalibor Đorđević was born in 1977, and the second applicant, his mother Radmila Đorđević, in 1956. Dalibor, mentally and physically disabled, was cared for by his mother. He was repeatedly harassed physically and verbally between July 2008 and February 2011 by children from the neighbouring school on account of his disability and Serbian origin. The harassment took the form of insults, shouting, spitting, hitting and pushing around, and on one occasion cigarette stubbing on his hands. Children also mocked the second applicant in Serbian dialect. The applicants' home was vandalised, with the doorbell often being rung at odd times, and insulting graffiti painted outside.

As a result, Dalibor became deeply disturbed, afraid and anxious, which was recorded by a number of medical reports. These also showed that he often bit his lips and fists, had a twitch, and signs of psoriasis owing to stress, and needed a calm and friendly environment.

The incidents were reported to various authorities on several occasions, including the school which was 70 metres away and which most of the children in question attended, the Social Welfare Service and the Ombudswoman for Persons with Disabilities. When police arrived, not always on time, they removed the children, without asking questions or identifying them. The children admitted violence towards Dalibor in interviews with the police, but were too young to be held criminally responsible.

In October 2009 and May 2010, the applicants' lawyer wrote to the Municipality's State Attorney's Office, about the long and ongoing harassment, complaining that there was no effective remedy in Croatian law for protecting persons from violent acts committed by children. She also complained to the Ombudswoman and asked for advice, however received a reply that she had no jurisdiction in the matter. Social services informed the mother that a civil action would have to be brought. The police said that an inquiry would not yield results. The State Attorney's Office said that they had no jurisdiction in the matter.

2. Decision of the Court

The applicant contended *inter alia* that the State had not given them adequate protection from the harassment and that there had consequently been violations of inter alia Articles 3, 8, 13 and 14.

Article 3

The Court decided to consider the incidents as a continuing situation. The incidents were well recorded and had an impact on the first applicant's mental and physical health, described as a peaceful person unable to defend himself. The Court considered that the effects of the continuous verbal and physical harassment – feelings of helplessness, and fear for prolonged periods of time, were sufficiently serious to meet the threshold of engaging Article 3.

For a positive obligation to arise to protect the first applicant, the authorities must have known or ought to have known of the existence of such ill-treatment by a third party, and failed to have taken reasonable measures to avoid the risk. Violent acts which fell under Article 3 required, in principle, criminal-law measures against the perpetrators. However, given the young age of Dalibor's harassers, it had been impossible to criminally sanction them. Furthermore, while their acts, taken separately, might not have amounted to a criminal offence, if examined in their entirety, they might have proved incompatible with Article 3.

Since July 2008, Dalibor's mother had informed the police about this ongoing treatment, as well as the ombudsman and social services. Therefore, the authorities had been well aware of the situation.

While the police had interviewed some children about the incidents, they had made no serious attempts to assess what had really been going on, and reports had not been followed by any concrete action. No policy decisions had been adopted and no monitoring mechanisms had been put in place in order to recognise and prevent further harassment. The lack of any true involvement of the social services and the absence of counselling given to Dalibor was particularly striking. Apart from responses to specific incidents, no relevant action of a general nature had been undertaken by the relevant authorities, despite their knowledge that Dalibor had been systematically targeted and that future abuse had been quite likely.

Therefore, there had been a violation of Article 3 in relation to Dalibor.

Article 8

Under Article 8, States did not only have to refrain from harming individuals, but there was also a duty to act to protect them from others. Radmila Dordevic's private and family life had been negatively affected by these incidents, and in the same way that the authorities had failed at effecting relevant measures to prevent Dalibor's further mistreatment, they had failed to protect her, in violation of Article 8.

Article 14

Domestic proceedings could have been raised under the Croatian Prevention Discrimination Act, which had specific provisions on ethnic origin and disability. It was also prohibited by the Constitution and European Convention. These were considered to offer a range of effective remedies, and as they were not exhausted, this complaint was rejected as inadmissible.

Article 13

As it had been impossible for the applicants to complain about the mistreatment, it was concluded that this right had been violated in connection with Articles 3 and 8.

Article 41

The Court awarded the applicants jointly €11,500 in respect of non-pecuniary damage. It awarded them jointly €1,206 for the costs and expenses incurred in the domestic proceedings and €3,500 for those before the Court.

Slovenian authorities failed in their positive obligations under Article 8 to facilitate access of father to his daughter – however he could not bring application on behalf of the daughter before the European Court of Human Rights as the mother had full custody

JUDGMENT IN THE CASE OF EBERHARD AND M. v. SLOVENIA

(Applications nos. 8673/05 and 9733/05)
1 December 2009

1. Principal Facts

The case originated in two applications by Mr Johann Ivan Eberhard and Ms M., his daughter. Mr Eberhard was married to M.E. and they lived together with their daughter, M., until M.E. moved out together with the child and filed for divorce in April 2001. In February 2002 the divorce between the two was finalised and the custody of the child was given to M.E.

On 4 May 2001 Mr Eberhard and his wife signed an agreement on access arrangements. After a month had passed during which the applicant claimed not to have had access to his daughter, he filed a request with the Šentjur Social Welfare Centre to have the agreement formally determined. M.E. continued to oppose contacts. On 1 August 2001 the Šentjur Social Welfare Centre issued an order allowing him to have access to the child four hours a week but refused to grant him the possibility of picking up the child at nursery and ordered instead that M.E. would bring the child to a meeting point. The access order became final and enforceable on 16 October 2002.

M.E. failed to comply with the order, so the applicant in November 2002 requested the enforcement of the order. The Šentjur Administrative Unit consequently ordered M.E. to allow access to the child and imposed a fine in case this was not respected. As a result of the continued refusal of M.E. to allow access to the child, the Unit issued orders against her imposing the payment of fees. M.E. appealed these orders successfully as it was found that M.E. had not been informed of the applicant's non-compliance notices. The access order itself was not modified by this decision and thus remained enforceable.

On 6 June 2003, Mr Eberhard lodged an application for custody of the child. Several attempts were made to set a hearing date, however this failed on various grounds including M.E.'s refusal to cooperate and the first applicant's request to appoint an expert psychologist. In December 2005 the applicant urged the domestic court to

issue an interim custody order and added an alternative request for an interim access order. The appointment of a new expert was also demanded. On 22 February 2006 Mr Eberhard lodged supervisory appeals complaining about the passivity of the judge.

In March 2006, M.E. was finally examined by the expert so that a hearing could be held regarding the interim order. In May the same year the domestic court rejected the applicant's request for interim custody but upheld his alternative request for an interim access order. Mr Eberhard and his daughter were therefore granted time to spend together during the week and on the weekends.

As M.E. continued to deny access to the child on certain occasions, the applicant complained in August 2006 requesting the payment of punitive fees for M.E. A hearing was set but then adjourned and the applicant lodged another supervisory appeal. During a hearing in September 2007 the proceedings were joined with a request for access arrangements that the applicant had filed in separate proceedings in 2004. During a hearing on 10 January 2008 the parties finally agreed on new access agreements and Mr Eberhard withdrew his custody request.

2. Decision of the Court

The applicants complained about the State's failure to enforce access arrangements decided in the administrative proceedings as well as the delays experienced in the proceedings concerning child custody and access arrangements, in violation of Article 6 and 8.

Admissibility

The Court firstly addressed the Government's submission that Mr Eberhard had no capacity to act on behalf of his daughter, as it was the mother who had custody of the child.

To this end, the Court recalled its past case-law on the issue that in cases arising out of disputes between parents, it was the parent entitled to custody who was entrusted with safeguarding the child's interests. In these situations, the position as a natural parent (without custody) could not be regarded as a sufficient basis to bring an application also on behalf of a child. The first applicant's position as a father was thus in this case insufficient, and consequently, the first applicant had no standing to act on the second applicant's behalf.

The Court thus limited its judgment to the situation of Mr Eberhard as the only applicant.

Article 8

The Court firstly noted that the tie between the applicant and his daughter fell within the scope of 'family life' within the meaning of Article 8. The Court emphasised that under Article 8 States have positive obligations to facilitate reunions between parents and their children and that ineffective and delayed proceedings might give rise to a violation of this Article. In the context of enforcement of family law decisions, the Court further stressed how the passage of time might have a strong negative influence on the parent-child relationship so that a swift implementation of the measure is required.

The role of the Court was thus to establish whether the national authorities took necessary, adequate and effective steps to facilitate the execution of the access order considering the mother's refusal to comply. The Court observed that the access order had not been enforced between the moment in which it became final in October 2002 and the domestic court's determination of new arrangements in May 2006, and that no measures were taken by the authorities in response to M.E.'s continued refusal to allow access to the child. The Court concluded that with regard to the execution of the access order, the State had failed to create the necessary conditions to have it enforced and ensure contact between the applicant and his daughter.

The proceedings concerning access arrangements and custody lasted more than four years, during which the applicant had extremely scarce contacts with his daughter. The Court acknowledged that the domestic courts had the possibility to adopt interim measures of their own motion but failed to do so. In addition, the access agreement should have been treated as urgent by the authorities, however the authorities had failed to make effective efforts to have the measure enforced.

The Court held therefore that the Slovenian authorities failed to ensure the enforcement of the access arrangements, resulting in a lack of contact between the applicant and his daughter for over four years, and furthermore failed to effectively and promptly conduct the proceedings, in breach of Article 8.

Article 6

The applicant's claim under Article 6 about the excessive duration of the proceedings, was rejected for non-exhaustion of domestic remedies.

Article 41

The Court held Slovenia was to pay the applicant €7,500 for non-pecuniary damage and €3,000 for costs and expenses.

Croatia should ensure contact between divorced father and his daughter at a time compatible with his work schedule and on suitable premises

JUDGMENT IN THE CASE OF GLUHAKOVIĆ v. CROATIA

(Application no. 21188/09)
12 April 2011

1. Principal Facts

The applicant, Stjepan Gluhakovic´, was a Croatian national born in 1960 and living in Rijeka, Croatia. In July 1999 Mr Gluhakovic´s wife left him; she was pregnant at the time. She gave birth in December 1999 to their daughter.

In a number of proceedings, before the local Municipal Court and Social Welfare Centre as well as before the Constitutional Court, Mr Gluhakovic´ was granted the right to contact with his daughter, who continued to live with her mother.

During these proceedings, Mr Gluhakovic´ repeatedly requested that the meetings with his daughter take place every fourth or eighth day, as he worked in Vicenza, Italy, and his work schedule was such that he had every fourth day off. He explained that it was therefore very difficult for him to travel to Rijeka on a fixed day of the week; he had to drive at night and was obliged to ask colleagues to replace him, causing him significant difficulties.

The national courts made no comment concerning his work schedule and repeatedly ordered that he see his daughter on a fixed day. Initially, until October 2008, meetings were ordered to take place every Tuesday for two hours, then from November 2008, once per week, and, from November 2009, every Thursday.

It was first ordered that the meetings were to take place at the Rijeka Counselling Centre and later, from November 2008, at the Social Welfare Centre. They had to be supervised by a third person, as recommended by a psychiatrist's report which diagnosed Mr Gluhakovic´ with paranoid psychosis.

In March and November 2005 the Counselling Centre reported to the national courts that their premises were not suitable for the meetings between Mr Gluhakovic´ and his daughter as they had to see one another in the Centre's kitchen or in offices of its employees. On that account, in July 2007 the Counselling Centre informed the applicant that he could no longer meet with his daughter on their premises.

In January 2009 the Social Welfare Centre also submitted to the courts that they had no suitable premises as, owing to a shortage of space, the only place where the applicant and his daughter could meet would be in a corridor.

In March 2010 the courts ordered that contact could take place once per week for three hours at a time when the applicant's work schedule allowed and at a place to be arranged between the parties themselves. However, that judgment had at the time of the judgment of the European Court of Human Rights not been enforced as the applicant's ex-wife refused to let him meet his daughter in his flat and no other suitable solution was found.

2. Decision of the Court

Relying on Article 8 of the Convention, Mr Gluhakovic´ complained that the Croatian authorities have not ensured regular contact with his daughter on adequate premises since 2000 and that, at the time of the Court's judgment, he had not seen his daughter at all since July 2007.

Article 8

It was clear that the tie between the applicant and his child fell within the scope of "family life" within the meaning of Article 8. The applicant's right to see his daughter at regular intervals was never in dispute before the national courts and they all agreed that the applicant should be able to enjoy that right. However, in view of the principle that the object and purpose of the Convention, which is an instrument for the protection of human rights, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective, the national court should have also ensured that the applicant was able to exercise his right to contact with his daughter effectively. The Court accepted that ordering that the meetings be supervised by a third person was a reasonable measure in view of the applicant's health problems as described by experts in psychology and psychiatry. However, the Court also accepted that travelling from Vicenza to Rijeka on a fixed day created difficulties for Mr Gluhakovic's right of contact with his daughter. The national courts on the other hand, had not found this to be the case, and had given no explanation as to why it had not been possible to accommodate his alternative proposals for contact. Indeed, his arguments had been consistently ignored at every judicial level.

Nor did the national courts take into account any objections as to the place of the meetings. They ignored both the Counselling Centre's reports as well as that of the

Social Welfare Centre's. The courts even ordered the meetings to take place at the Social Welfare Centre without assessing its suitability. This resulted in Mr Gluhakovic´ first having to go to significant lengths to organise his replacement at work, and having to meet his daughter in such places as a kitchen and offices of the Counselling Centre, and finally not seeing her at all as the only place to meet in the Welfare Centre would have been in a corridor.

Bearing in mind that Mr Gluhakovic´ had had no contact with his daughter since July 2007, the Court held that the Croatian authorities had failed to ensure his right to effective contact with his daughter, in violation of Article 8.

Article 41

The Court held that Croatia was to pay Mr Gluhakovic´ €15,000 in respect of non pecuniary damage.

Article 46

Exceptionally, and given the urgent need to put an end to the violation of Mr Gluhakovic's right to respect for his family life, the Court also decided to issue the direction that Croatia had to ensure effective contact between the applicant and his daughter at a time compatible with his work schedule and on suitable premises.

No violation of Article 8 of the Convention in the particular circumstances of the case as the domestic authorities had taken all the steps that could reasonably have been required of them to enforce the parental rights of the applicant

JUDGMENT IN THE CASE OF GRUJIĆ v. SERBIA

(Application no. 203/07)
28 August 2018

1. Principal Facts

The applicant, Mr Boško Grujić, was born in 1963. From 1991 until 2001 he lived with M.K., and the couple had two children together - J.G. born in January 1992 and M.G. born in 1994, who had a moderate intellectual disability. In January 2001, after the breakdown of the relationship, the local Social Care Centre decided that M.K. should have custody of the children, with the applicant allowed contact every other weekend and during the first half of the summer and winter school holidays.

The enforcement of this decision was suspended in June 2005 when the applicant notified the Social Care Centre that he intended to assert his parental rights in judicial proceedings and gain sole custody of the children. While the judicial proceedings were ongoing the domestic court ruled that an interim contact order be implemented on the same terms as the Social Care Centre's 2001 decision. In September 2008 neither the applicant nor M.K. attended the main custodial hearing of the Municipal Court and so that court decided that the applicant's civil claim to sole custody had been withdrawn. In 2011 the interim contact order was revoked on the basis that the judicial proceedings had ended in 2008.

During the judicial proceedings there were numerous problems with enforcing the interim contact order. Specifically, J.G. refused to see the applicant and although M.G. did want to see his father, M.K. refused to let him go alone without his sister. In 2007, after a year of unsuccessful attempts by the applicant to see his children, the Municipal Court interviewed the children, who stated that they did not want to see their father because they were afraid of him. J.G. explained that he had yelled at her, grabbed her phone out of her hand, and had once taken M.G. alone to a coffee bar and threatened not to return him. Reports commissioned by the local authorities into the case noted that the applicant and M.K. still had relationship difficulties and that M.K. was unable to help her children overcome their aversion to meeting their father. M.K. was then found guilty and fined for her non-compliance with the interim contact order over her refusal to allow M.G. to see his father without the presence of

J.G. By March 2009 the applicant had not seen his children in three years and when he was due to do so the children would become visibly distressed and state that they did not want to see the applicant.

After M.G. suffered an anxiety attack before a scheduled meeting with the applicant in February 2011 the domestic court ordered a report from the Social Care Centre which stated that M.G. had a moderate intellectual disability and while he felt loved and accepted by his mother and sister, his mother believed that M.G. was afraid of his father. However, the report stressed that sometimes the applicant met M.G. at school and that at these times M.G. had never displayed any fear or anxiety, indeed the meetings had been warm and affectionate. In May 2011 the local social services then organised a meeting between M.G. and the applicant in the presence of social workers. This meeting lasted one hour and passed pleasantly, M.G. talking and laughing with his father. However, after his return home, M.K. reported that M.G. had become upset and it was confirmed by a doctor that she had had to call him an ambulance.

The next meeting, in June 2011, was cancelled because M.K. informed the Social Care Centre that she could not drive M.G. to the meeting. M.G.'s maternal grandmother, Z.K.V., then called and was verbally aggressive to the social worker assigned to the case. After being informed that the meeting had been cancelled Z.K.V. and J.G. took M.G. to the Social Care Centre and were verbally aggressive towards the social workers there. M.G. was reported by those social workers to be frightened and confused. In 2013, two years later, M.K. and Z.K.V. were acquitted on charges of non-compliance with the interim contact order over this incident.

After this incident, meetings were held between M.G. and the applicant for an hour every week at the Social Care Centre and were held without any problems. However, at the end of 2011, the enforcement proceedings were terminated on the basis that the judicial proceedings had ended in 2008. In 2015 M.K. obtained an enforcement of this termination.

2. Decision of the Court

Relying on Article 8 of the European Convention on Human Rights the applicant complained to the European Court of Human Rights that the domestic authorities had failed to apply domestic law in a way that could have effectively secured his contact rights, and that the authorities should have taken more steps to help him re-establish meaningful contact with his children.

Article 8

The Court began by explaining that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life under Article 8. The State has a positive obligation to facilitate contact by a non-custodial parent with their children after divorce. This obligation is not absolute, and in this case a balance had to be struck between the interests and rights of the child, the mother, the applicant and that of wider society, with the child's best interests being the primary consideration and overriding the interests of the other parties when appropriate. Significantly, any coercion applied by the State in this area must be limited due to the competing interests and rights of the parties and the need to consider the best interests of the child and their rights under Article 8. Therefore, the State had to facilitate contact as much as could be reasonably demanded in the context of the special circumstances of the case.

The Court ruled that the crucial aspect of this case was whether the Serbian authorities took all the necessary steps to facilitate the enforcement of the interim contact order. After the applicant requested the enforcement of the interim order there were fourteen attempts at enforcement carried out by the domestic court bailiff in the presence of the applicant, and on one of those occasions a police officer was present. The domestic court had also heard from both children on two occasions and regularly asked for expert recommendations and reports from the Social Care Centre. Moreover, M.K. was prosecuted, convicted and fined for non-compliance with the interim order. The Court further noted that the authorities had been proactive in their behaviour in resolving the situation, organising supervised contact between the applicant and M.G.

Despite periods of inactivity, the Court found that the domestic authorities acted diligently in this case, although their actions had little impact on the applicant's right to participate effectively in his children's lives or visit them regularly. The difficulties in this regard were largely due to the daughter's reluctance to see her father as well as M.K.'s refusal to let M.G. see his father without the presence of his sister. The children also stated before the domestic court that neither of them wished to see their father. The Court noted that conflicts between parents, and between parents and children, are extremely sensitive for all parties and that resolving such conflicts can be particularly difficult for domestic authorities.

The Court then referred to a report drawn up by the Social Care Centre which gave the opinion that continued attempts to enforce the interim order would put additional pressure on the children but that the applicant refused to countenance other methods that might have enabled him to exercise his rights. The Court also noted that the

applicant's unauthorised and unsupervised meetings with his son at school were not a constructive way to establish parental contact with a particularly vulnerable child, and so the applicant himself was to some extent contributing to the difficulties surrounding the case. The applicant had not tried other possible ways to improve contact with his children, for instance by reaching an agreement with M.K., nor did he actively pursue his attempt to gain custody of the children as he did not attend the relevant domestic court hearing.

The Court emphasised that the State's obligations under Article 8 are not to any particular result but to the means that they employ. Therefore, while the applicant still was not able to exercise fully his parental rights, the national authorities had taken all the steps necessary and that could have been reasonably required of them in order to enforce those rights. Consequently, there had been no violation of Article 8 of the Convention.

Emergency care order for new born baby constituted a violation of the applicants' right to respect for family life in Article 8

GRAND CHAMBER JUDGMENT IN THE CASE OF K. AND T. v. FINLAND

(Application no. 25702/94)
12 July 2001

1. Principal Facts

The applicants, a mother and her cohabitant T., were Finnish nationals. K. was the mother of four and T. was the father of two of the children in their family.

The applicant mother had been hospitalised on several occasions, having been diagnosed as suffering from schizophrenia. In May 1993, when she was expecting her third child J., the Social Welfare Board, considering that K. was unable to care for her second child M., placed him in a children's home as a short-term support measure consented to by the applicants. As soon as she was born in June 1993, J. was, by virtue of an emergency order, placed in public care in the children's ward of the hospital, given K.'s unstable mental condition and the family's long-lasting difficulties. In a further emergency order, issued a few days later, M. was likewise placed in public care. K.'s unsupervised access to the children was prohibited and she was again hospitalised on account of her psychosis. The emergency care orders were replaced by normal care orders in July 1993. These were confirmed by the County Administrative Court. The Supreme Administrative Court rejected the applicants' appeals.

In September 1993 the access restriction was prolonged and in 1994 the children were placed in a foster home some 120 kilometres away from the applicants. Social welfare officials allegedly told both the applicants and the foster parents that the children's placement would last for years. The applicants proposed, in vain, that the care arrangements take place in the home of relatives and that the arrangements should, in any case, be aimed at reuniting the family. In May 1994 both applicants' access to the children was restricted to one monthly and supervised visit to the foster home. In December 1994 the Social Director informed the applicants that there were no longer any grounds for the access restriction. Nevertheless, only supervised meetings with the children held once a month on premises chosen by the Social Welfare Board were authorised. The Board confirmed this decision in January 1995 and the applicants' appeal was rejected.

Meanwhile, in May 1994, the applicants had also requested that the care orders be revoked. This request was rejected by the Social Welfare Board in March 1995. In April 1995 K. gave birth to a fourth child, who was not placed in public care. Shortly afterwards K. was taken into compulsory psychiatric care for six weeks, again on account of her schizophrenia.

The care plan was again revised in May 1996 and in April 1997 but the access restriction was maintained. In December 1998 the social authorities considered that the reunification of the family was not in sight. In November 2000 the applicants and the children were nevertheless allowed to meet once a month without supervision. These access restrictions remained valid until the end of 2001.

2. Decision of the Court

In its Chamber judgment of 27 April 2000, the Court held that there had been a violation of Article 8 in respect of the decisions to take the children into public care and the refusal to terminate the care. The Chamber further held that there had been no violation of Article 13. The case was referred to the Grand Chamber under Article 43 at the Government's request.

The applicants complained that their right to respect for their family life, guaranteed under Article 8, had been violated on account of the placement of their children J. and M. in public care and the subsequent care measures. They also complained that they had not been afforded an effective remedy, guaranteed under Article 13.

Article 8

The Court firstly established that at the time when the authorities intervened there existed between the applicants an actual family life within the meaning of Article 8 § 1 of the Convention, which extended to both children, M. and J. Hence the Court then moved on to consider whether the interferences with that family life had been justified under Article 8 § 2.

The emergency care orders

The Court accepted that when an emergency care order had to be made, it was not always possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor was this desirable, if those having custody of the child were seen as the source of an immediate threat to the child. The Court had however to be satisfied that the Finnish authorities were

entitled to consider that in relation to both J. and M. there existed circumstances justifying their removal from the care of the applicants without prior consultation. In particular, it was for Finland to establish that a careful assessment of the impact of the proposed care measure on the applicants and the children, as well as of the possible alternatives to taking the children into public care, had been carried out before implementing any care measures.

The Court found it reasonable for the authorities to believe that if K. had been forewarned of the authorities' intention to take either M. or the expected child J. away from her, there might have been dangerous consequences both for herself and her children. The authorities' assessment that T. would not on his own have been capable of coping with the mentally-ill K., the expected baby J. and M. was likewise reasonable. Associating only T. in the decision-making process was not a realistic option for the authorities either, given the close relationship between the applicants and the likelihood of their sharing information.

However, the taking of a new-born baby into public care at the moment of its birth was an extremely harsh measure. There needed to have been extraordinarily compelling reasons before a baby could be physically removed from the care of its mother, against her will, immediately after birth, as a consequence of a procedure in which neither she nor her partner had been involved. Such reasons had not been shown to exist. The authorities had known about the forthcoming birth of J. for months in advance and were well aware of K.'s mental problems, so the situation was not an emergency in the sense of being unforeseen. The Finnish Government had not suggested that other possible ways of protecting J. from the risk of physical harm from K. had even been considered. When a measure so drastic as to immediately deprive a mother of her new-born child was contemplated, it was incumbent on the national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and the child, was possible. The reasons relied on by the authorities were relevant but not sufficient to justify the serious intervention in the applicants' family life. Even having regard to the national authorities' margin of appreciation, the Court concluded that the emergency care order in respect of J. and the methods used in implementing that care were disproportionate. While there may have been a "necessity" to take some precautionary measures to protect J., the interference in the applicants' family life could not be regarded as having been "necessary" in a democratic society.

Different considerations came into play as far as M. was concerned. The authorities had good cause to be concerned about K.'s capacity, even with the aid of T., to continue caring for her family in a normal way, following the birth of her third child. M. was

showing signs of disturbance and thus a need for special care. The emergency care order in respect of him was not capable of having the same impact on the applicants' family life as that made in respect of J. He had already been physically separated from his family as a result of his voluntary placement in a children's home. The lack of association of T. and K. in the decision-making process was understandable in order not to provoke a crisis in the family before the stressful event of J.'s birth. The national authorities were therefore entitled to consider it necessary to take exceptional action, for a limited period, in the interests of M.

The normal care orders

Keeping in mind that the authorities' primary task was to safeguard the interests of the children, the Court had no reason to doubt that the authorities could consider that the children's placement in public care as from 15 July 1993, and in a foster home as from early 1994, was called for rather than the continuation of open-care measures or the introduction of new measures of that type. Nor could it be said that the normal care orders were implemented in a particularly harsh or exceptional way. Moreover, the applicants were properly involved in the decision-making process leading to the making of the normal care orders and their interests were protected.

The alleged failure to take proper steps to reunite the family

The Court recalled the guiding principle that the public care of a child should in principle be regarded as a temporary measure, to be discontinued as soon as circumstances permitted. Any measures implementing such temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible became more pressing the longer the period of care lasted, subject always to its being balanced against the duty to consider the best interests of the child.

The Court noted that some enquiries had been carried out in order to ascertain whether the applicants would be able to bond with J. and M. They did not, however, amount to a serious or sustained effort to facilitate family reunification. The minimum to be expected of the authorities was that they examined the situation anew from time to time to see whether there had been any improvement in the family's situation. The possibilities of reunification would progressively diminish and eventually disappear if the biological parents and their children were not allowed to meet each other at all, or only so rarely that no natural bonding between them was likely to occur. The restrictions and prohibitions imposed on the applicants' access to their children hindered rather than helped a possible family reunification. In the present

case, the exceptionally firm negative attitude of the authorities was striking. There was therefore a violation of the Article 8 in this respect.

The access restrictions and prohibitions

In so far as the complaint concerning the access restrictions was covered by the finding of a breach of Article 8 as a result of the failure to take sufficient steps for the reunification of the applicants' family, it was not necessary for the Court to examine the impugned measures as a possible separate source of violation. Regarding the most recent situation, including the period after the delivery of the Court's initial judgment, the Grand Chamber arrived at the same conclusion as the Chamber. Having regard to the children's situation during this later period, the authorities' assessment of the necessity of access restrictions did not fall foul of Article 8 § 2.

Article 13

The Grand Chamber saw no reason to depart from the Chamber's above-mentioned finding.

Article 41

The Grand Chamber upheld the Chamber judgment in so far as it had awarded each applicant FIM 40,000[156] in just satisfaction for non-pecuniary damage. It also upheld the Chamber's award for costs and expenses (FIM 5,190), but awarded a further FIM 60,000 for the proceedings before the Grand Chamber.

156 Approximate value FIM 1 = €0.17.

Delays in the proceedings resulting in a failure to secure a mother's regular contact with her sons violated her right to respect for family life

JUDGMENT IN THE CASE OF K.B. AND OTHERS v. CROATIA

(Application no. 36216/13)
14 March 2017

1. Principal Facts

The application was brought by K.B. ("the applicant") on behalf of herself and her two underage sons, D.B. and P.B. ("the children"). They were all Croatian nationals, born in 1968, 2001 and 2005 respectively. The applicant lived in I., whereas the children lived with their father, I.B., in S.

In March 2009 the applicant's relationship with the children's father, I.B., broke down. The applicant and the children then moved from S., where the family lived together, and went to live with K.B.'s parents in I. Proceedings regarding the divorce and the custody of the children were initiated in April 2009. In November 2009, the Ivanić-Grad Municipal Court temporarily awarded custody of the children to the applicant and gave I.B. contact rights. In May 2010 forensic experts recommended that a child protection measure of supervision of the exercise of parental authority be adopted; the measure was ordered in May 2011.

In July and August 2010, the children spent their summer holidays with their father in S., following a provisional measure issued at I.B.'s request on 18 June 2010. During that period the applicant was granted contact rights, to be exercised at I.B.'s home and by phone. On 28 June 2010 the applicant appealed against that decision, complaining that the measure was both objectionable for psychological reasons and costly. Her appeal was dismissed, but not until May 2011.

At the end of August 2010, I.B. did not hand the children over to the applicant. At the time of the judgment of the European Court of Human Rights, they were still living with him. In September 2010 the Split Municipal Court made an enforcement order ordering I.B. to hand over the children to the applicant. That order was quashed by the Split County Court in May 2011.

By its judgment on the couples' divorce in April 2011, the Split Municipal Court awarded custody of the children to I.B., and granted the applicant contact rights, to be exercised in I. Those rights, however, were not enforced. In June 2011 K.B. applied to the

above court for enforcement of its latest judgment, but her application was dismissed in December 2011 on the grounds that I.B. had not been obstructing the exercise of her contact rights, which remained unenforced exclusively because of the children's strong resistance to meet their mother. In August 2012 the court ordered that contact between K.B. and her children was to take place under the supervision of a specialist by the Split Social Welfare Centre. That order was also never enforced.

In June 2015, an expert opinion stated that the children's estrangement from their mother was the result of their father's negative attitude toward her. It recommended referring the father for psychotherapy, which was subsequently ordered by the court. In August 2015 the applicant, relying on the above expert opinion, requested that I.B. be deprived of custody. The court decided that the applicant's request would be examined together with her initial request for a change in contact arrangements. It would appear that at the time of the European Court's judgment these proceedings were still pending before the Split Municipal Court.

2. Decision of the Court

The applicant complained that, by failing to secure regular contact with her sons, the domestic authorities had breached their positive obligations under Article 8.

Article 8

The Court noted that the State had a positive obligation under Article 8 to take all necessary steps that could reasonably be demanded in the specific circumstances of each case to facilitate contact between parents and their children. The adequacy of the measures ought to be judged by the swiftness of their implementation, as in cases concerning enforcement of contact rights the passage of time could have irremediable consequences for family relations resulting in a *de facto* determination of the matter.

The Court further stressed that, although the children's views should be taken into account, the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children. An examination should be carried out to determine their best interests, which normally dictate that a child's ties with its family must be maintained, except in cases where this would harm its health and development. Thus, in cases like the present, where the children resisted contact with one parent, Article 8 required States to take all measures necessary to identify the causes of such resistance and address them accordingly. This was an obligation of means, not of result, and could require preparatory or phased measures.

The cooperation and understanding of all concerned was an important ingredient. However, since the authorities must do their utmost to facilitate such cooperation, the lack of it was not a circumstance which could by itself exempt them from their positive obligations under Article 8. Rather, it required of the authorities that they took measures to reconcile the conflicting interests, keeping in mind the best interests of the child as a primary consideration. Only after such measures had been exhausted were the domestic authorities to be considered to have complied with their positive obligations under Article 8.

Turning to the particular circumstances of the case, the Court observed that the children began drifting apart from their mother during the summer holidays in July and August 2010, which they spent with their father. In that period the applicant did not go to see the children because the court's decision of 18 June 2010 stated that she was to exercise her contact rights in I.B.'s home. The applicant had appealed against that part of the decision, complaining that the measure was both objectionable for psychological reasons and costly. However, it was only in May 2011, almost eleven months after the end of the period covered by the first-instance decision, that the Split County Court decided on the applicant's appeal. In that regard, the court failed to recognise the urgency of the situation and even ignored the domestic law providing that appeals in respect of family matters had to be decided within sixty days. What was more, when dismissing the applicant's appeal the Split County Court paid no heed to her argument as to the impracticability of the contact arrangements.

The Court further noted that, apart from the provisional measure of 18 June 2010, which applied only to the summer holidays of 2010, the domestic courts did not temporarily regulate custody and contact rights in respect of the children in the divorce and custody proceedings. This issue had been examined during the concurrent proceedings in respect of the regulation of I.B.'s contact rights, however those proceedings ended without a binding decision in April 2010. As a result, the enforcement order of 13 September 2010 ordering I.B. to hand over the children to the applicant after the summer holidays could not be carried out.

As already noted, the children started showing signs of resistance towards their mother during their stay with their father in the summer of 2010. However, the domestic authorities only decided to procure an opinion from forensic experts as to the causes of the children's resistance in November 2013 and eventually obtained it in June 2015. In other words, it took the domestic authorities almost five years to obtain the authoritative opinion necessary for them to make an informed decision as to what measures to take to address the applicant's children's refusal to meet her.

Furthermore, the authorities became involved in the children's treatment as late as April 2012, even though the need for the children to attend treatment in order to overcome the emotional difficulties brought about by their parent's separation had already been identified by the relevant professionals in July and October 2009. The various courses of treatment that the children did undergo over the years were not regularly monitored, streamlined or coordinated by the welfare or judicial authorities.

Lastly, the Court noted that the Split Social Welfare Centre only imposed the child protection measure of supervision of the exercise of parental authority in May 2011, that was more than one year after the forensic experts had made such recommendation and eight months after the children started expressing reluctance to having contact with their mother. The imposed measures had not entailed the children being referred for regular treatment, which would have rendered such treatment mandatory and the authorities obliged to monitor it.

In view of the above delays and shortcomings, the Court concluded that the domestic authorities had not discharged their positive obligations under Article 8 toward the applicant regarding her right to respect for family life. There had accordingly been a violation of that article.

Article 41

The applicant was awarded €12,500 in respect of non-pecuniary damage and €3,780 for costs and expenses.

Article 46

The applicant had asked the Court to indicate an individual measure with a view to helping the respondent State to fulfil its obligations to abide by its final judgment, namely to ask the State to secure effective contact between her and her children on suitable premises, and with all necessary and appropriate measures of psychological and other support in place. However, the Court declined on the grounds that the present case concerned an evolving situation and it was still pending before the domestic courts.

The authorities failed to take appropriate steps to facilitate contact between father and son, both with disabilities, in violation of Article 8

JUDGMENT IN THE CASE OF KACPER NOWAKOWSKI v. POLAND

(Application No. 32407/13)
10 January 2017

1. Principal Facts

The applicant, Mr Kacper Nowakowski, was a Polish national born in 1976 who was deaf and mute. In 2005 he married A.N., who also suffered from a hearing impediment and they had a child, S.N., who was born in 2006. The child suffered from a hearing impediment.

In 2007 A.N. filed for divorce. During the proceedings, an expert opinion was sought, which recorded strong emotional ties between the child and the mother whilst the ones with the applicant were described as weak and superficial. In November 2007 the Białystok Regional Court established that parental authority was to be divided between the two parents and that the child should reside with the mother. The applicant was allowed to see his son once a week for two hours each. The decision was not appealed and became final.

In 2011 the applicant lodged an application to have an extension of contact arrangements, requesting the meetings to take place outside of A.N.'s house and in her absence, as she had previously obstructed their meetings. The applicant's intent was to strengthen his ties with the child, who had reached the age of five. A further opinion was commissioned, which highlighted the weak nature of the father-child relationship and how the communication difficulties and the conflict between parents were affecting these ties. Mr Nowakowski contested these findings and argued that these opinions should have been prepared with the assistance of specialists in the needs of deaf people, but his request was rejected. He claimed that the finding made on account of his disability amounted to discrimination.

In August 2012 Białystok District Court dismissed the applicant's request, basing its decision *inter alia* on the findings of the expert opinion, the dependence of the child on his mother and ultimately his best interest. It was held that the involvement of the mother was necessary, as she was able to both use sign language and communicate orally, whilst the father mostly used signs and the son only communicated orally. The applicant lodged an appeal, but it was rejected.

Separate proceedings regarding the scope of the applicant's parental authority were initiated by A.N. in 2011. In 2012 the applicant's parental authority over the child was restricted to issues concerning his education.

2. Decision of the Court

The applicant complained that the decision concerning the contact rights had amounted to a violation of his Article 8 right to family life and that the dismissal of his application for increased contact was in breach of Article 14 of the Convention read in conjunction with Article 8, as it was based solely on his disability.

Article 8

The Court firstly stressed that the enjoyment of each other's company for a parent and child constituted a fundamental element of family life, even if the relationship between the parents had broken down. It further noted that the authorities enjoy a margin of appreciation when deciding on custody matters, however, stricter scrutiny is called for as regards any further limitations, such as restrictions placed on contact, as these entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.

The Court acknowledged that it was in principle in the child's best interest to maintain contact with both parents, so that the aim of its scrutiny in the present case was to analyse whether national authorities had taken the appropriate steps to facilitate contact between the applicant and his son and hence complied with their positive obligations under Article 8.

To this end, the Court analysed the dismissal of extended contact from two different points of view: the existing conflict between the parents and Mr Nowakowski's disability.

As to the conflict between the parents, the Court noted that the animosity was known to the domestic courts and that the expert reports had highlighted how this conflict prevented the full cooperation between the two with regard to the child, suggesting the use of counselling to resolve this. The domestic courts did not deem an obligation to undergo family therapy necessary, as some reassurances were given that A.N. and the applicant could attend the same parent support group. The Court further noted the existence of different legal instruments that could assist in alleviating the conflict between the parents, but that the possibility of using these was not properly examined by the national authorities. As a result, the contact between the child and the

applicant had not been facilitated. The Court recognised the difficulties experienced by the domestic courts due to the parent's conflict, but it stressed that they should nonetheless have taken measures to reconcile the parties' conflicting interests, keeping in mind that the child's interests were paramount.

With regard to the applicant's disability and the consequent communication issues, it was noted how the solution offered by the domestic courts was to involve the child's mother. The Court highlighted that such measure did not appropriately consider the existing animosity, nor the allegations made by the applicant with regard to the mother's obstruction of meetings. The domestic authorities should have considered measures more adapted to the specific circumstances, aimed at overcoming the barriers created by the applicant's disability. Specifically, the Court noted how the applicant had requested expert evidence to be sought from specialists familiar with the problems faced by those with hearing impairments, but this was rejected.

The Court noted that if the restricted contact arrangements were to be maintained it would have been likely that, with the passage of time, the applicant's relationship with his son could face the risk of breaking down. For these reasons, the Court found that the domestic authorities had failed to take the appropriate steps to facilitate the applicant's contact with his son in breach of Article 8.

Article 14 in conjunction with Article 8

The Court held that there was no need to examine separately the complaint under Article 14, taken together with Article 8, given the above analysis and the violation found.

Article 41

The Court held Poland was to pay the applicant €16,250 euros in respect of non-pecuniary damage and €698 for costs and expenses.

The failure to provide the applicant, who had been divested of legal capacity, with an avenue with which to establish his legal paternity over his child contravened the State's positive obligations under Article 8

JUDGMENT IN THE CASE OF KRUŠKOVIĆ v. CROATIA

(Application no. 46185/08)
21 June 2011

1. Principal Facts

The applicant, Mr Branko Krušković, was born in 1966. In February 2003 he was divested of his legal capacity by a decision of the Municipal Court. The decision was based on a report by a psychiatrist, who recommended that he would be divested of his legal capacity for a period of at least five years in order to undergo psychiatric treatment for a diagnosis of organic personality disorder and antisocial personality disorder resultant from long-term drug abuse. In April 2003 the local social welfare centre in Opatija appointed the applicant's mother as his legal guardian. In September 2006 his father was appointed the legal guardian due to the mother falling ill. Some time after that, on an unspecified date, an employee of the welfare centre was appointed as the applicant's guardian.

In June 2007 K.S. gave birth to a daughter, K., and named the applicant as the child's father. On 17 August 2007 the applicant, with the consent of the child's mother, gave a statement to the birth registry in Rijeka that he was the father of the child. He was then registered in this capacity on the child's birth certificate. In September 2007 the applicant made the same statement to the Rijeka Social Welfare Centre. In October 2007 the Rijeka Social Welfare Centre informed the birth registry that the applicant had been divested of his legal capacity. The birth registry consequently appealed to the local County Office of State Administration to have the applicant's inclusion on the birth certificate annulled. The county office went ahead with the annulment, on the grounds that as a person divested of his legal capacity the applicant could not recognise K. as his child before the law. This decision was not served on the applicant due to his lack of legal capacity but was instead served on his mother. In March 2010 the Opatija Welfare Centre brought a civil action in the Municipal Court against the applicant, K.S., and K., seeking for the Municipal Court to establish that the applicant was K.'s father. The conclusions of this civil action were pending at the time of the judgment of the European Court of Human Rights.

2. Decision of the Court

Relying on Article 8 (right to respect for family and private life) of the European Convention on Human Rights the applicant complained that he had been denied the right to be registered as the father of his biological child.

Admissibility

The Government argued that the applicant's statement that he was the father of K. had no legal consequences in Croatian law and therefore to deny him the right to make that statement did not violate his rights under Article 8, and therefore Article 8 was not applicable. The Court ruled that while this case was different from previous paternity cases, as the applicant had not instituted any proceedings himself before the national courts to establish his paternity, the legal relationship between a child born out of wedlock, K., and her natural father, the applicant, fell within the ambit of Article 8.

The Court decided to join the Government's argument that the applicant had not exhausted his domestic remedies to the merits of the case.

Article 8

The Court began by reiterating that Article 8 imposes both positive and negative obligations on the State to protect the rights of those within its jurisdiction. States must not just refrain from arbitrary interference but also adopt measures designed to ensure respect for Article 8. While States have a margin of appreciation in implementing measures to comply with their positive obligation, the Court is responsible for ensuring that these measures are reconcilable with the Convention. In the present case, the Court recognised that restricting the rights of persons divested of legal capacity is not in principle a violation of Article 8, but that such restrictions should be subject to procedural safeguards. Therefore, the Court's role in this case was to review whether the handling of the issue of the applicant's paternity was in contravention of the positive obligations inherent in Article 8.

Under domestic law the applicant had no way of giving any legal statement as to his paternity of K., instead he was entirely dependent on the actions of the competent welfare centre. This restriction was justified by the need to prevent people who had been divested of legal capacity from giving legally binding statements which might run contrary to their interests or fact. However, the Court went on to confirm that the applicant had a vital interest, protected by the Convention, in establishing the biological truth about his private and family life and having this truth recognised in

law. In this case, both the applicant and the child's mother agreed that the applicant was the biological father.

Furthermore, the Court noted that the relevant authorities never invited the applicant's father, who seemed to be his legal guardian at the time, to give his consent to the applicant's statement of paternity. And, if J.L., the employee of the social welfare centre who became the applicant's guardian, had been the legal guardian at the time then it was her duty to act in the applicant's interests, which included establishing his paternity over his child. However, no steps were ever taken to help the applicant by the competent social welfare centre.

According to the Government, the only possible means for the applicant to have had his paternity established was by the institution of civil proceedings to that end by a competent social welfare centre. While proceedings to this effect had been commenced, the applicant was listed as a defendant, despite never denying his paternity and his continual desire to have his paternity legally established. The Court went on to note that there was no obligation in national law for the relevant national authorities to bring proceedings to establish the applicant's paternity, and no way for the applicant to compel the authorities to bring such proceedings, with the State's unlimited discretion in this regard leading to the applicant being 'left in a legal void'.

Regarding the Government's argument that the applicant had not exhausted his domestic remedies, the Court noted that the national authorities had only instituted court proceedings to establish the applicant as K.'s father two and a half years after the applicant had requested them do so, thus establishing a situation in which the applicant's claim was ignored for no apparent reason. Therefore, the Court dismissed the objection as to exhaustion of domestic remedies.

The Court ruled that such a situation was not in the best interests of the applicant or the child, reiterating that a child born out of wedlock also has a vital interest in receiving information as to the identity of their biological parents as this is an important aspect of their personal identity. Therefore, a fair balance was not struck between the public interest in protecting persons derived of their legal capacity and the interest of the applicant in having his paternity legally recognised. As such, the Court found that the State had fallen short of its positive obligation to guarantee the applicant's rights, in violation of Article 8.

Article 41

The Court held that the applicant should be awarded €1,800 in respect of non-pecuniary damages, and €100 in respect of costs and expenses.

The lack of clarity in regulations regarding family visits in pre-trial detention, and arbitrariness in restricting direct contact between the applicant and his relatives constituted a violation of Article 8

JUDGMENT IN THE CASE OF KURKOWSKI v. POLAND

(Application no. 36228/06)
9 April 2013

1. Principal Facts

The applicant, Mariusz Kurkowski, was a Polish national born in 1960. He was a member of the management board of a ship-manufacturing company. In 2002 an investigation was opened with regards to the management board and in December 2004 Mr Kurkowski was remanded in custody by the Gdańsk District Court on reasonable suspicion that he had committed a series of offences related to the running of the company. The decision to place the applicant in pre-trial detention was justified on account of the severity of the offences and on the risk of obstruction in the proceedings. The decision was upheld by the Gdańsk Regional Court in January 2005.

The applicant's detention was extended by subsequent decisions by the Gdańsk District and Regional Court until his release in October 2006. These decisions relied on the reasonable suspicion that the applicant had committed the offences; the seriousness of the offences; the complexity of the case and the risk that the applicant would obstruct the proceedings by inducing witnesses to give false testimony. In August 2005 the applicant was charged with eleven offences and the first hearing took place in June 2006. In December 2005 Mr Kurkowski complained about the excessive length of the proceedings, but the request was rejected as the authorities found that in light of the complexity of the case the proceedings could not be considered lengthy. The criminal proceedings against the applicant were still ongoing when the present application was lodged with the European Court of Human Rights.

During the detention period, the applicant received several visits, mostly by his defence counsel and on 32 occasions he was allowed to meet his family. On 13 March 2006 the applicant requested an additional visit from his relatives, but this was rejected without any reasons given. On three occasions the contact between Mr Kurkowski and his family was restricted as they were separated by a glass partition.

2. Decision of the Court

The applicant complained of a violation of Article 3 due to the poor conditions of his detention and a violation of Article 5(3) on account of its excessive length. Furthermore, a violation of Article 6(1) was raised due to the unreasonable length of the criminal proceedings and under Article 8 on account of restrictions placed on family visits during his detention.

Article 3

In the present case, the applicant spent four days in a cell in which he was afforded approximately 2.1 m^2 of floor space, and four days in a cell where the floor space was approximately 2.6 m^2. Despite having found violations in previous cases concerning similar conditions, having regard to the brevity of the applicant's stay in these cells, the detention conditions did not reach the threshold of severity required by Article 3 of the Convention, and hence no violation was found.

Article 5(3)

The Court noted that the applicant's detention was grounded on a reasonable suspicion of having committed serious offences and the severity of the penalty, as well as the need to secure the conduct of the proceedings, in particular the obtaining of evidence from witnesses. These grounds were found by the Court to be relevant and sufficient to justify the applicant's detention. Furthermore, the Court found that given its complexity the case was handled by the authorities with the necessary diligence. No violation of Article 5(3) was thus found.

Article 6(1)

The complaint regarding the excessive length of the proceeding was rejected on account of non-exhaustion of domestic remedies under Article 35(1) and (4) of the Convention.

Article 8

The Court referred to earlier case law where it had found that detention entails inherent limitations on a detainee's private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family. It then reiterated that any interference by a public authority with a detainee's right to respect for family

life should be in accordance with the law, must pursue one or more legitimate aims and must be justified as being 'necessary in a democratic society'.

The present complaint was analysed both with regard to the refusal of family visits as well as the restrictions on direct contact between the applicant and his family. Regarding the former, the Court noted that at least on one occasion the applicant's request to have contact with his family was rejected without reasoning and that this represented an interference with the applicant's right to respect for family life. As to the lawfulness of the measure, the Court noted that the legal basis was to be found in Article 217(1) of the Code of Execution of Criminal Sentences, which gave the authorities the power to grant permission for family visits in prison. This provision did not give any further guidance as to the conditions for granting such permission. Furthermore, no appeal power was granted against the refusal of these visits. Such provision lacked reasonable clarity in defining the scope of the discretion exercised by the relevant authorities in restricting visiting rights and therefore the Court held in the present case that the unreasoned refusal to grant family visits to the applicant was not in accordance with the law and thus represented a violation of Article 8.

As to the limits on direct contact, the Court noted that on three occasions the applicant was separated from his family by a glass partition and found that this amounted to an interference with his Article 8 rights. The Court was satisfied that the requirement of lawfulness was fulfilled, as the restriction was applied in conformity with Article 217(2) of the Code of Execution of Criminal Sentences, which gave the power to determine the way in which the visits ought to be conducted and specified that visitors were not allowed to have direct physical contact with the detainee. The legitimate aim pursued was found to be the prevention of disorder and crime.

The Court hence had to address the fair balance between the competing interests. It accepted that restrictions might be imposed on detainees' contacts with their relatives, but in the present case it was pointed out how the authorities did not give any explanation as to the necessity of such restrictions on the specific occasions in comparison to other visits in which these were not imposed. For these reasons, the Court found that the restrictions had been applied by the domestic authorities in an arbitrary and random manner, in violation of Article 8.

Article 41

The Court held that Poland was to pay the applicant €1,500 for non-pecuniary damage.

Excessive length of custody proceedings and the State's failure to investigate effectively alleged child abuse violated Articles 3 and 8

JUDGMENT IN THE CASE OF M. AND M. v. CROATIA

(Application No. 10161/13)
3 September 2015

1. Principal Facts

The applicants, Ms M. and M., mother and daughter, were Croatian nationals born in 1976 and 2001 respectively, living in Zadar, Croatia.

Ms M. married Mr I.M. on 23 June 2001, and on 4 September 2001 their daughter was born. However the couple's relationship deteriorated, and divorce proceedings were started. On 24 August 2007 the divorce was granted by Zadar Municipal Court. According to the domestic court's decision, the father was awarded custody of their daughter and the mother was granted contact rights, along with the payment for their daughter's maintenance.

According to M.'s statement given to the police, on 1 February 2011 a serious episode of domestic abuse took place: her father hit her in the face, squeezed her throat and verbally abused her. An ophthalmologist diagnosed her with bruising of the left eyeball and eye socket tissue indicating that the injury had been inflicted by a hand blow. M. had also reported other instances of physical and psychological violence by her father that had occurred in the past three years admitting that she was afraid of him as he was a violent man.

As a consequence of the problematic situation in the family, a series of inter-connected proceedings ensued before Croatian criminal courts (to decide on the alleged child abuse), civil courts (to decide on custody and divorce) and social welfare authorities.

Following the incident on 1 February, Mr I.M. was indicted by the State Attorney for having committed the criminal offence of bodily injury on 30 March 2011. In October 2014 the proceedings were still pending as the court in Zadar was waiting to obtain a video-link device with which to examine M. during the hearing.

On 27 April 2011 Ms M. filed a criminal complaint against Mr I.M. accusing him of child abuse, citing the incident on 1 February 2011 as well as the allegation by their daughter that this episode had not been an isolated one. The criminal complaint was

dismissed in January 2012 as no sufficient elements had been found to confirm the abuse.

In parallel, on 30 March 2011 Ms M. instituted civil proceedings to reverse the custody order of 24 August 2007, and requested to be awarded temporary custody of her daughter. However, the request for temporary custody was refused two months later due to lack of proof that the alleged abuse had taken place. These custody proceedings were still pending at first-instance at the time of the European Court's judgment.

In the proceedings before the social welfare authorities involved in M.'s case, by decision of 7 November 2006, a child protection measure of supervision of the exercise of parental authority was ordered with a view to improving communication between the family members. The measure lasted until August 2008. The same measure was then imposed from September 2011 to March 2014 as the family situation had not seen any consistent improvement.

During all of the above legal proceedings, M. was examined by a series of psychiatrists and psychologists who all concluded that the child was emotionally traumatised by her parents' separation and conflictual and resentful relation, and that she had consistently expressed the wish to live with her mother. However, no danger had been found in the child continuing to live with her father as the allegations that M. had been abused by her father were not plausible enough to justify her immediate temporary removal from his custody.

2. Decision of the Court

The applicants claimed that the domestic authorities had failed to meet their positive obligations under the Convention as they neither adequately prosecuted Mr I.M. for the more serious criminal offence of child abuse perpetrated against his daughter, nor protected her against further violent acts by removing her from his home and care in breach of Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life).

Articles 3 and 8

Having regard to the fact that M. had been abused and evidence of it had been presented, and in particular to the fact that M. was both a child and alleged victim of domestic violence, the Court considered that the present case gave rise to the State's positive obligations under Article 3 of the Convention to investigate the alleged cases of abuse and protect her from future ill-treatment. In examining the alleged violation

of Article 8, the Court considered M.'s complaints under this Article as absorbed by her complaints under Article 3.

The Croatian authorities had instituted criminal proceedings only regarding the incident of 1 February 2011, deciding to completely ignore the previous series of alleged abuses M. had had to endure rather than charging Mr I.M. also with criminal or minor offences capable of covering all instances of ill-treatment sustained before then. As a consequence, they had failed to address M.'s situation in its entirety. Further, the length of the criminal proceedings had been too long to lead to an effective investigation in breach of the requirement of promptness and reasonable expedition implicit in the context of Article 3. Therefore, the Court held that there had been a violation of that Article.

As regards the alleged breach of the authorities' positive obligations to prevent future potential ill-treatment by taking all the necessary reasonable measures, the Court found that the domestic authorities had taken all the possible required steps to assess and weigh the risk of potential ill-treatment and to prevent it by taking into account various dissenting opinions and recommendations issued by different social authorities, and by carefully considering all the relevant materials. Therefore, the Court held that there had been no violation on this point of Article 3.

Article 8

The applicants complained that the domestic authorities had been ignoring M.'s wish to live with her mother, and that she had not been heard in the custody proceedings, which had been pending for more than four years. After three and a half years, M. had started exhibiting self-injuring behaviour, which she herself had described as a reaction to the frustration resulting from the fact that she had not been allowed to choose with whom to live, her freedom of action and her right to personal autonomy being limited in that way. These circumstances had raised issues regarding the applicants' right to respect for private and family life distinct from those analysed in the context of Article 3 and thus, in Court's opinion, required separate examination.

According to the Court, the present case had called for greater diligence by national courts and authorities as it concerned a traumatised child who had suffered great mental anguish culminating in self-harming acts. However, the domestic courts had failed to recognise the seriousness and the urgency of M.'s situation. What was for the Court even more surprising was that no steps had been taken to accelerate the proceedings even after M. had started exhibiting self-injuring behaviour.

The forensic experts in psychology and psychiatry involved in the case had found that both parents were equally unfit to take care of their child, a view that had been shared by the local social welfare centre. They also had established that M. expressed on various occasions a strong wish to live with her mother. As specified in Article 12 of the Convention on the Rights of the Child, children who are capable of forming their own views have the right to express them and to have due weight given to those views, in accordance with their age and maturity, in any proceedings affecting them. M. was nine and a half years old at the time of the institution of the proceedings and thirteen and a half at the time of the Court's decision. It would thus have been difficult to argue that, given her age and maturity, she had not been capable of forming her own views and expressing them freely.

The Court found that not respecting M.'s wishes as regards the issue with which parent to live constituted an infringement of her right to respect for private and family life in violation of Article 8 of the Convention. The findings concerning the protracted character of the custody proceedings equally applied to Ms M.'s situation as regards to her own right to respect for private and family life.

Article 41

The Court held that Croatia had to pay the child €19,500 and her mother €2,500 in respect of non-pecuniary damage, and €3,600 jointly to both for costs and expenses arising from the case.

The proposed expulsion of an Afghani man with a wife and two minor children would violate their right to respect for family life in Article 8

JUDGMENT IN THE CASE OF M. AND OTHERS v. BULGARIA

(Application no. 41416/08)
16 July 2011

1. Principal Facts

The applicants were Mr M, a national of Afghanistan who was born in 1974, his wife, a national of Armenia born in 1982, and their two minor children born in 2003 and 2005, all living in Bulgaria. After entering Bulgaria in 1998 and converting to Christianity in 2001, the first applicant was granted refugee status in March 2004 on the basis that he risked persecution in Afghanistan because of his religious conversion.

In December 2005, the Director of the National Security Service, issued an order withdrawing Mr M.'s residence permit, ordering his expulsion and detention pending expulsion, and banning him from re-entering Bulgaria for ten years on the ground that he was a "serious threat to national security". The Director relied on an internal document of 24 November 2005 which stated that the first applicant was involved in trafficking of migrants, which could be used for the transit of terrorists and thus discredit Bulgaria internationally. A further order for detention pending expulsion was issued by the Migration Directorate of national police in October 2006.

Mr. M was arrested and detained on 18 October 2006. In February 2007, September 2008 and January 2009, the Bulgarian police asked the Embassy of Afghanistan in Sofia to issue an identity document. The Embassy refused to issue Mr M. with a passport as he did not wish to receive one, nor to return to Afghanistan.

In October 2006, Mr M. challenged the order for withdrawing the residence permit of December 2005 before Sofia City Court. In October 2007, the Supreme Administrative Court refused Mr M.'s request to stop the enforcement of the expulsion order and, in a June 2008 judgment, it dismissed his appeal against that order.

Mr M. also challenged his detention order of October 2006 before Sofia City Court. The Sofia City Court found that the order had been signed by an unauthorised official and declared it null and void, but did not order Mr M.'s release.

In September 2008, the European Court of Human Rights indicated to the Bulgarian Government, in accordance with its rules on interim measures, that it should not deport Mr M. to Afghanistan until further notice. The national police ordered Mr M. to report daily to the local police station after his release in July 2009.

2. Decision of the Court

Relying on inter alia Articles 5, 8 and 13, the applicants complained about Mr M's unlawful detention, the threat to expel him and the lack of an effective remedy.

Article 5 § 1

The Court recalled that detention of people in order to expel them could be justified only for so long as deportation or extradition proceedings were in progress. If such proceedings were not pursued with due diligence, detention would be incompatible with the Convention.

Mr M. was detained for two years and eight-and-a-half months. Although the authorities had taken steps to secure him with an identity document, and attempted to send him to a different safe country, he remained in detention during this time. Given the lack of diligence on the part of the Bulgarian authorities, Mr M.'s detention had not been justified throughout its duration. On that basis and, noting that the existence of two separate detention orders had created legal uncertainty, the Court concluded that Mr M. had been detained in violation of Article 5 § 1.

Article 5 § 4

Mr M. had argued, in two separate court proceedings, that his detention, ordered by two different acts, in December 2005 and October 2006, had been unlawful. In the first proceedings the courts had refused to examine his appeal, and in the second, the courts had only established, almost two-and-a-half years later, that the second order had been signed by an unauthorised officer. Failing to ensure that Mr M. could speedily challenge in court the lawfulness of his detention pending expulsion had therefore breached Article 5 § 4.

Article 8

Regarding the threat of Mr M.'s expulsion, the Court noted that the applicants had established a genuine family life in Bulgaria, and that the deportation, if effected, would constitute and interference with this. Such interference would be in breach of Article

8 of the Convention unless it could be justified under paragraph 2 of that provision as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned. In relation to the requirement that the interference must be in accordance with the law, the Court reiterated that the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural adjustments related to the use of classified information. The body in question must also be competent to examine whether the measures taken pursue a legitimate aim and are proportionate. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.

In the present case the Supreme Administrative Court failed to provide meaningful independent scrutiny of the deportation order against Mr M. It applied a formalistic approach and left a governmental agency full and uncontrolled discretion to "certify" blankly, with reference to little more than its own general statements, that an alien was a threat to national security and must be deported. As such "certifications" were based on undisclosed internal information and were held to be beyond any meaningful judicial scrutiny, there was no safeguard against arbitrariness. Therefore, the applicants did not enjoy the minimum degree of protection against arbitrariness inherent in the concept of lawfulness within the meaning of the Convention. If the deportation order of 6 December 2005 was to be enforced, the resulting interference with the applicants' family life would not be "in accordance with the law", as required by Article 8 § 2 of the Convention. Consequently, the applicants had not been protected against arbitrariness, in violation of Article 8.

Article 13

The Court found that the Supreme Administrative Court had not examined properly the police declaration that Mr M. posed a threat to national security. Neither had the national court considered, with the rigorousness required under the Convention, Mr M.'s complaint that he risked ill-treatment or death if deported to Afghanistan. In addition, under Bulgarian law, appeals against deportation orders on national security grounds had no suspensive effect, and Mr M.'s request not to deport him until his

case was decided had been practically been left without examination. Accordingly, the Court concluded that Bulgarian law and practice in relation to remedies against deportation orders was in violation of Article 13.

Article 46

Given that the Court had already found similar violations in a number of cases in respect of Bulgaria decided in the past, and other comparable cases were pending before it, the Court found it necessary to assist the Bulgarian Government in the execution of their duty to enforce the Court's judgment.

In particular, the Court held that measures to enforce today's judgment should include changes to the Aliens Act or other laws in order to ensure that: 1) courts exercise thorough judicial scrutiny over the facts and reasons put forward for aliens' deportation; 2) courts examining deportation appeals balance the aim pursued by the expelling authorities against the affected individuals' human rights, including their right to respect for their family life; 3) the country to which aliens are to be deported be always indicated in a legally-binding act; 4) claims alleging a risk of death or ill-treatment in the receiving State be rigorously examined by courts; and 5) such claims, made in deportation appeals, have an automatic suspensive effect pending the examination of those claims.

Article 41

The Court held that Bulgaria was to pay Mr M. €12,000 in respect of non-pecuniary damage, €3,000 for costs and expenses.

The refusal to give legal recognition to the parent-child relationship when children were born as a result of surrogacy in a country where it was legal, amounted to a violation of Article 8 concerning the children's right to respect for their private life

JUDGMENT IN THE CASE OF MENNESSON v. FRANCE

(Application no. 65192/11)
26 June 2014

1. Principal Facts

The first and second applicants, Mr. Dominique Mennesson and Ms. Sylvie Mennesson, were French nationals, husband and wife, born in 1965 and 1955 respectively. The third and fourth applicants, Ms Valentina Mennesson and Ms Fiorella Mennesson were the first and second applicants' children. They were nationals of the United States of America born in 2000. All four applicants lived in Maisons-Alfort, France.

The first and second applicants were unable to have a child of their own and following a number of unsuccessful attempts to conceive a child using in vitro fertilization (IVF), they decided to travel to California, where the process of surrogacy was legal, and enter into a gestational surrogacy agreement.

On 1 March 2000, the surrogate mother was found to be carrying twins. In a judgment of 14 July 2000, the Supreme Court of California, to which the first and second applicants and the surrogate mother and her husband had applied, specified the particulars that were to be entered in the birth certificate and stated that the first and second applicants should be recorded as the 'genetic father' and the 'legal mother' respectively. The certificates were drawn up in accordance upon the twins' birth on 25 October 2000.

In early November, the first applicant went to the French consulate in Los Angeles to have the particulars of the birth certificate entered in the French register and the twins' names entered on his passport so that he could return to France with them. The consulate rejected his application, on the grounds that he could not prove that the second applicant had given birth, and suspecting a surrogacy agreement, sent the file to the Nantes public prosecutor's office.

The four applicants still managed to return to France in November 2000 as the twins had been issued US passports on which the first and second applicants were named as their parents. Upon their return, investigations were commenced against the

person or persons unknown for acting as intermediary in surrogacy arrangement. On 30 September 2004, the investigating judge held that on the ground that the acts in question were committed on US territory, where they were not classified as an offence, they did not constitute a punishable offence in France.

In the meantime, on 25 November 2002, on the instructions of the public prosecutor, the third and fourth applicants' particulars of birth were registered, however on 16 May 2003 the public prosecutor sought to annul them by instituting proceedings in the Créteil *tribunal de grande,* arguing that the surrogacy agreement was null and void in accordance with the public-policy principle that the human body and civil status are inalienable. The Créteil *tribunal de grande* declared the action inadmissible. The public prosecutor's office appealed and on 18 March 2010, the Paris Court of Appeal annulled the entries pertaining to the birth certificates.

The applicants appealed on points of law, claiming that Article 3 § 1 of the International Convention of the Rights of the Child had been disregarded, and that there had been a violation of Article 8 of the Convention taken alone and in conjunction with Article 14. The advocate general recommended quashing the judgment but on 6 April 2011 the Court of Cassation dismissed the appeal.

2. The decision of the Court

The applicants complained of a violation of the right to respect for their private and family life guaranteed by Article 8 of the Convention.

Article 8

It was not in dispute that the relationship between the applicants amounted to "family life" within the meaning of Article 8, or that the refusal of the French authorities to legally recognise the family ties between the applicants amounted to an "interference" with their right to respect for their family and private life. The dispute lied in the justification of such an interference, and whether it had been "in accordance with the law", pursued one or more of the "legitimate aims" listed in Article 8 § 2, and was "necessary in a democratic society".

The Court considered that for a measure to be in "accordance with the law" it should not only have some basis in domestic law, but also, referring to the quality of the law in question, it should be accessible to the person concerned and foreseeable as to its effects. These conditions were met in the present case as at the material time the Civil Code expressly provided that surrogacy agreements were null and void and

that this was on public-policy grounds, and the Court of Cassation had also previously specified, in a similar case that surrogacy agreements contravened the principles of the inalienability of the human body and civil status. The applicants could not therefore have been unaware that there was at least a substantial risk of the French court ruling accordingly in their case. The interference had therefore been "in accordance with the law" within the meaning of the Convention.

In relation to the question of whether there had been a legitimate aim, the Court accepted that the refusal to recognise surrogacy agreements was to protect children and surrogate mothers and hence pursued two of the legitimate aims listed in the Article 8 § 2: the "protection of health" and "the protection of the rights and freedoms of others".

Looking at the requirement of the interference being necessary in a democratic society, the Court observed that on the one hand, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation for State action will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted.

The Court of Cassation had held that the inability to record the applicants' relationship did not infringe their right to respect for their private and family life or their best interests as children in so far as it did not deprive them of the legal parent-child relationship recognised under Californian law and did not prevent them from living in France with the first and second applicants. In looking at this decision, the Court observed that it must verify whether the Court of Cassation duly took account of the need to strike a fair balance between the interest of the community in ensuring that its members conform to the choice made democratically within that community and the interest of the applicants – the children's best interests being paramount – in fully enjoying their rights to respect for their private and family life. It considered that in making a decision, a distinction had to be drawn in the instant case between the applicants' right to respect for their family life on the one hand and the right of the third and fourth applicants to respect for their private life on the other hand.

The Court first considered the applicants' right to respect for their family life and the "practical difficulties" as recognised by the Paris Court of Appeal, that the applicants face with regard to the lack of recognition under French law of their relationship, making reference to, inter alia, the difficulties in accessing rights or services requiring

proof of the legal parent-child relationship or travelling as a family. The Court noted however, that the applicants did not claim that it had been impossible to overcome the difficulties referred to and did not show that the inability to obtain recognition of the legal parent-child relationship under French law had prevented them from enjoying in France the right to respect for their family life. Therefore, also considering the margin of appreciation, the decision of the Court de Cassation struck a fair balance between the interests of the applicants and those of the French state, and there had been no violation of Article 8 with regard to the applicants' right to respect for their family life.

However, the Court considered the consequences of this serious restriction, on the identity and right to respect for private life of the third and fourth applicants, and observed that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation. Having regard also to the importance to be given to the child's interests when weighing up the competing interests at stake, the Court concluded that their right to respect for their private life, which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage, was significantly affected and therefore the right of the third and fourth applicants to respect for their private life was infringed. There was therefore a serious issue as to the compatibility of the situation with the children's best interests, which must guide any decision concerning them.

There has thus been a violation of Article 8 of the Convention with regard to the right of the third and fourth applicants to respect for their private life.

Article 41

The Court awarded the third and fourth applicant €5,500 each, in non-pecuniary damages, and all four applicants €15,000 in costs and expenses.

The excessive delay in implementing the transfer of the applicant's two children from her ex-husband to herself after she was awarded custody by a domestic court violated Article 8

JUDGMENT IN THE CASE OF MIJUŠKOVIĆ v. MONTENEGRO

(Application no. 49337/07)
21 September 2010

1. Principal Facts

The applicant, Ms Svetlana Mijušković, was born in 1971. In April 1998 she and a Mr V.K. were married, with their twins A and B born in October that year. In 2003 the applicant and her children moved back to her parent's house due to marital problems. In January 2005 V.K. took A and B for a holiday and subsequently refused to return them. In March 2005 the Social Care Centre in Nikšić (NSCC) ordered that the children be returned to the applicant and entrusted enforcement of this order to the Social Care Centre in Budva (BSCC). That same month the BSCC attempted to enforce the order with police assistance but were physically prevented from doing so by V.K.'s parents. Between April and June 2005, at the applicant's request, three further decisions were issued by the NSCC, urging V.K. to return the children. V.K. was threatened with fines and forcible enforcement proceedings should he refuse. No evidence was presented to the European Court of Human Rights that V.K. was ever fined or that any further forcible transfer of custody was attempted.

In 2006 the Court of First Instance dissolved the marriage and granted custody of the children to the applicant, ordering V.K. to pay child support. This ruling was upheld in the same year by both the High Court and the Supreme Court. The applicant then requested enforcement of this judgment, with an enforcement order issued by the domestic courts. While this order was issued in 2006 and called for the transfer of the children within three days, enforcement had still not occurred by 2009 when the applicant submitted a request for review seeking for the order to be enforced. The execution judge subsequently issued V.K. with a fine of €500 in March 2009, but the Bailiff was unable to enforce the fine due to the resistance of V.K.'s parents. The fine was eventually paid by V.K.'s father. Later in March the domestic court issued another enforcement order, requesting that V.K. hand the children over to their mother within three days or be faced with a €1,000 fine. Neither the order nor the fine was enforced by the national authorities.

In October 2009 the forcible transfer of the children was attempted but resisted by V.K. as well as A and B. Later that month enforcement was attempted again, but

this time V.K. proposed that the enforcement be delayed and when V.K.'s house was searched the children could not be found. The applicant was then invited to submit a proposal to the domestic court to suggest how the judgment could be enforced, and on the possibility of her providing 'the necessary labour force' for the enforcement. In November 2009 enforcement was again attempted, with the children refusing to go with the applicant, claiming that she had not treated them properly. However, once V.K.'s parents were removed from the situation the judgment was enforced and the children were surrendered to the applicant. During the period January 2005 until November 2009 the applicant alleged that she had only had sporadic and brief contact with her children, mostly during school time and only in the presence of V.K. or his father.

In June 2009 the domestic court had ruled in favour of V.K. in a civil complaint instituted by him on an unknown date over the custody of the children. This decision was partly based on an informal conversation a psychiatrist had had with A and B in which the psychiatrist concluded that the children wanted to live with their father but had been 'negatively directed' against their mother by an adult. This domestic court noted that while the children had been living with their father contrary to the ruling made in 2006, the children had come to like the situation and it was in their interest to 'verify the situation'. In September 2009 the High Court in Podgorica quashed this judgment and returned the case to the first instance court.

In February 2007 V.K. was found guilty of domestic violence against the applicant and was sentenced to three months in prison suspended for two years. However, this judgment was overturned as the original prosecution had been time barred. V.K. was also criminally charged with child abduction, but was acquitted in December 2007 with the domestic court noting, 'although the said acts of the accused contained all the elements of the criminal offence he had been charged with, the said offence represented an act of minor significance'. This judgment was then upheld and became final in May 2008.

2. Decision of the Court

Relying on Article 8 the applicant complained to the Court that the delay in enforcing the custody judgment of March 2006 and the failure of the State to enforce the NSCC's order of March 2005 meant that she was unable to exercise her parental rights under domestic legislation and the Convention.

Article 8

The Court began by noting that the mutual enjoyment by parent and child of each other's company is a fundamental element of family life under Article 8. While there is a positive obligation on States to take measures to reunite parents with their children, in cases of divorce this obligation is not absolute. Instead, States must take all necessary steps that could reasonably be demanded in the circumstances of the case to bring about reunification.

The State first took steps to reunite the applicant with her children when they attempted to enforce the decision of the NSCC in March 2005. After the NSCC's decision was superseded by the domestic court's 2006 decision to grant custody of A and B to the applicant, only three further attempts were made to reunite the applicant with her children until November 2009. In this period V.K. was only fined once, two years and nine months after the applicant sought the enforcement of the domestic court's judgment. Forcible enforcement of the custody order was only attempted after the case had been communicated to the respondent Government and this order was only enforced less than three months before the case was heard before the Court. The Government provided no explanation of why it took so long to attempt to enforce the domestic court's decision. While the reunion of parent and child may not, in certain cases, be able to take place immediately and without the necessary preparation, there was no evidence that any such precautions or preparations explained the delay in enforcement.

Notwithstanding the State's margin appreciation and the fact that A and B were eventually transferred to the applicant, the Court concluded that the Montenegrin authorities had failed to make adequate and effective efforts to execute the NCSS decision and the final domestic court judgment in a timely manner. Consequently there was a violation of Article 8.

Article 41

The Court held that the applicant should be awarded €10,000 in respect of non-pecuniary damages, and as she applied for costs after the deadline, she was not awarded any money by the Court in respect of costs and expenses.

State of prolonged uncertainty as to applicants' personal identity contrary to Articles 6 and 8

JUDGMENT IN THE CASE OF MIKULIĆ v. CROATIA

(Application no. 53176/99)
7 February 2002

1. Principal Facts

Montana Mikulić was a Croatian national born out of wedlock in 1996. On 30 January 1997, she and her mother filed a paternity suit against H.P. before Zagreb Municipal Court. A number of hearings scheduled by that court were adjourned because H.P. failed to appear. H.P. also failed to abide by court orders to attend appointments to undergo DNA tests to establish paternity, which were scheduled six times. After three-and-a-half years, the Municipal Court concluded that H.P. was the applicant's father. It based its conclusion on the testimony of the applicant's mother and on the fact that H.P. had been avoiding DNA tests.

H.P. appealed to Zagreb County Court, which quashed the first-instance judgment, finding that H.P.'s paternity could not be established primarily on the basis of his avoidance of DNA tests. The case was sent back to the Municipal Court which was ordered to hear witnesses who, H.P. alleged, had had intimate relations with the applicant's mother during the relevant period. On 19 November 2001 the Municipal Court established H.P.'s paternity and granted the applicant maintenance. H.P. appealed. At the time of the judgment of the European Court of Human Rights, the proceedings before the County Court were still pending.

2. Decision of the Court

The applicant complained, under Article 8, that the failure of the domestic courts to reach a decision in her case had left her uncertain about her personal identity. She also complained, under Article 6 § 1, about the length of the proceedings and, under Article 13, that she had no means of speeding up the proceedings and that Croatian law did not oblige defendants in paternity suits to comply with a court order to undergo a DNA test.

Article 6 § 1

The period which fell within the Courts jurisdiction began on 6 November 1997, after the Convention entered into force in respect of Croatia, and had hence lasted for four

years and two months. However, regard was also had to the fact that at the time of Croatia's ratification, the proceedings had already lasted for nine months.

The Court reiterated that particular diligence is required in cases concerning civil status and capacity. In view of what was at stake for the applicant in the present case, the competent national authorities were required to act with particular diligence in ensuring the progress of proceedings.

The Municipal Court scheduled 15 hearings, six of which had been adjourned because H.P. had failed to appear, while none had been adjourned owing to the applicant's absence. The Government contended that the Municipal Court was impeded in progressing with the proceedings because the defendant did not comply with the orders to attend hearings and the DNA tests, however the Court reiterated that it is for States to organise their legal systems in such a way that their courts can guarantee the right to everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time. Having regard to the circumstances of the case, the Court considered that the length of the proceedings failed to satisfy the reasonable-time requirement. There had, therefore, been a violation of Article 6 § 1.

Article 8

In the present case the only avenue by which the applicant could establish whether or not H.P. was her biological father was though judicial proceedings before a civil court. The Court noted that no measures existed under Croatian law to compel H.P. to comply with the court order for DNA tests to be carried out. Nor was there any direct provision governing the consequences of such non-compliance. It was true, however, that the courts in civil proceedings were free to reach conclusions taking into consideration the fact that a party had been obstructing the establishment of certain facts. However, this procedural provision was of a general character, giving discretionary power to courts to assess evidence, and not in itself a sufficient and adequate means for establishing paternity in cases where the putative father was avoiding a court order to undergo DNA tests. In addition, the first-instance court had failed to resolve the question of paternity through the assessment of other relevant evidence.

The Court considered that people in the applicant's situation had a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. On the other hand, it had to be borne in mind that the protection of third persons might preclude their being compelled to make themselves available for medical tests of any kind, including DNA tests.

A system like the Croatian one, which had no means of compelling the alleged father to comply with a court order to undergo DNA tests, could in principle be considered to be compatible with Article 8. The Court considered, however, that under such a system the interests of the individual seeking the establishment of paternity must be secured when paternity could not be established by means of DNA testing. The lack of any procedural measure to compel the alleged father to comply with the court order was only in conformity with the principle of proportionality if it provided alternative means enabling an independent authority to determine the paternity claim speedily. No such procedure was available to the applicant in the present case.

Furthermore, in determining an application to have paternity established, the courts were required to have regard to the basic principle of the child's interests. The Court found that the procedure available did not strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay, and that of her supposed father not to undergo DNA tests. Accordingly, the inefficiency of the courts had left the applicant in a state of prolonged uncertainty as to her personal identity, and there had been a violation of Article 8.

Article 13

The Court found that the applicant had no effective remedy in respect of the length of the proceedings and that there had, therefore, been violation of Article 13 read in conjunction with Article 6 § 1. Concerning her complaint that no measures existed under domestic law to ensure the presence of the defendant before the court in paternity proceedings, the Court concluded that it had already taken this aspect into account in its considerations under Article 8 and that it was, therefore, unnecessary to examine the same issue under Article 13.

Article 41

The Court awarded the applicant €7,000 for non-pecuniary damage.

The failure of the State to effectively facilitate contact between a child and her father and paternal grandparents, and the lack of effective remedies, violated Articles 8 and 13

JUDGMENT IN THE CASE OF MITOVI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 53565/**13**)
16 April 2015

1. Principal Facts

The applicants were Mr Marjan Mitov (the first applicant), Mrs Cveta Mitova (the second applicant) and Mr Denčo Mitov (the third applicant) who were born in 1972, 1949, and 1950 respectively. They all are of both Macedonian and Bulgarian nationality, with the second and third applicants being the parents of the first applicant.

In 2008 the first applicant married a Mrs J.S.M. in Skopje, with the couple then travelling to live in Australia where they had a daughter, M.M. After a breakdown in the couple's relationship Mrs J.S.M. and the child returned to Macedonia in 2011, followed by the first applicant. In October 2011 Mrs J.S.M. brought a civil claim to have her marriage with the first applicant dissolved. At the request of the domestic court the Social Care Center (the Centre) initiated proceedings to determine the parental rights of the applicant and Mrs J.S.M.

Upon the dissolution of the couple's marriage by the national court, custody of M.M. was granted to her mother, with the contact rights of the first applicant established by the Centre on 4 July 2012. The first applicant's now ex-wife was ordered to comply with this decision. In October 2012 the first applicant announced to the Centre that he was returning to Australia, which responded by setting aside its previous decision on the basis that the first applicant had never attended any of the scheduled meetings. Indeed, he had allegedly seen his daughter only once since his return to the respondent State, in January 2012.

In 2013 the applicant informed the Centre that he would be returning to the respondent State for roughly four months that year and requested that the Centre set out his rights to have contact with his daughter in that time. The Centre did so, and the applicant wrote to the Ministry to request enforcement of this order by the police. He also wrote to the Centre to seek temporary custody of the child. Both the Centre and the Ministry asserted that they did not have jurisdiction over the enforcement of the Centre's decisions. In September 2013 the first applicant returned to Australia again having not seen his daughter.

The Centre then informed the first applicant that enforcement of the Centre's most recent decision had been completely obstructed by Mrs J.S.M and that this obstruction was causing M.M. 'irreparable damage … to her psychological, emotional and social development'. However, the first applicant's request for temporary custody of M.M. was dismissed as the Centre considered that to grant this request would not have been in the best interests of the child.

In April 2014 the first applicant informed the Centre that he would be arriving in the respondent State in May that year, and requested that the Centre specify his contact rights with M.M. The Centre did so, but only for the months of May and July. The applicant's request for the Centre to specify his visitation rights for August was dismissed in September, after he had returned to Australia.

While the events relating to the first applicant were ongoing, in 2012 the second and third applicants asked the Centre to set out their own contact rights with M.M., their grandchild. Even after the Centre's decision was issued in 2013 the two applicants were unable to meet with M.M. due, they were informed by a letter from the Centre, to Mrs J.S.M.'s refusal to cooperate. A new decision was made by the Centre in January 2014, and after this there was some limited contact between the second and third applicants and M.M., in supervised meetings on the Centre's premises. In April 2014 the Centre yet again delivered a new decision on contact between the two applicants and their grandchild. The European Court of Human Rights, at the time of its judgment, had received no information on whether this decision had been implemented.

In August and October 2013 the first applicant and the Centre had each lodged a criminal complaint against Mrs J.S.M. regarding her refusal to comply with the Centre's orders. In December 2014 Mrs J.S.M. was found guilty of child abduction over her refusal to allow the first applicant contact with his child and sentenced to a three month suspended sentence.

2. Decision of the Court

Relying on Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy) the applicants complained that the domestic authorities had failed to enforce the Centre's decisions regarding their right to have contact with M.M., and that they had been denied an effective remedy in respect of their Article 8 rights.

Article 8

The Court began by establishing that Article 8 places an obligation on States to facilitate reunions between parents and children. This obligation is not absolute – the authorities must take all necessary steps as can be reasonably demanded in the circumstances to facilitate contact. The adequacy of these steps are partly judged on how swiftly they are implemented, as the passage of time can have irremediable consequences for the parent-child relationship.

The relationship of parent and child, the first applicant and his daughter, was held by the Court to be a fundamental element of 'family life' under Article 8. The relationship between M.M. and her grandparents was recognised by the Court to be of a different nature, with the right to maintain a normal grandparent-grandchild relationship calling for a lesser degree of protection than the right to maintain a parent-child relationship. The Court was satisfied, however, that as the Centre had decided that the grandparents had a right to establish a close relationship with their granddaughter this right fell under the scope of Article 8.

The Court noted that the Centre had delivered seven orders regulating the applicants' contact rights in respect of M.M., but that there had been unexplained and excessive delays between requests for decisions and the decisions themselves. This particularly affected the first applicant who had only limited time in the respondent State. While the Centre's decisions were binding and enforceable, the Court noted that the authorities did not take any measures to create the necessary conditions for the execution of those decisions. As such, the Centre's orders remained unenforced, and the applicants were unable to see M.M. until 13 February 2014 when the second and third applicants were able to establish contact.

While the Centre had considered the effects that separation from her father might have on M.M., it did not consider the legitimate interest of the applicants in developing and sustaining a bond with M.M. Indeed, in cases such as these, the possibility of family reunification progressively diminishes as long as contact between the applicants and the child is forbidden. Notwithstanding the sensitivity of the case, the Court concluded that the domestic authorities had failed to make adequate and effective efforts to enforce the applicants' rights under Article 8, and therefore there had been a violation of this Article.

Article 13

The Court began by setting out that Article 13 required States to ensure that there were domestic remedies available to provide appropriate redress to arguable complaints made under the Convention. While States were afforded some discretion in how they complied with their obligations the remedy they provided had to be effective in practice and law.

The applicants in this case requested three remedies. The first was for the Centre and the Ministry of Justice to enforce the Centre's decisions, the second was for temporary custody of the child, and the third was for criminal charges of child abduction to be brought against Mrs J.S.M. The request for enforcement was refused as both the Centre and the ministry of Justice declined jurisdiction in the matter. Therefore, the applicants had no legal avenue to set enforcement proceedings in motion. The Government did not provide the Court with information on which body had competence in the matter and as such the Court was not convinced that national law regarding enforcement applied to the Centre's orders. The Court concluded that there was no effective remedy under domestic law for the applicant's complaint that the Centre's orders were not enforced. The Court was similarly not convinced that the criminal charges brought against Mrs J.S.M. provided an effective remedy, especially as no charges were brought on behalf of the second and third applicants. As the applicants did not have access to an effective remedy in relation to their complaints under Article 8 the Court concluded there had been a violation of Article 13.

Article 41

The Court held that the first applicant should be awarded €13,000, and the second and third applicants €7,000 jointly, in respect of non-pecuniary damages. The applicants were awarded €850 in respect of costs and expenses.

A custodial sentence imposed on a mother for non compliance with contact orders did not amount to a violation of Article 8

JUDGMENT IN THE CASE OF MITROVA AND SAVIK v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 42534/09)
11 February 2016

1. Principal Facts

The applicants were Ms Spaska Mitrova and Ms Suzana Savik, born in 1983 and 2007 respectively and living in Gevgelija. The first applicant was the mother of the second applicant.

The first applicant married Mr V. Savik (the father) in 2006 and gave birth to the second applicant in February 2007. On 10 May 2007, the Gevgelija Court of First Instance dissolved the marriage and awarded the first applicant custody of the second applicant.

On 31 May 2007 the Gevgelija Social Welfare Centre (the Centre) made an order specifying that the father would be allowed to see the second applicant once a week, for two hours, at the first applicant's house. The first applicant's refusal to allow the father to have contact with the second applicant at four scheduled meetings between 8 and 29 June 2007 led to her being convicted and sentenced to six months' imprisonment, suspended for one year. Following the continued refusal of the first applicant to let the father see the child, she was given a further suspended sentence on 17 December 2007.

On 21 November 2007 and 29 April 2008, the Centre issued fresh orders, allowing the father to see the child for five hours and seven hours respectively, at the Centre rather than at the first applicant's house. Again, the first applicant failed to appear with the second applicant at the Centre six times between November 2007 and April 2008. As a result, the Public Prosecutor brought criminal charges against her.

The first-instance court sentenced her to three months of imprisonment on 10 July 2008. Her appeals to both the Skopje Court of Appeal and subsequently to the Supreme Court were dismissed. On 30 July 2009 the first applicant started serving her prison sentence and the Centre gave the father temporary custody of the second applicant.

On 6 October 2009, two days before her release and afterwards, on 4 January 2010, the first applicant lodged two contact requests with the Centre, which could not be

examined because she refused to take part in interviews with officials from the Centre. On the basis of a fresh request, made on 29 January 2010, which now contained sufficient details, the Centre decided on arrangements for her contact with the child.

In a judgment of 11 March 2010, the first-instance court granted the father's application for custody of the second applicant. However, on 20 May 2010, the first-instance judgment was set aside by the Skopje Court of Appeal ordering the first instance court to re-assess the evidence and provide convincing arguments that the first applicant was unfit for custody. During the trial, a group of experts established that both parents were mentally fit and had the required capacity to care for the child. The first-instance court found that the first applicant's past misbehaviour had been a result of her lack of trust in the authorities and her strained relationship with the father, but this had not affected her ability to care for the child. Therefore, the first-instance court found that it was in the best interest of the child for her to remain in the custody of the first applicant. On 3 February 2011, the Skopje Court of Appeal upheld this judgment.

On 1 March 2012, the Supreme Court overturned the Court of Appeal's judgment of 3 February 2011, and gave custody of the second applicant to the father. According to the Supreme Court, this was in the best interest of the child, given that when the first applicant used to have custody of the child, this often resulted in the father being unable to see the second applicant whereas the father's behaviour had proven to be constructive and cooperative.

2. Decision of the Court

The first applicant complained that the custodial sentence imposed on her by the judgment of 10 July 2008, the Centre's failure to determine the first applicant's right to have contact with the second applicant for several months during and immediately after imprisonment, and the Supreme Court's judgment revoking her custody of the child, violated their right to family life as protected under Article 8 of the Convention.

Article 8

The Court acknowledged that the mutual enjoyment by a parent and a child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention.

The Court then pointed out that under Article 8, the State has a positive obligation to take appropriate measures in order to allow the non-custodial parent and the child to

be reunited, including in the event of conflict between the parents. The Court noted that this obligation is, however, not absolute, and will depend of the circumstances of each case. Furthermore, albeit the use of coercive sanction in this sensitive area is not desirable, it must not be ruled out in the event of "manifestly unlawful behaviour by the parent with whom the child lives".

The Court stressed that 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, bearing in mind that the child's best interest must be the primary consideration. The Court also noted that the child's best interest may, in certain circumstances, override those of the parents.

In assessing whether the custodial sentence was "necessary in a democratic society", the Court noted that while the custodial sentence had short term effects on the applicants' rights, it had, in the long run the child's best interests, namely to benefit from the company of both parents, as a primary consideration. The Court therefore found that the interference of the State with the first applicant's rights under Article 8 could not be considered disproportionate, given the case as a whole and the failure of the first applicant's to comply with the Centre's orders, thereby preventing the father and the child to see each other. The Court underlined that in such circumstances, where one parent prevents the other from seeing the child, "the likelihood of family reunification will be progressively diminished and eventually destroyed".

While the Court acknowledged that it is an essential part of a prisoner's right to respect for family life that the authorities enable and assist him/her to maintain contact with close family, the Court held that, as the first applicant did not make any proper requests to the authorities, including the Centre, to allow her to contact her child, the Centre did not have the power to determine of its own motion the applicants' right to private and family life.

The fact that the applicants did not see each other following the first applicant's release from prison for almost six months, was not the Centre's fault as the applicant had refused to take part in interviews with officials from the Centre.

In granting the father custody of the child, the Court notes that the Supreme Court had taken into account the best interest of the child as when the first applicant had custody of the child, she continuously refused to allow the father to see the child.

Therefore, the Court found there was no violation of Article 8 of the Convention.

Unlawful detention of child asylum seekers, in breach of Article 3 and 5

JUDGMENT IN THE CASE OF MUSKHADZHIYEVA AND OTHERS v. BELGIUM

(Application no. 41442/07)
19 January 2010

1. Principal Facts

The applicants, Aina Muskhadzhiyeva, born in 1966, and her four children, Alik, Liana, Khadizha and Louisa (born in 2006, 2003, 2001 and 2000 and respectively aged seven months, three and a half years, five and seven years at the time of the European Court of Human Right's judgment), were Russian nationals of Chechen origin living in a refugee camp in Poland.

Having fled from Grozny in Chechnya, the applicants arrived in Belgium on 11 October 2006, and sought asylum there the next day. Mrs Mushhadzhiyeva, the first applicant, did not possess any identity documents, and claimed that she had never applied for asylum in Belgium or any other country, that she did not know in which country she had entered the EU first and that she had not resided in any other EU country before Belgium.

Her fingerprints revealed that she had been registered in Poland several times between 2004 and 2006. She then provided conflicting information without being able to provide proof, admitting that she had crossed Poland on her way to Belgium and that she had in the past resided in Poland for a few months before going back to Russia. She added that she had left Russia again in early October 2006, to make her way to Belgium and seek asylum there.

In November 2006 Poland declared itself responsible to assess the asylum application.[157] The Belgian authorities issued a declaration refusing the applicants permission to stay in Belgium and ordered their transfer to Poland. On 22 December 2006, while awaiting their transfer, the applicants were placed in a closed transit centre near Brussels airport, known as 'Transit Centre 127 Bis'.

157 On the basis of Article 16 (d) of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the EU State responsible for examining an asylum application lodged in a Member States by a third-country national.

On 29 December 2006, the applicants submitted a request for release to the Brussels Court of First Instance. On 5 January 2007, this court held that the refusal of permission to stay was in accordance with the law, as it was necessary to ensure that the Polish authorities would take care of the asylum claims. The applicants appealed this decision.

On 23 January 2007, the Court of Appeal declared the decision of deportation lawful and on 24 January 2007, the applicants challenged the Court of Appeal's decision before the Cour de Cassation. On the same day, the applicants were sent to Poland, where they started living in a centre for refugees while waiting for their asylum claims to be assessed. On 21 March 2007, the Cour de Cassation declared that their appeal was inadmissible, as they had already been sent to Poland.

Whilst the applicants were still in Belgium the NGO 'Médecins sans frontières' established that the children, in particular Khadizha, suffered from psychological and psychotraumatic symptoms and should be released to limit the damage. On 27 March 2007, another report drawn up by a psychologist in Poland confirmed Khadizha's very critical psychological state and stated that the deterioration might have been caused by the detention in Belgium.

2. Decision of the Court

The applicants complained of violations of Articles 3 and 5 of the Convention. Specifically, they complained about the conditions of their detention in 'Transit Centre 127 bis' for more than a month, and claimed that their detention had been unlawful and the remedy against it before the Court of Cassation ineffective, as they had been removed from the country before that court had reached a decision.

Article 3

Examining first the situation of the four children, the Court recalled that it had already found, in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[158], the detention of an unaccompanied minor in 'Transit Centre 127 bis' contrary to Article 3 and that the extreme vulnerability of a child was paramount and took precedence over the status as an illegal alien. The Court differentiated the present case from *Mubilanzila*, as the children here were not separated from the first applicant, their mother, but drew a parallel between the extreme vulnerability of the children in both cases. The conditions of detention in the centre '127bis' were not designed to house

158 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03.

children, as confirmed by several reports cited by the Court. The Court also referred to the concern expressed by independent doctors about the children's state of health.

Having regard to the age of the children, the length of their detention and the state of their health, the Court found that the conditions to which the children were subjected in the '127bis' detention centre had reached the level of severity required to constitute inhuman treatment and therefore found a violation of Article 3.

The Court then went on to examine the mother's case, trying to assess if the first applicant could be found to be an indirect victim of the ill-treatment that had been inflicted on her children. As the first applicant had not, at any stage, been separated from her children, she did not suffer the angst of being unable to protect them and their constant presence must have somewhat appeased the distress and frustration of their detention. As a result, the detention did not reach the level of severity required to constitute inhuman and degrading treatment and no violation of Article 3 was found in respect of the mother.

Article 5 §1

Referring to its decision in *Mubilanzila*, the Court found that even though the family had not been separated, the fact that the children were kept in a closed centre designed for adults and ill-suited to their extreme vulnerability, constituted a breach of Article 5 § 1 in respect of the children.

Turning to the detention of the mother, the Court saw no reason for it to have been in breach of the Convention. She had been lawfully detained with a view to her expulsion from Belgium, and there had therefore been no violation of Article 5 § 1 in respect of her.

Article 5 § 4

The Court looked at whether the failure of the Cour de Cassation to deliver its decision concerning the applicants' request for release before they were sent back to Poland, constituted a breach of Article 5 § 4. While the Cour de Cassation had indeed delivered its decision following the applicants' transfer, prior to that two courts having de facto and de jure jurisdiction had examined the request without delay while the applicants were still in Belgium. The applicants had lodged a complaint with a court of first instance on 29 December 2007, and this court had ruled on the matter at short notice six days later. Similarly, the applicants had the opportunity to appeal the order of the Council Chamber while they were still on Belgian territory.

The Court reiterated that Article 5 § 4 does not guarantee any right, as such, to an appeal against decisions ordering or prolonging detention. In principle, under Article 5 § 4 it is sufficient for an appeal to be examined by a single court, provided that the procedure followed is of a judicial nature and gives the individual concerned guarantees appropriate to the nature of the deprivation of liberty in question. Therefore, the Court held that there had been no violation of Article 5 § 4.

Article 41

The Court awarded €17,000 in total to the four children for the non-pecuniary damage that resulted from the detention. As the applicants did not make a claim for costs and expenses, the Court made no such award.

Domestic courts' orders to return three children to their father against their will and without an adequate assessment of their best interests constituted a violation of Article 8

JUDGMENT IN THE CASE OF N.TS. AND OTHERS v. GEORGIA

(Application No. 71776/12)
2 February 2016

1. Principal Facts

The applicant, Ms N.Ts., was a Georgian national born in 1976 living in Tbilisi. Her three nephews – N.B., and twin boys, S.B. and L.B. – were born in 2002 and 2006 respectively and were minors at the time of the proceedings.

Ms N.Ts.' sister – the boys' mother – passed away in November 2009 and her children went to live with their aunts and maternal grandparents. At the end of December 2009, Mr G.B. – the boys' father – requested the return of his sons, but the maternal family refused it. This was mainly due to his drug abuse (although in 2008 he started a methadone substitution treatment), a couple of previous convictions for drug abuse and the fact that in 2008 he was diagnosed with psychiatric and behavioural disorders. However, according to his medical file, in February 2010 he was diagnosed with an early remission stage of his addiction, and he did not pose any threat either to himself or to the people surrounding him. Further, according to another medical certificate, he was not suffering from any psychiatric pathology.

On 5 January 2010 Mr G.B. asked the Tbilisi City Court to order the return of his sons. Despite the court's decision to have the Social Service Agency ('SSA') involved in the case by requesting it to appoint a representative to protect the boys' interests and to conduct an assessment of the living conditions of both the father and maternal family, SSA representatives were not involved at this stage of the proceedings. They participated only in the subsequent appeal proceedings brought by the maternal family, by holding the status of an "interested party".

In May 2010, the Tbilisi City Court ordered that the three boys be returned to their father as it considered that beneficial and necessary for their physical and intellectual development. It recognised Mr G.B. as fit to resume his parental responsibilities, despite an expert report recommending that no changes should have been made to the boys' living environment as they had been suffering from separation anxiety disorder and had showed a negative attitude towards their father.

The maternal family filed an appeal to the Tbilisi Court of Appeal criticising that the court of first instance had put the father's rights at the centre of its decision instead of being guided by the best interests of the children. In February 2011, the Court of Appeal quashed the appealed decision and ruled that the three boys should stay with their maternal family. However, in October 2011, the Supreme Court of Georgia remitted the case for re-examination. The Tbilisi Court of Appeal, by decision of 2 February 2012, reversed its previous decision, concluding that the children should live with Mr G.B. The aunts and maternal grandparents' appeal to the Supreme Court of Georgia was rejected in May 2012.

Two attempts to enforce the Tbilisi City Court's execution order for enforcement of the decision concerning the return of the boys to the father failed as the children refused to move with Mr G.B. At the time of the proceedings before the European Court of Human Rights, the boys were living with their maternal grandparents and aunts.

2. Decision of the Court

The applicant alleged that her nephews' right to respect for private and family life enshrined in Article 8 of the Convention had been breached on account of the domestic courts' decision to return the children to their father. She maintained in particular that the national authorities had failed to thoroughly assess the best interests of the boys and that the proceedings had been procedurally flawed.

Scope of the application and admissibility

The applicant made it clear that she lodged an application with the Court solely in the name and on behalf of her nephews, and was not pursuing any possible complaints on her own behalf. In their comments, the Government claimed that the aunt did not have ***locus standi*** to complain on behalf of her nephews.

The Court held that it would limit its consideration of the current case to the following two questions: whether Ms N.Ts. had *locus standi* to complain on behalf of her nephews and, if so, whether the boys' right to respect for their private and family life had been violated on account of the domestic courts' decision to return them to their father.

The Government argued that the applicant lacked necessary standing to act on behalf of her nephews as the boys' father had never been deprived of his parental rights and was their sole legal guardian after their mother's death, and the boys had never been placed under the guardianship of their aunt. Here the Court emphasised that the

three boys were clearly in a vulnerable position. They were minors who had lost their mother and had a complicated, if not hostile, relationship with their father. In the present circumstances, there was no doubt that the aunt had a sufficiently close link with her nephews to complain on their behalf, having regard to the fact that since their mother's death, she had cared for and provided a stable home to them.

The Court then examined the case in order to determine if it satisfied two additional criteria: first, the risk that without the aunt's complaint, the boys would have been deprived of an effective protection of their rights; and that there was no conflict of interests between them and their aunt. As to the first criterion, in view of the boys' family situation, there seemed to be no closer next of kin who could have complained on their behalf. There was therefore no alternative source of representation which would render their aunt's assumption of the role inappropriate or unnecessary. As to the second criterion, the core of the complaint was the alleged failure of the domestic authorities to comply procedurally with the requirements of the Convention and to act in the best interests of the children. The Court therefore did not see how there could be a conflict of interests between the aunt and her nephews on this point, taken into account the fact that she did not complain in her own name. In view of all the above, the Court considered that the aunt had standing to lodge an application on behalf of her nephews.

Article 8

The Court found that the essence of the case laid in the aunt's submissions that her nephews' rights under Article 8 had been violated because the domestic courts had failed to thoroughly assess their situation and to take their best interests into consideration. Here there were two fundamental aspects to examine: whether the boys were duly involved in the proceedings, and whether the decisions taken by the domestic courts were dictated by their best interests.

Although the first-instance court had requested the appointment of an SSA representative for the boys, the Court had reservations as to the specific role the representative had played in the course of the domestic proceedings. The SSA had become formally involved in the proceedings only from the appeal stage and only with an "interested party" status for which the Code of Civil Procedure made no provision. Hence, it was unclear how the SSA could have effectively represented the children's interests while lacking a formal procedural role. In addition, it remained ambiguous what such SSA's representation implied exactly, as the relevant legislation did not spell out the functions and powers of the representative appointed under the above scheme. During the period of more than two years that the proceedings lasted, SSA

representatives had met the boys only a few times with the sole purpose of drafting reports on their living conditions and their emotional state of mind. However, no regular contact had been maintained in order to monitor the boys and establish a trustworthy relationship with them.

In this context, the Court referred to instruments of several international bodies which seek to ensure that in cases where there are conflicting interests between parents and children, either a guardian *ad litem* or another independent representative is appointed to represent the child's views and keep him/her informed about the proceedings. The Court did not see how the SSA's drafting of reports and attending court hearings without the requisite status could be considered adequate representation by those standards. Moreover, contrary to the relevant international standards, the national courts had failed to consider the possibility of directly involving at least the oldest boy in the proceedings affecting their rights.

The domestic courts' decision to return the boys to their father was mainly based on two reasons: that it was in the boys' best interest to be reunited with their father, and that the maternal family had a negative influence on the boys. While the Court accepted that motivation, it underlined that the domestic courts had failed to give adequate consideration to the fact that the boys did not want to be reunited with their father. Whatever manipulative role the maternal family might have played in alienating the boys from their father, the evidence concerning the boys' hostile attitude towards him was unambiguous. Moreover, several reports by psychologists had warned of the potential risks to the boys' psychological health in case of a forced return to their father. In those circumstances, such a radical measure without considering a proper transition and preparatory measures aimed at assisting the boys and their estranged father in rebuilding their relationship appeared to be contrary to the boys' interests.

The Court concluded that the flawed representation and consequential failure to duly present and hear the boys' views, as well as to take into consideration their best interests and emotional state, had undermined the procedural fairness of the decision-making process, in breach of their right guaranteed by Article 8.

Article 41

The Court held that Georgia was to pay the boys €10,000 jointly in respect of non-pecuniary damage, and €900 for costs and expenses arising from the case.

The return, ordered by Swiss courts, of a child who had been abducted by his mother, to Israel from Switzerland would not be in his best interest and would violate Article 8

GRAND CHAMBER JUDGMENT IN THE CASE OF NEULINGER AND SHURUK v. SWITZERLAND

(Application no. 41615/07)
6 July 2010

1. Principal Facts

The applicants in this case, Isabelle Neulinger and her son Noam Shuruk, were Swiss nationals living in Lausanne, Switzerland. The first applicant, Ms Neulinger decided to settle in Israel in 1999, and married an Israeli national, Shai Shuruk. Their son, Noam, was born in Tel Aviv in 2003 and he had both Israeli and Swiss nationality.

According to the applicants, in the autumn of 2003 the child's father joined the Jewish "Lubavitch" movement, which they described as ultra-orthodox and radical, known for its zealous proselytising. After marital difficulties had arisen, fearing that her husband would take their son to a "Chabad-Lubavitch" community abroad for religious indoctrination, Ms Neulinger applied to the Tel Aviv Family Court for a *ne exeat* order to prevent Noam's removal from Israel. On 20 June 2004 the Family Court made such an order that was to expire when the child attained his majority, and also granted "temporary custody" of the child to the mother in an interim decision.

In a decision of 17 November 2004, the Family Court confirmed the first applicant's custody of the child and granted a right of visitation to the father.

Upon an urgent application lodged by the first applicant, on 12 January 2005, the Tel Aviv Family Court prohibited the father from entering the child's nursery school or the first applicant's flat. Restrictions were also imposed on the access right granted to the father.

The couple's divorce was pronounced on 10 February 2005 with no change in the attribution of guardianship.

In a decision of 27 March 2005, the Tel Aviv Family Court dismissed an application lodged by the first applicant for the annulment of the *ne exeat* order prohibiting the removal of the second applicant from Israel. On 24 June 2005, the first applicant secretly left Israel for Switzerland with her son.

In a decision of 30 May 2006, delivered after an application by the child's father, the Tel Aviv Family Court observed that the child was habitually resident in Tel Aviv and that, as of 24 June 2005, the parents had been joint guardians of their son. It held that the child's removal from Israel without the father's consent had been wrongful within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the Hague Convention).

The child's father then lodged an application with the Lausanne District Justice of the Peace seeking an order for his son's return to Israel. In a decision of 29 August 2006, the father's application was dismissed. The Court considered that whilst the child's removal had been wrongful within the meaning of Article 3 of the Hague Convention, it had to apply Article 13, sub-paragraph (b), of that Convention, as there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

On 25 September 2006 the father appealed against that decision before the Vaud Cantonal Court, which ordered an expert's report. The report, drafted by a pediatrician and child psychiatrist, stated that the child's return to Israel with his mother would expose him to a risk of psychological harm whose intensity could not be assessed without ascertaining the conditions of that return, in particular the conditions awaiting the mother and their potential repercussions for the child; that the return of the child without his mother would expose him to a risk of major psychological harm; and that the maintaining of the status quo would also represent for the child a risk of major psychological harm in the long term.

In a letter of 30 April 2007, on the question whether the first applicant would be prosecuted or imprisoned if she returned to Israel, the Israeli Central Authority stated that it would positively consider instructing the Israel Police to close the criminal file for lack of public interest, provided that Ms Neulinger did not commit further acts of abjection with respect to the child and fulfill certain conditions.

In a judgment of 22 May 2007, the Vaud Cantonal Court dismissed the father's appeal, confirming that this case was an exception to the principle of the child's prompt return, in accordance with Article 13, sub-paragraph (b), of the Hague Convention. The father lodged a civil appeal with the Federal Court and on 16 August 2007, it allowed the father's appeal on the ground that Article 13 of the Hague Convention had been wrongly applied, and ordered Ms Neulinger to return the child to Israel.

On 27 September 2007, the Chamber decided to indicate to the Government, under Rule 39, that it was desirable, in the interest of the parties and for the proper conduct

of the proceedings before the Court, not to enforce the return of Noam Shuruk until the Court rendered its judgment in the case.

In a provisional-measures order of 29 June 2009 the Lausanne District Court, at the request of the first applicant, decided that Noam should live at his mother's address in Lausanne, suspended the father's right of access and granted parental authority to the mother, so as to allow her to renew the child's identity papers.

2. Decision of the Court

Relying in particular on Article 8, the applicants complained that Noam's return to Israel would constitute an unjustified interference with their right to respect for family life.

In a judgment of 8 January 2009, a Chamber of the Court held that there had been no violation of Article 8. The case was referred to the Grand Chamber under Article 43 at the applicants' request.

Article 8

The Grand Chamber found that the Federal Court's order for the child's return constituted an 'interference' with the right to respect for family life within the meaning of Article 8 for the two applicants. Therefore the Court examined whether the impugned interference met the requirements in Article 8, namely, whether it was "in accordance with the law", pursued one or more legitimate aims and was "necessary in a democratic society" in order to fulfill those aims.

The Court firstly reiterated the Chamber's findings saying that the second applicant's removal from Israel by his mother was wrongful since the father had guardianship jointly with the mother under Israeli law and Noam's removal rendered his right of access illusory in practice.

The Court observed that in Israeli law the institution of guardianship, which included the right to determine the child's place of residence, was comparable to custody rights under Article 5 of the Hague Convention, which refers in its definition to the right "to determine the child's place of residence". In the Court's view, this right to determine the child's place of residence was breached because it was to be exercised jointly by both parents. Additionally, the mother took the child to Switzerland in breach of an order prohibiting his removal from Israel that had been made by the competent Israeli court at her own request. Therefore, the Court found, like the Chamber, that the

first applicant removed her child from Israel to Switzerland "wrongfully", within the meaning of Article 3 of the Hague Convention and she committed an abduction for the purposes of that Convention. Accordingly, in ordering the child's return under Article 12 of the Hague Convention, the impugned measure had a sufficient legal basis.

The Court shared the Chamber's opinion that the decision by the Federal Court to return the child pursued the legitimate aim of protecting the rights and freedoms of Noam and his father, which the parties had not denied before the Grand Chamber.

On the question whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – had been struck, the Court stated that the best interests of the child must be the primary consideration and the child's best interests might, depending on their nature and seriousness, override those of the parents. The child's interest comprises of two limbs; the child's ties with its family must be maintained and his/her development in a sound environment should be ensured. These principles are also inherent in the Hague Convention, which requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation, according to Article 13.

It was not the Court's task to take the place the domestic authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if he returned to Israel. However, the Court was competent to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests.

The Court noted that the domestic courts hearing the case were not unanimous as to the appropriate outcome. A number of experts' reports concluded that there would be a risk for the child in the event of his return to Israel, and in any event, in the view of the courts and experts, he could return only with his mother so as to avoid significant trauma.

In order to determine whether the forced return of the child accompanied by his mother, even though she seemed to have ruled out this possibility, would represent a proportionate interference with the right of each of the applicants to respect for their family life, the Court took into account the developments which had occurred since the Federal Court's judgment ordering the child's return. Noam had Swiss nationality and had arrived in the country at the age of two. According to the applicants he had

settled well there, attending a municipal secular day nursery and a State-approved private Jewish day nursery. He went to school in Switzerland and spoke French. Even though he was at an age (7 years old) where he still had a certain capacity for adaptation, the fact of being uprooted again would probably have serious consequences for him.

As to the problems that the mother's return would entail for her, she could be exposed to a risk of criminal sanctions, the extent of which, however, remained to be determined. As the possibility of the first applicant not being prosecuted by the Israeli authorities would depend on a number of conditions relating to her conduct, such criminal proceedings could not be ruled out, according to the Court. In such a scenario, it would not be in the best interests of the child, considering that the first applicant would probably be the only person to whom he related. In the event of her imprisonment, it was doubtful whether the father would have the capacity to take care of the child, in view of his past conduct and limited financial resources. Ms Neulinger was not therefore totally unjustified in refusing to return to Israel according to the Court.

In light of the above-mentioned considerations, particularly the more recent developments in the applicants' situation, the Court was not convinced that it would be in the child's best interests for him to return to Israel. As to the mother, she would sustain a disproportionate interference with her right to respect for her family life if she were forced to return with her son to Israel. Consequently, there would be a violation of Article 8 of the Convention in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced.

Article 6

The Grand Chamber unanimously confirmed the Chamber's finding that the complaint under Article 6 § 1 constituted one of the essential points of the complaint under Article 8 and that it was not necessary to examine it separately.

Article 41

The Court held that Switzerland was to pay the applicants a total of €15,000 jointly for costs and expenses.

Failure of the Polish authorities to comply with their positive obligations and enforce a family court order following an international child abduction constituted a violation of Article 8

JUDGMENT IN THE CASE OF OLLER KAMINSKA v. POLAND

(Application no. 28481/12)
18 January 2018

1. Principal Facts

The applicant Ms Oller Kaminska was a Polish national. On 27 March 2000, she gave birth to a child, a girl named A. At the time the applicant was married to the child's father, M.K., and lived in Poland. She already had a son from a previous relationship, B, born in 1993. In 2006, the family moved to Ireland. They lived there together until January 2009, when the couple split up and M.K. moved back to Poland.

In June 2009, M.K. went to Ireland on holiday and said he intended to take A to Poland for the summer holidays. The applicant was concerned about M.K. possibly not returning the child to Ireland after their holidays in Poland, and hence on 29 June 2009, she instituted proceedings before the Ennis District Court under the Guardianship of Infants Act of 1964, seeking a declaration that the habitual residence of the child was in Ireland and that the child was to return to Ireland on 15 August 2009. On 2 July 2009, the Ennis District Court issued a consent order as an interim measure. By way of this consent order, the parents agreed that the child was to spend time with her father in Poland from 7 July 2009 to 15 August 2009. The order also established that the child's habitual residence was in Ireland. However, in the midst of the proceedings, the father failed to return the child to the applicant in Ireland in August 2009.

On 15 September 2009, the Ennis District Court granted sole custody to the applicant and issued the first return order. The applicant then applied to the Polish Ministry of Justice – designated as the Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) – for assistance with the return of the child.

On 4 December 2009, the Gdansk Regional Court decided to enforce the first Irish return order. In concurrent proceedings, the District Court of Malbork in Poland rejected the applicant's application for the child's return. On 22 June 2010, the Gdansk Court of Appeal quashed the Regional Court's decision, stating that the Irish return order could not be reconciled with the District Court of Malbork's decision.

Following this, the applicant continued her appeal to the Polish Supreme Court, which quashed the decision of the Court of Appeal and remitted the case for re-examination. In conjunction with the remitted re-examination, the applicant restarted proceedings in Ireland. On 9 September 2011, the High Court of Ireland superseded their 2009 order and granted joint custody. The court still ordered the child's return to Ireland by 2 November 2011.

The applicant then sought to have the new Irish order enforced in Poland. At a hearing on 9 May 2012, the father stated that he refused to comply with the previous Irish Court orders, alleging the child was in a "bad psychological state." After this, the child and father disappeared within Poland and attempts to execute the second Irish return order by the State Guardian failed. The matter finally came before the Malbork District Court on 7 September 2012 which determined that the proceedings for recognition and enforcement should be discontinued, as the second Irish order had expired.

The applicant secured the return of her child unilaterally. On 26 September 2012, the applicant met the child outside her school and travelled to Ireland with her.

2. Decision of the Court

The applicant complained that the Polish courts had violated her right to respect for her family life because they had failed to promptly reunite her with her daughter, as ordered by two Irish courts. She relied on Articles 6 and 8 of the Convention.

Article 8

The Court considered the relationship between the applicant and her daughter amounted to "family life" within the meaning of Article 8(1) of the Convention. The Court further held that with respect to the State's positive obligations, Article 8 includes a parent's right to have measures taken with a view to being reunited with his or her child and an obligation on the national authorities to take such measures. In the context of international child abduction, the positive obligations that Article 8 of the Convention lays on the Contracting State must be interpreted in light of the Hague Convention.

Therefore, the main point to be assessed by the Court was whether the Polish authorities had taken all the measures that they could reasonably have been expected to take in order to ensure the applicant's family rights had been secured. In this connection, the Court noted there was no enforcement of the judgment of 9 September 2011

for the first seven months and that it effectively took the Polish authorities over one year to decide that the Irish enforcement order was valid and enforceable. Further, the applicant had no contact with her daughter during this period of time.

Moreover, the Court stated in the area of international child abduction, the adequacy of a measure is to be judged by the swiftness in their implementation; they require urgent handling as the passage of time and change of circumstances can have irreparable consequences for relations between the children and the parent who does not live with them.

The Court found the applicant had done everything that could have been reasonably expected of her to exhaust national channels of redress. The Polish authorities had refused to enforce the Irish court orders and ruled independently of the Irish court on custody matters.

Overall, the Polish authorities failed to act swiftly to enforce the Irish judgment as required under European Union law (i.e. the relevant provisions of Council Regulations concerning the recognition and enforcement of judgments in matters of parental responsibility and matrimony). The Polish government's argument that the length of proceedings resulted solely from the complexity of the case was rejected. Further, the Polish domestic courts issued contradictory decisions. As a result of this, the applicant's right to respect for her family life did not receive effective protection.

Subsequently a violation of Article 8 was found. The Court did not consider it necessary to examine the case under Article 6.

Article 41

The applicant was awarded €15,000 in damages, and a further €10,000 in relation to costs and expenses.

Segregating Roma children in Croatian primary schools discriminatory in violation of Article 14 in conjunction with Article 2 of Protocol No.1

GRAND CHAMBER JUDGMENT IN THE CASE OF ORŠUŠ AND OTHERS v. CROATIA

(Application no. 15766/03)
16 March 2010

1. Principal Facts

The applicants were 15 Croatian nationals of Roma origin. They were born between 1988 and 1994 and all live in northern Croatia.

The applicants attended primary school in the villages of Macinec and Podturen at different times between the years 1996 and 2000. They participated in both Roma-only and mixed classes before leaving school at the age of 15.

In April 2002 the applicants brought proceedings against their primary schools. They claimed that the Roma-only curriculum in their schools had 30 % less content than the official national curriculum. They alleged that that situation was racially discriminatory and violated their right to education as well as their right to freedom from inhuman and degrading treatment. They also submitted a psychological study of Roma children who attended Roma-only classes in their region which reported that segregated education produced emotional and psychological harm in Roma children, both in terms of self-esteem and development of their identity.

In September 2002 the Municipal Court dismissed the applicants' complaint. It found that the reason why most Roma pupils were placed in separate classes was that they needed extra tuition in Croatian. Furthermore, the curriculum at Podturen and Macinec Elementary schools was the same as that used in parallel classes in those schools. Consequently, the applicants had failed to substantiate their allegations concerning racial discrimination. The applicants' complaint was also subsequently dismissed on appeal. The applicants' constitutional complaint, lodged in November 2003, was dismissed on similar grounds in February 2007.

2. Decision of the Court

The applicants alleged that their segregation into Roma-only classes at school deprived them of their right to education in a multicultural environment and discriminated

against them, and made them endure severe educational, psychological and emotional harm, and in particular feelings of alienation and lack of self-esteem. They also complained about the excessive length of the proceedings they brought before the domestic courts. They relied, in particular, on Article 3, Article 6 § 1, Article 2 of Protocol No. 1 and Article 14 of the European Convention on Human Rights.

In a judgment of 17 July 2008, the Chamber of the Court held that there had been no violation of Article 2 of Protocol No. 1 taken alone or in conjunction with Article 14 concerning the applicants' complaint that they were placed in Roma-only classes at primary school; and, a violation of Article 6 § 1 of the Convention concerning the excessive length of the proceedings brought by the applicants in particular before the Constitutional Court. The case was referred to the Grand Chamber under Article 43 at the applicants' request.

Article 6§1

The Court found that the length of proceedings (more than four years) before the Constitutional Court in a case of such importance had been excessive and concluded that the right of the applicants to a fair trial within a reasonable time had not been respected, in violation of Article 6 §1.

Article 14 taken together with Article 2 of Protocol No. 1

The Court found that this case raised primarily a discrimination issue. It recalled its findings from its earlier case law that, as a result of their history, the Roma had become a specific type of disadvantaged and vulnerable minority. They therefore required special protection, including in the sphere of education.

The Court noted the reasons given by the Government for the placement of the applicants in Roma-only classes, namely that they had lacked adequate command of the Croatian language. It considered that while temporary placement of children in a separate class on the grounds of language deficiency was not, as such, automatically contrary to Article 14 of the Convention, when this affected, as in the present case, exclusively the members of a specific ethnic group, specific safeguards had to be put in place.

Croatian law at the time had not provided for separate classes for children lacking proficiency in the Croatian language. In addition, the tests applied for deciding whether to assign pupils to Roma-only classes had not been designed specifically to assess the children's command of the Croatian language, but had instead tested the children's general psycho-physical condition.

As regards the curriculum, once assigned to Roma-only classes the applicants had not been provided with a programme specifically designed to address their alleged linguistic deficiency. While additional Croatian classes had been offered to the applicants, they have not been sufficient and have been offered only at some stages of education.

All applicants had spent a substantial period of their education in Roma-only classes. However, there had been no particular monitoring procedure and, although some of the applicants had attended mixed classes at times, the Government had failed to show that any individual reports had been drawn up in respect of each applicant and his or her progress in learning Croatian. The lack of a prescribed and transparent monitoring procedure had left a lot of room for arbitrariness.

Furthermore, the statistics submitted by the applicants for the region in which the applicants lived, and not contested by the Government, had showed a drop-out rate of 84% for Roma pupils before completing primary education.

As regards the parents' passivity and lack of objections in respect of the placement of their children in separate classes, the Court held that the parents, themselves members of a disadvantaged community and often poorly educated, had not been capable of weighing up all the aspects of the situation and the consequences of giving their consent. In addition, no waiver of the right not to be subjected to racial discrimination could be accepted, as it would be counter to an important public interest.

Consequently, while recognising the efforts made by the Croatian authorities to ensure that Roma children received schooling, the Court held that no adequate safeguards had been put in place at the relevant time to ensure sufficient care for the applicants' special needs as members of a disadvantaged group. Accordingly, the placement, at times, of the applicants in Roma-only classes during their primary education had not been justified, in violation of Article 14 taken together with Article 2 of Protocol No. 1.

Article 41

The Court held that Croatia was to pay to each applicant €4,500 in respect of non-pecuniary damage and, to the applicants jointly, €10,000 in respect of costs and expenses.

The establishment of the principle of the positive obligation to protect life under Article 2, in a case involving a young man seriously injured by his former teacher

JUDGMENT IN THE CASE OF OSMAN v. THE UNITED KINGDOM

(Application no. 23452/94)
28 October 1998

1. Principal Facts

The first applicant, Mulkiye Osman, was the mother of the second applicant, Ahmet Osman, who was a former pupil of Paul Paget-Lewis at Homerton House School.

In 1986 the headmaster of Homerton House School, Mr Prince, noticed that one of his teaching staff, Paul Paget-Lewis, had developed an attachment to Ahmet Osman. In January 1987 Mrs Green, the mother of Leslie Green, a pupil at the same school, made a complaint to Mr Prince that Paget-Lewis had been following her son home after school and harassing him. After being interviewed by Mr Perkins, Paget-Lewis also submitted a written statement, which Mr Perkins found "disturbing" since it clearly showed that he was "overpoweringly jealous" of the friendship between Ahmet Osman and Leslie Green. Mr Perkins suggested him to seek psychiatric help.

Meanwhile, the school management conducted several other interviews with the relevant individuals. According to the diary of Mr Prince, between 3 March 1987 and 17 March 1987 he met with the police on four occasions to discuss the matter.

While attempting to arrange a transfer of Ahmet Osman to another school, it was discovered that the files relating to Ahmet and Leslie Green had been stolen from the school office. Paget-Lewis denied any involvement in the theft.

On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. Mr Prince informed the police and wrote about this to the Inner London Education Authority (ILEA), he also informed them that he was worried that the psychological imbalance of Paget-Lewis might pose a threat to the safety of Ahmet Osman. Paget-Lewis was seen by Dr Ferguson, an ILEA psychiatrist, on 19 May 1987. Dr Ferguson recommended that Paget-Lewis remain teaching at the school but that he should receive some form of counselling and psychotherapy.

In the following days, a brick was thrown through a window of the applicants' house. A police officer was sent to the house and completed a crime report. On two occasions

in June 1987, the tyres of the car of Mr Ali Osman (the first applicant's husband and the second applicant's father) were deliberately burst. Both incidents were reported to the police.

After another examination of Paget-Lewis, Dr Ferguson concluded that he should be removed from Homerton House and was designated temporarily unfit to work. Paget-Lewis was temporarily suspended from teaching, however this was lifted and he began working as a supply teacher at two other local schools.

In August or September 1987, a number of attacks were made on the properties of the Osman family, including pouring of engine oil and paraffin on the house, smashing the windscreen of Mr Osman's car, jamming their front door lock with superglue, and smearing of dog excrement on their doorstep and car. All these incidents were reported to the police.

The police visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he told them that the loss of his job was so distressing that he felt that he was in danger of doing something criminally insane, however the Government denied that this had been said.

On 7 December 1987 a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger.

On 15 December 1987 Paget-Lewis was interviewed by officers of ILEA at his own request. An ILEA memorandum dated the same day recorded that Paget-Lewis felt in a totally self-destructive mood, blaming Mr Perkins for all his troubles.

On 17 December 1987, police officers arrived at Paget-Lewis' house with the intention of arresting him on suspicion of criminal damage, but he was absent.

In early January 1988 the police commenced a procedure with a view to prosecuting Paget-Lewis for driving without due care and attention. In addition, Paget-Lewis' name was put on the Police National Computer as being wanted in relation to the collision incident and on suspicion of having committed offences of criminal damage.

On 7 March 1988 Paget-Lewis was seen near the applicants' home by a number of people. At about 11 p.m. Paget-Lewis shot and killed Mr Osman and seriously wounded Ahmet Osman. He then drove to the home of Mr Perkins where he shot and wounded him and killed his son. Early the next morning Paget-Lewis was arrested.

On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time.

On 28 September 1989 the applicants commenced proceedings against, *inter alios*, the Commissioner of Police of the Metropolis alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988. On 19 August 1991 the Metropolitan Police Commissioner issued an application to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The Court of Appeal subsequently held that, according to the exclusionary rule of the 1989 ruling of the House of Lords in the case of *Hill v Chief Constable of West Yorkshire*, no action could lie against the police in negligence in the investigation and suppression of crime on the grounds that public policy required immunity from suit.

2. Decision of the Court

Relying on Articles 2, 6, 8 and 13, the applicants complained that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure.

Article 2

The applicant asserted that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which Paget-Lewis posed, the authorities had failed to comply with their positive obligation under Article 2.

The Court firstly stated that, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their duty to prevent and suppress offences, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Although it had been asserted that by the stage where the police were informed of all relevant connected matters including a graffiti incident, the theft of the school files and Paget-Lewis' change of name, the police should have been alert to the need

to investigate further Paget-Lewis' alleged involvement in those incidents or to keep a closer watch on him, the Court was not persuaded that the police's failure to do so at this stage could be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. In the Court's view, while Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger.

As Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident, the Court considered that the police's appreciation of the situation and their decision to treat it as a matter internal to the school could not be considered unreasonable.

With regards to the acts of vandalism against the Osmans' home and property, and the assertion that the police did not keep records of the reported incidents, the Court stated that this failing could not be said to have prevented the police from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court also noted in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage.

With regard to the alleged fact that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions, the Court considered that those statements could not be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such.

Consequently, the Court considered that the applicants had failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. The Court accordingly found no violation of Article 2.

Article 8

The Court recalled that it had not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty

under Article 2. That conclusion equally supported a finding that there had been no breach of any positive obligation implied by Article 8.

As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the Court reiterated that the police had firstly taken the view that there was no evidence to implicate Paget-Lewis, and later, in the light of new developments in the case, an attempt had been in fact made to arrest and question Paget-Lewis on suspicion of criminal damage. Therefore, the Court concluded that there had been no breach by the authorities of any positive obligation under Article 8.

Article 6 § 1

The applicants alleged that the dismissal by the Court of Appeal of their negligence action against the police on grounds of public policy amounted to a restriction on their right of access to a court in breach of Article 6 § 1.

In regards to the applicability of Article 6, which the Government had disputed arguing that there was no right in domestic law to sue the police for negligence, the Court disagreed and considered that the applicants had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, and that the harm caused was foreseeable.

The Court then noted that the reasons which led the House of Lords in the *Hill case* to lay down an exclusionary rule to protect the police from negligence actions were based on the view that the interests of the community as a whole were best served by a police service whose efficiency and effectiveness in the battle against crime were not jeopardised by the constant risk of exposure to tortious liability for policy and operational decisions.

Although the aim of such a rule might be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court emphasised the issue of proportionality. The application of the rule without further enquiry into the existence of competing public interest considerations only served to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounted to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

The Court concluded that the application of the exclusionary rule in the case constituted a disproportionate restriction on the applicants' right of access to a court and violated Article 6 § 1.

Article 13

The Court considered that no separate issue arose under Article 13 in view of its finding of a violation of Article 6 § 1.

Article 50[159]

The Court awarded each of the applicants the sum of GBP 10,000[160] for damages, and the GBP 30,000 for costs and expenses.

159 Now Article 41.

160 Approximate value £1 = €1.60.

The administrative detention of minors together with their family in a detention centre not equipped for the children's particular needs gave rise to violations of Article 3, 5 and 8

JUDGMENT IN THE CASE OF POPOV v. FRANCE

(Application Nos. 39472/07 and 39474/07)
19 January 2012

1. Principal Facts

The applicants were Mrs. Yekaterina Yakovenko and Mr. Vladimir Popov together with their two children, born in 2004 and 2007.

According to the first two applicants, whilst living in Kazakhstan they were assaulted and harassed by the local police on account of their Russian origin and their Russian Orthodox faith. On several occasions Mrs. Popov was taken by the police and beaten, and hence she decided to leave the country in December 2002 and entered France on a two-week visa. Her husband followed her in France in June 2003.

Both applicants applied for asylum in France but their application was rejected and they later lost their appeal. They requested a fresh examination of their case and applied for recognition as stateless persons but these applications were also rejected. In June 2005, the Ardennes prefecture informed the applicants of its refusal to issue them with residence permits and directed them to leave the country within one month.

On 27 August 2007 the parents and their children, who were under the age of 3 years old and 6 months old were apprehended by the police and taken into custody. Later that day the Maine-et-Loire prefecture ordered their administrative detention in an hotel in Angers. On 28 August the family was transferred to the Charles-de-Gaulle airport in order to have them removed to Kazakhstan. However, the flight they were supposed to be embarked on was cancelled so they could not be removed and were transferred to the administrative detention centre of Rouen-Oissel.

The Rouen-Oissel detention centre was not equipped for the detention of children. There was no leisure or learning area, and beds for children were not available. The eldest child presented signs of anxiety whilst they were in the centre and refused to eat. An extension of the applicants' administrative detention was granted for fifteen days.

On 11 September 2011 the applicants were transferred again to the Charles-de-Gaulle airport, but their removal failed for a second time. On 12 September 2011 a judge

found that the applicants were not to be blamed for the failed removal attempt and ordered their release.

Before their arrest and detention, the applicants had filed for a fresh request for asylum and on 16 July 2009 the National Asylum Tribunal granted them refuge status on the grounds that the enquiries the prefecture had made to the authorities in Kazakhstan, disregarding the confidentiality of asylum applications, had made it dangerous for them to return there.

2. Decision of the Court

The applicants complained that the conditions and length of their detention in the Rouen-Oissel detention centre had breached Articles 3 and 5 of the European Convention on Human Rights with regard both to the parents as well as the children. The applicants further complained of a violation of Article 8 with regard to the interference in their family life as a consequence of their placement in detention.

Article 3

The Court firstly addressed the complaint with regards to the detention conditions of the children. It was observed that the fact that the children were accommodated together with their parents did not exempt the State from complying with its Article 3 obligations and its duty to protect the children's interests, reiterating that considerations regarding the extreme vulnerability of children must take precedence over any other considerations regarding their status of illegal migrants.

As to the conditions of detention, the Court noted that although according to French law the centre was one authorised to receive families, this simply required the centre to have bedrooms specially adapted for children, without expressly mentioning the facilities required for the accommodation of children together with their parents. The Court acknowledged the findings of various reports including from the European Committee for the Prevention of Torture and the Commissioner for Human Rights, according to which the detention centre was in fact not equipped with such facilities. For example there were no children's beds or adequate play areas, and the automatic doors to the rooms were dangerous for them. In this regard it was also pointed out how the promiscuity, stress, insecurity and hostile atmosphere in these centres had a negative impact on young children, in contradiction with international principles according to which the detention of children for lengthy periods must be avoided. The Court therefore concluded that the conditions in which the children were held were not suitable to their age.

Turning to the length of the detention, the Court noted that although the period of fifteen days was not excessive *per se*, it could be perceived as never-ending for children considering the conditions in which they were held and their young age. To this end, the Court acknowledged the anxiety and psychological stress that such detention had caused the children and concluded that the State had failed to take into proper consideration the inevitable consequences of detention on the third and fourth applicants. Considering the children's young age, the length of their detention and the conditions of their confinement, there had been a violation of Article 3 in relation to the children.

In relation to the detention of the parents, the Court acknowledged the distress and frustration that the detention might have caused them, however they had not been separated from their children and hence those feelings must have been alleviated. For this reason, the minimum level of severity for a violation of Article 3 had not been reached, and no violation was found.

Article 5(1)(f)

The Court reiterated in the present case how Article 5(1)(f) provides an exception to the general rule set out in Article 5(1), allowing States to control the liberty of aliens in an immigration context. With regard to the children, the Court found that, notwithstanding the fact that they were accommodated with their parents and that the detention centre had a dedicated wing for families, considering the conditions of detention mentioned above, the authorities had failed in protecting the children's right to liberty. The children's particular situation was not considered by the authorities, which did not verify whether the placement in the detention centre was a measure of last resort for which no alternative was available. A violation of the children's right under Article 5(1)(f) was therefore found, however no violation was found in terms of the parents.

Article 5 (4)

The Court noted that the parents had the possibility of having the lawfulness of their detention examined by the courts, however such a remedy was not accessible for the children. Since French legislation did not provide for the possibility of placing minors in administrative detention, no order for removal was issued against the children nor was there a decision to place them in detention so no challenge before the courts was possible. The children found themselves in a legal vacuum, with no access to remedies to challenge the lawfulness of their detention in violation of Article 5(4) of the Convention.

Article 8

The Court noted that whilst mutual enjoyment by parent and child of each other's company represents a fundamental aspect of family life, this does not mean that respect for family life is guaranteed simply by keeping the family together, especially when the family is placed in detention. The Court thus held that the fifteen days detention period could be regarded as an interference in the applicants' family life.

An interference will constitute a violation unless it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society. The Court observed how the legal basis for detention was to be found in French legislation and the legitimate aim in the present case would be the prevention of illegal immigration and the control of the entry and residence of aliens. Hence the Court went then on to assess the proportionality of the family's placement in detention. In this context, particular importance was given to the principle of the best interest of the child.

The Court noted how the applicants did not present a risk of absconding, and considering the effectiveness of their previous compulsory residence in an hotel, their confinement in a detention centre did not appear to be justified by a pressing social need. Furthermore, from the facts of the case it was apparent to the Court that no alternatives to detention were considered nor that the authorities had ever reconsidered the possibility of a confinement in a place different from the detention centre, and finally that no steps were taken to enforce the removal as soon as possible. The Court noted that it had rejected an application[161] on a similar issue, but in the present case gave particular weight to recent developments with regards to the children's best interest in the context of detention and ruled therefore this principle cannot be interpreted as limited to only keeping the family together, but instead must instruct the authorities' approach to detention, requiring them to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life.

A violation of Article 8 was therefore found, as in the absence of any factors indicating a risk of absconding, the detention of the family in a secure centre for fifteen days was disproportionate to the aim pursued.

161 *Muskhadzhiyeva and Others v. Belgium*, judgment of 19 January 2010, no. 41442/07 (also included as a summary in this publication).

Article 41

The Court held France was to pay the applicants €10,000 for non-pecuniary damage and €3,000 for costs and expenses.

Inadequate care, detention conditions and unlawful detention of an unaccompanied minor seeking asylum violated Articles 3, 5 and 13

JUDGMENT IN THE CASE OF RAHIMI v. GREECE

(Application No. 8687/08)
5 April 2011

1. Principal Facts

The applicant, who was born in 1992, left Afghanistan to flee the armed conflicts there and arrived in Greece, where he was arrested on 19 July 2007. He was placed in a detention centre pending an order for his deportation and was held there until 21 July 2007. A deportation order was issued on 20 July 2007, which mentioned that the applicant's cousin, N.M., was accompanying him. On his release the applicant was not offered any assistance by the authorities. He was homeless for several days and subsequently, with the aid of local NGOs, found accommodation in a hostel. In September 2007 an application he made for political asylum was rejected, with his appeal is still pending at the time of the judgment of the European Court of Human Rights.

2. Decision of the Court

The applicant complained, among other things, under Articles 3, 5 and 13, of a complete lack of support or accompaniment appropriate to his status as an unaccompanied minor, and of the conditions in the detention centre, in particular the fact that he had been placed together with adults.

Articles 3 and 13

The applicant had not been accompanied by a relative when his asylum application was registered on 27 July 2007. Between 19 and 27 July 2007 the authorities, on the basis of an uncertain procedure, had assigned the applicant to an adult, N.M., who was supposed to act as a guardian and represent him in his dealings with the authorities. However, the established fact that the applicant had been without a guardian for a lengthy period lent credence to his claims concerning the preceding period, to the effect that he had not in fact known N.M. In the light of these considerations and the reports by international organisations and NGOs on the subject, it was clear that the applicant had been an unaccompanied minor.

The Government argued in the present case that it should be declared inadmissible due to non-exhaustion of domestic remedies. When considering this claim, the Court noted that the information brochure provided by the authorities to the applicant, outlining some of the available remedies, mentioned the possibility of making a complaint to the chief of police but did not indicate the procedure to be followed or whether the chief of police was required to respond to complaints and, if so, within what period. The Court further questioned whether the chief of police represented an authority satisfying the requirements of impartiality and objectivity necessary to make the remedy effective. As to the legislation, it did not empower the domestic courts to examine living conditions in detention centres for illegal aliens or to order the release of a detainee on those grounds. The Court attached particular importance to the specific circumstances of the present case. Firstly, the applicant was a minor who had had no legal representation while in detention. Secondly, his complaints about his personal situation in detention related solely to the fact that he had been detained together with adults. Lastly, the information brochure in Arabic would have been incomprehensible to the applicant, whose native language was Farsi. Accordingly, the Court rejected the respondent Government's objection of non-exhaustion of domestic remedies in respect of the applicant's conditions of detention.

Turning to the merits of the case, the Court could not say with certainty whether the applicant had been placed together with adults. However, the conditions of detention in the centre, particularly with regard to the accommodation, hygiene and infrastructure, had been so bad that they undermined the very meaning of human dignity. Moreover, the applicant, on account of his age and personal circumstances, had been in an extremely vulnerable position and the authorities had given no consideration to his individual circumstances when placing him in detention. Accordingly, even allowing for the fact that the detention had lasted for only two days, the applicant's conditions of detention had in themselves amounted to degrading treatment in breach of Article 3.

Owing to his youth, the fact that he was an illegal alien in a country he did not know and that he was unaccompanied and therefore left to fend for himself, the applicant undoubtedly came within the category of highly vulnerable members of society, and it had been incumbent on the Greek State to protect and care for him by taking appropriate measures in the light of its positive obligations under Article 3. With regard to the period after 27 July 2007, the date on which the applicant had lodged his asylum application, the record of that application had made no mention of any member of his family accompanying him. There was no indication in the case file that the authorities had taken action subsequently to assign a guardian to him. On this point, the Commissioner for Human Rights of the Council of Europe, the Office of the

United Nations High Commissioner for Refugees and Amnesty International had all noted persistent and serious shortcomings in Greece regarding the supervision of unaccompanied migrant children. After the applicant's release and until the lodging of his asylum application, he had been left to fend for himself and had been taken care of by local NGOs. Hence, the authorities' indifference towards him must have caused him profound anxiety and concern. In previous case law the Court had noted the particular state of insecurity and vulnerability in which asylum seekers were known to be living in in Greece and had found that the Greek authorities were to be held responsible because of their inaction. Accordingly, the threshold of severity required by Article 3 had also been attained in the present case.

In sum, the applicant's conditions of detention in the detention centre and the authorities' failure to take care of him, as an unaccompanied minor, following his release had amounted to degrading treatment. There had therefore been a violation of Article 3. Furthermore, in view of the Court's findings with regard to the exhaustion of domestic remedies, the State had also failed to comply with its obligations under Article 13.

Article 5

The Court first considered Article 5 § 1 (f). It noted that the applicant's detention had been based on law and had been aimed at ensuring his deportation. In principle, the length of his detention – two days – could not be said to have been unreasonable with a view to achieving that aim. Nevertheless, the detention order in the present case appeared to have resulted from automatic application of the legislation in question. The national authorities had given no consideration to the best interests of the applicant as a minor or his individual situation as an unaccompanied minor. Furthermore, they had not examined whether it had been necessary as a measure of last resort to place the applicant in the detention centre or whether less drastic action might have sufficed to secure his deportation. These factors gave cause to doubt the authorities' good faith in executing the detention measure. This was all the more true since the conditions of detention in the centre, particularly with regard to the accommodation, hygiene and infrastructure, had been so severe as to undermine the very meaning of human dignity.

Looking at Article 5 § 4, the Court stated that the applicant had been unable in practice to contact a lawyer. Furthermore, the information brochure outlining some of the remedies available had been written in a language, which he would not have understood, although the interview with him had been conducted in his native language. The applicant had also been registered as an accompanied minor although

he had had no guardian who could act as his legal representative. Accordingly, even assuming that the remedies had been effective, the Court failed to see how the applicant could have exercised them. Violations of Article 5 were hence found.

Article 41

The applicant was awarded €15,000 in respect of non-pecuniary damage.

Failure to promptly and effectively investigate the deaths or disappearances of a group of Roma whose boat sank off the Montenegrin coast was in violation of Article 2 of the Convention

JUDGMENT IN THE CASE OF RANĐELOVIĆ AND OTHERS v. MONTENEGRO

(Application no. 66641/10)
19 September 2017

1. Principal Facts

The applicants in this case were Serbian nationals and one who was also a national of the "Former Yugoslav Republic of Macedonia".

The applicants' relatives were among a group of around 70 Roma who boarded the boat "Miss Pat" on the Montenegrin coast on 15 August 1999, with the intention of going to Italy. Due to overcrowding of the boat, it sank just a few hours after leaving the coast with only one survivor. By 30 August 1999 that one survivor was found alive on the Montenegrin shore, and 35 bodies were found at sea, 13 of which were identified by their relatives. The forensic specialists were not able to determine the causes of death with certainty, however, stated that it was likely that the passengers died from drowning.

On 1 September 1999, the Court of First Instance in Bar initiated a formal judicial investigation against seven individuals on suspicion of illegally crossing the State border in connection with reckless endangerment. Over the next three years, by the end of 2002, it was decided that two defendants at large would be tried in their absence appointing representatives for them. Between 25 December 2002 and 14 April 2004 eleven hearings took place and a further eight were adjourned for procedural reasons. The case was eventually transferred to the High Court in Podgorica in April 2004. In 2008 this court rejected the indictment in respect of one of the defendants and subsequently decided that two defendants who lived outside of Montenegro would be tried in their absence. Between 28 September 2009 and 9 July 2014 another fifteen hearings were held, with twenty-two hearings again being adjourned for procedural reasons.

After the number of delays in July 2014 the High Court in Podgorica acquitted all the defendants due to a lack of evidence. The prosecutor filed an appeal against that judgment.

The applicant Begija Gaši, whose brother and sister in law had been missing since the boat accident was questioned as a witness in the proceedings. The Ombudsman also issued a report in December 2009 stating that the duration of the proceedings of more than ten years was unjustified.

2. Decision of the Court

Relying predominantly on Article 2 of the Convention, the applicants complained that that Montenegrin authorities had failed to comply with their duty to conduct to a prompt and effective investigation into the death and disappearances of their family members and to prosecute those responsible.

The Court decided to continue its examination of the case only in respect of one of the applicants, Begija Gaši, who had submitted her observations within the required time-limit, while striking out all other applicants who did not respond to the Court's request for their submissions.

Admissibility

The Court rejected the objections by the Montenegrin Government with regards to the admissibility of the complaint. Concerning the applicant's victim status, Ms Gaši had been in a position to lodge the application in respect of her brother and sister-in-law, despite their bodies not being identified. The Court specifically noted that she had been consistent throughout the proceedings that her relatives were on the boat, and that not all the passengers had been found, and no DNA analysis had been performed by the authorities. Hence Ms Gaši's complaint under Article 2 was admissible.

Article 2

The Court stated that the obligation in Article 2 to protect the right to life imposes a procedural obligation on the State to investigate deaths when they occur at the hands of State agents as well as at the hands of private or unknown individuals. In order for an investigation to be effective it must be able to lead to the identification and punishment of those responsible. This, however, is not an obligation of result but of means, and any deficiency in the investigation which undermines this ability will risk falling short of the required standard of effectiveness.

Where an official investigation leads to proceedings in national courts, the proceedings, including the trial stage, must fall within the required standards of the positive obligation to protect lives through law. Granted that there may be obstacles or

difficulties which prevent progress in an investigation, the authorities are still required to promptly investigate an alleged infringement of the right to life. In the present case, the Court observed that more than ten years and seven months after the new indictment was issued and more than seventeen years and nine months after the event, criminal proceedings were still pending at second instance.

The Court also found that violations had occurred where the trial continued unduly and that the passage of time inevitably eroded the amount and quality of evidence available. The lack of diligence of the investigation also cast doubt on the good faith efforts of the investigating authorities.

The Court considered that undue lengthy proceedings of the investigation into the circumstances of an individual's death were a strong indication that the proceedings were defective and could point to a potential violation of the State's procedural obligation under Article 2 of the Convention. In the present case the Court ruled that the Government had failed to justify the lengthy proceedings. As a result the delays were not compatible with the State's obligation under Article 2, and the investigation and criminal proceedings had not complied with the requirements of promptness and efficiently. The Court ruled that there had been a violation of Article 2 of the Convention.

Article 41

The Court held that Montenegro was to pay Ms Gaši €12,000 in respect of non-pecuniary damage and €500 in respect of costs and expenses.

Positive obligations of States to protect victims of human trafficking

JUDGMENT IN THE CASE OF RANTSEV v. CYPRUS AND RUSSIA

(application no. 25965/04)
7 January 2010

1. Principal Facts

The applicant was a Russian national and the father of Ms Oxana Rantseva, who died in Cyprus in March 2001. She had arrived in Cyprus in early March that year on an "artiste" visa, and started work in a cabaret only to abandon her place of work and lodging three days later leaving a note saying that she was going back to Russia. After finding her in a night club in Limassol some ten days later, at around 4 a.m. on 28 March, the manager of the cabaret where she had worked took her to the police asking them to declare her illegal in the country and to detain her, apparently with a view to expelling her so that he could have her replaced in his cabaret. The police, after checking their database, concluded that Ms Rantseva did not appear to be illegal and refused to detain her. They asked the cabaret manager to collect her from the police station and to return with her later that morning to make further inquiries into her immigration status. The manager collected the applicant's daughter at around 5.20 a.m.

Ms Rantseva was brought by the cabaret manager to the house of another employee, where she was taken to a room on the sixth floor of the apartment block, whilst the manager remained in the flat. At about 6.30 a.m. that morning, Ms Rantseva was found dead in the street below the flat. A bedspread was found looped through the railing of the balcony.

Following the death, those present in the flat were interviewed. A neighbour who had seen Ms Rantseva's body fall to the ground was also interviewed, as were the police officers on duty when the applicant's daughter had been brought in earlier that morning. An autopsy was carried out which concluded that Ms Rantseva's injuries were the result of her fall and that the fall was the cause of her death. At an inquest hearing some time later it was decided that Ms Rantseva died in strange circumstances resembling an accident in an attempt to escape from the flat in which she was a guest, but there was no evidence to suggest criminal liability for her death.

Another autopsy was carried out in Russia at the applicant's request, which concluded that additional investigation into the death was necessary, and these findings were

forwarded to the Cypriot authorities in the form of a request for mutual legal assistance under treaties to which Cyprus and Russia were parties. A report by the Cypriot Ombudsman noted in connection with Ms Rantseva's case that the word "artiste" had in Cyprus become synonymous with "prostitute".

2. Decision of the Court

Relying on inter alia Articles 2, 3, 4, and 5, Mr Rantsev complained about the investigation into the death, and the failure of the Cypriot and Russian authorities to protect his daughter from trafficking.

Article 2

As regards Cyprus, the Court considered that the chain of events leading to Ms Rantseva's death could not have been foreseen by the Cypriot authorities and, in the circumstances, they therefore had no obligation to take practical measures to prevent a risk to her life.

However, a number of flaws had occurred in the investigation carried out by the Cypriot authorities: there had been conflicting testimonies which had not been resolved; no steps to clarify the strange circumstances of Ms Rantseva's death had been made after the verdict of the court in the inquest proceedings; the applicant had not been advised of the date of the inquest and as a result had been absent from the hearing when the verdict had been handed down; and although the facts had occurred in 2001 there had not yet been a clear explanation as to what had occurred. There had therefore been a violation of Article 2 as a result of the failure of the Cypriot authorities to effectively investigate Ms Rantseva's death.

As regards Russia, the Court concluded that there had been no violation of Article 2 as the Russian authorities were not obliged themselves to investigate Ms Rantseva's death, which had occurred outside their jurisdiction.

Article 3

The Court held that any ill-treatment which Ms Rantseva might have suffered before her death had been inherently linked to her alleged trafficking and exploitation and that it would consider this complaint under Article 4.

Article 4

The Court noted that, like slavery, trafficking in human beings, by its very nature and aim of exploitation, was based on the exercise of powers attaching to the right of ownership; it treated human beings as commodities to be bought and sold and put to forced labour; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims. Accordingly the Court held that trafficking itself was prohibited by Article 4. It concluded that there had been a violation by Cyprus of its positive obligations arising under that Article on two counts: first, its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas, and, second, the failure of the police to take operational measures to protect Ms Rantseva from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking.

There had also been a violation of this Article by Russia on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used.

Article 5 § 1

The Court found that the detention of Ms Rantseva for about an hour at the police station and her subsequent confinement to the private apartment, also for about an hour, did engage the responsibility of Cyprus, and that both were contrary to Article 5 § 1 by Cyprus.

Article 41

The Court held that Cyprus had to pay the applicant €40,000 in respect of non-pecuniary damage and €3,150 for costs and expenses, and that Russia had to pay him €2,000 in respect of non-pecuniary damages.

Delays and lack of diligence in domestic proceedings with regard to a physical attack on a child which led to the impossibility of the case being examined, violated the State's positive obligations under Article 8

JUDGMENT IN THE CASE OF REMETIN v. CROATIA

(Application no. 29525/10)
11 December 2012

1. Principal Facts

The applicant, Tomislav Remetin, was a Croatian national born in 1989. In April 2003 the applicant, who was 13 years old at the time, was physically attacked by the father of a boy he had had an argument with in a school playground. Medical documentation showed that the applicant sustained bruises on the left cheek, on the left lumbar region and around the spleen. The applicant informed the police of the incident and the man was identified as I.Š.

Three sets of proceedings were initiated against I.Š. over time: minor offence proceedings on account of disturbing the public peace, as well as criminal and civil proceedings.

In May 2003 minor offence proceedings were instituted by the Dubrovnik Minor Offences Court at the request of the police. Hearings were held in June 2004 and in April 2005, however the proceedings were discontinued as the prosecution had become time-barred.

In June 2003 the applicant's father lodged a complaint with the Dubrovnik Municipal State Attorney's Office against I.Š. The Dubrovnik Police were asked to investigate the allegations, and interviewed the applicant's father, I.Š. and other witnesses and obtained medical evidence. In December 2003, I.Š. was indicted before Dubrovnik Municipal Court. The applicant and I.Š. were heard, but the judge conducting the proceedings dismissed requests to call other witnesses finding the facts had already been established. The Deputy State Attorney then abandoned the prosecution of I.Š. due to insufficient evidence and the applicant's father took over the role of as a subsidiary prosecutor.

In September 2006 a further indictment was lodged by the applicant's father with the Dubrovnik Municipal Court against I.Š on charges of violent behaviour, inflicting bodily injury, making serious threats and verbal insult. It was later amended to also

include ill-treatment of a child. He also lodged a claim for damages. At these proceedings too, the applicant's father requested for witnesses to be heard but the judge dismissed the request and concluded the proceedings. On 12 January 2007 the Dubrovnik Municipal Court acquitted I.Š. of the charges of violent behaviour and discontinued the proceedings with regard to inflicting bodily injuries and making serious threats , due to the prosecution having become time-barred. In January 2007 an appeal was lodged before the Dubrovnik County Court, which upheld the acquittal of the charges of violent behaviour and quashed the part of that judgment discontinuing the proceedings as regards the charges of inflicting bodily injury and making serious threats. A retrial was ordered with respect to these charges.

In April 2008 the Dubrovnik Municipal State Attorney's Office brought charges of making serious threats against I.Š. before the Dubrovnik Municipal Court. In December 2008 the proceedings were discontinued as the accused had already been acquitted by a final judgment for the same facts under a different legal qualification. It also instructed the applicant that he could pursue his civil claim in separate civil proceedings.

In January 2009 an appeal was lodged before the Dubrovnik County Court which quashed the judgment and a retrial was ordered. The case was thus presented before the Dubrovnik Municipal Court, which in April 2009 again discontinued the proceedings as the accused had already been acquitted by a final judgment for the same facts under a different legal qualification. A further appeal before the Dubrovnik County Court was lodged, which was discontinued on the grounds that the prosecution had become time-barred. In July 2009 the applicant lodged a constitutional complaint with the Constitutional Court against the judgment of the Dubrovnik County Court, but this was rejected. Alongside of these proceedings, in January 2009 the applicant lodged a complaint before the Constitutional Court which was forwarded to the Supreme Court with regard to the excessive length of the proceedings, but this was dismissed as ill-founded.

As to the civil proceedings, in February 2009 the applicant lodged a civil action in the Dubrovnik Municipal Court against I.Š., claiming compensation for non-pecuniary damage, which was dismissed as it had become time-barred. An appeal was lodged, but the first-instance decision was upheld.

2. Decision of the Court

The applicant complained about a violation of Article 8 due to the authorities' failure to carry out an effective investigation into his complaint, and of Article 6 due to the excessive length of the proceedings.

Article 8

The Court firstly recalled that whilst the essential object of Article 8 was to protect the individual against arbitrary action by the public authorities, this Article also encompassed positive obligations that involved the adoption of measures in the sphere of relations between individuals. To this end, the Court stressed that States, in order to fulfil their duty to protect the physical and moral integrity of an individual under Article 8, must put in place and enforce an adequate legal framework affording protection against acts of violence by private individuals.

The Court noted how the attack of the present case was made against a thirteen-year-old boy by an adult over a trivial dispute and attached particular importance to the applicant's age which resulted in him being considered as a 'vulnerable individual'.

The Court noted that in the event of an attack on a person's physical integrity by another private individual, the Convention did not necessarily require State-assisted prosecution against the attacker. However, if such prosecution was available and the individual availed himself of this possibility, the Court's scrutiny would be aimed at the effectiveness and manner in which this was implemented. To this end, the Court stressed that providing an appropriate legal framework for protecting individuals from violent attacks was not sufficient, as a violation of Article 8 could occur if the legal framework and practices were defective in their application, and hence the State had failed in its positive obligations.

The Court noted that whilst the first response of the domestic authorities was to open an investigation on the same day, institute proceedings for minor offences, gather witnesses and medical evidence and finally lodge an indictment against I.S., none of the further steps taken by the Croatian authorities could be qualified as effective or sufficiently diligent.

Both the minor offences proceedings instituted by the police as well as the criminal proceedings instituted by the State Attorney's Office were terminated due to the prosecution having become time-barred. The Court held that in the event of time-barred prosecution, if the State was not able to provide highly convincing and plausible reasons to justify it, it would be a strong indication that the proceedings were defective to the point of constituting a violation of the State's positive obligations under the Convention.

In order to assess this, the Court noted that in the criminal proceedings, the Dubrovnik Municipal Court held the first hearing two years and six months after the indictment

had been lodged and during this time no further steps were taken by the domestic authorities. Furthermore, the Court noted how the individuals present at the time of the attack were not called to testify. It was the Court's view that the excessive delay in scheduling the first hearing and the lack of diligence of the prosecution authorities resulted in the criminal prosecution becoming time-barred. The applicant's father tried to remedy this lack of diligence by taking over the role of subsidiary prosecutor, but his request to be granted legal aid given his lack of legal knowledge was refused.

With regard to the minor offence proceedings, the Court noted that over the course of two years the Dubrovnik Minor Offences Court only examined I.Š. and failed to hear any of the witnesses. In the Court's opinion no particular reasons to justify such slowness could be adduced.

As a result, these practices led to the impossibility of the case being examined, showing a failure by the State to comply with its positive obligations under Article 8 of the Convention.

Article 6

The Court considered the complaint with regard to the excessive length of proceedings to be manifestly ill-founded and it was rejected pursuant to Article 35(4) of the Convention.

Article 41

Croatia was held to pay the applicant €7,500 in respect of non-pecuniary damage.

The Croatian authorities' investigation into the applicant's complaint that she had been forced into prostitution was not adequate and hence violated the procedural obligation under Article 4

JUDGMENT IN THE CASE OF S.M. v. CROATIA[162]

(Application no. 60561/14)
19 July 2018

1. Principal Facts

The applicant, Ms. S.M., was born in 1990, and from 2000 to 2004 she lived with a foster family. She then moved to a public home for children and young persons where she stayed until she completed professional training as a waiter.

On 27 September 2012 the applicant lodged a complaint with the police against a T.M., a former policeman, alleging that between the summer of 2011 and September of the same year he had forced her into prostitution using physical and psychological pressure. The applicant related that she had met T.M. in 2011 through a social networking site and that he had offered to find her a job as a waitress. Instead he had begun demanding that she perform sexual services for other men and would beat her if she did not comply. He gave her a mobile phone so that clients could contact her. The applicant said that she had been too scared of T.M. to resist. T.M. then rented a flat where the applicant and him lived together and she provided sexual services to other men. When she refused he would beat her, which he did every couple of days. Since T.M. lived in the same flat he controlled everything she did.

The applicant went on to say that once when she was left at home with a key she called a friend, M.I., and asked her to help her escape. M.I.'s boyfriend, T.R. then arrived and took her to M.I.'s home, where she stayed for about ten days.

M.I. related to the police that at the end of summer 2011 the applicant suddenly returned to M.I.'s home having agreed with M.I.'s mother to come and stay with them. Only after the applicant came to live with M.I. and her mother did M.I. learn where or for whom the applicant was involved in prostitution. The applicant told M.I. that she had used an opportunity to run away from T.M. when he had been out of the flat where they had lived. M.I.'s boyfriend, T.R., had told her that he had spoken with the applicant about the situation but did not give any details.

162 This case has been referred to the Grand Chamber and a judgment is awaited.

On 6 November 2012 the County State Attorney's Office indicted T.M. on the charges of forcing another to prostitution, as an aggravated offence of organising prostitution. On 21 December 2012 the applicant was officially given the status of human trafficking victim by the Office for Human and Minority Rights of the Government of Croatia. The Croatian police contacted the Croatian Red Cross, who in turn organised individual counselling for the applicant. The applicant was also provided with legal aid by a non-governmental organisation within the legal-aid scheme supported by the state.

During the applicant's testimony in court she elaborated on her first statement to the police. T.M. however denied the applicant's version of events and instead claimed that she had entered into prostitution in order to pay her debts and to gain money. T.M. had lived with her in the flat where the applicant sometimes met clients, but never compelled her to do anything. On 15 February 2013 the domestic court acquitted T.M. on the grounds that although it had been established that he had organised a prostitution ring, it had not been established that the applicant had been forced into prostitution. As he had been indicted on the aggravated charge, he could not be convicted on the basic charge of organising prostitution. The applicant's testimony was given less weight in the court's deliberations because the domestic court had found her statement to be incoherent, unsure, and that she had paused and hesitated when speaking.

The State Attorney's Office appealed against the decision, arguing that the first instance court had erred when it did not accept the applicant's testimony. The County Court dismissed this appeal, upholding the original judgment and its findings. On 31 March 2014 the applicant lodged a complaint with the Constitutional Court. On 10 June 2014 the Constitutional Court declared the complaint inadmissible, asserting that the applicant had no right to bring a constitutional complaint regarding criminal charges.

2. Decision of the Court

Relying on Articles 3, 4, and 8 the applicant complained that the inadequacy of the domestic legal framework and the procedural response of the domestic authorities to her allegations against T.M. violated her rights. In particular she alleged that the domestic authorities had failed to elucidate all the circumstances of the case, had not secured her adequate participation in the proceedings and had not properly qualified the offence.

Article 4

The Court considered that the complaint should be analysed from the standpoint of Article 4 (prohibition of slavery and forced labour). It stated that trafficking itself as well as the exploitation of prostitution fell within the scope of that provision.

The Court stated that it was irrelevant that there was no international element to the case since Article 2 of the Council of Europe Anti-Trafficking Convention encompasses "all forms of trafficking in human beings, whether national or transnational" and the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others refers to exploitation of prostitution in general.

Article 4 contains a positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a position of slavery, servitude, or forced or compulsory labour. Therefore States are under a positive obligation to put in place a legislative and administrative framework to prohibit and punish trafficking and also to protect victims. The Court was satisfied that at the time of the alleged offence there was an adequate framework in Croatia for its examination within the context of the trafficking in human beings, forced prostitution and exploitation of prostitution. The Court also accepted that the applicant was provided with support and assistance by the Government. This included recognition of her status as a victim of human trafficking and the free legal assistance she was provided through state-funded and state-supported programmes carried out by NGOs. There had hence been an adequate legal framework in place to support the applicant.

However, while the initial investigation was prompt, the Court stated that more individuals should have been interviewed by the police, especially M.I.'s mother and M.I.'s boyfriend. This suggested to the Court that the Croatian authorities did not investigate the case in depth and did not attempt to gather all available evidence.

Further, the authorities had never made a serious attempt to investigate the psychological pressure inflicted on the applicant by T.M. as a relevant factor in assessing whether T.M. forced the applicant into prostitution. Nor did they investigate the presence of rifle parts in T.M.'s flat and the applicant's economic dependence on T.M.

The Court went on to point out that according to Croatian law, the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, and the Anti-trafficking Convention, the consent of the victim is irrelevant.

The national authorities did not consider the possible impact of psychological trauma on the applicant's ability to coherently relate the circumstances of her exploitation. The Court also ruled that the presence of T.M. in the courtroom could have had an adverse effect on the applicant even if he was subsequently removed.

The Court considered that in this case the Croatian authorities did not fulfil their procedural obligations under Article 4, and that therefore there was a violation of Article 4.

Article 41

The Court held that the applicant should be awarded €5,000 in respect of non-pecuniary damages, and nothing in respect of costs and expenses as the applicant was represented by a lawyer provided by a non-governmental organisation funded by the state.

Right of a father whose child was born out of wedlock to have contact with his child

GRAND CHAMBER JUDGMENT IN THE CASE OF SAHIN v. GERMANY

(application no. 30943/96)
8 July 2003

1. Principal Facts

Asim Sahin, born in 1950, was a Turkish national at the relevant time, but subsequently acquired German nationality. He was the father of a child, G., born outside of wedlock in June 1988. He acknowledged paternity, agreed to pay maintenance, and regularly saw his daughter for visits until October 1990, when the mother prohibited further contact. In December 1990 he applied unsuccessfully to the domestic courts for a right of access. His subsequent appeal was dismissed on the basis of a psychologist's report which concluded that allowing the applicant access to his child without the parents first overcoming their ongoing conflict would not be in the child's interest. In the expert psychologist's examination of the child, G. was never asked about her father or if she wished to see her him. The domestic court also ruled that it was not necessary to hear the child as part of the proceedings as questioning her about her relationship with her father, according to the psychologist, would have placed a psychological strain on her. The applicant's appeal to the Constitutional Court was rejected.

2. Decision of the Court

In its Chamber judgment in this case, delivered on 11 October 2001, the European Court held that there had been violations of both Article 8 and 14 of the Convention. The case was then referred to the Grand Chamber under Article 43.

The applicant complained under Article 8 (right to respect for family life) that the German court's dismissal of his request for access to his child, who had been born outside of marriage, violated the Convention. The applicant also also complained of discriminatory treatment contrary to Article 14 (prohibition of discrimination) in conjunction with Article 8.

Article 8

The parties agreed that to refuse the applicant access to his child amounted to an interference with his right to respect for his family life under Article 8 § 1. The Court

reiterated that any interference with Article 8 would constitute a violation unless it was in accordance with the law, pursued a legitimate aim, and was necessary in a democratic society. The interference with Article 8 was in accordance with the letter of domestic law and pursued the legitimate aim of protecting the 'health or morals' and the 'rights and freedoms' of the child. To determine whether the interference was necessary in a democratic society the domestic authorities were required to strike a fair balance between the interests of the child and those of the child's parents. In this case the German courts provided relevant reasoning for their decision to refuse access. Specifically, the serious tensions between the child's parents and the risk that visits by the applicant to his child would adversely affect the child's development.

In assessing whether those reasons were sufficient, the Court considered whether the decision-making process had adequately protected the applicant's interests. It noted that he had been able to submit all his arguments in favour of obtaining visiting rights and that he had access to all the relevant information relied on by the national courts. The Court stated that it would be going too far to say that domestic courts should always hear oral evidence from a child on the issue of access. As the child had been only five years old at the relevant time, the domestic court had been entitled to rely on the findings of an expert. The Court was satisfied that the German court procedure had been reasonable in the circumstances and had provided sufficient material for the national court to reach a reasoned decision on the question of access. The procedural requirements implicit in Article 8 had therefore been met.

Article 14 in conjunction with Article 8

The Court began by observing that at the relevant time divorced fathers of children born within marriage were legally entitled to gain access to their children, and that this access could, if necessary, be restricted or suspended in the child's interest. However, the fathers of children born outside marriage could only have access to their children if the child's mother agreed, or they were able to obtain a court ruling that such contact was in the child's interest.

The question before the Court was whether the application of this law had resulted in an unjustified difference in treatment between the applicant, a father to a child born out of wedlock, and divorced fathers. In applying the relevant section of the Civil Code the German courts had found that only special circumstances could justify the assumption that personal contact with the father would have a permanently beneficial effect on the child's well-being. As these special circumstances were not met, despite the domestic court's having been convinced of the applicant's responsible motives,

attachment to his daughter, and genuine affection for her, a burden had been placed on the applicant that was heavier than the one on divorced fathers.

The Court stated that only very weighty reasons could justify treating fathers of children born outside marriage differently from fathers of children born within marriage. No such reasons were given in this case. There had accordingly been a violation of Article 14 taken together with Article 8.

Article 41

The Court awarded the applicant €20,000 for non-pecuniary damage and €4,500 for costs and expenses.

The placement of the first applicant's children in the "Il Forteto" community and the lack of contact constituted violations of Article 8, with the applicant being able to act on behalf of children she no longer had parental rights over

GRAND CHAMBER JUDGMENT IN THE CASE OF SCOZZARI & GIUNTA v. ITALY

(application nos. 39221/98 and 41963/98)
13 July 2000

1. Principal Facts

The first applicant, Dolorata Scozzari, was a Belgian and Italian national, born in 1960 and living in Italy. She also acted on behalf of her children, G., aged thirteen, and M., aged six at the time of the European Court of Human Right's judgment. The second applicant, Carmela Giunta, was an Italian national, and the first applicant's mother.

On 9 September 1997, in view of the dramatic situation in the first applicant's home, which had been largely brought about by the violence of the first applicant's husband towards both her and the children and the fact that the elder child had been subjected to paedophile abuse by a social worker, the Youth Court suspended the first applicant's parental rights and ordered the children's placement with the "Il Forteto" community. Two of the main leaders of that community had been convicted in 1985 for ill-treatment of three disabled people (a girl and two boys) who had stayed there. One of them was also convicted of sexual abuse. The two men continued to hold positions of responsibility within the community, and were actively involved in the proceedings concerning the first applicant's children and in the arrangements for looking after them.

On 9 September 1997 the Youth Court ordered that the first applicant should have contact with the younger child only, but she was prevented from doing so in practice. Subsequently, it ordered that she should receive counselling in preparation for contact with the younger child. Visits that had already been arranged were, however, suspended in July 1998. Subsequently, following the Youth Court's decision of 22 December 1998 to allow contact with both children, the first applicant was allowed to visit them for the first time on 29 April 1999. A second visit took place on 9 September 1999, but social services decided to suspend all visits thereafter.

2. Decision of the Court

The first applicant, who purported to also be acting on behalf of her children, complained of infringements of Article 8 of the Convention in that her parental rights had been suspended, her children had been taken into care, the authorities had caused delays before finally allowing her to see the children, too few contact visits had been organised and the authorities had placed the children at "Il Forteto".

The second applicant also alleged a violation of Article 8, complaining that the authorities had discounted the possibility of her being given the care of her grandsons.

Admissibility

The Italian Government contested the first applicant's standing also to act on behalf of her children. The Court said that minors could apply to the Court even, or indeed especially, if they were represented by a parent who was in conflict with the authorities. It considered that in the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there was a danger that some of those interests would never be brought to the Court's attention and that the minor would be deprived of effective protection of his rights under the Convention. Consequently, even though the mother in this case had been deprived of parental rights – indeed, that was one of the causes of the dispute which she had referred to the Court – her standing as the natural parent sufficed to afford her the necessary power to apply to the Court on the children's behalf, also, in order to protect their interests.

Article 8

It was common ground that there had been interferences with the applicants' right to respect for family life, that these was in accordance with the law, and that they were for "the protection of health or morals" and "the protection of the rights and freedoms of others", as they were intended to protect the welfare of the first applicant's children. The Court hence had to consider whether they had been necessary in a democratic society.

The suspension of the first applicant's parental authority and the removal of the children

The Court noted that the first applicant's domestic circumstances seriously deteriorated in 1994. It was particularly struck by the negative role played by her former husband. However, it had to be noted, too, that even after separating from her former

husband, the first applicant had found it difficult to look after her children (a report by a neuropsychiatrist employed by the local health authority indicated that the first applicant was suffering from a personality disorder and was incapable of managing the complex situation of her family and children). The problem was compounded by the severe trauma suffered by the elder child as a result of the paedophile abuse of him by a social worker who had succeeded in ingratiating himself with the family. The Court considered that, against that background, the authorities' intervention was based on relevant and sufficient reasons and was justified by the need to protect the children's interests. Consequently, there had been no violation of Article 8 of the Convention on that account.

The contact between the first applicant and her children

The Court considered, firstly, that the decision of 9 September 1997 to prohibit any contact between the first applicant and her elder son did not appear to have been based on sufficiently valid reasons. While the complex circumstances that were harmful to the family life and the development of the children had fully justified their being temporarily taken into care, the grave situation within the first applicant's family did not justify by itself contact with the elder child being severed.

The Court further noted that although the decision of 9 September 1997 had provided for the organisation of visits with the younger son, nothing further was done until 6 March 1998, when the Youth Court finally decided to require visits to be preceded by a preparatory programme for the mother. However, nothing had come of that as, just two days before the first visit had been due to take place on 8 July 1998, the Youth Court had decided, at the request of the deputy public prosecutor, who had just started an investigation concerning the children's father, to suspend the visits that had already been scheduled. Subsequently, despite the Youth Court's order of 22 December 1998 for the resumption of visits by 15 March 1999, the first visit did not take place until 29 April 1999.

It was apparent from the case file that, from the first visit, social services had played an inordinate role in the implementation of the Youth Court's decisions and adopted a negative attitude towards the first applicant, one for which the Court found no convincing objective basis. In reality, the manner in which social services had dealt with the situation up till then had helped to accentuate the rift between the first applicant and the children, creating a risk that it would become permanent. The fact that there had been only two visits (after one and a half year's separation) since its decision of 22 December 1998 should have incited the Youth Court to investigate the reasons for the delays in the programme, yet it had merely accepted the negative conclusions of social services, without conducting any critical analysis of the facts.

Consequently, there had been a violation of Article 8 on that point.

The decision to place the children with the "Forteto" community

The Court noted that two of the principal leaders and co-founders of "Il Forteto" had been convicted in 1985 of the ill-treatment and sexual abuse of three disabled people staying in the community. Contrary to the assertions of the respondent Government, the evidence on the case file showed that the two leaders concerned played a very active role in bringing up the first applicant's children. The Court's reservations were reinforced by the fact that the Youth Court had been aware of the convictions when it took the decisions regarding the first applicant's children. A further contributory factor was the sexual abuse to which the elder child had been subjected in the past. The combination of those two factors made the first applicant's concerns about her children's placement at "Il Forteto" understandable from an objective standpoint.

The situation had been compounded by the fact that some of the leaders of "Il Forteto" appeared to have contributed substantially to delaying or hindering the implementation of the decisions to allow contact between the first applicant and her children, and that there was evidence pointing to the first applicant's children having been subjected to their mounting influence with the aim of distancing the boys, particularly the elder boy, from their mother.

The absence of any time-limit on the care order, the negative influence of the people responsible for the children at "Il Forteto", coupled with the attitude and conduct of social services, were driving the first applicant's children towards an irreversible separation from their mother and long-term integration within "Il Forteto". Consequently, the children's uninterrupted placement at the time of the judgment of the European Court of Human Right's at "Il Forteto" did not satisfy the requirements of Article 8 of the Convention.

The position of the second applicant

The evidence on the case file indicated that the second applicant would have had substantial difficulty in looking after the children properly. The Court consequently considered that the authorities' decision not to entrust the children into the second applicant's care had been based on reasons that remained relevant even after the second applicant's move to Italy, which in any event was interrupted by her trips to Belgium. The Court hence concluded that there had been no violation of Article 8 as regards the second applicant.

Article 41

The Court considered that the first applicant had undoubtedly sustained non-pecuniary damage and awarded her ITL 100,000,000[163]. It considered, further, that the children had personally sustained damage, and awarded each child in person ITL 50,000,000. Finally, ITL 17,685,000 was awarded for costs and expenses.

163 Approximate value ITL1 = €0.00052

The applicant prisoner's claim of a violation of Article 8 in relation to the refusal of the authorities to transfer him closer to his family was rejected as inadmissible, whilst the detention conditions were found to be incompatible with Article 3

JUDGMENT IN THE CASE OF SERCE v. ROMANIA

(Application no. 35049/08)
30 June 2015

1. Principal Facts

The applicant, Mr Ali Serce, was a Turkish national born in 1966. He was married and had four children, who lived in Turkey.

In June 2005 he was convicted by the Bucharest County Court on account of aggravated murder and sentenced to eighteen years' imprisonment. He served his sentence in two different prisons in Romania, Rahova and Giurgiu, where he was held at the time of the present application to the European Court of Human Rights.

In 2007 the applicant lodged a request before the Romanian Ministry of Justice to be transferred to Turkey, in order to be close to his family who was unable to travel to Romania as they did not have enough means to do so. This request was based on the Convention between Romania and Turkey on the transfer of convicted persons. The Ministry of Justice initiated the transfer proceedings and in June 2007 the Ankara District Court ruled that the rest of the sentence could be served in Turkish prisons. In February 2008 the applicant's request was brought before the Bucharest Court of Appeal, which later in April 2008 rejected the transfer, on account of differences in regulation of conditional release in Turkey, which might have resulted in the applicant being released in a shorter time.

The applicant lodged a subsequent transfer request, which was also rejected by the Bucharest Court of Appeal in December 2011.

2. Court's decision

The applicant complained about a violation of Article 3 on account of the inhuman conditions of his detention, as well as a violation of Article 8 due to the impossibility of maintaining contact with his family given the Romanian authorities' refusal to transfer him to Turkey.

Article 3

The Court firstly reiterated that Article 3 requires States to ensure detention conditions are compatible with human dignity, to prevent that the method of execution of these measures causes distress or hardship to the individual of an intensity exceeding the unavoidable level of suffering inherent in detention and to protect the individual's health and well-being.

The Court had previously found that in addition to overcrowding, issues such as lack of appropriate furniture in the cells, poor sanitary conditions, such as a limited number of toilets and sinks for a large number of detainees, sinks in cells providing only cold water for a wide range of needs, and the presence of bedbugs or other insects were relevant for the assessment of whether detention conditions complied with Article 3.

In the present case, the applicant complained of lack of hygiene and the presence of bedbugs, which prevented him from sleeping at night. He also complained of a lack of activities and opportunities to work. To this end, the Court considered reports produced by a Romanian NGO which visited the prisons as well as previous case-law on the non-Convention compliant conditions of the Rahova and Giurgiu Prisons. It concluded that the sanitary conditions were unsatisfactory and that those taken in conjunction with the applicant's health and the overcrowding of the prison, constituted a violation of Article 3.

Article 8

The Court noted that the central issue of the present case was to establish if the refusal of the Romanian authorities to allow the transfer of the applicant to Turkey fell within the scope of the Convention.

To this end, the Court firstly noted that no relevant provisions existed in Romanian law as to indicate a right to be transferred to Turkey. Furthermore, such a substantive right was not provided by the Convention between Romania and Turkey concerning the transfer of convicted persons either, as this did not bind the Romanian authorities to allow the transfer request in favour of the applicant.

The Court further stressed that the Convention does not grant prisoners the right to choose their place of detention and that separation from families was an inevitable consequence of the exercise of States' prerogatives in ordering detention in the context of their criminal sanctioning. The present complaint was thus found to be

incompatible *ratione materiae* with the provisions of the Convention in accordance with Article 35 (3).

Article 41

The Court held Romania was to pay the applicant €5,000 in respect of non-pecuniary damage.

Court order to return young child to his father in another country found in violation of Article 8

JUDGMENT IN THE CASE OF ŠNEERSONE AND KAMPANELLA v. ITALY

(Application no. 14737/09)
12 October 2011

1. Principal Facts

The applicants were two Latvian nationals, Ms Jeļizaveta Šneersone and her son Marko Kampanella, born in 1973 and 2002 respectively and living in Riga.

Marko was born in Italy whilst the first applicant and Marko's father were living together. In 2003, when Marko was one year old, his parents separated and the applicants moved to a separate residence.

On 20 September 2004, at the request of the first applicant, the Rome Youth Court granted custody of Marko to his mother as the ongoing conflict between the parents made joint custody unfeasible. While the father was still granted contact with Marko on specified days of the week, he nonetheless appealed the decision, requesting joint custody or sole custody be granted to him as he did not want the first applicant to take the child abroad without his approval. The Youth Section of the Rome Court of Appeal rejected his request for sole custody and found the father's concern that the first applicant might move to Latvia with their son unfounded, as the first applicant had previously left Marko in his father's care when travelling to Latvia and Marko did not have a passport.

On 24 June 2005, the guardianship judge granted an authorization to issue a passport to Marko. On 11 July Marko's father appealed against the decision but this was rejected.

On 3 February 2006, the Court of Civitavecchia ruled that Marko's father had to make child support payments, however he failed to do so. For that reason, in April 2006, the applicants contended that they had no choice but to return to Latvia, as they did not have any financial support.

On 7 February 2006 Marko was granted Latvian citizenship. On an unspecified date, on Marko's father request, the Rome Youth Court granted him interim sole custody of Marko and held that the child should live with his father.

In accordance with the Hague Convention concerning child abduction, the Italian Ministry of Justice asked the Latvian authorities to return Marko to Italy. The Latvian courts decided in 2007 that Marko's return to Italy would not be in his best interests. That decision was supported by the findings of a psychologist who concluded that separating Marko from his mother would inevitably negatively affect the child. On 4 June 2007 a request by the first applicant to the Riga City Vidzeme District Court to be granted sole custody of Marko was granted.

In April 2008, upon a request from Marko's father, the Rome Youth Court ordered Marko's return to Italy on the basis of the 2003 European Council Regulation No 2201/2003 concerning jurisdiction in matters of parental responsibility. In August that year, the Italian authorities asked Latvia to act upon the Rome Youth Court's decision and send Marko to Italy. The first applicant's appeal was rejected by the Rome Court of Appeal, which adopted its decision in written proceedings without hearing the parties but after taking into account their written observations.

On 10 July 2009, the bailiff of the Rīga Regional Court approached Marko's father inviting him to reestablish contact with his son, however the father did not respond.

In October 2008, Latvia brought an action against Italy before the European Commission in connection with the return proceedings. It claimed in particular that Italy had respected neither the Regulations nor the decisions of the Latvian courts concerning Marko. The Commission issued a reasoned opinion, finding that Italy had not violated the Regulations or any general principle of community law.

2. Decision of the Court

Article 8

Regarding the admissibility of the case, the Court observed that a restrictive or purely technical approach regarding the representation of children before the Court should be avoided. It therefore rejected the Government's argument concerning the incompatibility *rationae personae,* holding the view that minors can apply to the Court even, or indeed especially, if they are represented by a parent who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. In such cases, the standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the child's behalf too, in order to protect the child's interests. It was not in dispute that the relationship between the applicants amounted to "family life" within the meaning of Article 8. In deciding whether Marko's return would amount to a violation of Article

8 on account of the Italian courts' order for the second applicant to be returned to Italy, the Court noted that neither the Italian government nor the applicants disputed that the removal of Marko had been wrongful under the Hague Convention on international child abductions, and that the decisions by the Italian Courts' to return him to Italy had the legitimate aim of protecting the right and freedoms of Marko and his father.

However, the Court considered that the Italian courts, in making their decision to return Marko to Italy, did not reasonably take into account Marko's best interests. The Italian courts did not refer to the two psychologists' reports that had been drawn up in Latvia pursuant to requests from the applicants' representative and then relied upon by the Latvian courts. Neither did the Italian courts refer to the potential dangers to Marko's psychological health that had been identified in those reports.

As to the residence that Marko's father proposed as his accommodation after his return to Italy, no effort was made by any Italian authorities to establish whether it was suitable as a home for a young child. The Court was unconvinced that the Italian courts sufficiently appreciated the seriousness of the difficulties, which Marko was likely to encounter in Italy.

The Court concluded that the interference with the applicants' right to respect for their family life was not "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention. Accordingly, the Court found a violation of Article 8 of the Convention on the account of the Italian courts' order for Marko's return to Italy.

The Court also considered the procedural fairness of the decision-making in the Rome Youth Court to determine whether there had been a violation of Article 8 of the Convention on account of the first applicant's absence from the hearing of the Rome Youth Court. Taking into account that both Marko's father and the first applicant submitted, with the aid of counsel, detailed written statements to two levels of Italian courts, the Court was satisfied that the procedural fairness requirement of Article 8 had been observed. Accordingly there had been no violation of Article 8 on account of the first applicant's absence from the hearing of the Rome Youth Court.

Article 6

In considering Article 6 of the Convention, the Court found that the proceedings before the Italian courts did not disclose any appearance of a violation and therefore found this part of the application manifestly ill-founded.

Article 41

The Court held that Italy was to pay Marko and his mother jointly €10,000 in respect of non-pecuniary damage and €5,000 for costs and expenses.

Failure by the national authorities to take all reasonable measures to facilitate the applicant's reunion with her son, despite domestic decisions in her favour, amounted to a violation of Article 8

JUDGMENT IN THE CASE OF ŠOBOTA-GAJIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 27966/06)
6 February 2008

1. Principal Facts

The applicant, Ms Verica Šobota-Gajić, was born in 1964 and lived in the vicinity of Gradiška. The applicant married Z.G, with whom she had two children, a daughter born in 1992 ("A") and a son born in 1994 ("B"). Following an alleged episode of domestic violence, the applicant left her husband taking A whereas Z.G kept B.

On 30 May 2002 the applicant initiated divorce and custody proceedings before the Gradiška Court of First Instance. In a judgment of 19 February 2003, the Gradiška Court of First Instance granted the applicant a divorce and awarded her custody of A and B. On 28 February 2003 the Social Work Centre granted the applicant provisional custody of A and B pending the entry into force of the judgment of 19 February 2003.

On 28 April 2003 the applicant complained to the Human Rights Chamber, a domestic human-rights body, that the ongoing proceedings so far had failed to meet the standard of speed and efficiency required under Article 8 of the Convention in order to secure her the right to respect for her family life.

On 30 July 2003 the Department for General Administration accepted to enforce the decision of 28 February 2003. However, on 18 August and 26 September the Department for General Administration carried out two unsuccessful attempts to enforce the decision of 28 February 2003.

On 6 November 2003, the Human Rights Chamber found a violation of Article 8 of the Convention and awarded the applicant damages, ordering the Republika Srpska "to take all necessary steps through its authorities, to promptly execute the decision of the Social Work Centre, in any event no later than 5 January 2004" and "to pay to the applicant, by 5 January 2004, 2,500 Bosnian markas [the equivalent of 1,280 euros] by way of compensation for non-pecuniary damages"

On 18 December 2003 the Department for General Administration handed over B to the applicant. On the next day Z.G abducted B.

On 23 April 2004 the competent public prosecutor, having been satisfied that there was sufficient evidence that Z.G. had committed child abduction, filed an indictment with the Gradiška Court of First Instance.

On 14 January 2006 Z.G. died and the criminal proceedings against him were terminated. B remained with D.B., his paternal grandmother. On 1 February B objected to being returned to his mother and the Social Work Centre decided not to use coercion.

On 2 March 2006 the Social Work Centre unsuccessfully attempted to persuade D.B. to facilitate the return of B. According to the minutes of the meeting, D.B. expressed, in the presence of B, her disgust for the applicant. D.B. was described as manipulative, possessive, authoritarian and aggressive.

On 31 March 2006 the Gradiška Minor Offences Court convicted D.B. of subjecting B to psychological violence and ordered the Social Work Centre to secure the prompt return of B with police assistance if necessary.

Following a period between 2006 and 2007, during which the national authorities were constantly unable to enforce the decision, the Social Work Centre returned B to the applicant on 22 January 2007.

2. Decision of the Court

The applicant complained under Article 8 of the Convention that the national authorities had failed to take all reasonable measures to facilitate her reunion with her son, regardless of several domestic decisions in her favour.

Article 8

Regarding the admissibility of the case, the Government maintained that considering the return of B on 22 January 2007 and the decision of the Human Rights Chamber, the applicant could no longer claim to be a victim of the alleged violation. The Court however reiterated earlier case law holding that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a 'victim' unless the national authorities have acknowledged and then afforded redress for, the breach of the Convention. The Court held that in this situation, the sum awarded (€1,280) to the applicant, did not constitute sufficient redress given,

notably, the continuation of the impugned situation for more than three years after the award.

The relationship between the applicant and her son clearly amounted to "family life" within the meaning of Article 8; that being so, the question was whether there had been a failure to respect the applicant's right to family life.

In answering this, the Court looked at whether the national authorities had complied with the positive obligations and taken all the necessary steps to facilitate reunion, as could reasonably be demanded in the special circumstances of the case and whether they had struck a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law. In a case like the present one, the adequacy of a measure was to be judged by the swiftness of its implementation as the passage of time could have irremediable consequences for relations between the children and the parent who did not live with them.

The Court observed that the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and without the necessary preparation, and pointed to the death of Z.B and the refusal of D.B to cooperate. However in the present case, there was no evidence that any such preparatory work which could explain the above-noted delays by the authorities.

In determining whether the national authorities had taken all the necessary steps to facilitate reunion, the Court looked at the interdepartmental disputes over administrative responsibilities between the different national departments involved, which occurred in the period between the first submission made by the applicant on 15 May 2001 and the actual reunion with her son which took place on 22 January 2007. There was no indication, at any stage of the proceedings that the applicant contributed to any of these delays.

Referring to the order made on 31 March 2006, to secure the prompt return of B with police assistance if necessary, the Court noted that although immediately enforceable, the order was not enforced until 22 January 2007 due to confusion as to the responsibility for enforcement between the Social Work Centre, the Gradiška Court of First Instance and the local police, all avoiding to take responsibility and failing to cooperate.

As a result of the regional departments' repeated failure to take action and enforce decisions in the applicant's favour, resulting in excessive delays, the Court found a violation of Article 8 of the Convention.

Article 41

The Court awarded the applicant €8,800 in non-pecuniary damages, and €4,700 in costs and expenses.

The trial and sentencing of the two child applicants, convicted of murder in an adult court, violated Articles 5 and 6

GRAND CHAMBER JUDGMENTS IN THE CASES OF T. v. THE UNITED KINGDOM and V. v. THE UNITED KINGDOM

(Application nos. 24724/94 and 24888/94)
16 December 1999

1. Principal Facts

The applicants, British citizens both born in August 1982, were convicted in November 1993 of the abduction and murder of a two-year-old boy. They were ten years old at the time of the offence, and eleven at the time of their trial, which took place in public in the Crown Court and attracted intense levels of press and public interest. Following their conviction, the applicants were sentenced to be detained indefinitely "during Her Majesty's pleasure". According to English law and practice, children and young persons sentenced to be detained during Her Majesty's pleasure first had to serve a "tariff" period, set by the Home Secretary, to satisfy the requirements of retribution and deterrence. Following the expiry of the tariff, detainees were released unless, in the view of the Parole Board, they continued to represent a danger to the public. The Home Secretary set a tariff of fifteen years in respect of each applicant. This decision was quashed in judicial review proceedings by the House of Lords on 12 June 1997 as the Home Secretary had wrongly allowed himself to be swayed in his decision making by the public pressure surrounding the case. No new tariff had yet been set by the date of the European Court of Human Right's judgment.

2. Decision of the Court

The applicants complained under Article 3 (prohibition of torture) that their subjection to a full adult trial and the length of their prison sentence amounted to a breach of the Convention. They also complained that they had not been afforded a fair trial and that the fixing of their tariff period by the Home Secretary, rather than by a tribunal, gave rise to a breach of Article 6 (right to a fair trial). Finally, the applicants also complained under Article 5 (right to liberty and security) that the system of sentencing children in the respondent State was arbitrary, and that they had no opportunity to have the lawfulness of their continued detention after their conviction determined by a judicial body.

Article 3

The Trial

The Court began by considering whether attributing criminal responsibility to the two applicants was enough to breach their rights under Article 3. The Court noted that there was no clear common standard among the member states of the Council of Europe as to the minimum age of criminal responsibility, indeed the UK's age of 10 was neither the lowest amongst the member states nor differed disproportionately from the general age limits of other European States. Therefore, attributing criminal responsibility to the two applicants did not breach Article 3.

The Court then considered whether the fact that the criminal proceedings took place over three weeks in an adult Crown Court, that adult court procedure applied during the trial, and that after their conviction the applicants' names were released violated T and V's rights under Article 3. In this respect the Court recognised that international law gave more weight to the protection of juvenile defendants than to publicity and the need to try minors in adult courts. However, the Court also considered that there was no evidence in this case that holding the trial of the applicants in public amounted to ill-treatment of the minimum severity necessary to bring it within the scope of Article 3. The Court further concluded that the criminal proceedings against the applicants were not motivated by any intention on the part of the State to humiliate the applicants or cause them suffering, in fact special measures had been taken to modify the domestic court's procedure to take the applicants' age into account. Any proceedings or inquiry into the acts committed by T and V would have caused the applicants 'feelings of guilt, distress, anguish and fear' and so the particular features of the trial process that gave rise to the applicants' suffering would not have done so any more than any other attempt by the authorities to deal with the applicants in relation to their offence. As such, the Court did not find a violation of Article 3 in relation to the applicants' trial.

The Sentence

Being sentenced to detention 'during Her Majesty's pleasure' entailed a minimum period of detention, 'the tariff', before which the applicants could not be released. The Court did not consider that the punitive element in the State's approach to sentencing inherently gave rise to a breach of Article 3, or that the Convention prevented State's from sentencing children to an indeterminate sentence that allowed for the offenders' detention to be based on the need to protect the public. As the final tariff had not yet been set by the date of the European Court's judgment, it could not draw

any conclusions as to the length of the punitive detention to be served by the applicants. The six years that the applicants had already served was not held to amount to inhuman or degrading treatment. Therefore, there had been no breach of Article 3 in relation to the applicants' sentence.

Article 6

The Trial

In order to establish whether the nature of the applicant's trial had violated Article 6 the Court began by establishing that this Article as a whole guaranteed the right of an accused person to participate effectively in their criminal trial. In relation to children, the Court was of the opinion that it was essential that they should be dealt with in a manner that took full account of their age, level of maturity and intellectual and emotional capacities, and that steps were taken to promote their ability to understand and participate in the proceedings. From this starting point the Court went on to note that in regard to criminal procedures involving young children it would be necessary to conduct the hearing in a way as to reduce as far as possible their feelings of intimidation and inhibition. While the Government argued in this case that the general interest of an open justice system required public trials, the Court observed that authorities could still modify court procedure by establishing selected attendance rights for the public and press.

While special measures were taken to promote the applicants' understanding of the three week public court proceedings, the Court noted that the court procedure must have been at times incomprehensible and intimidating to an eleven year old child, and that certain measures taken by the authorities to modify the courtroom, such as raising the level of the dock to allow the applicant's to see, served to increase the applicants' discomfort during the trial. Psychiatric reports issued in respect of both applicants gave evidence that their post-traumatic stress disorder had limited their ability to instruct their lawyers and testify in their own defence. Indeed the evidence presented to the court suggested that neither applicant was able to properly follow the course of proceedings. While both applicants were represented by skilled lawyers, the Court considered it highly unlikely that either applicant would have felt comfortable enough to consult with or properly aid their representatives. Therefore, the Court found that there had been a breach of Article 6 of the Convention in respect of the trial.

The Sentence

The Court agreed with the applicants' argument that as the tariff was fixed by the Home Secretary, rather than an independent and impartial tribunal as required by Article 6, there had been a violation of this Article in relation to their sentencing.

Article 5 § 1

The Court observed that the applicants were made subject to detention following conviction by a competent court and therefore their detention fell within the scope of Article 5 § 1. However, the sentence of detention during Her Majesty's pleasure was lawful under English law, imposed in a procedure prescribed by law, and could not be said to be arbitrary as it was in conformity with the purposes for depriving liberty as allowed by Article 5 § 1. The Court therefore concluded that there had been no violation of Article 5 § 1.

Article 5 § 4

The applicants' complaint pertaining to Article 5 § 4 was that while the Article provided for the availability of an individual's release if their detention was found to be unlawful, the applicants had no opportunity to have the lawfulness of their continued detention determined by a judicial body. In circumstances where a national court imposed a fixed sentence of imprisonment upon an individual for the purposes of punishment, the Court had established that the safeguards required by Article 5 § 4 had to be incorporated into that national court's decision making. As it has already been established that the applicants' tariff had been set by the Home Secretary rather than an independent tribunal, it could not be said that the safeguards required under Article 5 § 4 were incorporated into the applicants' sentencing. Furthermore, after the Home Secretary's initial tariff was quashed no further tariff was decided upon. This meant that the applicants were unable to challenge the lawfulness of their detention as there was no complete legal framework for their detention at that time. Therefore, the applicants had been unable to challenge the lawfulness of their detention since their conviction and so there was a violation of Article 5 § 4.

Article 41

The applicants made no claim for either pecuniary or non-pecuniary damage and so were not awarded any. The Court awarded legal costs of 18,000 pounds sterling (GBP) to T. and GBP 32,000 to V.[164]

164 Approximate value £1=€1.59

Sending an Afghan family of asylum seekers back to Italy under the European Union "Dublin" Regulation without individual guarantees concerning their care would be in violation of Article 3

GRAND CHAMBER JUDGMENT IN THE CASE OF TARAKHEL v. SWITZERLAND

(Application No. 29217/12)
4 November 2014

1. Principal Facts

The applicants, Golajan Tarakhel, born in 1971, his wife Maryam Habibi, born in 1981, and their six minor children, born between 1999 and 2012, were Afghan nationals living in Switzerland.

Mr Tarakhel and Mrs Habibi met and married in Pakistan before living in Iran for 15 years. They then left Iran for Turkey, from where they took a boat to Italy. The couple and their five oldest children landed on the Italian coast in July 2011, before being subjected to an identification procedure and placed in a reception facility. They were then transferred to the Reception Centre for Asylum Seekers ("CARA") in Bari, once their identity had been established.

In late July 2011, the applicants left the CARA without permission and travelled to Austria, where they unsuccessfully claimed asylum. They later travelled to Switzerland, lodging an asylum application there in November 2011. In January 2012, the Federal Migration Office ("FMO") in Switzerland decided not to examine the applicants' asylum application on the basis that, in accordance with the European Union's Dublin Regulation[165], Italy was the State responsible for examining the application.

The FMO subsequently issued an order for the applicants to be removed to Italy. The applicants appealed to the Federal Administrative Court, which dismissed the appeal in February 2012. The applicants then requested the FMO to have the proceedings reopened and to grant them asylum in Switzerland but this was dismissed by the Federal Administrative Court in March 2012 on the basis that the applicants had not submitted any new arguments.

165 The "Dublin" system serves to determine which European Union (EU) Member State is responsible for examining an asylum application lodged in one of the Member States by a third-country national. All EU Member States shall apply the Regulation, as well as Norway, Iceland, Switzerland and Liechtenstein.

2. Decision of the Court

The applicants complained that if they were returned to Italy, "in the absence of individual guarantees concerning their care", they would be subjected to inhuman and degrading treatment as a result of the "systematic deficiencies" in the reception arrangements for asylum seekers, in violation of Article 3. They further complained under Article 13 that the Swiss authorities had not given sufficient consideration to their personal circumstances and had not taken into account their situation as a family in the procedure for their return to Italy.

Article 3

The Court reiterated the general principle that expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In addition, the Court underlined the fact that an asylum seeker is "a member of a particularly underprivileged and vulnerable population group in need of special protection".

The Court made reference to the UNHCR Recommendations and the Human Rights Commissioner's report of 2012, both of which referred to a number of failings in Italy's reception arrangements for asylum seekers. A lack of spaces in reception centres meant that a large number of asylum seekers were left without accommodation. In 2013, the UNHCR had identified a number of problems relating to the varying quality of the services provided, depending on the size of the facilities, and to a lack of coordination at national level. The Human Rights Commissioner, in his 2012 report, had noted the existence of problems relating to legal aid, care and psychological assistance in emergency reception centres, the time taken to identify vulnerable persons and the preservation of family unity during transfers.

Therefore, the Court concluded that the structure and overall situation of the reception arrangements in Italy raised serious doubts as the capacities of the system. Consequently, the possibility that a significant number of asylum seekers could be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded. Hence, it was necessary to examine the applicants' individual situation in the light of the overall situation prevailing in Italy at the relevant time concerning reception conditions.

Given the inadequacy of facilities in Italy, Switzerland had a responsibility to obtain assurances from the Italian authorities that the applicants would be received in facilities with conditions adapted to the age of their children, and that the family would remain together, on their return to Italy. Though the FMA had been contacted by the Italian authorities regarding where the family would be accommodated, the Swiss authorities had not received sufficiently detailed information that they could be sure the applicants would be treated appropriately. In the absence of such individual guarantees, the Court found that there had been a violation of Article 3 of the Convention.

Article 13 taken in conjunction with Article 3

Referring to the applicants' interview with the FMO and ability to appeal to the Federal Administrative Court, the Court considered that the applicants had had an effective remedy in respect of their Article 3 complaint available to them. Accordingly, their complaint under Article 13 was rejected as manifestly ill-founded.

Article 41

The Court held that Switzerland was to pay the applicants €7,000 in respect of costs and expenses.

Undue length of family proceedings and lack of enforcement of access order constituted violations of Articles 6 and 8

JUDGMENT IN THE CASE OF V.A.M. v. SERBIA

(Application no. 39177/05)
13 March 2007

1. Principal Facts

The applicant, Ms V.A.M., in February 1999 brought civil proceedings in which she sought to dissolve the marriage with her husband, D.M., to gain sole custody of her daughter, S.M., and to obtain child maintenance. The breakdown of Ms V.A.M.'s marriage and her husband denying all contact with her daughter occurred, it seemed, as a result of her having contracted HIV.

Following the institution of proceedings, the Fourth Municipal Court of Belgrade adjourned 15 separate hearings. Throughout this time, though mostly in response to the applicant's numerous proposals, the Municipal Court attempted to obtain information as regards the respondent's correct address from various State bodies, including the tax authorities, municipalities, the Ministry of Education and the Commercial Court. Summonses were sent to a number of addresses but each time the respondent could not be served, which led the Municipal Court to conclude, on 17 April 2003, that he was "clearly avoiding receipt" of all court documents. The proceedings in the case were still ongoing at the time of the judgment by the European Court of Human Rights.

On 23 July 1999 the Municipal Court ordered the respondent to facilitate the applicant's access to S.M., twice a month, until the adoption of a final decision on the merits of the case. Despite this, at the time of the European Court's judgment, Ms V.A.M. had been unable to see her daughter for some eight years, the access order not having been formally served on D.M..

On 15 June 2006 the Municipal Court granted provisional custody of S.M. to the applicant and ordered the respondent to surrender the child, pending a final decision in the ongoing civil suit. In its reasoning it found *inter alia* that: i) the respondent had made it clear, from the outset, that he would "not allow" the applicant to have contact with S.M. because of his fear that she might also be "infected" with HIV; ii) the applicant was, despite the respondent's claims to the contrary, a responsible and motivated parent whose medical condition was stable, constantly under review, and who presented no danger to S.M.; and iii) the respondent had not only failed to

comply with his obligation to inform the court of his correct address but had in addition, for many years, deliberately avoided receipt of court summonses which, in turn, had resulted in the applicant being denied all contact with S.M. and indicated a gross disregard for the interests of S.M. on his part. On 13 November 2006 the District Court accepted the respondent's appeal of the decision of the Municipal Court, quashed the impugned order and instructed the Municipal Court to re-examine the issue of the applicant's interim custody.

2. Decision of the Court

Ms V.A.M. complained under Articles 6, 8 and 13 about the length and fairness of the civil proceedings and the lack of an effective remedy. She also complained about discrimination on account of her HIV status under Article 14.

Article 6 § 1

The reasonableness of the length of proceedings is assessed in the light of the circumstances of the case and having regard to the complexity of the case, the behaviour of the applicant and the conduct of the relevant authorities. What is at stake for the applicant is also a relevant consideration and special diligence is required in view of the possible consequences which the excessive length of proceedings may have, notably on the enjoyment of the right to respect for family life. A chronic backlog of cases is not a valid explanation for excessive delay as States have a duty to organise their judicial systems in such a way that their courts can meet the obligation to hear cases within a reasonable time.

The proceedings in the present case had so far lasted eight years, of which two years and 11 months were to be examined by the Court (after the date the Convention had entered into force in relation to Serbia). Given what was at stake for Ms V.A.M. and her child, especially with a view to Ms V.A.M.'s medical condition, the Court found that the domestic authorities, instead of showing exceptional diligence in expediting the proceedings, consistently failed to make use of the procedures to oblige D.M. to take part. The Court therefore held that there had been a violation of Article 6 in relation to the length of the civil proceedings.

Article 8

The Court first noted 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. Further, even though the primary object of Article 8 is to protect the

individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life. In cases concerning the enforcement of decisions in the sphere of family law, the Court has repeatedly found that what is decisive is whether the national authorities have taken all necessary steps to facilitate the execution as can reasonably be demanded in the special circumstances of each case. The adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit. Although coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live.

Having regard to the facts of the case, including the passage of time and the best interests of S.M., the Court concluded that the Serbian authorities had failed to make adequate and effective efforts to execute the interim access order of 23 July 1999. There had, accordingly, been a breach of the applicant's right to respect for her family life and a violation of Article 8.

In addition, given the compelling circumstances of the case, in particular what was at stake for the applicant, the conduct of the Serbian authorities and, indeed, the difference in the nature of the interests protected by Article 6 and Article 8, the Court found that the length of the impugned civil proceedings amounted to a separate breach of Article 8.

Article 13

The Court concluded that there has been a violation of Article 13 taken together with Article 6 on account of the lack of an effective remedy under domestic law for the applicant's complaints concerning the length of her civil case.

Article 14

The Court found that the available evidence was insufficient for it to conclude that the applicant had indeed been discriminated against on the grounds of her health. This complaint was therefore considered manifestly ill-founded and rejected.

Article 41

The Court awarded the applicant €15,000 in respect of non-pecuniary damage and €4,350 for costs and expenses.

Total removal of father's access right on the basis of religious beliefs was discriminatory in violation of Article 14 taken in conjunction with Article 8

JUDGMENT IN THE CASE OF VOJNITY v. HUNGARY

(Application no. 29617/07)
12 February 2013

1. Principal Facts

The applicant, Péro Vojnity, was a Hungarian national born in 1948, and belonged to the religious denomination *Hit Gyülekezete* (Congregation of the Faith). The applicant had a son, born in 1994, who after the divorce of his parents was placed with his mother. Mr Vojnity was granted access right.

Mr Vojnity lodged an application to reclaim custody of the child or have the conditions of the access rights re-regulated. Despite the suggestion made by a psychiatrist to allow loose contact with the child, the Szeged District Court rejected his request. In 2004 a further request by Mr Vojnity was rejected, as the same court found that the applicant's circumstances were not satisfactory for the upbringing of a child.

In 2006 custody was withdrawn from the mother by the Szeged Guardianship Authority, and the child was placed with his older brother. The applicant was not considered for the placement of the child, due to his heavy-handed proselytism and his inadequate housing conditions but was granted access rights.

The older brother filed actions with the District Court against Mr Vojnity to have him deprived of his access rights. The expert psychologist observed that the applicant's participation in his child's life was harmful, notably because of his insistence on proselytism, and the District proceeded to remove the applicant's access rights. The Csongrád County Regional Court upheld this decision on 4 February 2008.

2. Decision of the Court

The applicant complained that the complete withdrawal of his access rights amounted to an unjustified and disproportionate interference with his right to family life, contrary to Article 8 of the Convention, read alone and in the light of Articles 14 and 9, as he alleged that the authorities' denial represented a differential treatment on account of his religious beliefs. He also alleged a violation of Article 6.

Article 14 read in conjunction with Article 8

The Court reiterated that the enjoyment of each other's company for a parent and child is a fundamental aspect of family life. In the present case the applicant had regular contact with the child up until the decision to withdraw his access right, so it was apparent that this decision constituted an interference with his right to respect of family life.

The Court firstly noted that the domestic courts had had regard above all to the child's interest when granting the request for the withdrawal of the applicant's access rights. However, the Court found that the applicant's religious convictions were in fact decisive in the considerations made by the national authorities, which had led to a difference in treatment with regard to other parents placed in a similar situation but who did not have any strong religious beliefs. In accordance with the Court's case-law, such a difference of treatment must have an objective and reasonable justification, or it must be deemed discriminatory. In the present case the legitimate aim was found to be the protection of the health and rights of the child.

Looking at the facts of the case, the Court acknowledged that the national authorities showed a legitimate concern for the child's development but noted that no convincing evidence had been given that the applicant's religion had exposed the child to a risk of actual harm.

Furthermore, the Court reiterated that in the context of restrictions upon parental access rights, a strict scrutiny is required and measures as radical as the complete severance of contact can be justified only in exceptional circumstances, as children have a right to maintain family ties. In the Court's view the existence of such exceptional circumstances was not demonstrated in the present case, as the authorities failed to determine what real harm the applicant's religious beliefs could cause the child.

The Court observed that the measure adopted by national authorities had the effect of rendering any form of contact between the applicant and his son impossible, without giving consideration to alternative - less severe - measures, was not proportionate to the legitimate aim pursued, namely protecting the child's best interests.

It was thus held that the applicant had been discriminated against on the basis of his religion in the exercise of his right to respect for family life, in violation of Article 14 taken together with Article 8.

Other Articles

The Court considered that no separate issues arose under Article 6, under Article 8 taken alone or under Article 9 taken alone or in conjunction with Article 14, since the factual circumstances relied on are the same as those for the complaint examined above.

Article 41

The Court held that Hungary was to pay the applicant €12,500 for non-pecuniary damage and €3,000 for costs and expenses.

International child abduction – failure to consider allegations of "grave risk" to child

GRAND CHAMBER JUDGMENT IN THE CASE OF X v. LATVIA

(Application no. 27853/09)
26 November 2013

1. Principal Facts

The applicant, Ms X, was a Latvian national born in 1974. At an undetermined date she moved to Australia where she married a Mr R.L. In 2004, while still married to R.L., the applicant met a Mr T. who she then moved in with at the end of the year. In February 2005 the applicant gave birth to a daughter, E., and in November 2005 the applicant formally divorced R.L. The paternity of the child was not established at this stage. The applicant continued to live with T, with T formally renting accommodation to the applicant who in turn received single-parent benefits. The applicant acquired Australian nationality in 2007. The relationship between the applicant and T. deteriorated and in 2008 she left Australia for Latvia taking the child, aged three years and five months, with her.

Subsequently, T. submitted an application to the Australian Family Court to establish parental rights in respect of E. and applied for the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction. The Family Court established his paternity and that the applicant and T. had had joint parental responsibility for their child since birth in a decision dated 6 November 2008. The applicant had been invited to attend the hearing in person or to follow the hearing by telephone but had not done so. She did not appeal the decision.

In September 2008 the Latvian Central Authority received a request for the return of the child issued by the Australian Central Authority. It was heard in Latvia by both the District and the Regional Court with T. being present for the proceedings. In those hearings, the applicant argued that T. had no grounds for being recognised as the father of E. as at the time of her birth the applicant had been married to another man. Furthermore T. had never expressed a desire to have his paternity recognised before she returned to Latvia. The applicant also argued that T. had acted abusively towards her and that the child had developed a connection to Latvia. At the appellate stage the applicant also produced a certificate from a psychologist stating that the child would suffer trauma if separated from the applicant. The Latvian Courts ordered the return of the child to Australia having found that the removal had been unlawful and carried out without the consent of T. The appellate court decided that it could

not consider the psychologist's report on E. as it concerned the merits of the custody issue, which was to be decided by the Australian courts.

The applicant refused to comply with the domestic court's order to return the child to T. and requested a stay of execution of the return order. In response the domestic court ordered a further hearing in April 2009. In March 2009 T. unexpectedly encountered the applicant and the child whilst in Latvia and was able to take the child back to Australia with him. Once in Australia, the Australian national courts ruled that T. had sole parental responsibility for the child and that the applicant was only allowed to visit her daughter in the presence of a social worker. She was also forbidden from speaking to her daughter in Latvian.

2. Decision of the Court

The applicant complained that there had been a violation of Article 8 of the Convention on account of the Latvian courts' decision to order her daughter's return to Australia. In its Chamber judgment of 15 November 2011, the Court concluded by a majority that there had been a violation of Article 8. The case was referred to the Grand Chamber under Article 43 at the Government's request.

Article 8

The Court noted that the decision to return the child to Australia had amounted to an interference with the applicant's right to respect for her private and family life. That interference had been in accordance with the law. The Court also considered that the interference had pursued a legitimate aim, namely that of protecting the rights of the child and of her father.

With regard to the necessity of the interference, the Court noted that there was a broad consensus in support of the idea that in all decisions concerning children, their best interests had to be paramount. Those interests might not be the same as those of the parents and, in the context of an application for return made under the Hague Convention – which was distinct from custody proceedings – they had to be evaluated in the light of the exceptions provided for by the Hague Convention, particularly those concerning the passage of time (Article 12) and the existence of a "grave risk" (Article 13 (b)). The European Court's role here lay in verifying whether the decision-making process in the domestic courts, which led to the decision to return the child to the State of habitual residence, had been fair and that her best interests had been defended.

In the present case, the Court noted that the applicant had submitted to the Riga Regional Court a certificate, prepared by a psychologist after the first-instance judgment indicating, *inter alia*, that an immediate separation from her mother was to be ruled out on account of the likelihood of psychological trauma for the child. In the Court's opinion, it was unacceptable for the domestic courts to rule this expert report inadmissible on the ground that it concerned the merits of the custody issue rather than the application for return that was before them, and was thus not part of the proceedings in question: in fact, the psychological report drew attention to a risk of psychological trauma, directly linked to the best interests of the child, and represented an arguable allegation of a "grave risk", which ought therefore to have been examined in the light of Article 13(b) of the Hague Convention, as should the issue of whether it was possible for the mother to follow her daughter to Australia and to maintain contact with her. The need to comply with short time-limits, admittedly also laid down by the Hague Convention, could not exonerate the Latvian authorities from undertaking an effective examination of such an allegation.

In conclusion, the Court held that in refusing to examine a certificate issued by a professional which disclosed the possible existence of a "grave risk" for the child within the meaning of Article 13(b) of the Hague Convention, the Latvian authorities had failed to comply with their procedural obligations. It followed that there had been a violation of Article 8 of the Convention.

Article 41

The Court held that Latvia was to pay the applicant €2,000 in respect of costs and expenses.

The State authorities failed in their positive obligations to protect children from severe neglect in violation of Article 3

JUDGMENT IN THE CASE OF Z. AND OTHERS v. THE UNITED KINGDOM

(Application no. 29392/95)
10 May 2001

1. Principal Facts

The applicants were four siblings, Z, a girl born in 1982, A, a boy born in 1984, B, a boy born in 1986 and C, a girl born in 1988. In October 1987, the applicants' family was referred to the social services by its health visitor because of concerns about the children, including reports that Z was stealing food. Over the next four-and-a-half years, the social services monitored the family and provided various forms of support to the parents. During this period, problems continued. In October 1989, when investigating a burglary, the police found the children's rooms in a filthy state, the mattresses being soaked with urine. In March 1990, it was reported that Z and A were stealing food from bins in the school. In September 1990, A and B were reported as having bruises on their faces. On a number of occasions, it was reported that the children were locked in their rooms and were smearing excrement on the windows. Finally, on 10 June 1992, the children were placed in emergency foster care on the demand of their mother who said that, if they were not removed from her care, she would batter them. The consultant psychologist who examined the children found that the older three were showing signs of serious psychological disturbance and noted that it was the worst case of neglect and emotional abuse she had seen.

The Official Solicitor, acting for the applicants, commenced proceedings against the local authority claiming damages for negligence on the basis that the authority had failed to have proper regard for the children's welfare and to take effective steps to protect them. Following proceedings which terminated in the House of Lords, the applicants' claims were struck out. In the judgment given on 29 June 1995, it was held that public policy considerations were such that local authorities should not be held liable in negligence in respect of the exercise of their statutory duties safeguarding the welfare of children.

2. Decision of the Court

The applicants alleged that the local authority had failed to take adequate protective measures in respect of the severe neglect and abuse which they were known to be

suffering due to their ill-treatment by their parents and that they had no access to court or to an effective remedy in respect of this. They invoked Articles 3, 6, 8 and 13 of the Convention.

Article 3

Article 3 enshrines one of the most fundamental values of a democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment. States have to take measures to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable people and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

There was no dispute that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment. The Government did not in fact contest that the State had failed in its positive obligation under Article 3 to provide the applicants with adequate protection against inhuman and degrading treatment. This treatment was brought to the attention of the local authority, at the earliest in October 1987, which was under a statutory duty to protect the children and had a range of powers available to it, including removing them from their home. The children were however only taken into emergency care, at the insistence of their mother, on 30 April 1992.

Over the intervening period of four-and-a-half years, they had been subjected in their home to what the child consultant psychiatrist who examined them referred to as horrific experiences. The Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence. The Court acknowledged the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case however left no doubt as to the failure of the system to protect the applicants from serious, long-term neglect and abuse. Accordingly, there had been a violation of Article 3.

Article 8

Having regard to its finding of a violation of Article 3, the Court considered that no separate issue arose under Article 8.

Article 6

The Court was satisfied that, at the outset of the proceedings, there was a serious and genuine dispute about the existence of the right asserted by the applicants under the domestic law. Article 6 was therefore applicable to the proceedings brought by the applicants alleging negligence by the local authority.

Concerning compliance with Article 6, the Court found that the outcome of the domestic proceedings brought was that the applicants, and any children with complaints such as theirs, could not sue a local authority in negligence for compensation, however foreseeable – and severe - the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. However, this did not result from any procedural bar or from the operation of any immunity which restricted access to court. The striking out of the applicants' claim resulted from the application by the domestic courts of substantive law principles and it was not for this Court to rule on the appropriate content of domestic law. Nonetheless, the applicants were correct in their assertions that the gap they had identified in domestic law was one that gave rise to an issue under the Convention, but in the Court's view it was an issue under Article 13, not Article 6 § 1. Hence, the Court found no violation of Article 6.

Article 13

In deciding whether there had been a violation of Article 13, the Court observed that where alleged failure by the authorities to protect people from the acts of others was concerned, there should be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3, which ranked as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.

The Court found that the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority had failed to protect them from inhuman and degrading treatment or the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy in respect of the breach of Article 3 and there had, accordingly, been a violation of Article 13.

Article 41

The Court awarded in respect of pecuniary damage 8,000 pounds sterling (GBP) to Z., GBP 100,000 to A., GBP 80,000 to B., and GBP 4,000 to C. The Court also awarded GBP 32,000 to each applicant for non-pecuniary damage and a total of GBP 39,000 for costs and expenses.[166]

166 Approximate value £1=€1.60.

Missing babies from hospitals – a continuing violation of Article 8, and Serbia must give credible answers about what has happened to each child and compensate the parents

JUDGMENT IN THE CASE OF ZORICA JOVANOVIĆ v. SERBIA

(Application no. 21794/08)
26 March 2013

1. Principal Facts

The applicant, Zorica Jovanović, was a Serbian national who was born in 1953.

On 28 October 1983 Ms Jovanović gave birth to a healthy baby boy in the Ćuprija Medical Centre, a State-run hospital. Three days later, when she and the baby were about to be released, she was informed that her son had died. She tried to access the hospital nursery where her son had spent the night, but was restrained by two orderlies. A nurse tried to inject her with a sedative, which she managed to avoid. In a state of shock and with no other options left open to her, she checked out of the hospital.

The baby's body has never been handed over to Ms Jovanović or her family. She has never been provided with an autopsy report or informed as to when and where he was allegedly buried. The hospital simply informed her that her son had died on 31 October 1983 and that there was no indication as to the cause of death.

In November 2002 the local municipality informed Ms Jovanović that her son's birth, but not death, had been registered in the municipal records. This was again confirmed in September 2007.

A criminal complaint filed by Ms Jovanović's husband against the hospital staff – following reports in the media about other similar cases – was rejected in October 2003 as unsubstantiated. No further reasoning was given and it was not clear if a preliminary investigation was carried out or not.

Between 2003 and 2010 certain official steps were taken to improve procedures in hospitals following the death of newborns and to investigate allegations in 2005 by hundreds of parents whose newborn babies had gone missing following their supposed deaths in hospital wards, mostly from the 1970s to the 1990s. Official reports found serious shortcomings in the applicable legislation in the 1980s as well as in the procedures and statutory regulations as to what should happen when a newborn died in hospital and that parents' doubts as to what had really happened to their children

were therefore justified. The reports also found that the State's response to the situation had in itself been inadequate. In December 2010 a working group set up by the Serbian Parliament concluded that no changes to the existing, by that time already amended legislation, were necessary, except in relation to the collection and usage of medical data. The group also noted that the Constitution made it impossible to extend the applicable prescription period for prosecution of crimes committed in the past, or to introduce new, more serious, criminal offences and/or harsher penalties.

Ms Jovanović was repeatedly treated for depression from 2009 to 2011.

2. Decision of the Court

Relying in particular on Article 8, the right to respect for private and family life, and Article 13, the right to an effective remedy, Ms Jovanović complained of the Serbian authorities' continuing failure to provide her with any information about what had happened to her son and the continuing failure to provide her with any redress.

Article 8

The Court noted that Ms Jovanović had remained without any credible answer as to what happened to her son in 1983. She had never seen the dead body of her son, the cause of his death had never been determined and his death had never actually even been officially recorded. Nor had any adequate consideration been given to the criminal complaint filed by her husband. Indeed, the Serbian authorities themselves had affirmed in a number of reports that there were shortcomings and inadequacies in the applicable legislation at the time, in the procedures and statutory regulations in the event of newborns dying in hospital as well as in the State's response to the allegations of babies going missing from hospitals.

Despite several seemingly promising official initiatives between 2003 and 2010, the working group report of December 2010 ultimately concluded that no changes were necessary to the already amended legislation. However, that clearly only improved the future situation and did not, in effect, do anything for the parents, including the applicant, who had had to go through such an ordeal in the past.

Therefore, the Court concluded that Ms Jovanović had suffered a continuing violation of the right to respect for her family life due to Serbia's failure to provide her with credible information as to what had happened to her son. Accordingly, there had been a violation of Article 8.

The Court held that there was no need to examine separately the complaint under Article 13.

Article 46

Given the significant number of potential applicants, the Court further held that Serbia had to take – within one year of the present judgment becoming final – appropriate measures to provide individual redress to all parents in a situation similar to the applicant's. That process should be supervised by an independent body, with adequate powers, so that credible answers were given regarding what had happened to each missing child and adequate compensation provided.

In the meantime, the Court decided to adjourn all similar applications already pending before it.

Article 41

The Court awarded €10,000 in respect of non-pecuniary damage and €1,800 for costs and expenses.