



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

FIFTH SECTION

CASE OF S.I. v. SLOVENIA

(Application no. 45082/05)

JUDGMENT

STRASBOURG

13 October 2011

FINAL

13/01/2012

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

In the case of S.I. v. Slovenia,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 45082/05) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovenian national, S.I. (“the applicant”). He lodged the application on his own behalf and on that of his daughter and his son on 25 November 2005. The President of the Chamber granted anonymity to the applicant of his own motion under Rule 47 § 3 of the Rules of Court.

2. The applicant was represented by Mr B. Verstovšek, a lawyer practising in Celje. The Slovenian Government (“the Government”) were represented by their Agent, Mrs T. Mihelič Žitko, State Attorney.

3. The applicant alleged that he and his children had been unable to enjoy family life together due to the length of the custody and contact arrangements proceedings and due to the judge’s refusal to enforce provisional contact arrangements.

4. On 12 May 2010 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1951. His daughter and son were born in 1996 and 1999 respectively.

6. The applicant and the mother of the above-mentioned girl and boy ("the mother"), who were the only children she and the applicant had together, separated in September 2003. At that time the mother moved out of the house in which they had lived together. The children stayed with the applicant.

7. On 27 October 2003 the applicant lodged a claim for custody and, as alternative, a request for contact arrangements. He also requested that an interim decision be issued pending final determination of the case.

8. On 2 November 2003 the mother took the children to live with her.

9. Further to a request by the court, the Ljubljana Welfare Office submitted a report on 7 November 2003. On the same date the court held a hearing and issued an interim decision granting provisional custody to the applicant. It would appear that this decision was not enforced at that time and the children did therefore not move to the applicant.

10. On 21 November 2003, at the second hearing in the case, the mother objected to the interim decision and requested the resumption of the previous state of affairs. Since it was established that the mother had not received the court decision, the court revoked it.

11. On 19 January 2004 the parties entered into an agreement before the Ljubljana Welfare Office concerning the applicant's contact with the children. According to the agreement, the children were to spend every Wednesday and Friday afternoon and every other weekend with the applicant.

12. On 26 January 2004, the mother lodged a counterclaim for custody and a request for an interim decision granting her provisional custody. On the same date, as well as on 23 February 2003, the applicant also requested the court to issue an interim decision.

13. Further to the court's request, the Ljubljana Welfare Office submitted an additional report on 5 March 2004.

14. The mother prevented the applicant from having contact with the children during the weekend of 19 to 21 March 2004, by taking the children to her relatives. In this connection, the applicant lodged a criminal complaint of abduction of the children, which was dismissed as of minor importance on 9 December 2004.

15. A hearing was held on 23 March 2004. Subsequently, on 30 March 2004, the court requested a report from an expert psychologist.

16. On 13 April 2004 the applicant made written submissions, in which he mentioned that since the last hearing the mother had prevented him from having contact with the children on Wednesday, 24 March 2004, and the weekend of 9 to 11 April 2004, but nevertheless requested the court to suspend the proceedings, as he and the mother might reach a settlement. On 14 May 2004, however, he complained that the mother had not allowed him to see the children during the Easter and May holidays and the proceedings therefore continued.

17. On 31 August 2004 the expert submitted his report, which was forwarded to the parties for comments. On 27 September 2004 the applicant informed the court that he had spent the holiday with the children between 3 and 18 July 2004 and requested that an interim decision be issued.

18. On 8 October 2004 the court held a brief hearing, which was adjourned for further evidence to be obtained by the court.

19. In the meantime, on 8 September 2004, the court ordered the applicant to pay the expert's fees. He appealed against this decision and on 21 October 2004 requested the court to send the file to the higher court for consideration of his appeal. At the same time he again requested that an interim decision be issued.

20. On 10 January 2005 the case was taken up by a new judge specialising in family matters. The applicant again urged the judge to issue an interim decision.

21. The court scheduled a hearing for 2 March 2005, which was adjourned at the request of the applicant, stating that the parties would again try to reach a settlement. However, on 10 March 2005 the applicant again requested the court to issue an interim decision.

22. On 14 March 2005 the court held a hearing at which the applicant complained about having only very poor contact with his children, which was brought to the attention of the welfare office. The applicant further explained that after the agreement had been signed on 19 January 2004 he had had contact with the children during the subsequent six months. After that, however, the contact was obstructed, partly also because the agreement did not include arrangements for contact during holidays. The applicant then confirmed that the children had spent the weekend of 11 to 13 March 2005 with him, but that he had been prevented from spending all the three holidays in that school year with them. The next hearing was scheduled for 9 May 2005. However, after the applicant informed the court that he was again unable to have contact with the children, the court changed the date of the next hearing to 4 April 2005.

23. At the hearing of 4 April 2005 the applicant stated that he had not had contact with his children on a regular basis since 5 December 2004. The court, however, noted that the applicant had had contact with the children on 1 April 2005, and of its own motion issued an interim decision granting provisional custody to the mother and setting out new provisional contact

arrangements allowing the applicant to have contact two hours per week. The applicant objected.

24. On 19 April 2005 the judge held a meeting with the children.

25. At the hearing of 20 April 2005 the judge attempted to reach a friendly settlement, but to no avail. On that day the court upheld in part the applicant's objection to the interim decision of 4 April 2005 and issued a new interim decision setting out provisional contact arrangements, so that the applicant was allowed to spend with the children every Tuesday afternoon, every second weekend, and part of the school holidays. The applicant was to pick up the children from school and take them to the mother's home after the visit. The decision also included a provision that failure to comply with the contact arrangements would result in a fine of 100,000 Slovenian tolar (SIT).

26. The parties appealed. Consequently, the court sent the file to the higher court and requested priority treatment.

27. On 19 May 2005 the Ljubljana Higher Court dismissed appeals against the interim decision of 20 April 2005 and an appeal by the applicant against the decision of 8 September 2004 concerning expert fees. The applicant lodged an appeal on points of law which was declared inadmissible by the Ljubljana District Court. The applicant appealed against this decision.

28. After 14 July 2005 the mother started to prevent the applicant's contact with the children. On 11 August 2005 she also lodged a criminal complaint against the applicant for neglect and maltreatment of a minor. The criminal complaints related to an incident when the applicant allowed his daughter to read a book by Melissa Panarello, *100 Strokes of the Brush Before Bed*. The public prosecutor requested the court to undertake certain investigating measures, such as questioning the applicant. The criminal complaint was subsequently dismissed as unfounded on 2 March 2006. The public prosecutor noted that the daughter, who read only a few pages, was not pushed by the applicant to read the book, which was intended for teenagers.

29. On 1 August 2005 the applicant attempted to pick up the children from their mother's home to take them for the scheduled holiday. As the mother refused to comply with the interim decision of 20 April 2005, the court issued a decision on the same day, stating that the applicant's contact with the children during the holiday should be secured by removing the children from whoever they were with on 1 August 2005. Further to the delivery of this decision the enforcement was attempted. It failed, however, as the mother informed the welfare officer that she had lodged a criminal complaint against the applicant (see paragraphs 28 above). Consequently, the welfare officer advised the enforcing officer to discontinue the enforcement (see paragraph 54, section 238f, above).

30. On 2 August 2005 the court made inquiries about the allegations made against the applicant to the relevant prosecutor's office, the police and the welfare office.

31. Due to the pending appeal (see paragraph 27 above) the case was sent to the higher court on 12 August 2005.

32. On 22 August 2005 the mother objected to the enforcement decision of 1 August 2005. Her objection was dismissed on 12 September 2005.

33. On 24 August 2005 the mother requested that the provisional contact arrangements be modified so that the applicant could only have very limited contact with the children, under the supervision of the welfare office.

34. On 31 August 2005 the Ljubljana Higher Court rejected the applicant's appeal against the first-instance decision dismissing his appeal on points of law.

35. On 31 August and 8, 12 and 14 September 2005 the applicant lodged requests for fines to be imposed for non-compliance by the mother with the contact arrangements of 20 April 2005, amounting to SIT 800,000 in total. He also urged the court to issue a new interim decision.

36. A hearing was held on 23 September 2005. According to the transcript of the hearing, the applicant told the judge that he had not had any contact with the children since 14 July 2005. The mother said that the applicant had, during the holiday of 1 to 14 July 2005, allowed the daughter to read an inappropriate book, which the applicant denied, saying that the daughter had taken the book as it had an interesting cover page but had not read it (see paragraph 28 above). The applicant was then asked by the judge if he would agree with the mother's proposal to have contact supervised by the Ljubljana Welfare Office. He agreed at first. However, his representative then stated that the applicant believed that it would be unpleasant for the children to have contact with him under supervision. The judge then appointed an expert in psychology to prepare a new report and stated that she would not issue any decisions imposing fines, due to new circumstances which required the preparation of a new expert report. She further stated that the imposition of monetary fines would be a less severe sanction than removal of the children by force, which had already failed, and would not be reasonable in view of the fact that the applicant was not paying the full amount of maintenance.

37. On 27 September 2005 a new expert psychologist was appointed.

38. On 2 November 2005 the applicant lodged a constitutional appeal, complaining that the judge had arbitrarily refused to decide on his enforcement requests, depriving him of the opportunity to appeal. On 21 December 2005 the Constitutional Court, relying on section 50 of the Constitutional Court Act, dismissed the appeal, finding that it did not concern a specific decision of a State body, and noted that "there was no right to lodge a constitutional appeal directly against the act or omission of the State authorities."

39. On 2 November 2005 the applicant requested that the provisional contact arrangements be modified and on 16 January 2006 he lodged a new request for an interim decision.

40. On 23 November 2005 the judge held a meeting with the expert and then decided also to appoint a psychiatrist to examine the parents.

41. On 9 December 2005 the applicant requested the judge to step down. The request was rejected by the president of the court on 27 December 2005.

42. On 12 January 2006 the psychiatrist's report was sent to the parties for comments.

43. In the period between 26 September 2005 and 20 January 2006 the applicant lodged further four requests for fines, in a total sum of SIT 2,700,000, to be imposed on the mother for her non-compliance with the contact arrangements in the period between 20 September 2005 and 17 January 2006.

44. At the hearing of 27 January 2006 the court questioned the experts. The court noted that according to the expert reports both parents were suitable for parenting. It also issued a new interim decision modifying the provisional contact arrangements so that the applicant had a right to spend every other weekend with the children (from Friday to Monday) and every Thursday afternoon and a part of upcoming holiday. The court prohibited the mother from picking up the children from school on the days that they were supposed to be with the applicant. The representative of the applicant confirmed at the subsequent hearings that these contact arrangements were being complied with by the mother.

45. The mother was ordered to pay the expert's fees. She appealed, unsuccessfully.

46. At the hearing of 24 April 2006 a conditional settlement was prepared at the proposal of the applicant. At the next hearing, on 29 May 2006, the applicant's representative confirmed that the applicant and the children had had regular contact, in line with the latest contact arrangements. The parties agreed that they would terminate the pending criminal proceedings they had instituted against each other.

47. On 14 June 2006 the court held a hearing at which the applicant again confirmed that contact arrangements were being complied with.

48. On 23 October 2006 the expert report was supplemented at the request of the court.

49. On 15 November 2006 the parties reached an agreement on custody and contact rights. The agreement provided that the mother had sole custody of the children and set out contact arrangements for the applicant and the children who were to spend every Thursday afternoon, every other weekend (from Friday to Monday) and half the school holidays together.

50. In the course of the proceedings the applicant, in addition to the criminal complaint mentioned above (see paragraph 14 above), lodged a

number of further criminal complaints against the mother concerning criminal offences of, *inter alia*, child abduction and sexual violence against a minor. The mother also lodged two criminal complaints against the applicant. One of them concerned abduction, the other concerned alleged neglect and maltreatment of a minor (see paragraph 28 above). All criminal complaints were ultimately dismissed by the public prosecutor.

II. RELEVANT DOMESTIC LAW

51. As regards the relevant provisions of domestic family law see *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, §§ 63-73, 1 December 2009. In addition, the following legislation is relevant to the present case.

52. Article 23 of the Slovenian Constitution (*Ustava Republike Slovenije*, Official Gazette no. 33/91-I with amendments) provides, in so far as relevant, as follows:

“Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law.

...”

53. The Civil Procedure Act (*Zakon o pravdnem postopku*, Official Gazette no. 26/1999 with amendments) provided, in so far as relevant:

Section 363

“(1) An appeal is allowed against any first-instance decision, unless a law provides otherwise.

...”

Section 408

“(1) In marital disputes and disputes concerning relations between parents and children the courts shall of their own motion take all steps necessary to safeguard the rights and interests of the children ...

(2) In disputes concerning the custody and maintenance of children and in disputes concerning contacts between children and parents or other persons, the panel is not bound by the parties’ requests. Where so provided by the law, the panel may take decisions even when no request has been made.

(3) For the protection of the interests of the persons mentioned in the first paragraph, the panel may investigate matters not presented by the parties, and collect information necessary for a decision ...”

Section 411

“(1) During proceedings concerning marital disputes and disputes relating to relationships between parents and children, the court may, at the request of one of the parties or of its own motion, issue interim decisions concerning child custody and maintenance as well as interim decisions withdrawing or restricting contact rights and determining contact arrangements.

...”

54. The Execution of Judgments and Insurance of Claims Act (*Zakon o izvršbi in zavarovanju*, Official Gazette no. 51/1998 with amendments) provided, as far as relevant:

**Section 9
(Legal remedies)**

“(1) An appeal is allowed against any first-instance decision, unless a law provides otherwise.

...”

**Section 15
(Application of the provisions of the Civil Procedure Act)**

“In enforcement proceedings provisions of the Civil Procedure Act should apply, unless a law provides otherwise.”

**Section 226
(Acts which shall be performed by a defaulter only)**

“(1) If a person under obligation (*dolžnik*) [“the defaulter”] is obliged to do something specified under the enforcement provision of a decision, and which cannot be done by anyone else, the court shall issue a decision setting a deadline for the fulfilment of the obligation.

(2) In an enforcement decision, the court shall set out a fine for the eventuality that the defaulter does not fulfil the obligation within the time-limit set by the court.

(3) If the defaulter does not fulfil the obligation, the court shall order *ex officio* execution based on the decision imposing a fine. At the same time, the court shall issue a new decision setting a new deadline for the fulfilment of the obligation, and a new fine, higher than the one previously imposed, in the event that the defaulter fails to comply again.

...

(5) When determining the fine the court should take into account the importance of the act that should be performed by the defaulter and other circumstance of the case.”

Section 238b
(Request for enforcement and decision)

“ ...

(3) The court is not bound by the requested means of enforcement.

(4) When it is necessary for protection of the child's interests the court can change the means of enforcement provided for in the enforcement order.”

Section 238f
(Enforcement of the decision concerning contact arrangements)

“(1) A court's decision concerning the right to have contact with a child shall be enforced in accordance with first, second, third and fifth paragraph of section 226 of this Act.

(2) In exceptional and particularly justified cases, when this would be necessary for the protection of the child's interests and the enforcement mentioned in the preceding paragraph was unsuccessful, the court may allow the enforcement as prescribed in section 238e of this Act [direct removal].

(3) Provisions of sections 238a, 238b and 238c [which concern the enforcement of custody decisions] should be used *mutatis mutandis* in these proceedings.

(4) If, during the enforcement under the second paragraph, the enforcing officer observes that the child opposes the contact ... and finds that the enforcement by means of removing the child would not be in the child's interest, he or she can discontinue the procedure and inform the court about the reasons.

(5) If the court establishes that the child opposes the contact ..., and finds that the enforcement by means of removal of the child would not be in the child's interest ... it can, at the request of the enforcing officer ... or the person against whom the enforcement is carried out, suspend the enforcement for three months at most.

(6) The court can suspend the enforcement at the request of the welfare office or the person against whom the enforcement is conducted also when the proceedings for a modification of contact arrangements are pending or if the enforcement would be against the child's interests.”

Section 272
(Conditions for interim decision)

“(1) The court shall issue an interim decision in order to protect a non-pecuniary claim, if the claimant shows that he the claim is likely to be established ...”

Section 278
(Revocation of an interim decision)

“ ...

(2) At the request of the debtor, the court should discontinue [enforcement] proceedings and invalidate the actions already taken if the circumstances on the basis

of which the interim decision had been adopted have changed so that the interim decision is no longer needed.”

55. Finally, section 50 of the Constitutional Court Act (*Zakon o ustavnem sodišču*, Official Gazette no. 15/1994 with amendments), provides, as far as relevant:

“(1) Due to a violation of human rights or fundamental freedoms, a constitutional complaint may, under the conditions determined by this Act, be lodged against individual acts by which state authorities, local authorities, or holders of public powers decided on the rights, obligations, or legal entitlements of individuals or legal entities.

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

56. The applicant complained on his own and his children’s behalf that they had been unable to enjoy family life together due to the length of the custody and contact arrangements proceedings and due to the judge’s refusal to enforce provisional contact arrangements. He invoked Article 6 § 1 of the Convention. Being the master of the characterisation to be given in law to the facts of any case before it, the Court considers that these issues fall to be examined solely under Article 8 of the Convention (see *V.A.M. v. Serbia*, no. 39177/05, § 115, 13 March 2007, and *Karadžić v. Croatia*, no. 35030/04, §§ 33-63 and 67, 15 December 2005).

57. Article 8 reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

58. The Government argued that the applicant had no standing to pursue this complaint on the behalf of the children, as the mother was their statutory representative. The applicant contested this argument.

59. The Court notes that the decision of 7 November 2003 by which the applicant was granted the custody of the children was revoked (see

paragraphs 9 and 10 above) and that the mother has had sole custody of them on the basis of the interim decision of 4 April 2005 (see paragraph 23 above) and, finally, the agreement (see paragraph 49 above).

60. Having regard to the fact that the mother had sole custody rights in respect of the children when the application was lodged with the Court and that situation has not changed since then, the Court concludes that the applicant has no standing to act on the children's behalf (see *Eberhard and M.*, cited above, §§ 89 and 90; *Sahin v. Germany* (dec.), no. 30943/96, 12 December 2000, and *Petersen v. Germany* (dec.), no. 31178/96, 6 December 2001).

61. The Court notes that this part of the application, in so far as it concerns the applicant, is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) Delays in the proceedings

62. The applicant argued that he had often been unable to see his children due to the delays in the proceedings. He submitted that the case was of no particular complexity and that he had not contributed to the length of the proceedings in any significant way. He lodged a request for withdrawal of the judge as this was the only possibility he had after the problematic hearing of 23 September 2005. As regards the issue of the mother's address, he argued that this was the court's responsibility, not his. In addition, the attempts to settle the case as well as the lodging of the appeal on point of law did not cause any significant delays.

63. The Government argued that the proceedings concerned were of a complex nature, which was due in particular to the ongoing mutual conflict between the parents, the criminal complaint lodged against the applicant and the need to appoint three experts. In addition, the court made two interim decisions and adopted several procedural decisions, many of which were challenged by the parties.

64. The Government also maintained that the applicant had contributed to the length of the proceedings by not providing a correct address for the children's mother at the beginning of the proceedings, by twice requesting adjournment of proceedings in an attempt to reach a settlement with the mother, and by lodging an appeal on points of law which was not an available remedy.

(b) Non-enforcement of the interim decision

65. The applicant argued that the court had acted unlawfully and arbitrarily by not enforcing the interim decision of April 2005. As a consequence the applicant had been unable to have any contact in line with the interim decision of 20 April 2005 in the period between 20 May 2005 and 15 November 2006. In his view, an interim decision which could not be enforced was futile. In the present case the court was not passive, but deliberately refused to enforce the interim decision in question. Had the court believed that there were justified reasons for prohibiting contact it should have issued a new interim decision including the reasoning. By simply not enforcing the decision, the court also deprived the applicant of any opportunity to appeal. The applicant lodged a constitutional appeal against the conduct of the judge, but to no avail.

66. The Government submitted that the court issued an interim decision in the present case because the agreement before the welfare office was not enforceable. They were of the opinion that the non-enforcement of the interim decision caused an interference with the applicant's family life. The interference was however lawful and proportionate.

67. The Government further submitted that judges deciding in family-related disputes had extensive discretionary powers in order to protect children's best interest. In this connection, they referred to section 411 of the Civil Procedure Act and sections 15, 272 and 278 (2) of the Execution of Judgments and Insurance of Claims Act. Having doubts as to whether the applicant's contact with his children was in their interest, the court had to postpone any decision as to the enforcement or modification of the interim decision until new expert reports had been prepared. At that time the applicant refused to accept an option to have contact with his children under the supervision of the welfare office. The Government moreover maintained that the court modified the interim decision immediately after the report was submitted. The judge's refusal to enforce the decision was therefore of a temporary nature and necessary for the protection of the children's interest and was proportionate.

2. Relevant principles

68. The Court notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005). Article 8 includes for parents a right that steps be taken to reunite them with their children and an obligation on the national authorities to facilitate such reunions (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I, and *Fuşcă v. Romania*, no. 34630/07, § 34, 13 July 2010).

69. 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 (see, *mutatis mutandis*, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A, and *Ignaccolo-Zenide*, cited above, § 96). In this context, 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 non-resident parent (see *Ignaccolo-Zenide*, cited above, § 102, and *Fușcă*, cited above, § 37). In addition, the Court has previously considered that ineffective, and in particular delayed, conduct of custody proceedings may give rise to a breach of Article 8 of the Convention (see *V.A.M.*, cited above, § 49, and *Eberhard and M.*, cited above, § 143).

3. *The Court's assessment*

(a) **Delays in the proceedings**

70. The Court notes that the applicant, on 27 October 2003, instituted proceedings seeking custody and, alternatively, contact arrangements concerning his children, then aged seven and four. In November 2003 the children began living with their mother. The applicant's contact with the children was to be regulated by the court, to which the applicant repeatedly submitted requests for determination of contact arrangements. The court's decision, even though it was of an interim nature, was essential in that it would, unlike the agreement of 19 January 2004 (see paragraph 11 above), allow for enforcement of contact.

71. The Court cannot but observe that the conduct of the proceedings was clearly influenced by the animosity between the parties, who also instituted several sets of criminal proceedings against each other (see paragraphs 14, 28, 30 and 50 above). It agrees with the Government that the case was of a certain complexity, which is also demonstrated by the fact that three expert reports and a welfare office report were prepared at the request of the court. However, while in the period after 14 March 2005 the domestic court was active throughout the proceedings, scheduling hearings on a regular basis, the same was not true for the earlier period. In particular, the Court notes that between the second hearing, which was held on 21 November 2003, and the fifth hearing, on 14 March 2005, no significant steps, apart from the appointment of an expert in psychology, were taken. As a result, the first interim decision setting out provisional contact arrangements was issued a year and a half after the request to that effect was made by the applicant (see, by contrast, *Z. v. Slovenia*, no. 43155/05, § 152, 30 November 2010, and *Trdan and Č. v. Slovenia*, no. 28708/06, § 94, 7 December 2010). Considering that the requests concerning contact with

young children should be given utmost priority, the Court finds that the facts to which the Government referred (see paragraphs 63 and 64 above) are not sufficient to justify the aforementioned delay.

72. The Court notes that the applicant had been able to have access to his children in certain periods before the interim decision was issued. It would, however, emphasise that between 21 November 2003 (see paragraph 10 above) and 20 April 2005 (see paragraph 25 above) his contact with the children depended on whether the mother would allow it to take place as no binding decision had been issued by the court to facilitate the contact despite the numerous requests lodged by the applicant to that effect.

(b) Non-enforcement of the interim decision

73. The Court notes that the domestic court on 20 April 2005 issued an interim decision setting out provisional contact arrangements as well as determining the means of enforcing them, which was by imposition of a fine if the mother failed to comply with the arrangements (see paragraph 25 above). On 15 July 2005, despite the interim decision, the mother started to prevent any contact whatsoever. Consequently, the applicant lodged four requests for enforcement by 14 September 2005 (see paragraph 35 above). At the hearing of 23 September 2005 the judge refused to enforce the decision, as she considered that recent circumstances required the preparation of a new expert report and that the enforcement by imposition of a fine would in any event not be reasonable (see paragraph 36 above).

74. The Court understands the need for certain discretionary powers of judges in family-related disputes, with the aim of protecting children's best interests. It also appreciates that for the aforementioned reason the domestic law provided that decisions could be issued by the judges on their own initiative, without any formal request being lodged by the parties. That said, the Court notes that the applicant alleged that the judge, instead of using the means provided by law, overstepped the powers entrusted to her.

75. The Court observes that had the judge considered that the interim decision of 20 April 2005, which was in any event temporal in nature, was no longer a valid one, she could have changed it or, if appropriate, have issued another kind of decision as stipulated by the domestic law (see paragraphs 53 -54 above). The Government adduced no reasons as to why the judge should or could not have proceeded in that way in the present case. The judge, by merely saying that the enforcement would not be ordered, which was not an option provided in the domestic legislation, in effect declined to take a formal and reasoned decision on the issue (see, *mutatis mutandis*, *Marini v. Albania*, no. 3738/02, §§ 118-22, ECHR 2007-XIV (extracts)). As a result, the applicant was also deprived of any opportunity to bring the issue to a higher court. Such an opportunity would normally have been open to him had there been a formal decision by the first-instance court (see paragraphs 53 -54 above).

76. It is true that the applicant when asked at the hearing of 23 September 2005 if he would agree with the mother's proposal to have contact supervised declined this option. This, however, did not absolve the authorities to conduct the proceedings so as to afford due respect to the interests safeguarded for the individual by Article 8 (see, *mutatis mutandis*, *McMichael v. the United Kingdom*, 24 February 1995, §§ 86-7, Series A no. 307 B, §§ 86-7, and *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports of Judgments and Decisions* 1996-IV).

77. The Court moreover observes that further enforcement requests made after the hearing of 23 September 2005 and before the new interim decision was issued (see paragraph 43 above) remained unanswered. As a result, the applicant did not have any contact with the children until 27 January 2006, when the court issued a new interim contact decision. The Court notes that the applicant, although alleging otherwise in his submissions to the Court (see paragraph 65 above), was able to have regular contact with his children following the interim decision of 27 January 2006 (see paragraphs 46 and 47 above).

78. Lastly, the Court notes that having had no other means to challenge the judge's conduct, the applicant applied to the Constitutional Court. The latter declared his appeal inadmissible on the grounds that it did not concern a specific decision of a State body (see paragraph 38 above). It is not the Court's function to express an opinion on the interpretation of domestic law, which is primarily for the national courts to interpret (see *Lambert v. France*, 24 August 1998, § 37, *Reports of Judgments and Decisions* 1998-V). However, it notes that the interpretation of section 50 of the Constitutional Court Act (see paragraph 55 above), to allow constitutional appeals only against formal decisions of State bodies, excludes cases which may give rise to a violation of rights enshrined in the Convention as well as the Slovenian Constitution by means of act or omission, including a refusal to take a decision, as demonstrated by the present case.

(c) Conclusion

79. The Court concludes that the Slovenian authorities, for the reasons stated above, failed to meet their obligations arising from Article 8 of the Convention in the proceedings concerning child custody and contact rights in the period prior to 27 January 2006. There has consequently been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

80. In his submissions of 26 November 2008, the applicant complained also about the breach of Article 9 of the Convention alleging that due to lack of contact he was unable to provide religious education for his children. It is noted that the impugned proceedings ended on 15 November 2006 (see

paragraph 49 above) and that this complaint was therefore introduced outside the six-month time-limit provided in Article 35 § 1 and should thus be rejected under Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

82. The applicant claimed 180,000 euros (EUR) in respect of non-pecuniary damage.

83. The Government contested the claim.

84. Ruling on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

85. The applicant also claimed EUR 8,000 for the costs and expenses incurred before the domestic courts and EUR 2,500 for those incurred before the Court.

86. The Government disputed both claims. As regards the costs and expenses incurred before the Court, the Government argued that the claim was not justified by the statutory domestic rates concerning attorney's fees.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings. As regards the proceedings before the Court, it reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them (see, among many other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 77, Series A no. 316-B, and *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 98, ECHR 1999-IV). In the present case, however, the applicant neither explained his claim by the reference to the statutory domestic scale (see *Gaspari v. Slovenia*, no. 21055/03, §§ 81-3, 21 July 2009) nor did he submit any supporting documents or detailed information which would show that the costs claimed

have been actually and necessarily incurred. The Court therefore also rejects this claim.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning delays in proceedings regarding child custody and contact arrangements and non-enforcement of provisional contact arrangements, examined under Article 8 of the Convention, which the applicant lodged on his own behalf, admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;
3. *Holds* by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) plus any tax that may be chargeable in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Fura joined by Judge Power is annexed to this judgment.

D.S.
C.W.

DISSENTING OPINION OF JUDGE FURA JOINED BY JUDGE POWER

1. I voted against finding a violation of article 8. These are my reasons.

2. My starting point is that the national judge is better placed than the international judge to decide in cases about family life in general and parental rights in particular. It is a delicate exercise to balance all rights involved including the best interests of the children. In this area the States enjoy a wide margin of appreciation.

3. The majority observes concerning the delays that the court proceedings on the domestic level were influenced by the animosity between the parties but that the court was active, at least periodically (see paragraph 71). In particular the delay in issuing the first interim decision setting out provisional contact arrangements was not justified in the eyes of the majority. I am not convinced.

4. It is clear from the facts that the parents were not in disagreement all the time. On several occasions they managed to enter into agreements about the applicant's contact with the children or at least negotiate with the aim of reaching a settlement (see paragraphs 11, 16 and 21). Under those circumstances the court proceedings were suspended and scheduled hearings were adjourned on the request of the applicant. A more proactive attitude from the domestic court would not have been helpful.

5. When the majority goes on to criticize the domestic judge for overstepping her powers (see paragraphs 73-74) I respectfully disagree. The judge acted exactly as a conscientious and professional judge should. She used her discretion to order another expert opinion to be absolutely sure that whatever was decided would be in the best interest of the children. This decision does not come across as arbitrary or disproportionate.

6. Now, several years later and with the benefit of hindsight, to pronounce what the judge ought to have done instead (see paragraph 75) goes too far. This amounts to an attempt to micromanage from Strasbourg what is best done on the domestic level, as required by the principle of subsidiarity.

7. Finally the argument put forward by the majority in paragraph 78 that the interpretation of article 50 of the Constitutional Court Act effectively barred the applicant from access to court and thus being in violation of his Convention rights and constitutional rights is not only speculative but also beside the point. The complaint is examined under article 8, not article 6.

8. In conclusion there has been no violation of article 8 since the domestic authorities did what was expected of them to meet the standards of the Convention, no more, no less.