



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

FIRST SECTION

CASE OF VUJICA v. CROATIA

(Application no. 56163/12)

JUDGMENT

STRASBOURG

8 October 2015

FINAL

08/01/2016

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

In the case of Vujica v. Croatia,

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

Elisabeth Steiner, *President*,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 15 September 2015,

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

PROCEDURE

1. The case originated in an application (no. 56163/12) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Ms Klaudia Vujica (“the applicant”), on 13 August 2012.

2. The applicant was represented by Ms G. Ćorluka, an advocate practising in Vinkovci. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, that by refusing to return her children the domestic courts had failed to secure her right to respect for her family life and that by awarding the custody of all three of her children to their father, those courts had breached that right.

4. On 20 February 2013 the application was communicated to the Government.

5. On 5 March 2014 the President of the Former First Section decided to give priority to the application according to Rule 41 of the Rules of Court.

6. The Government of Austria, having been informed of their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (a) of the Rules of Court), did not avail themselves of that opportunity.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1974 and lives in Graz.

8. On 7 March 1997 she married Mr S.V. in Vienna (Austria). They lived in Vienna until January 2006, when they decided to move to Komletinci (Croatia).

9. Meanwhile, on 3 January 1999 the applicant gave birth to their daughter, E.V, on 6 June 2001 to their son, F.V., and on 21 January 2006 to their second daughter, L.V.

10. On 6 January 2009 the applicant and S.V. separated. He remained in Croatia, whereas the applicant returned to Austria.

11. Following her arrival in Austria the applicant collected the children from her husband's parents, who lived in Vienna and with whom the children had been spending the Christmas holidays, and took the children with her to Graz.

12. When the applicant did not return to Croatia, S.V. went to Austria with a view to taking the children back to Croatia. However, the applicant opposed that. The children therefore remained in Graz where the applicant enrolled the two older children in school and the youngest child in kindergarten. S.V. maintained contact with the children by talking to them over the phone and by visiting them occasionally. It would appear that the applicant and S.V. eventually agreed that the children would remain in Austria but would spend holidays with their father in Croatia.

13. In August 2010, after the summer holidays, which the children spent with their father and paternal grandparents in Croatia, the father refused to return them to the applicant, claiming that the children had refused to go back to Austria.

A. Proceedings in Croatia

14. In September 2010, relying on the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: "the Hague Convention", see paragraph 54 below), the applicant asked the Austrian Ministry of Justice, as the Austrian Central Authority within the meaning of that Convention, to return her children. The Ministry of Justice immediately contacted the Croatian Ministry of Health and Social Welfare (*Ministarstvo zdravstva i socijalne skrbi*) as the Croatian Central Authority.

15. By a letter of 23 September 2010 the Ministry of Health and Social Welfare forwarded the applicant's request to the Vinkovci Municipal Court (*Općinski sud u Vinkovcima*).

1. Measures to facilitate the voluntary return of the children

16. A copy of the Ministry's letter of 23 September 2010 was sent to the Vinkovci Social Welfare Centre (*Centar za socijalnu skrb Vinkovci*). Pursuant to Article 10 of the Hague Convention (see paragraph 53 below), the latter was invited to mediate with the father the voluntary return of the children to Austria, and to inform the Vinkovci Municipal Court and the Ministry of the results thereof.

17. The Vinkovci Social Welfare Centre interviewed S.V., talked to the children without his presence and carried out an on-site inspection of his home. On 28 October 2010 it replied to the Ministry's request. The relevant part of that reply reads as follows:

"S.V. states that his actions were in accordance with the wishes of his children, who wanted to remain living with him in Croatia. He justifies his current actions by the wish to afford his children a happy life. During the interview on the [premises] of the Centre S.V. did not try to portray [the applicant] as a bad or irresponsible mother ... S.V. verbalises the wish that in the divorce proceedings the custody of the children be awarded to him primarily because he wants the children to be happy. He states that the children wish to remain living with him. He does not want to restrict his wife's contacts with the children. ... During the conversation S.V. leaves the impression of an emotionally warm person. He does not appear to be a parent who would physically punish or behave inappropriately towards the children.

... by an on-site inspection it was established that the father had secured adequate housing and other conditions. He has a permanent source of income ... as he has a bar on the ground floor of the house [where he and the children live], where he works. [Thus] while working he stays [physically] very close to his family, which gives the children [a sense of] security.

It was further established that E.V. and F.V. had frequently changed school and that they had started the new school year by going to an elementary school in Komletinci where, according to the father, they had adapted well. It is not in the children's interest to frequently change school, schoolmates and teachers. The children should have stability. Every removal of the children from their habitual environment (family or school setting) is stressful and leaves consequences on the children. It requires them to make additional efforts to adapt to the new environment and the school and to make new friends.

Given that the children's mother had in the meantime lodged an application for the return of her wrongfully retained children from Croatia, the Centre conducted an interview with the children on its premises without the presence of the father. Their wish is that their parents live together, as most children in their situation do. They are aware that the parents are divorcing. They are not taking the side of [either] the father or the mother. E.V. and F.V. understand the family situation whereas L.V. is at an age when her parents' situation is still not clear to her. The children express the wish to live with their father. They see their relationship with the father as closer and [consider that] they are more emotionally attached [to him]. They like the life in the countryside, in Komletinci. The life in Austria is very different from the life in Komletinci. In Komletinci they have more free time, and meet and play with other children of their age. The pace of life in Austria makes that impossible. Here they are very well accepted in school. They know their neighbours and other children of their age.

In the light of the foregoing [the Centre] found that it would be in the children's interest to continue living with their father in Komletinci. In accordance with that [view] the Centre has submitted the opinion of a psychologist and a social worker to the Vinkovci Municipal Court."

2. Non-contentious proceedings for the return of children

18. Non-contentious proceedings for the return of the children were instituted on 7 October 2010, that is, on the date the Ministry's letter of 23 September 2010 forwarding the applicant's request under the Hague Convention to the Vinkovci Municipal Court (see paragraph 15 above) was received at that court. The Vinkovci Social Welfare Centre participated in those proceedings as an independent intervener *sui generis* with a view to protecting the children's interests.

19. During the proceedings the court decided to obtain and consult the report of the social welfare centre prepared for the purposes of deciding on the custody of the children in the parallel civil proceedings for divorce and child custody (see paragraphs 33-35 below). On 4 November 2010 the report was received at the court.

20. At a hearing held at 11 a.m. on 19 November 2010 the applicant's representative argued that the retention of the three children by their father in Croatia had been wrongful and that they should be returned forthwith. She averred that the fact that the social welfare centre had submitted a report in the parallel civil proceedings for divorce and child custody should have no bearing in the present proceedings as the Hague Convention did not provide for exceptions from the obligation to promptly return the children. She also stated that the applicant's right to equality in the proceedings had been breached because, even though she was fluent in Croatian as her parents were of Croatian origin, she had not been invited by the Vinkovci Social Welfare Centre to participate in the family assessment procedure leading to its report.

21. S.V.'s representative invited the court to dismiss the applicant's request. She argued that the retention of the children had not been wrongful and that in any event S.V. could not have forced the children to return to their mother against their wishes. In particular, the children had clearly communicated their wishes not to return to Austria to the employees of the social welfare centre and had even told their father that they would run away if returned, which suggested that the return would have caused them psychological trauma. Furthermore, while it was true that the report of the social welfare centre was prepared in the context of the parallel civil proceedings for the purposes of deciding on custody of the children, its findings, which had suggested that the children did not want to return to Austria, could not be ignored in the present proceedings.

22. The representative of the Vinkovci Social Welfare Centre agreed with S.V.'s representative that the applicant's request should be dismissed

and that the children's retention had not been wrongful. She submitted that the children had been interviewed by the employees of the centre first together and then individually, and that they had stated that they did not like the life in Austria and wanted to live in Croatia.

23. In her reply the applicant's representative stated as follows:

"... especially the youngest child of the parties L.V., who is only four years old, is very attached to her mother, and has expressed a wish to return with her to Austria. As regards the two older children, what should primarily be taken into account, given their age, are their [best] interests and not just where they wish to live. In any event, this cannot have an impact on the decision making in this case having regard to Article 16 of the [Hague] Convention."

24. At the same hearing the court heard both parties. The applicant in her testimony stated that in mid-August 2010 S.V. had called her to tell her that he would not be returning the children to Austria because they did not want that. The applicant further testified that on that occasion she had spoken with the children over the phone and that the two older children had told her that they indeed did not want to return to Austria, whereas the youngest child had expressed the wish to return. The applicant also stated that she had not seen her children from the time their father had retained them in Croatia until the day before the hearing.

25. From S.V.'s testimony it followed that the youngest child, L.V., was indecisive as to which parent she wanted to live with. In his own words:

"L.V. is [still] small and at times she wants to live with her mother, and every now and then with me."

26. At the same hearing, on 19 November 2010, the Vinkovci Municipal Court delivered a decision whereby it dismissed the applicant's request. In so doing it relied on the report of the Vinkovci Social Welfare Centre, which included the opinions of a social worker and a psychologist employed with the centre and which had been prepared for the purposes of deciding on the custody of the children in the parallel civil proceedings for divorce and child custody (see paragraphs 19 and 33-35 below). The relevant part of that decision read as follows:

"The petitioner ... maintains her request that her children be returned to Austria where they had the last domicile, that is, their habitual residence and where they went to school. The fact that the social welfare centre gave its opinion in the [parallel] civil proceedings for divorce [and child custody] is of no relevance for reaching a decision in these [return] proceedings because the Republic of Croatia, as a signatory of the Hague Convention on the Civil Aspects of International Child Abduction, is bound to honour the provisions of that Convention.

The counterparty ... in his reply opposes the [petitioner's] request, considering that the conditions prescribed in the Hague Convention had not been met in the present case. In particular, in order for the Hague Convention to apply, the children had to have been wrongfully removed or wrongfully retained and the right of custody had to have been breached. The law did not attribute the right of custody to the petitioner, nor had she been awarded that right by a judicial or administrative decision or an

agreement equal to such decisions. Hence, the petitioner herself does not have the right of custody any more than the counterparty himself, given that the divorce proceedings, where [the issue of] custody is being examined, are still pending before this court.

He also invokes Article 13 paragraph 1 (b) [of the Hague Convention] which provides that the court is not bound to order the return of a child if it establishes that the return would expose the child to, *inter alia*, psychological harm, and that it may also refuse to do so if the child objects to being returned.

The representative of the Vinkovci Social Welfare Centre in her observations considers that the present case does not concern wrongful retention of children because the Centre had, even before the petitioner submitted her request, been involved in the social anamnesis of the family [i.e. family assessment]. Namely, the children's father had addressed the Centre when in 2009, during a visit of the children to his parents in Austria, the spouses had separated, that is to say, when the petitioner had left [him], gone to Austria, taken the children, retained them and enrolled them in a school in Austria. The father, in order to protect the interests of the children, had decided not to take certain steps [to return them] but had instead visited the children in Austria as much as he could. When the children this summer had come to Croatia with his parents, they had not wanted to go back to Austria. The father had then sought advice from the Centre, which had advised him that he should not return the children to their mother by force. After that, he had filed for divorce, whereas the petitioner had lodged a request for the return of wrongfully retained children.

In the proceedings conducted before the Vinkovci Social Welfare Centre, the children were heard, all three of them together and then individually, and they expressed the wish to live in Croatia. Therefore, the representative of the Social Welfare Centre considers that, in order to protect the children's interests and well-being, it is necessary to dismiss the petitioner's request as unfounded.

...

In these proceedings, instituted following the request of the petitioner for the return of the children, the court has to apply the Ratification of the Hague Convention (Civil Aspects of International Child Abduction) Act.

Section 12(2) of that Act provides that the court will refuse to order the return of a child if he or she is settled in the new environment.

According to evidence taken, it was established that the parties married on 7 March 1997 in Austria, in Vienna. During the marriage, E.V. was born on 3 January 1999, F.V. on 6 June 2001 and L.V. on 21 January 2006. The parties came with their three children to live in Croatia, in Komletinci.

In the acrimony during the [2008] Christmas holidays [the petitioner] verbalised the wish to end their life together. [She] left the common household and went to live in Austria. At that time the children were in Austria, visiting their paternal grandparents. Upon her arrival in Austria the petitioner immediately went to collect the children and did not allow the father to take them back to Croatia, even though the children wanted to go to Croatia and had to finish another school term [there].

[In] summer [2010] the children, together with their paternal grandparents, came to [Croatia to] spend three weeks of their summer holidays at the seaside. After returning from the seaside, the children came to live in Komletinci. According to the counterparty's statement, which the petitioner acknowledged, the two older children had refused to return to Austria, expressing the wish to stay in Komletinci.

From the enclosed certificates of domicile issued by the [police authorities] it was established that all three children have registered domicile on the territory of Croatia, at the address ... in Komletinci ... as of 17 October 2006. Therefore, the petitioner's arguments that the children have registered domicile only in Austria are incorrect.

In the present case the court has not yet rendered a final decision in the [parallel civil] proceedings [for divorce and child custody]. However, that does not affect the adoption of the decision on the request for the return of the children on the basis of the Hague Convention on the Civil Aspects of International Child Abduction.

It is the opinion of this court that the father did not, without the knowledge and approval of the mother, abduct the children from the living environment in which they were settled. It is to be noted that the children have previously lived in Komletinci, that E.V. finished the second grade of the elementary school in Komletinci where she went to school until the first semester of the third grade, and that F.V. also attended the first grade in the school in Komletinci. It therefore follows that the children were retained in the place where they previously used to live. This school year E.V. and F.V. are again attending the elementary school in Komletinci.

From the opinion of the psychologist at the Vinkovci Social Welfare Centre it undoubtedly follows that it is not in the children's interests to change school again because they would have to re-adapt to [new] teachers, curriculum, schoolmates, etc. From the opinion submitted it is evident that the children have adapted to their current living environment and school setting, and that they have verbalised the wish to live with their father.

Given all the aforementioned [considerations], this court, relying on Article 12 paragraph 2 and Article 13 paragraph 1 (a) and (b) of the Hague Convention on the Civil Aspects of International Child Abduction, refuses to order the return of the children, finding that the children have adapted without any problems to the environment in which they had previously lived and that, in the given circumstances, returning them to the mother in Austria would place them in an unfavourable position and expose them to psychological trauma, which certainly cannot be to their benefit.

It is also to be noted that the children themselves, especially the two older children, object to being returned to Austria.

Having regard to all the above, this court decides as [indicated] in the operative part."

27. On 30 November 2010 the applicant appealed against the first-instance decision.

28. On 24 February 2011 the Vukovar County Court (*Županijski sud u Vukovaru*) dismissed the applicant's appeal and upheld the first-instance decision, which thereby became final. The second-instance decision was served on the applicant's representative on 17 March 2011. The relevant part of that decision reads as follows:

"The appellant claims that the aim of the [Hague] Convention is the prompt return of children to the country of their habitual residence, and that what is protected is the last status of the children.

In the appellant's opinion it was necessary to apply exclusively Article 12 paragraph 1 of the said Convention and order the children's return forthwith.

...

The appeal is unfounded.

...

It was established that all three children have registered domicile on the territory of Croatia, at the address ... in Komletinci ... as of 17 October 2006.

The first-instance court correctly found that the father did not without the knowledge and approval of the mother abduct the children from the living environment where they were settled because the children have previously lived in Komletinci, [where] E.V. finished the second grade of elementary school ... and F.V. attended the first grade ...

The first-instance court relied on Article 12 paragraph 2 and Article 13 paragraph 1 (a) and (b) of the [Hague] Convention.

As rightly pointed out by the appellant, the first-instance court had erred in relying on Article 12 paragraph 2 of that Convention because the children had been brought to Croatia at the beginning of July 2010, whereas the proceedings [for the return of children] were instituted in September 2010, that is, before the expiration of the period of one year referred to in paragraph 1 of Article 12 of the [Hague] Convention.

However, this second-instance court finds that the first-instance court correctly applied Article 13 paragraph 1 (a) and (b) of the [Hague] Convention, and, in the opinion of this court, also paragraph 2 of that Article because the two older children, whose views it is appropriate to take into account given their age, object to being returned.

Since the children have already adapted to life in the environment (in which they have previously lived – before going to Austria) there is a grave risk that their return would expose them to psychological trauma. The change of school would have traumatising effects on the two older children if, during the school year, they were to be transferred to Austria, where the curriculum is completely different.

For these reasons the appeal is dismissed and the first-instance decision upheld.”

29. On 15 April 2011, the applicant lodged a constitutional complaint alleging, *inter alia*, that her constitutional right to a fair hearing and to respect for her family life, guaranteed by Article 29 paragraph 1 and Article 35 of the Croatian Constitution (see paragraph 51 below), had been violated. On 25 January 2012 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant’s constitutional complaint and served its decision on her representative on 15 February 2012. The relevant part of that decision reads as follows:

“[The complainant] considers that the [constitutional] rights guaranteed in Articles 14 paragraph 2, 16, 26, 29 paragraph 1, 35, 62, 63 and 140 of the Constitution have been breached by the contested decision of the lower-instance courts.

...

Having regard to the arguments raised in the constitutional complaint the Constitutional Court examined the contested decisions under Article 29 paragraph 1 and Article 63 of the Constitution.

...

Having regard to the opinion of the Vinkovci Social Welfare Centre ... and the fact that both older children ... (E.V. and F.V.) expressed the wish as to where and with which parent they wanted to continue living after [their parents'] divorce, and that they refuse to be separated from their father, the Constitutional Court finds that the competent courts rendered the contested decisions by correctly assessing all the particular circumstances of the present case."

3. *Civil proceedings for divorce and child custody*

30. Meanwhile, on 27 August 2010 S.V. brought a civil action against the applicant in the Vinkovci Municipal Court seeking: (a) divorce; (b) the right to have their children living with him (hereafter: "custody"); and (c) maintenance for the children. As in the above-mentioned proceedings for the return of children (see paragraph 18 above), the Vinkovci Social Welfare Centre also participated in these proceedings as an independent intervener *sui generis* with a view to protecting the children's interests.

31. On 30 August 2010 the court invited the Vinkovci Social Welfare Centre to submit a report on the financial and family situation of the parties and to give its opinion on the issue of which parent the children would prefer to live with and on the contacts with the other parent.

32. On 17 December 2010 the applicant responded to S.V.'s action. In her response she agreed to the divorce, contested S.V.'s claim for custody and proposed instead that she be granted custody.

33. After having interviewed the children and S.V., and having carried out an inspection of his home on 20 October 2010, the Vinkovci Social Welfare Centre submitted its report to the court on 28 October 2010. The report consisted of the opinion of a social worker and the opinion of a psychologist, who were both employed at the centre.

34. The relevant part of the opinion of the social worker reads as follows:

"[S.V.] justifies his current actions by his wish to afford his children a happy life. During the interview he repeatedly stated that after spending the summer holidays in Croatia, the children expressed the wish not to return to Austria any more. He did not stop his wife coming and seeing the children but she never came ... During the interview he did not try to portray [her] as a bad or irresponsible mother ... S.V. verbalises the wish that in the divorce proceedings the custody of the children be awarded to him primarily because he wants the children to be happy. He stated that that the children wished to remain living with him. He did not want to restrict his wife's contacts with the children. ... During the conversation S.V. leaves the impression of an emotionally warm person. He does not appear to be a parent who would physically punish or behave inappropriately towards the children.

... by an on-site inspection it was established that the father had secured adequate housing and other conditions. He has a permanent source of income ... as he has a bar on the ground floor of the house [where he and the children live] where he works. [Thus] while working he stays [physically] very close to his family, which gives the children [a sense of] security.

It is evident that E.V. and F.V. have frequently changed school and that they started the new school year by going to the elementary school in Komletinci where, according to their father, they have adapted well. It is not in the interest of the children to frequently change school, schoolmates and teachers. The children should have stability. Every removal of the children from their habitual environment (family or school setting) is stressful and has consequences on the children. That requires additional efforts from the children to adapt to the new environment, [the new] school and to make new friends.

Given that the children's mother lives in Austria ... employees of this Social Welfare Centre had no possibility to examine and establish [her] housing conditions and family situation and assess [them] and [thus] could not give an opinion on the possibility of contacts between the mother and the children at her place of residence in Austria.

Having regard to the foregoing, I am of the opinion that E.V., F.V. and L.V. should continue living with their father ..."

35. The relevant part of the opinion of the centre's psychologist reads as follows:

"This opinion was prepared on the basis of a psychological interview with S.V. as well as on the basis of psychological examination of the children and the perusal of the documents available at the Centre.

...

An interview with the children was conducted. Their wish is that their parents live together, as most children in their situation do. They are aware that their parents are divorcing. They are not taking the side of [either] the father or the mother. E.V. and F.V. understand the family situation whereas L.V. is at an age when her parents' situation is still not clear to her. The children express the wish to live with their father. They see their relationship with the father as closer and [consider that] they are more emotionally attached [to him]. They especially like the life in Komletinci, that is, in a smaller community. The life in Austria differs to a significant degree from the life here. They have more free time, [and] meet with children of their age. They spend their free time playing, which is not the case in Austria, not because one of the parents would prohibit or prevent them from doing so but because the pace of life is such. The parents and the children are not at home during the day because they work and the children go to school, so they spend very little time together, which means a lot to the children. Here they are well accepted in school, they know the neighbours and generally the social network (teachers, neighbours, children of their age) works better. Moreover, it is not in the children's interest to change school anew, which is stressful because the children have to re-adapt to teachers, the curriculum and [find new] friends.

I am of the opinion that the children should remain living with their father given that S.V. adequately takes care of their needs as well as of their education and upbringing. At the same time, the children verbalise their wish to live with their father."

36. As the applicant did not oppose the divorce, at the hearing held on 18 November 2010 the court ruled that S.V.'s civil action was to be considered a joint petition for divorce. At the same hearing the applicant and S.V. asked the court to adjourn the hearing so that they could agree on

the issues of child custody, access rights of the non-custodial parent and maintenance.

37. At the hearing held at 1 p.m. the next day, 19 November 2010, that is, two hours after the hearing in the above-mentioned proceedings concerning the return of children (see paragraph 20 above), the parties informed the court that they had agreed that the two older children would live with their father but that they could not reach an agreement on custody of their youngest child, L.V.

38. The applicant's representative stressed that it was in L.V.'s interest, as she was only four and a half years old at the time, to live with her mother, to whom she was emotionally attached and with whom she had expressed the wish to live. She added that at that age the role of the mother was very important. Lastly, the applicant's representative reiterated that the applicant had not been involved in the family assessment procedure carried out by the Vinkovci Social Welfare Centre, resulting in its report. In particular, she had not been interviewed or otherwise examined by its staff (see paragraph 20 above). She therefore invited the court to obtain a joint expert opinion from a psychologist and a psychiatrist with a view to establishing whether it was in L.V.'s best interests to live with her mother or with her father.

39. The representative of the social welfare centre stated that the applicant had not been involved in the family assessment procedure because she was a foreign national who lived abroad. After reiterating the findings made in the centre's report (see paragraphs 33-35 above), she added that the children were very emotionally attached to each other and it was therefore not advisable to separate them.

40. S.V.'s representative argued that the court should respect the professional opinions expressed in the social welfare centre's report and that the children should not be separated. She added that her client was willing to allow the applicant to have longer and more frequent contacts with L.V., given that she was not burdened by school obligations. Lastly, S.V.'s representative opposed the proposal to obtain a joint expert opinion (see paragraph 38 above) as it was not disputed between the parties that they were both capable of adequately taking care of the children.

41. After hearing the representatives of the parties and of the social welfare centre as the intervener, the Municipal Court at the same hearing first rejected the proposal by the applicant's representative to obtain a joint expert opinion, and then pronounced a judgment whereby it: (a) divorced the marriage between the applicant and S.V.; (b) decided that all three children were to live with S.V.; (c) granted the applicant access (contact) rights; and (d) ordered the applicant to regularly pay a certain amount of money as maintenance for their children. In particular, the court decided that the applicant should exercise her access rights by taking the children to her home in Austria on the last weekend of every month (or any other weekend if the parties agreed otherwise), as well as during the seven days of

the winter holidays, fifteen days of the summer holidays and during other holidays interchangeably.

42. In deciding on the issue of child custody, the court relied on the report of the social welfare centre (see paragraphs 33-35). The relevant part of that judgment reads as follows:

“The court rejected the second petitioner’s [the defendant’s] proposal to take evidence by obtaining a joint expert opinion from experts in psychology and psychiatry because it is undisputed between the parties that they both satisfy the conditions for assuming parental responsibility, with which the court agrees. Given that on the basis of the evidence taken it can reach a decision on the merits even without the proposed evidence, which would indicate whether the parents are fit to take care of the children, the court considered [obtaining] the opinion of an expert in psychiatry unnecessary and [thus] rejected that proposal, having regard to section 10(1) of the Civil Procedure Act which requires that [the civil] proceedings be conducted without delays and with the least cost.

...

As regards their minor children, E.V. and F.V., the parties reached an agreement that they would live with their father. However, the mother argued that it was in the [best] interests of [their younger daughter] L.V., who is four years old, to live with her as she was emotionally attached to her [mother].

From the report of the social welfare centre it follows that the children wish, as do most children in their situation, the parents to live together in a harmonious relationship, that they are aware of the fact that their father and mother are divorcing, and that they are not taking the side of [either] the father or the mother. However, they expressed the wish to live with their father because they see their relationship with their father as much closer and are more emotionally attached to him. Furthermore, it follows from the report that the children like their life in Komletinci, that is, [a life] in a smaller community where they have more free time, socialise with other children of their age [and] spend their free time playing, which is not the case in Austria. It further follows from the report that the children are well accepted in school and that it is not in the children’s best interests to change school again, which is considered stressful as they would again have to adjust to [new] teachers, curriculum and schoolmates. Therefore, in the opinion of the social welfare centre, the children should remain living with their father given that he adequately takes care of their needs, their upbringing and education and that, at the same time, the children have verbalised the wish to live with their father.

At the hearing ... the representative of the social welfare centre stated that she maintained the opinion provided [in the report of the social welfare centre] and reiterated that the children were very attached to each other and that it would not be advisable to separate them.

The first petitioner [the plaintiff] stated at the same hearing that he did not dispute that the mother met the conditions to be awarded custody of the children but that he considered that it would be in the best interests of the children to live together, which was what the children wanted, and that he was willing to allow the second petitioner [the defendant] to maintain more extensive contact with L.V. given that she was not burdened by school obligations.

When awarding custody it has to be taken into account that brothers and sisters with existing emotional connections should not be separated unless that is their wish or in

their best interests. Given that according to the report of the social welfare centre the children have verbalised the wish to live together, the court, promoting the best interests of the child within the meaning of Article 3 of the International Convention on the Rights of the Child and [in accordance with] the basic principles of the European Convention on the Exercise of Children's Rights, has decided to award custody to their father.

When deciding on the mother's access (contact) rights, the court has, having regard to the agreement of the parties that the mother shall exercise those rights in the manner proposed by the social welfare centre, but so that the mother takes the children to her home in Austria, [decided] that [she should have contact with the children] on the last weekend of every month or any other weekend if the parties agree otherwise, as well as during the seven days of the winter holidays, fifteen days of the summer holidays and during other holidays interchangeably."

43. On the same day the applicant and S.V. signed a written agreement (hereinafter: "interim custody agreement") regulating the applicant's access rights in the period until the first-instance judgment became final. They agreed that in that period the applicant would exercise her access rights according to the visiting schedule set forth in the first-instance judgment. In addition, the parties agreed that the applicant would immediately take their youngest daughter, L.V., with her to Austria and return her to S.V. on 9 January 2011. However, on 9 January 2011 the applicant did not return their youngest child to S.V., but retained her in Austria.

44. Meanwhile, on 17 December 2010 the applicant appealed against the first-instance judgment. She argued that: (a) under Article 16 of the Hague Convention (see paragraph 54 below) the first-instance court was not allowed to proceed until the adoption of the final decision in the proceedings for the return of children; (b) the first-instance court had not referred S.V. and her to the mandatory mediation procedure before divorce, contrary to section 44 of the Family Act (see paragraph 52 below); and (c) she had not participated in the family assessment procedure carried out by the social welfare centre. The applicant also reiterated her earlier argument that her younger daughter, L.V., was emotionally attached to her and was at an age when it was in her best interests to live with her mother, as her separation from the mother would be more detrimental than separation from her siblings. As regards her two older children, the applicant emphasised that if they really wanted to remain living with their father in Croatia, she was prepared to respect that wish. However, the decision on their custody should not have been made before the decision in the return proceedings.

45. By a judgment of 23 February 2011 the Vukovar County Court dismissed an appeal lodged by the applicant and upheld the first-instance judgment, which thereby became final. The second-instance judgment was served on the applicant's representative on 16 March 2011. The relevant part of that judgment reads as follows:

"In her appeal the appellant argues that ... the [first-instance] court was not allowed to proceed in these [civil] proceedings until the final resolution of the [non-

contentious] proceedings for the return of wrongfully retained children pending before the same court, in accordance with Article 16 of the Hague Convention on the Civil Aspects of International Child Abduction. The purpose of that Convention was that children were returned to the State from which they had been abducted. Only then should proceedings for custody have been conducted, given that the children had been uprooted from the milieu in which they had lived hitherto.

[The appellant] also argues that she did not participate in the [family assessment] carried out by the Vinkovci Social Welfare centre. She considers that the youngest child L.V. was very emotionally attached to her and that the [first-instance] court should have taken that into account.

...

As the parties, however, did not agree on custody in respect of their youngest child, L.V., the court, deferring to the opinion of the social welfare centre and respecting the wishes of the children, decided that she should remain living with her father, brother and sister in Komletinci.

In particular, during an interview with the expert team of the Vinkovci Social Welfare Centre the children expressed the wish to live with their father because they considered their relationship with the father closer, they liked the life in Komletinci [that is] in a smaller community where they had more free time, spent time with children of their age, spent free time playing which was not the case in Austria, and also because they went to school here where they were well accepted.

From the report of the Vinkovci Social Welfare Centre it follows that the children are very attached to each other and that it would not be wise to separate them and change their environment, which corresponds to the children's wishes.

Since the children verbalised the wish to live together and given that L.V. did not yet have school obligations – which made it possible for her to maintain more extensive contacts with her mother, if the parents agreed – the first-instance court, endorsing the best interests of the child within the meaning of Article 3 of the International Convention on the Rights of the Child and [in accordance with] the basic principles of the European Convention on the Exercise of Children's Rights, correctly decided that the children should remain living with their father [while] leaving open the possibility that this decision could be altered if circumstances change.

...

The case file also contains certificates of domicile in respect of all the parties' children from which it is evident that their registered address is in Komletinci since 17 October 2006. In any event, the whole family previously lived together in Komletinci.

Having regard to the above, the appellant's argument that she was prevented from participating in the assessment carried out by the social welfare centre is unfounded because she participated in the proceedings before the [first-instance] court, as did the father, where the representative of the social welfare centre was present and where the parents reached an agreement on the custody [of the children] except L.V. Given that an agreement was reached as to where the children would live, even if they go to Austria on weekends to maintain contact with their mother, it could not be said that they were abducted or uprooted from the milieu in which they were living, particularly taking into account the wishes of the children and the fact that the two older children go to school in Komletinci."

46. The applicant then, on 15 April 2011, lodged a constitutional complaint alleging, *inter alia*, that her constitutional rights to a fair hearing and to respect for her family life, guaranteed by Article 29 § 1 and Article 35 of the Croatian Constitution (see paragraph 51 above) had been violated.

47. On 25 January 2012 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant's constitutional complaint and served its decision on her representative on 15 February 2012. The relevant part of that decision reads as follows:

“... the report of the Vinkovci Social Welfare Centre of 20 October 2010 and the opinion of a psychologist are enclosed with the case file of the first-instance court. Both [documents] come to the same conclusion that the children of the parties should continue living with their father after the divorce.

At the main hearing held in the case on 19 November 2011 both parties proposed that the two older children (E.V. and F.V.) remain living with their father and that [the youngest child] L.V. remain living with her mother – who lodged the constitutional complaint. At that hearing the complainant as the defendant did not ask for the application of the Hague Convention on the Civil Aspects of International Child Abduction.

...

The Constitutional Court considers that in every [set of] proceedings concerning custody of children the best interests of the child must be a primary consideration.

...

The Constitutional Court finds that ... the Vinkovci Social Welfare Centre undertook the necessary steps before adopting the report concerning custody of the children.

The proposal expressed in the report of the Social Welfare Centre that all three children should continue living with their father after the divorce is, after all, in line with the opinion of the psychologist.

The proposal was based on the fact that both older children (E.L. and F.L.) had expressed the wish as to which parent they wanted to live with, whereas as regards the [youngest child] L.V. it was established that she was ‘still at an age where she does not completely understand her parents’ situation, that all three children were very emotionally attached to each other and that, [while] accepting the fact that their parents were divorcing, they wanted to continue living together, with at least one parent.

...

In view of the above, the Constitutional Court considers that the constitutional rights provided for in Article 29 paragraph 1 and Article 35 of the Constitution, and the rights guaranteed by Articles 6 and 8 of the European Convention on Human Rights were not breached by the contested decisions.

The Constitutional Court also notes that the legal views expressed in the contested judgments ... are primarily based on the best interests of the child and are also founded on the established principles of international law.

...

As regards the complainant's arguments that the Hague Convention on the Civil Aspects of International Child Abduction was applicable in the instant case, the Constitutional Court finds correct the ... reasoning expressed in the contested judgment of the Vukovar County Court, which ... reads:

'... Given that an agreement was reached as to where the children would live, even if they go to Austria on weekends to maintain contacts with their mother, it could not be said that they were abducted ...' "

B. Proceedings in Austria

48. Given that the applicant did not respect the interim custody agreement of 19 November 2010 (see paragraph 43 above) and did not return L.V. to Croatia on 9 January 2011 but retained her in Austria, on 13 April 2011 S.V., relying on the Hague Convention, requested the Croatian Ministry of Health and Social Welfare, as the Croatian Central Authority, to contact the Austrian Ministry of Justice, as the Austrian Central Authority, with a view to returning L.V.

49. On 11 May 2011 the Graz First-Instance Court instituted proceedings relating to the applicant's request for return of the children.

50. On 22 September 2011 the Graz First-Instance Court, relying on Article 13 paragraph 1 (b) of the Hague Convention (see paragraph 54 below), dismissed S.V.'s request. It held that returning L.V. to Croatia would expose her to psychological harm or otherwise place her in an intolerable situation. In so deciding it relied on the opinion of an expert in psychology which suggested that separating L.V. from her mother would have devastating consequences. The court added, *obiter dictum*, that the Vinkovci Municipal Court had breached the Hague Convention when it had decided on custody of the applicant's three children before a final decision had been delivered on her request for the return of the children.

II. RELEVANT DOMESTIC LAW

A. The Constitution

51. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette of the Republic of Croatia, no. 56/90 with subsequent amendments) read as follows:

Article 16

"(1) Rights and freedoms may be restricted only by law in order to protect the rights and freedoms of others, the legal order, public morals or health.

(2) Every restriction of the rights and freedoms should be proportional to the nature of the necessity for the restriction in each individual case."

Article 29(1)

“In the determination of his rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.”

Article 35

“Everyone shall be guaranteed respect for, and the legal protection of, his personal and family life ...”

Article 62

“The State shall protect maternity, children and the youth, and shall create social, cultural, educational, material and other conditions promoting the right to a decent life.”

Article 134

“International agreements in force which have been concluded and ratified in accordance with the Constitution and made public shall be part of the internal legal order of the Republic of Croatia and shall have, in terms of their legal effects, precedence over the [domestic] statutes. ...”

B. The Family Act

52. The relevant provisions of the Family Act (*Obiteljski zakon*, Official Gazette no. 163/03 with subsequent amendments), which entered into force on 22 July 2003, read as follows:

Second part**MARRIAGE****IV. TERMINATION OF MARRIAGE***3. Mediation before divorce***Section 44**

“The [mandatory] mediation procedure shall be conducted:

- 1) when the [civil] proceedings for divorce are instituted by an action [of one spouse],
- 2) when the [civil] proceedings for divorce are instituted by a joint petition [for divorce] [of both spouses] and the spouses have minor common or adopted children or [adult] children in relation to which they exercise parental responsibility.”

Section 45

“...

- (3) The [mandatory] mediation procedure shall not be conducted if one or both spouses live abroad.

(4) As an exception from paragraph 3 of this section, the mediation procedure shall be conducted if the spouses have minor common or adopted children or [adult] children in relation to which they exercise parental responsibility, and the court finds that there are no significant difficulties for the spouses to participate in the mediation procedure.”

Section 46

“(1) When the court receives an action or a joint petition [for divorce] referred to in section 44 of this Act, at the first hearing it will ask the spouses to state immediately which social welfare centre, marriage and family counselling centre or person authorised to provide professional assistance (mediator) they wish to consult with a view to resolving their marital disputes or reaching an agreement regulating the legal consequences of the divorce.

(2) The court shall ask the parties if there is an agreement as to which parent the child will live with, on contacts with the other parent or on the child’s residence during the divorce proceedings.

(3) If the spouses have not agreed where to undertake the mediation procedure, the court shall of its own motion make a decision on the choice of mediator.

(4) ... No separate appeal lies against a decision referred to in paragraph 3 of this section.

(5) Spouses are bound to initiate the mediation procedure within fifteen days of the adoption of the decision referred to in subsection (4) above.”

Third part

PARENTS AND CHILDREN

II. RIGHTS AND DUTIES BETWEEN PARENTS AND CHILDREN

2. Parental responsibility

Section 102

“The court shall, upon a petition by the parent, the child or the social welfare centre, issue a new decision on custody and access rights, and if need be, on other elements of parental responsibility, if substantially changed circumstances so require.”

III. RELEVANT INTERNATIONAL LAW

A. The Hague Convention on the Civil Aspects of International Child Abduction

53. The Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”) was concluded on 25 October 1980 and entered into force on 1 December 1983. It entered into force in respect of Croatia, by notification of succession, on 1 December 1991 and in respect of Austria on 1 October 1988. The purpose of the Hague Convention is set out in its preamble as follows:

“... to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence ...”

54. The relevant provisions of the Hague Convention read as follows:

Article 1

“The objects of the present Convention are -

- a)* to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b)* to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”

Article 2

“Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.”

Article 3

“The removal or the retention of a child is to be considered wrongful where

- a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or the retention; and
- b)* at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

Article 4

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.”

Article 5

“For the purposes of this Convention –

- a)* ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
- b)* ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”

...

Article 7

“Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

- a) ...;
- b) ...;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- ...”
- ...

Article 10

“The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.”

Article 11

“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay ...”

Article 12

“Where a child has been wrongfully removed or retained in terms of Article 3 and at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.”

Article 13

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Article 14

"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

...

Article 16

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

Article 17

"The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention."

Article 18

"The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

Article 19

"A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

Article 20

"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

B. Convention on the Rights of the Child

1. *Relevant provisions*

55. Relevant provisions of the Convention on the Rights of the Child of 2 September 1990, which entered into force in respect of Croatia on 12 October 1992, read as follows:

Article 3 paragraph 1

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

2. *General Comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*

56. The relevant part of General Comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) adopted by the Committee on the Rights of the Child at its sixty-second session (14 January – 1 February 2013), reads as follows:

“4. ‘Shall be a primary consideration’

39. However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child’s best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The applicant complained that the domestic authorities had failed to secure her right to respect for her family life in that: (a) they had not taken any measures to facilitate the voluntary return of her children; (b) the domestic courts had not acted expeditiously in the proceedings for the return of children; and (c) in the same proceedings the courts had refused to order

the return of her children. She also complained that by deciding in the civil proceedings for divorce and child custody that all three of her children were to live with their father, the domestic courts had breached her right to respect for her family life. She relied on Article 8 of the Convention, the relevant part of which reads as follows:

“1. Everyone has the right to respect for his ... family life

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.”

58. The Government contested those arguments.

59. As regards the applicant’s complaint that the domestic authorities had not taken any measures to facilitate the voluntary return of her children, the Court finds that it would be difficult to accept that in the situation such as the one in the present case where the social authorities considered that the children should not be returned – a view that was subsequently endorsed by the judicial authorities – the social authorities would nevertheless have been obliged to take measures to facilitate the children’s voluntary return. That complaint must therefore be regarded as absorbed by the applicant’s complaint concerning the domestic courts’ refusal to order the return of her children.

A. Admissibility

60. The Government disputed the admissibility of these complaints by arguing that the applicant could not claim to be a victim of the violation complained of.

1. The parties’ arguments

(a) The Government

61. The Government first argued that the Hague Convention was not applicable in the present case because the retention of the applicant’s children by their father in Croatia had not been “wrongful” within the meaning of Article 3 of that Convention (see paragraph 54 above). The Government explained that at the time of retention both the applicant and her former husband had had parental responsibility in relation to their children. Therefore, by retaining the children in Croatia their father had merely exercised his own “rights of custody”, as defined in Article 5 paragraph 1 (a) of the Hague Convention (see paragraph 54 above), in particular the right to determine their residence. Thus he could not have breached the applicant’s custody rights, as required by Article 3 paragraph 1 (a) of the same Convention for the retention to be “wrongful”

and, consequently, for that Convention to apply. Furthermore, the second cumulative condition of that provision had not been met either, because at the time of the retention the children had been habitually resident not in Austria but in Croatia.

62. The Government also noted that the applicant had agreed with her former husband that their two older children would live with him and that they could not agree with whom the youngest child would reside (see paragraph 37 above). However, when the domestic courts had rendered the final judgment in the proceedings for divorce and child custody and decided that all three children would live with their father, the applicant, contrary to that judgment, had retained the youngest child with her in Austria (see paragraphs 41, 43 and 45 above). In those circumstances, according to the Government, the applicant could not claim to be a victim of the violation complained of, because she had agreed that the two older children would reside with their father, whereas to the extent that the domestic courts' decisions had differed from that agreement, she had simply ignored them and continued to live with her youngest child in Austria.

(b) The applicant

63. The applicant replied that the Government, like the domestic courts in the return proceedings complained of, had misconstrued the notion of "habitual residence" and had erred in holding that the retention of her children in Croatia by their father had not been "wrongful" within the meaning of Article 3 of the Hague Convention.

64. The applicant did not comment on the Government's remaining arguments concerning her victim status.

2. The Court's assessment

(a) Applicability

65. The Court reiterates that in the area of international child abduction the positive obligations which Article 8 of the Convention imposes on the Contracting States with respect to reuniting parents with their children must be interpreted in the light of the requirements of the Hague Convention (see, for example, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I; *Karadžić v. Croatia*, no. 35030/04, § 54, 15 December 2005; and *X v. Latvia* [GC], no. 27853/09, § 93, ECHR 2013). Therefore, by arguing that the Hague Convention was not applicable to the present case (see paragraph 61 above), the Government in fact contended that the case did not concern (international) child abduction and thus could not have triggered relevant positive obligations under Article 8 of the present Convention. This argument by the Government is therefore to be understood as an objection concerning the incompatibility *ratione materiae* rather than the applicant's victim status.

66. The Court however considers that, for the reasons set out below (see paragraphs 67-70 and 96), it may leave open the issue of applicability of the Hague Convention in the present case.

(b) Other grounds of inadmissibility

(i) The applicant's two older children

67. The Court first reiterates that an applicant cannot claim to be a victim in a case where he or she is partly responsible for the alleged violation (see, *mutatis mutandis*, *Paşa and Erkan Erol v. Turkey*, no. 51358/99, §§ 19-22, 12 December 2006). It notes that at the hearing held immediately before the adoption of the first-instance judgment of 19 November 2010 in the civil proceedings for divorce and child custody, the applicant and her former husband informed the first-instance court that they had agreed that their two older children would live with their father (see paragraph 37 above). In these circumstances the Court accepts the Government's argument that in respect of the two older children the applicant indeed cannot claim to be a victim of the violation complained of, within the meaning of Article 34 of the Convention. This finding applies both to the civil proceedings for divorce and child custody and to the proceedings for the return of children because the applicant, having agreed that the custody of those children be awarded to their father, could not insist that they nevertheless be returned to her under the Hague Convention.

68. It follows that the applicant's complaints under Article 8 of the present Convention, in so far as they concern the two older children, are inadmissible for lack of victim status and must be rejected pursuant to Article 34 and Article 35 §§ 3 (a) and 4 thereof.

(ii) The applicant's youngest child

(a) As regards the alleged breaches of the State's positive obligation to reunite parents with their children in the proceedings for the return of children

69. The Court reiterates that the applicant complained, *inter alia*, that the domestic courts had failed to secure her right to respect for her family life because in the course of the return proceedings they had not acted expeditiously and had refused to order the return of her children, including the youngest child (see paragraph 57 above).

70. In this connection the Court first notes that the applicant did not live with her youngest child in the period from late August 2010, when the father retained all three children in Croatia (see paragraph 13 above), to 19 November 2010, when, pursuant to the interim custody agreement of the same date with her former husband, she took that child with her to Austria (see paragraph 43 above) and never returned her. This means that, if in the present case there was the positive obligation of the State to reunite the

applicant with her youngest child (see paragraph 66 above), it existed only in that period of some two and a half months.

71. In these circumstances the applicant cannot complain that the domestic courts' refusal to order the return of her children, including the youngest one, was in breach of that positive obligation because at the time the first-instance decision to that effect of 19 November 2010 (see paragraph 26 above) became final on 24 February 2011 (see paragraph 28 above) that obligation no longer existed due to the applicant's own actions. Nor can it be argued, given the short period of time during which that obligation existed, that the domestic courts had failed to discharge it by not acting expeditiously in the proceedings for the return of children (see, *a fortiori*, *Strömblad v. Sweden*, no. 3684/07, §§ 91-94, 5 April 2012).

72. It follows that the applicant's complaints under Article 8 of the Convention concerning the alleged breaches of the State's positive obligation to reunite her with her youngest child, are inadmissible as manifestly ill-founded under Article 35 § 3 (a) of the Convention and must be rejected pursuant to Article 35 § 4 thereof.

(β) *As regards the award of custody*

73. On the other hand, the Court considers that the applicant may claim to be a victim of the violation of her right to respect for her family life to the extent that her complaint under Article 8 of the Convention concerns the award of custody of her youngest child. In this connection the Court first notes that the applicant and her former husband never agreed on the custody of their youngest child (see paragraph 37 above). While it is true that the applicant has been living with that child since 19 November 2010 (see paragraph 43 above), that fact is not, in the Court's view, sufficient to deprive her of her victim status.

74. The Court reiterates in this respect that domestic measures hindering enjoyment of family life, such as a decision granting custody of children to a parent, constitute an interference with the right to respect for family life (see, for example, *Hoffmann v. Austria*, 23 June 1993, § 29, Series A no. 255-C, and *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 171, 27 September 2011).

75. It further reiterates that in the context of complaints under Article 8 of the Convention concerning the right to respect for home it held that the mere existence of a final judgment ordering an applicant to vacate the flat amounted to an interference with that right as long as such judgment could be enforced (see, for example, *Bjedov v. Croatia*, no. 42150/09, §§ 59-62, 29 May 2012 and the cases cited therein). It considers that the same applies to judgments awarding custody of children, namely, that the mere existence of such a judgment constitutes an interference with the right to respect for family life of the non-custodial parent, notwithstanding the fact that the judgment has not yet been executed.

76. Even though in the present case the applicant under Austrian law (see paragraph 50 above) has no obligation to return her youngest child to her former husband, she does under Croatian law. That is so because the Vinkovci Municipal Court's judgment of 19 November 2010 ordering that all three of the applicant's children were to live with their father (see paragraph 41 above) remains valid and enforceable on the territory of Croatia, which the applicant has to enter in order to exercise her access rights in respect of the two older children. In particular, the judgment in question, apart from awarding the custody of the applicant's children to their father, specifies that she is to exercise her access rights by taking the children to her home in Austria (see paragraph 41 above), which necessarily entails the applicant entering Croatia with a view to taking them to Austria.

77. In view of the above considerations (see paragraphs 73-76), the Court considers that the Vinkovci Municipal Court's judgment of 19 November 2010 constitutes, in so far as it concerns her youngest child, an interference with the applicant's right to respect for her family life guaranteed by Article 8 § 1 of the Convention. Consequently, she can (still) claim to be a victim of the violation complained of.

78. It follows that the applicant's complaint under Article 8 of the Convention concerning the award of custody of her youngest child, is not inadmissible for lack of victim status and that the Government's objection to that effect must be dismissed.

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

B. Merits

1. The parties' arguments

(a) The Government

80. The Government submitted that the decisions by the Croatian courts that all the applicant's children, including the youngest child, would live with her former husband, while granting the applicant access rights, had not violated her right to respect for her family life.

81. In that connection the Government first conceded that the domestic court had not referred the parties for mediation. However, mediation was to take place only if the judge at the first hearing referred the parties because they had been unable to agree on the legal consequences of the divorce, including those concerning the children (see paragraph 52 above). In the instant case the parties had asked that the first hearing be adjourned so that they could reach an agreement on the custody of their children (see paragraph 36 above).

82. The Government further submitted that the domestic courts' decision that the applicant's children, including the youngest one, were to live with their father had had the legitimate aim of protecting the children's interests. It had also struck a fair balance between the competing interests of the children, the parents and the public order, bearing in mind that the children's best interests were the primary consideration in matters relating to their custody.

83. In particular, the courts had ordered that the applicant's two older children would live with their father because: (a) those children had wanted to continue living with him in Croatia; (b) the parties had agreed to that arrangement; and (c) the life in Komletinci had been less stressful for the children than living in Austria (see paragraphs 41-42, 45 and 47 above). They had relied on the report and the opinion of the local social welfare centre, according to which it had been in the children's interests not to change school and social setting, and to stay together as they were emotionally very close (see paragraphs 34-35 and 38 above). Against that background, the domestic courts had established that it was in the best interests of the children not to separate them. They therefore granted their father also custody of the youngest child (see paragraphs 41-42, 45 and 47 above), despite the applicant's opinion that given that child's age it would have been better if she lived with her in Austria (see paragraph 38 above).

84. Having regard to the margin of appreciation left to the States in family matters, the Government considered that the domestic courts in the present case, when deciding that it had been in the best interests of the children to live with their father, had struck the right balance between the applicant's right to live with her children and the children's best interests. In rendering their decisions, the courts had taken care to preserve the relationship between the children and their family and at the same time ensure the children's development in a healthy environment. In so doing, they had taken into consideration the age of the children, their level of maturity, various emotional and psychological factors, the children's close relationship with one another, and the overall family situation.

85. Lastly, the Government averred that the domestic courts had respected the procedural requirements implicit in Article 8 of the Convention. In particular, those courts had carefully examined all the evidence, taken into account the specific circumstances of the case, the best interests of the children and their rights. They had given reasons for their decisions, against which the applicant had had the right to lodge remedies, of which she had availed herself.

(b) The applicant

86. The applicant argued that the final judgment in the civil proceedings for divorce and custody had been rendered before the decision on her request in the proceedings for the return of children, which was contrary to

Article 16 of the Hague Convention (see paragraph 54 above). The applicant further argued that no mandatory mediation procedure had taken place before the civil proceedings for divorce and custody had commenced, contrary to sections 44(1) sub-paragraph 1 and 45(4) of the Family Act (see paragraph 52 above).

2. *The Court's assessment*

87. Given that the Court has already established that the Vinkovci Municipal Court's judgment of 19 November 2010 (see paragraph 41 above), which was upheld by the Vukovar County Court's judgment of 23 February 2011 (see paragraph 45 above), constituted, in so far as it concerns her youngest child, an interference with the applicant's right to respect for her family life guaranteed by Article 8 § 1 of the Convention (see paragraph 77 above), it must further examine whether that interference was justified in terms of Article 8 § 2. It reiterates that any such interference constitutes a violation of that Article unless it is "in accordance with the law", pursues a legitimate aim and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, for example, *Diamante and Pelliccioni*, cited above, § 171).

88. The Court finds no reason to question that the interference with the right to respect for her family life in the applicant's case pursued a legitimate aim of protecting the rights and freedoms of others, namely the rights of her children. It however considers that in the present instance the issues of lawfulness of that interference and its necessity are closely interconnected. The Court will therefore examine them together (see, *mutatis mutandis*, *M.S. v. Croatia*, no. 36337/10, § 94, 25 April 2013).

89. The Court reiterates that in assessing the necessity of an interference, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation. The Court recognises that the authorities enjoy a wide margin of appreciation when deciding on custody. Where the measures at issue concern parental disputes over their children, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact and custody disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their margin of appreciation. However, that does not mean that in this sphere its review is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced by the domestic courts were

relevant and sufficient. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance (see, for example, *Diamante and Pelliccioni*, cited above, §§ 174, 176 and 182).

(a) As regards the domestic courts' omission to refer the applicant and her former husband for mandatory mediation before the divorce

90. Turning to the specific circumstances of the present case, the Court finds it appropriate first to address the applicant's argument (see paragraph 86 above) that the domestic courts had proceeded in the civil proceedings for divorce and custody without requesting the parties to undergo mediation beforehand, contrary to section 44(1) sub-paragraph 1 and 45(4) of the Family Act (see paragraph 52 above). The Court notes that section 44(1) sub-paragraph 1 of the Family Act indeed provides for a mandatory mediation procedure where, as in the instant case, the civil proceedings for divorce are instituted by a joint petition for divorce and the spouses have minor common children in relation to which they exercise parental responsibility (see paragraphs 36 and 52 above). The Government admitted that the Vinkovci Municipal Court had not referred the parties for mediation but explained that it had not done so because it had accepted a request lodged by the applicant and S.V. to adjourn the first hearing so that they could agree on the legal consequences of the divorce affecting their children, including the children's future residence (see paragraphs 36 and 81 above). According to the Government, under section 46(1) of the Family Act (see paragraph 52 above) the court could have referred the parties for mediation only at the first hearing (see paragraph 81 above). Since the first hearing was adjourned at the request of the parties, it was unable to refer them at the second hearing, despite being informed at that hearing that the parties had been unable to agree on the custody of their youngest child (see paragraphs 36-37 and 81 above).

91. The Court finds it difficult to accept this argument by the Government. As the text of section 46(1) and (2) of the Family Act (see paragraph 52 above) suggests, the purpose of the mandatory mediation procedure before divorce is not only to reconcile the spouses with the help of a trained professional but also to facilitate an agreement on the legal consequences of the divorce, including the custody of the children and contacts with the non-custodial parent. In view of the importance of mandatory mediation before divorce for the (future) welfare of the children, the Court cannot accept that this procedure could be dispensed with in such a blithe and formalistic way, as the Government have suggested. It is clear to the Court that the Vinkovci Municipal Court was allowed to adjourn the first hearing in the case for the reasons as stated. However, it is equally evident that once the parties had informed the court at the second hearing that they could not agree on the custody of their youngest child (see paragraph 37 above), the first-instance court was required, under

section 44(1) sub-paragraph 1 of the Family Act (see paragraph 52 above), to refer them for mediation. However, it did not do so.

92. While it is true that under section 45(3) of the Family Act the mandatory mediation procedure may be dispensed with if, as in the present case, one of the spouses lives abroad, the Court also notes that section 45(4) provides for an exception in cases where there are no significant difficulties for the spouses to participate in the mediation procedure (see paragraph 52 above). In the applicant's case the Vinkovci Municipal Court did not rely on section 45(3) of the Family Act to justify its failure to refer her and S.V. for mediation, let alone examine whether the conditions set forth in section 45(4) had been met (see paragraph 42 above).

(b) As regards the failure of the domestic courts to stay the divorce and custody proceedings pending the final outcome of the return proceedings

93. The applicant also argued that the civil proceedings for divorce and custody had been concluded by a final judgment before the proceedings for the return of children had come to an end by a final decision, contrary to Article 16 of the Hague Convention (see paragraphs 54 and 86 above).

94. The Court first notes in this connection that Croatia is bound by the Hague Convention since 1 December 1991 (see paragraph 53 above). It further reiterates that in child abduction cases it has held that Article 16 of the Hague Convention sought to ensure that the custody proceedings do not prejudice those concerning the child's return, and therefore required a stay of the proceedings on the merits of rights of custody until a decision has been taken on the child's return (see *Carlson v. Switzerland*, no. 49492/06, § 75, 6 November 2008) or deferring the judgment on custody until the Hague Convention proceedings have been finalised (see *Iosub Caras v. Romania*, no. 7198/04, § 34, 27 July 2006).

95. The Court observes that in the instant case the domestic courts did not stay the custody proceedings, and that the first-instance judgment in those proceedings had been adopted on 19 November 2010, that is, three and a half months before the decision concerning the applicant's request for the return of her children became final on 24 February 2011 (see paragraphs 26, 28 and 42 above). It would therefore appear that those courts acted contrary to Croatia's international obligations under Article 16 of the Hague Convention.

96. This finding does not call into question the Court's above conclusion that the issue of applicability of the Hague Convention could be left open in the present case (see paragraph 66). That is so because the duty under Article 16 thereof to stay custody proceedings until a decision has been taken on the child's return arises as soon as the return proceedings are instituted, regardless of the fact that those return proceedings may eventually lead to a finding that the said Convention did not apply in a particular case.

(c) As regards the failure of the domestic courts to examine what was in the best interests of the youngest child

97. The Court reiterates that in the present instance the domestic courts decided that all three of the applicant's children were to live with their father. That decision thus included also her youngest child, who was aged four and a half at the time and in respect of whom the applicant maintained throughout the domestic proceedings that the child was very emotionally attached to her. Nonetheless, the domestic courts decided that the applicant's youngest daughter was to live with her father because they considered that to be in the children's best interests. The courts based their decision on the view of the local social welfare centre, according to which it was not advisable to separate the children as they were emotionally very attached to each other (see paragraphs 39, 42, 45 and 47 above).

98. At this juncture the Court finds it important to emphasise that it attaches great importance to maintaining family ties between siblings. In particular, in *Mustafa and Armağan Akin* case it was struck by the absence of reasoning justifying the separation of the siblings, and held that maintaining the ties between them was too important to be left to the discretion and whim of their parents (see *Mustafa and Armağan Akin v. Turkey* (no. 4694/03, §§ 23-24, 6 April 2010).

99. However, the child's best interests may not always coincide with those of his or her siblings. The Court has acknowledged this in the *Cristescu* case where it held that the domestic authorities had had a sufficient evidentiary basis (including statements made by witnesses, psychological and other expert assessments, and the parties' – the children's and the parents' – own wishes) for the decision to separate the two brothers even if the separation had eventually proved to have had a negative effect on the smooth continuation of the relationships within the family (see *Cristescu v. Romania*, no. 13589/07, § 62, 10 January 2012).

100. In the Court's view the reasoning of the domestic courts in the present case (see paragraph 97 above) suggests that they examined what was in the best interests of all three children taken as a group, without undertaking a separate examination of what was in the best interests of each child. In particular, the courts did not explain why they considered that it was in the best interests of the applicant's youngest child to live together with her siblings (and the father) instead with her mother and rejected, without adducing relevant reasons, the applicant's proposal to obtain a joint expert opinion from a psychiatrist and a psychologist aimed at establishing what was in the best interests of that particular child (see paragraphs 38, 41-42 above).

101. In this respect the Court refers to the General Comment no. 14 of the Committee on the Rights of the Child according to which potential conflicts between the best interests of a child, considered individually, and those of a group of children have to be resolved on a case-by-case basis,

carefully balancing the interests of all parties and finding a suitable compromise (see paragraph 56 above).

102. Had the domestic courts in the applicant's case examined separately what was in the best interests of each individual child their decision might have been different. In particular, had they established that it was in the best interests of the youngest child to live with her mother, this could have reflected on the applicant's right to family life as it would have significantly strengthened her position in finding a fair balance between all the interests involved.

103. The Court is therefore of the opinion that the analysis conducted by the domestic courts before reaching the decision that all three of the applicant's children were to live with their father was not sufficiently thorough. Consequently, the reasons they adduced for their decisions cannot be regarded as "relevant and sufficient"

(d) Conclusion

104. In view of the shortcomings identified above (see paragraphs 90-103), the Court finds that the interference with the applicant's right to respect for her family life was not justified in terms of Article 8 § 2 of the Convention.

105. There has accordingly been a violation of that Article in the present case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

106. The applicant also complained that the principle of equality of arms had not been respected in the civil proceedings. In particular, she complained that she had not participated in the family assessment procedure carried out by the Vinkovci Social Welfare Centre, which had led to the adoption of the report on which the domestic courts had heavily relied when awarding custody of her children to her former husband. She relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

107. The Government contested that argument.

108. The Court notes that this complaint is linked to those examined above and must therefore likewise be declared admissible.

109. Having regard to the finding relating to Article 8, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 6 § 1 of the Convention (see *Hunt v. Ukraine*, no. 31111/04, §§ 61-66, 7 December 2006).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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

111. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

112. The Government contested that claim.

113. The Court notes that the applicant can institute proceedings under section 102 of the Family Act (see paragraph 52 above) and seek reversal of custody in respect of her youngest child relying on substantially changed circumstances (see paragraphs 43 and 48-50 above). Having regard to this, to the specific circumstances of the case and to the grounds on which it has found a violation of Article 8 of the Convention, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage sustained.

B. Costs and expenses

114. The applicant also claimed EUR 4,206 for the costs and expenses incurred before the domestic courts and EUR 5,000 for those incurred before the Court.

115. The Government contested these claims.

116. 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 considers it reasonable to award the sum of EUR 1,220 for costs and expenses in the domestic proceedings and EUR 850 for the proceedings before the Court.

C. Default interest

117. The Court considers it appropriate that the default interest rate 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, UNANIMOUSLY,

1. *Declares* the complaint concerning the award of custody of the applicant's youngest child admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,070 (two thousand and seventy euros) in respect of costs and expenses, to be converted into Croatian kunas at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Elisabeth Steiner
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Møse is annexed to this judgment.

E.S.
A.M.W.

CONCURRING OPINION OF JUDGE MØSE

1. The judgment concludes that the Croatian courts' decisions according to which the youngest of the three children should live with her father and not with the mother amount to a violation of Article 8. This is based on an examination of the issues of lawfulness and necessity together (see paragraphs 88-105 of the judgment). I do not fully agree with the reasoning in that part of the judgment.

2. In my view, the domestic courts' omission to refer the applicant and her former husband for mandatory mediation before the divorce (which is discussed in paragraphs 90-92 of the judgment) is not a strong argument for finding a violation. In the light of the factual circumstances of the present case, the significance of this statutory requirement – which was not absolute – should not be exaggerated.

3. The judgment then addresses the failure of the domestic courts to stay the divorce and custody proceedings pending the final outcome of the return proceedings (see paragraphs 93-96). The conclusion is that it “would appear” that the domestic courts acted contrary to Croatia's international obligations under Article 16 of the Hague Convention. It is certainly important that States observe the provisions of that Convention but a possible failure to do so in the present case (see paragraphs 66, 95 and 96) is not a decisive argument in favour of finding a violation of Article 8 of the European Convention.

4. According to the judgment, the reasoning of the domestic courts suggests that they examined what was in the best interests of all three children taken as a group without undertaking a separate examination of what was in the best interests of each child (see paragraphs 97-103). In my view this formulation is too general. It does not take into account the fact that the national authorities to some extent took into consideration the specific situation of the youngest child (see paragraphs 25, 26, 35 and 45). Furthermore, the authorities emphasised on several occasions that the children were emotionally attached to each other and that it was not advisable to separate them (see paragraphs 39, 42, 45 and 47). This is a well-known consideration in custody cases, one which has been accepted under the Convention (see paragraph 98).

5. On the other hand, the situation was clearly complex and required particular focus on the interests of the youngest child. It is not clear why the applicant's proposal to obtain a joint expert opinion about the child from a psychiatrist and psychologist was rejected. An expert opinion would also have been in line with the General Comment of the Committee on the Rights of the Child (see paragraphs 100-101). I therefore agree that there was a violation of Article 8.