



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

FIRST SECTION

CASE OF C v. CROATIA

(Application no. 80117/17)

JUDGMENT

Art 8 • Respect for family life • Custody proceedings involving minor and subsequent enforcement • Failure to appoint special guardian *ad litem* in circumstances contrary to domestic and international legal standards • Minor not heard in person by competent judicial authorities contrary to domestic and international legal standards • Decision-making process irredeemably undermined by procedural flaws

STRASBOURG

8 October 2020

FINAL

08/01/2021

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

In the case of C v. Croatia,

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

Krzysztof Wojtyczek, *President*,

Ksenija Turković,

Linos-Alexandre Sicilianos,

Aleš Pejchal,

Armen Harutyunyan,

Pere Pastor Vilanova,

Pauliine Koskelo, *judges*,

and Abel Campos, *Section Registrar*,

Having regard to:

the application (no. 80117/17) 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 a Croatian national, Mr C (“the applicant”), on 16 November 2017;

the decision to give notice of the applicant’s complaint concerning the respect for his family life to the Croatian Government (“the Government”) and to declare the remainder of the application inadmissible pursuant to Rule 54 § 3 of the Rules of Court;

the decision not to have the applicant’s name disclosed;

the parties’ observations;

Having deliberated in private on 8 September 2020;

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

INTRODUCTION

1. The case concerns the right of a child to be heard in custody proceedings, as well as the need to appoint a special guardian *ad litem* to protect the child’s interests. The applicant relied on Article 8 of the Convention.

THE FACTS

2. The applicant was born in 2006 and lives in Rijeka. He was represented before the Court by his mother, A, and by Ms J. Biloš, a lawyer practising in Zagreb.

3. The Government were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Divorce and custody proceedings

5. By a judgment of 14 January 2010, the applicant's parents' marriage was dissolved. It was decided that the applicant would live with his mother, while contact sessions between him and his father, B, were to take place on the basis of a mutual agreement between the parents.

6. Following appeals by both parties, on 29 April 2010 the second-instance court quashed the divorce judgment of 14 January 2010 (see paragraph 5 above) and remitted the case, stating that it was necessary to determine the exact schedule of the contact sessions.

7. In the resumed proceedings, on 22 October 2010, the first-instance court gave judgment according to which contact sessions between B and the applicant were to take place on Wednesday afternoons, every other weekend including an overnight stay, every other public holiday, and during a part of the summer holidays. That judgment became final.

8. On 3 November 2011 supervision of both parents' parental care (*nadzor nad izvršenjem roditeljske skrbi*) was imposed for a period of six months. That measure was subsequently prolonged at regular intervals.

B. Alleged sexual abuse and suspension of contact

9. In January 2012, A came to the X Social Care Centre ("the Centre"), stating that she suspected that B had sexually abused the applicant. She also lodged a criminal complaint in that connection (see paragraph 48 below).

10. In response, the head of the supervision measure made an unannounced visit to B's house, where he found the applicant cheerful, not frightened, and showing affection to B. The father fully denied the mother's allegations of abuse. The Centre also contacted the X Counselling centre and arranged an evaluation of the family. The Counselling centre subsequently interviewed A and B and held seven meetings with the applicant.

11. On 11 January 2012 A lodged an application for an interim measure to suspend contact between B and C. After holding a hearing, on 1 March 2012 the first-instance court accepted A's proposal in order to protect the applicant's best interests. On appeal, the second-instance court amended that decision, limiting the duration of the suspension of contact until the end of June 2012. This measure was ultimately prolonged until the final conclusion of the proceedings concerning the alleged sexual abuse.

12. On 10 July 2012 the first-instance court ordered a psychological and psychiatric expert evaluation involving the applicant and both of his parents in order to establish whether B had sexually or otherwise abused C.

13. On 18 October 2012 the X Polyclinic delivered its opinion to the first-instance court concluding that there had been no signs of sexual abuse by B. It also observed that C was growing up in disrupted circumstances

following the divorce of his parents and that he had been burdened with A's negative attitudes towards his father. In addition to other aspects of the mother's inappropriate behaviour (isolation, ignorance, manipulation), in the experts' opinion, the facts of the case indicated emotional abuse of the applicant by his mother and it was recommended that family and legal protection measures be taken to protect the applicant from possible further emotional abuse by A. A objected to the findings of the expert opinion, claiming that its assessment had not been conducted according to the relevant court order (see paragraph 12 above).

14. On 5 December 2012 the first-instance court rejected A's application for suspension of contact between B and C, as established by the judgment of 22 October 2010 (see paragraph 7 above). That decision was quashed on appeal, the second-instance court stating that the first-instance court had failed to reply to the objections raised by A to the findings of the X Polyclinic's expert opinion.

15. On 29 January 2013 the Centre issued a warning to A, pointing out her mistakes and shortcomings in the upbringing of and care for the applicant due to her lack of cooperation and disregard of his best interests.

16. On 19 June 2013 the first-instance court ordered an additional multidisciplinary psychological and psychiatric expert opinion in order to clarify the objections raised by A.

17. On 3 September 2013, the expert witnesses of the X Polyclinic clarified their previous findings, confirming that there had been no suspicion of abuse by the father, while the mother's actions had been dangerous for the child and his future development. On 7 November 2013 the experts made additional observations regarding the objections raised by A, stating that the expert assessment had been conducted according to the court order and reiterated that there had been no sexual abuse of C.

18. At the hearing held on 17 December 2013, A again applied for suspension of contact between B and C. On 30 September 2014 the first-instance court rejected her application because it had been established that B had not abused the applicant. On 7 January 2015 the second-instance court dismissed an appeal lodged by A.

C. Second set of custody proceedings

19. Meanwhile, on 28 November 2012, B brought a petition to amend the custody decision concerning the applicant, referring to the findings of the expert opinion dated 18 October 2012 that the mother had been emotionally abusing the applicant (see paragraph 13 above).

20. On 15 November 2013 a psychiatric and psychological evaluation was ordered.

21. On 13 June 2014 the first-instance court received the experts' opinions, recommending that the applicant live with his father and have

regular contact with his mother. The relevant parts of the experts' opinions read as follows:

“There is no doubt that [the applicant] is in a symbiotic relationship with his mother, and that such a relationship is a result of the mother's inappropriate parental behaviour. At the present stage of [the applicant's] psycho-sexual development (latency), the symbiotic relationship between him and his mother is not appropriate for [the applicant's] normal psychophysical development. Therefore, the regressive behaviour showed by [the applicant], which was visible during the evaluation, is not surprising. The consequences of the symbiotic relationship could be detrimental to the psychological health of [the applicant], who is already showing [symptoms of] psychological dysfunction. The symbiosis between [the applicant] and his mother should be resolved. The current dynamics of family relationship ... offers only one solution, namely that [the applicant's care and custody] be entrusted to his father. Since the mother shows an inability to perceive her parenting behaviour as harmful, the continuation of [the applicant's] life with his mother would only exacerbate his poor mental health, whereas he already manifests inadequate psychological functioning with regard to his age as well as ... adjustment disorders, on the basis of the evaluation of the specialist of paediatric psychiatry, Dr. K., which were manifested during this evaluation as strong intra-psychological tension, irritability, psycho-motor disorder, emotional lability and short anger episodes that reached the level of agitation.

At the present stage of the psycho-physical development of the child, it is not important which parent is more engaged in his upbringing and care; it is important for both parents to participate for the purpose of further psychosexual development of the child. Therefore, it is important for [the applicant] while a minor to have a continuous relationship with both his mother and father.”

In view of the above, the question is: what is the most appropriate measure of protection for a child in the developmental stage of latency, who remains in an inappropriate symbiotic relationship with his mother, and the father nevertheless proves to be the parent who is able to better protect the interests of the child (as perceived by all institutions, including this expert evaluation). Abrupt separation from his mother threatens disintegration and a developmental crash. Gradual separation opens the possibility for the mother, driven by her frustration, immaturity and fears, to increase the pressure on [the applicant]. It seems that the unresolved symbiotic relationship with the mother, for which she rather than the child bears responsibility, may only be interrupted in the future ‘violently’ – either by an adult or by the child himself, again accompanied by a developmental crash (for example conflict with the symbiotic parent in the upcoming adolescence and ‘chain dissipation’ which carries the risk of developing a disorder typical of the developmental stage of adolescence: defiance, rebellion, emotional or behavioural disorder, shifting dependence on other objects – dysfunctional peer groups or psychoactive agents; or the opposite – by regressing to the psychotic level of functioning ... Therefore, as the suspicion of sexual abuse by the father is multiply unjustified, as the mother has isolated the child from both his father and all other family members, as the mother-child symbiotic relationship may only be interrupted ‘violently’, as the symbiotic relationship with the mother and her functional deviations pose the main developmental risk for [the applicant], in our view the most appropriate measure of protection of [the applicant] would be to entrust his care in the future to his father, who stands out as a more adequate parent for the further psychophysical development of the child. We emphasise that the relationship between [the applicant] and his mother must remain continuous; we therefore suggest regular meetings between the two. Over time, when

the situation finally stabilises, when the child ceases to be a ‘patch’ in the dysfunctional parental relationship, when he is convinced that he has both his mum and dad – his developmental potential could be released.”

22. At the hearing held on 11 March 2015, A submitted the findings of a psychologist, J.H., whom she had privately hired. They stated that, prior to enforcing any measure, it would be necessary for both parents to undergo psychotherapy and to gradually establish communication and an emotional bond between B and the applicant, taking the child’s needs into consideration in the process.

23. On 3 June 2015 the first-instance court gave judgment, ordering that the father have custody of the applicant and ordering a schedule for contact with the mother. The relevant part of that judgment reads as follows:

“The Court entirely accepted as competent and complete the findings and opinions of the expert witnesses, whose claims did not contradict the conclusions of the experts involved in the relationship between the parties, according to which it is considered that the parents of the minor [applicant] do not have a minimum joint performance, or minimum parental cooperation in relation to their shared child. The minor [applicant] is more burdened by his mother’s negative attitudes towards his father, than with his father’s negative attitudes towards the mother and he follows the instructions of this mother. The ‘symbiotic attachment of the mother’ to the child is being encouraged by the [mother], suggesting that the [mother] does not allow access to any other person that could endanger this symbiosis; therefore, instead of becoming ever more mature and independent, [the applicant] shows regressive developmental tendencies and still uses baby talk. Therefore, the father stands out as the parent who protects the child’s interest better than the mother, and taking into consideration that the suspicion of abuse by the father has proven unjustified, it is in the interest and for the benefit of [the applicant for his care] to be entrusted to his father, who stands out as a more adequate parent for the further psychophysical development of the child and who could establish better parental co-operation.

The court considers that the evidence in the case show that [the applicant] had been emotionally abused by his mother, and that [his mother] has been focusing more on resolving the mutual conflict with [his father] rather than on meeting the needs of [the applicant], in particular developing a close relationship between him and his father.

During the proceedings, the court issued two interim measures in order to re-establish contact between the father and [the applicant], and although the meetings had initially started taking place, they were eventually discontinued because, as the [mother] stated, [the applicant] did not want to see his father, although the authorities, who had continuously attempted to help the parents, established that it was the mother who showed inappropriate parental behaviour expressing her negative attitudes towards the father, as well as isolating, ignoring and manipulating the child.

Therefore, the court concludes that the father proves to be the parent who is able to better protect the interests of the child, accept expert suggestions and help, cooperate with the authorities and who is guided by the child’s best interests rather than by his own.”

24. The first-instance court also issued a provisional measure, ordering that the applicant was to live with his father until the final conclusion of the court proceedings.

25. On 2 October 2015 the second-instance court dismissed A's appeal against the above judgment. The applicant then lodged a constitutional complaint, which was dismissed by the Constitutional Court on 27 April 2017.

D. Enforcement proceedings

26. In the meantime, on 2 July 2015, during a conversation with a lawyer from the Centre, A stated that she would not act in accordance with the judgment of 3 June 2015 (see paragraph 23 above). She was warned of the consequences of non-compliance with that judgment.

27. On 8 July 2015 A stated at the police station that she refused to hand over the child to his abusive father.

28. On 30 December 2015 B lodged an application for enforcement of the judgment of 3 June 2015 (see paragraph 23 above).

29. On 15 January 2016 the first-instance court issued an enforcement order, ordering A to immediately hand over the applicant to B.

30. An enforcement attempt scheduled for 11 March 2016 was unsuccessful because the applicant and A were not found at their address.

31. On 30 March 2016 A was fined 10,000 Croatian kunas (HRK) for failing to act in accordance with the enforcement order.

32. On 8 April 2016, A and B were invited to the Centre to attempt to reach an agreement. Both parents expressed their willingness to cooperate and B subsequently informed the court bailiff that he temporarily waived enforcement. Enforcement was ultimately continued since A had failed to respond to further calls by the Centre for the purpose of arranging contact sessions.

33. On 8 April 2016 A applied for postponement of the enforcement, claiming that she had not been aware of a previous enforcement attempt and that she had been served the enforcement order only on 7 April 2016. She proposed that enforcement be postponed until the Constitutional Court had decided on C's constitutional complaint (see paragraph 25 above). Her application was dismissed.

34. On 15 June 2016 the judgment of 3 June 2015 (see paragraph 23 above) was enforced at the playground of the applicant's school during his football training, in the presence of court bailiffs, police officers and representatives of the Centre. After a short conversation with his father, the applicant agreed to go home with him. Later that day, the applicant ran away from B's home and went back to his mother.

35. On 16 June 2016 the first-instance court issued a ruling declaring the enforcement final and rejected an appeal lodged by A.

36. A did not lodge a constitutional complaints against any of the decisions issued in the enforcement proceedings.

37. It would appear that B again applied for enforcement of the judgment of 3 June 2015 (see paragraph 23 above), but that those enforcement proceedings were stayed pending the outcome of the third set of custody proceedings (see paragraph 39 below).

E. Third set of custody proceedings

38. On 21 June 2016 A was summoned to appear at the Centre, where she stated that on the evening following the enforcement the applicant had come to her of his own motion, visibly frightened, and that she had taken him to a children's hospital for examination.

39. On 21 September 2016, A lodged a civil action against B, requesting amendment of the judgment of 3 June 2015 (see paragraph 23 above) and applying for an interim measure to order that the applicant's temporary residence be set with her.

40. According to an expert opinion issued in May 2017, it was recommended that the applicant live with his mother for a period of six months, during which time he and B were to undergo psychotherapeutic treatment in order to resolve their conflicts. It was also stated that, should the mother continue to obstruct the applicant's contact with his father, it would be best for the applicant to be temporarily separated from both his parents.

41. On 8 September 2017 the first-instance court issued an interim measure, by which the applicant was temporarily to live with A, whereas B was to be allowed supervised contact.

42. During the proceedings, both parents and the applicant underwent a combined psychological and psychiatric evaluation. As a result, on 24 January 2018 the Centre issued a "measure of supervision of personal relations" (*mjera nadzora nad ostvarivanjem osobnih odnosa*) between B and C, for a period of six months, subsequently renewing it once. During that period, the applicant had supervised contact with his father once a week for two hours.

43. These proceedings were suspended until the final conclusion of the proceeding concerning the applicant's temporary placement outside the family (see paragraph 44 below). They are still ongoing.

F. Proceedings concerning the applicant's placement outside the family

44. Relying on the recommendation of the expert opinion from May 2017 (see paragraph 40 above), on 1 March 2019 the Centre applied to the court to have A's right to live with the applicant revoked and for him to be temporarily placed outside the family in a competent care institution for a period of one year, while ensuring his contact with both parents. In the centre's opinion, the mother's behaviour and her inappropriate and negative

attitude towards the father had caused the applicant's further alienation from the latter and refusal to have closer contact with him. In the Centre's opinion, the mother's actions had amounted to emotional abuse of the child.

45. The mother opposed the Centre's proposal, and so did the applicant's specially-appointed guardian *ad litem*, claiming that such an action was not in his best interest.

46. On 12 April 2019 the Rijeka Municipal Court dismissed the Centre's application, finding no reason for the placement of the applicant in a children's home. The applicant, who was 13 years old, had lived with his mother since birth, had been severely traumatised by the enforcement of the court judgment ordering him to live with his father (see paragraph 34 above) and strongly opposed placement in a children's home. In any event, the court noted that the proposed children's home had no available places and that B and the applicant were still undergoing the psychotherapeutic treatment recommended by experts (see paragraph 40 above).

47. Following an appeal by the Centre, on 9 August 2019 the Zagreb County Court upheld the first-instance decision.

G. Relevant criminal proceedings

48. On 11 January 2012, A reported her suspicions that B had sexually abused the applicant to the police (see paragraph 9 above). Following an investigation, on 19 March 2014 the State Attorney's Office dismissed A's complaint, finding that there had been no reasonable suspicion that B had committed the criminal offence he was accused of. A subsequent application on the part of A to have investigative actions in respect of B conducted was dismissed.

49. In another set of proceedings, based on the results of the investigations carried out and in particular the opinion of the combined expert evaluations and the suspicion that A had emotionally abused the applicant (see paragraphs 13 above), on 12 September 2014 an indictment for the criminal offence of violation of a child's rights was issued against A. These proceedings are ongoing.

50. On 7 July 2015, B brought criminal charges against A for the criminal offence of failing to implement a decision on the protection of the child's well-being and an indictment against A was issued on 20 October 2015. The indictment was confirmed on 6 October 2017 and those proceedings are ongoing.

RELEVANT LEGAL FRAMEWORK

A. Relevant domestic law

51. The relevant provisions of the Family Act 2003 (*Obiteljski zakon*, Official Gazette no. 163/03 with subsequent amendments), which was in force between 22 July 2003 and 31 October 2015, read as follows:

Section 89

“(1) A child is entitled to seek protection of his or her rights before the relevant authorities, which must inform the social-care centre [*Centar za socijalnu skrb*] thereof.

(2) The child is entitled to a special guardian *ad litem* in cases specified by this Act.

(3) The special guardian shall be appointed by the social-care centre in cases where another authority is deciding on the infringement of the child’s right, and by the court when the social-care centre is competent to decide on a right of the child.

(4) The special guardian shall submit a report on the representation of the child at the request of, and within the time-limit set forth by, the authority that appointed him or her.

(5) In proceedings involving decisions on the child’s right or interest the child is entitled to be informed in an appropriate way of the relevant circumstances of the case, obtain advice and express his or her views, and to be informed of the possible consequences of [those] views. The [child’s] views shall be given due weight in accordance with his or her age and maturity.”

Section 167

“In order to protect certain personal and pecuniary rights and interests the social-care centre shall appoint a special guardian *ad litem* ...

6. ... in other cases where the interests of the child conflict with those of the parents.”

52. The relevant provisions of the Family Act 2015 (*Obiteljski zakon*, Official Gazette no. 103/15), which came into force on 1 November 2015, reads as follows:

Section 86

“2. ... In all proceedings involving decisions on the child’s right or interest the child is entitled to be informed in an appropriate way of the relevant circumstances of the case, obtain advice and express his or her views, and to be informed of the possible consequences of [those] views. The [child’s] views shall be given due weight in accordance with his or her age and maturity.”

Section 360

“(1) In proceedings concerning personal or proprietary rights and interests of the child, the court will enable the child to express his or her opinion, unless the child declines.

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(2) The court shall enable the child to express his or her opinion in an appropriate place and in the presence of a professional, if it considers that necessary in the circumstances of the case.

(3) In an exception to paragraph 2 of this section, in the case of a child younger than 14 the court shall enable his or her opinion to be expressed by way of a special guardian *ad litem* or another professional person.

(4) The [competent] court is not under an obligation to obtain a child's opinion in cases where there are particularly important reasons, which shall be explained in the decision.

(5) Every child under paragraph 1 of this section needs to be informed of the subject, evolution and possible outcome of the proceedings in a manner appropriate to his or her age and maturity, in so far as that does not present a danger to the development, education or health of the child.

(6) The obligation provided in paragraph 5 of this section is incumbent on the special guardian *ad litem*, the court or an expert from the [competent social-care authority], depending on the circumstances of the case, which the court shall take into account."

Section 536

"(1) If it is impossible to reach an agreement in matters concerning the personal rights of the child, which raise the issue of with which parent ... a child will live, ...the court may of its own motion or following a proposal by the child or a parent decide on the matter by an interim measure.

...

(4) If the interests of the child and the parents are in conflict, the child under paragraph 1 of this section shall be represented by a special guardian *ad litem* appointed by the [relevant] social-care centre....

(5) In proceedings as those under paragraph 1 ... of this section, the court shall enable the child to express his or her opinion in accordance with section 360 of this Act. ..."

B. Relevant international law

53. The relevant international law has been summarised in *M. and M. v. Croatia*, no. 10161/13, §§ 94-99, 102, ECHR 2015 (extracts).

THE LAW

I. PRELIMINARY ISSUE

54. At the outset the Government expressed their concerns about the fact that the applicant was represented by his mother in the proceedings before the Court. A had a strong conflict of interest with the applicant. The lawyer representing C before the Court had previously represented A before the domestic authorities. The Government pointed out that the expert findings obtained in the various domestic proceedings had clearly indicated there had

been a serious problem regarding A's behaviour towards the applicant, which had amounted to emotional abuse, for which criminal proceedings had been pending against her (see paragraphs 13 and 49 above).

55. The Court has previously held that the position of children under Article 34 called for careful consideration, since children generally had to rely on others to present their claims and represent their interests, and may not be of an age or capacity to authorise that steps be taken on their behalf in any real sense. A restrictive or technical approach in this area is therefore to be avoided (see *N.Ts. and Others v. Georgia*, no. 71776/12, § 54, 2 February 2016; and *A.K. and L. v. Croatia*, no. 37956/11, § 47, 8 January 2013). The key consideration in such cases is that any serious issues concerning respect for a child's rights should be examined (see *N.Ts. and Others*, cited above, § 55; *Tonchev v. Bulgaria*, no. 18527/02, § 31, 19 November 2009; and *Hromadka and Hromadkova v. Russia*, no. 22909/10, § 118, 11 December 2014). The Court has also held that, in cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests (see *Moog v. Germany*, nos. 23280/08 and 2334/10, § 41, 6 October 2016).

56. The Court observes that the applicant was a minor at the time of lodging of the application and that his mother had been granted temporary custody (see paragraph 41 above). As to the alleged conflict of interest between him and his mother, who lodged the application before the Court in his name, the Court observes that the core of the complaint in the present case is the alleged failure of the domestic authorities to comply with the procedural requirements of the Convention and to act in the best interests of the applicant as a child. In view of the object and scope of the application, as formulated (see paragraphs 57 and 64-67 below), the Court does not discern any conflict of interest between A and the applicant on this very point. The fact that A is not complaining in her own name further supports the above understanding of the Court (see *N.Ts. and Others*, cited above, § 57, and, conversely, *Kruškić v. Croatia* (dec.), no. 10140/13, § 97, 25 November 2014). The Government's argument in this connection must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The applicant complained that in the second set of custody proceedings and their subsequent enforcement a special guardian *ad litem* had not been appointed to represent and protect his interests, that he had not been given an opportunity to be heard in those proceedings and that the decision to grant custody to his father without any preparation or adaptation period had not been in his best interests as provided in Article 8 of the Convention, which reads as follows:

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

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

A. Admissibility

58. The Government pointed out that any complaint relating to the proceedings preceding or following the second set of custody proceedings and its enforcement (see paragraphs 19 and 28 above) should be declared inadmissible as being belated or owing to the failure to exhaust available domestic remedies. Any possible complaint regarding suspension of contact between B and C had also been lodged after the expiry of the six-month time-limit, since the final decision in those proceedings had been issued on 3 February 2015, against which no constitutional complaint had been lodged.

59. With regard to the enforcement proceedings (see paragraph 28 above), the Government submitted that the applicant could not claim to be a victim since the enforcement proceedings had not been directed against him, but against his mother. In particular, payment of fines, incarceration and taking away of the child, had been in reaction to A’s obstructive behaviour with regard to the enforcement order.

60. The applicant disagreed.

61. The Court observes that it is clearly apparent from the applicant’s complaint, as formulated (see paragraph 57 above), that his application was directed only against the decision given in the second set of custody proceedings and the subsequent enforcement of that decision (see paragraphs 23 and 34 above) and not against any other decisions preceding or following those proceedings.

62. As regards the Government’s assertion that the applicant could not claim to be a victim in respect of the enforcement proceedings, because the enforcement had formally been directed against his mother and not him, the Court considers this argument misconstrued. While it is true that in *K.B. and others v. Croatia* (no. 36216/13, §§ 109-10, 14 March 2017) the Court declared incompatible *ratione personae* complaints which a non-custodial parent brought before the Court in the name of his children concerning non-enforcement of their contact rights, the situation in the present case is significantly different. Here the applicant complains about the failure of the State to protect his rights in the decision-making process leading to the decision imposed that he live with his father, and the enforcement of that court judgment as the natural continuation of the former decision. It can thus not be concluded that the applicant could not claim to be a victim in the

enforcement proceedings which concern such a crucial aspect of his private and family life such as the decision with which of his parents he was to live (see, *mutatis mutandis*, *M. and M. v. Croatia*, cited above, § 172, and *N.Ts. and Others*, cited above, § 59). The Government's argument should accordingly be dismissed.

63. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties observations

64. The applicant contended that, contrary to domestic law, in the second set of custody proceedings and the subsequent enforcement of that decision, a special guardian *ad litem* had never been appointed to represent him or to protect his interests.

65. Furthermore, he had not been given an opportunity to be heard in the custody proceedings complained of and the authorities had failed to ensure his right to express his views and to give due weight to such views in accordance with his age and maturity. He had never been informed in an appropriate manner of the important circumstances of the case, nor of the fact that he could express his own views, nor about the possible impact of the proceedings on his private and family life. Relying on the Court's judgment in *M. and M. v. Croatia* (cited above), the applicant emphasised the right of every child to be provided the opportunity to be heard and to participate in any matter affecting his or her private or family life.

66. Lastly, the applicant claimed that the decision to grant custody to his father without any preparation or adaptation period had not been in his best interest. In particular, B had instituted enforcement proceedings before the Constitutional Court had rendered its decision on his constitutional complaint in the custody proceedings and his proposal to postpone the enforcement. Neither the competent court nor the expert witnesses nor the Centre had proposed, adopted or initiated any measures for the gradual establishment of contact between him and B in order to allow him to adjust to his father, the necessity of which had precisely been advocated by the applicant's privately hired psychologist (see paragraph 22 above) and known to the competent authorities.

67. Moreover, the authorities had never provided the applicant with any explanation of the decision imposed that he live with his father. On the contrary, he and his mother had had no knowledge of the enforcement proceedings until April 2016, when A had received a decision imposing a fine on her. The enforcement of the impugned custody judgment had been very traumatising and had caused the applicant great mental distress, as it

had been carried out unannounced, at a school playground, during his football training, in the presence of his coach, other children and their parents, and with the assistance of police officers. Owing to his forcible separation from his mother, despite his “developmental crash” and without therapy to reduce the adverse consequences for his health, the applicant contested that the balance between his best interests and well-being and those of his father had not been achieved.

68. The Government stressed that, despite the efforts of all relevant institutions, the conflict between the parents had continued, in that they had instituted several sets of court proceedings against each other. Even after all allegations of sexual abuse had been dismissed by all relevant authorities, A had maintained that abuse had taken place and had failed to co-operate with relevant institutions or to adhere to any advice or instructions from the Centre, for which she had been issued a written warning and criminal proceedings had been instituted against her. A had explicitly stated that she had not wanted to encourage the applicant to meet with his father, and later that she had had no intention of complying with the final court judgment to hand the applicant over to his father.

69. The Government further emphasised that the judgment issued in the second set of custody proceedings and its subsequent enforcement had been in the best interest of the applicant, based on the unequivocal conclusions of the experts, who had established that the “symbiotic relationship” between him and his mother had been inappropriate and that it could be interrupted only by a “violent path”. As stressed by the experts, gradual separation, on the other hand, had implied a risk that A would exert more pressure on the applicant owing to her frustration, immaturity and fears. For those reasons, the Government argued that it had been in the applicant’s best interest for what the experts had defined as a “symbiotic relationship” with his mother to have been interrupted as soon as possible, so as to enable his further psychosocial development. When rendering their judgment, the national courts had taken into account the fact that gradual separation from A had not been optimal. As regards the findings issued by an expert witness privately hired by A, the Government observed that they had not been in contradiction with the findings and opinions of the court-appointed expert witnesses who had also foreseen a “developmental crash” of the applicant, but estimated that it would be the easiest way to achieve his developmental potential.

70. As to the right of the applicant to express his own views, the Government submitted that it had not been necessary to give the applicant an opportunity to be heard in court because all the authorities involved in the domestic proceedings had clearly and unequivocally known that the applicant had wished to live with his mother. However, based on the facts and circumstances of this case, the Government considered that it had been obvious that not only had the applicant been faced with a conflict of

loyalties, but that he had also been in a “symbiotic relationship” with his mother, which had implied a lack of clear boundaries between the two. Taking into account the age of the applicant, the fact that he had been repeatedly subjected to expert evaluations, and psychological and psychiatric treatment during the course of the proceedings, as well as that the expert witnesses clearly stated in their findings that the applicant had opted to live with his mother, it had been neither essential nor necessary for the applicant to have been given an opportunity to be heard before the national courts. In addition, the applicant had not been a party to the custody proceedings and there had therefore been no legal obligation under the relevant domestic law to appoint a special guardian *ad litem* in respect of him.

71. Lastly, the enforcement proceedings had been carried out in accordance with the findings and opinions of the experts and no coercive measures had been used in relation to the applicant, who had ultimately voluntarily gone with his father. Given the above, the Government concluded that the problems in the applicant’s family and the ensuing legal situation had resulted from the unresolved relationship between the parents and their lack of cooperation rather than from the failure of the competent authorities to fulfil their positive and procedural obligations under Article 8 of the Convention.

2. *The Court’s assessment*

(a) **General principles**

72. The Court recalls that Article 8 of the Convention requires that the domestic authorities strike a fair balance between the interests of the child and those of the parents, and that, in the balancing process, particular importance be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII; *Sommerfeld v. Germany* [GC], no. 31871/96, § 64, ECHR 2003-VIII (extracts)). To that end, the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation, together with a whole series of factors – in particular those of a factual, emotional, psychological, material and medical nature – and made a balanced and reasonable assessment of the respective interests of each person, exercising a constant concern for determining what the best solution would be for the child (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 139, ECHR 2010, and *Antonyuk v. Russia*, no. 47721/10, § 134, 1 August 2013).

73. The Court further reiterates that, whilst Article 8 contains no explicit procedural requirements, the decision-making process must be fair and such

as to afford due respect to the interests safeguarded by Article 8 (see, for example, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V (extracts)). In particular, in a number of childcare cases the Court has examined whether the parents had been sufficiently involved in the decision-making process, with a view to establishing whether their rights under Article 8 had been violated (see, for example, *Sommerfeld*, cited above, §§ 66-75, and *Sahin*, cited above, §§ 68-78). The Court has previously held that the same considerations apply, *mutatis mutandis*, to children in any judicial or administrative proceedings affecting their rights under Article 8 of the Convention. In particular, in such cases it cannot be said that the children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views and if due weight, in accordance with their age and maturity, was not given to those views (see *M. and M. v. Croatia*, no. 10161/13, §§ 171 and 181, ECHR 2015 (extracts)).

(b) Application to the present case

74. The Court observes that the essence of the present case lies in the applicant's complaint that the second set of custody proceedings and its enforcement, as conducted by the authorities, were not in compliance with the requirements of Article 8 of the Convention and that they resulted in the disregarding of his best interest.

75. With respect to the first part of the applicant's complaint, the Government claimed that there had been no need to give an opportunity for the applicant to be heard in court since it had been clear to all the authorities involved that he had wished to continue living with his mother. Moreover, they contended that the applicant had not needed a special guardian *ad litem* in the custody proceedings since he himself had not been a party to those proceedings (see paragraph 70 above).

76. The Court notes in this connection that the Family Act 2003, applicable at the material time to the applicant's case, imposed an obligation on the competent social-care centre to appoint a special guardian *ad litem* in cases where the interests of a child conflicted with those of the parents (see section 167 of the Family Act 2003, cited in paragraph 51 above). In this context, reference should also be made to Article 10 of the European Convention on the Exercise of Children's Rights, which came into force in respect of Croatia on 1 August 2010, and which provides that the duty of a representative is to act in an appropriate manner on behalf of the child, by providing information and explanations to the child, determining the views of the child and presenting them to the judicial authority (see paragraph 53 above). Likewise, the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice seek to ensure that in cases where there are conflicting interests between parents and children, either a

guardian *ad litem* or another independent representative is appointed to represent the views and interests of the child and keep the child informed about the content of the proceedings (see paragraph 53 above).

77. In the light of the above-mentioned domestic legislation and international legal standards, the Court cannot accept the Government's assertion that it was not necessary to appoint a special guardian *ad litem* in respect of the applicant simply because he was not formally a party to the custody proceedings. On the contrary, the Court notes that the applicant's situation, as a child of divorced parents in a custody battle, would appear to be an example of cases in which children may need special guardians *ad litem* in order to protect their interests, explain to them court proceedings and decisions and their consequences, as well as generally to liaise between the competent judge and the child. However, the applicant was never provided with such a guardian in the course of the second set of custody proceedings, leaving it to his mother to fulfil this role.

78. The Court will next examine whether the applicant, who was nine years old when the second set of custody proceedings were concluded, was given an opportunity to be heard by the competent judicial authorities. In this connection the Court observes that section 86 of the Family Act 2003, as in force at the material time, provided that the child was entitled to express his or her views in proceedings involving decisions on his or her right or interest. It further stated that the child's views were to be given due weight in accordance with his or her age and maturity (see paragraph 51 above). The foregoing obligation to hear the child was further strengthened by the Family Act 2015 (see paragraph 52 above). Moreover, the Court reiterates that, pursuant to the international standards in force, in any judicial or administrative proceedings affecting children's rights under Article 8 of the Convention, children capable of forming their own views should be sufficiently involved in the decision-making process and be given the opportunity to be heard and thus to express their views (see *M. and M.*, cited above, §§ 171 and 181; and *M.K. v. Greece*, no. 51312/16, §§ 74 and 91, 1 February 2018; see also §§ 53 and 73 above).

79. In the present case, the applicant was never interviewed in person by any of the judicial authorities deciding on his custody. The Government for their part maintained that the relevant legislation had not provided for obligatory direct involvement of children and that, in any event, all the authorities involved had been well aware of the applicant's wish to live with his mother.

80. The Court is not convinced by the Government's argument. In view of the relevant legal standards on the matter, in the present case the Court does not see a sufficient explanation why the domestic courts failed both to give any consideration to the possibility of directly involving the applicant in the proceedings and to give any reasons for not examining him (see *M. and M.*, cited above, §§ 184-85). The potential need for his direct

involvement was particularly apparent given the flaws in the quality of his representation, as noted above (see *N.Ts. and Others*, cited above, § 80).

81. In the Court's view, the combination of flawed representation and the failure to duly present and hear the applicant's views in the proceedings irretrievably undermined the decision-making process in the instant case. Such a conclusion obviates the need for the Court to examine whether the applicant's best interests were properly assessed by adopting the decision to grant custody to his father without any preparation or adaptation period or whether the enforcement of that decision had been compatible with Article 8 of the Convention (see *E.S. v. Romania and Bulgaria*, no. 60281/11, § 82, 19 July 2016).

82. Without prejudice to any future decision the domestic courts might adopt in the present case (see *E.S. v. Romania and Bulgaria*, cited above, § 82), which is still pending before the domestic courts (see paragraph 43 above), the foregoing failures lead the Court to conclude that there has been a violation of the applicant's right to respect for his family life, as guaranteed by Article 8 of the Convention

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicant claimed 8,197.40 euros (EUR) in respect of pecuniary damage and EUR 25,000 in respect non-pecuniary damage.

85. The Government contested those claims

86. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 7,500 in respect of non-pecuniary damage.

B. Costs and expenses

87. The applicant also claimed EUR 4,583.33 for the costs and expenses incurred before the Court.

88. The Government contested that claim.

89. According to the Court's settled 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. The Court notes that, save in relation to the amount paid for the

preparation of the application form (HRK 12,500; approximately EUR 1,700) and translation expenses (HRK 2,778.75; approximately EUR 380), the applicant's representative failed to comply with the requirements set out in Rule 60 § 2 of the Rules of Court, in that she did not enclose further relevant supporting documents to prove that the applicant had actually incurred the remainder of the expenses claimed. The Court therefore awards the applicant EUR 2,080 for expenses incurred in the proceedings before the Court.

C. Default interest

90. 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 application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,080 (two thousand and eighty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (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;
4. *Dismisses*, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Krzysztof Wojtyczek
President

C v. CROATIA JUDGMENT

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

K.W.O.
A.C.

CONCURRING OPINION OF JUDGE KOSKELO

1. Like my colleagues, I have voted in favour of the finding of a violation of Article 8 in the present case. I would, however, like to express my reservations regarding the preliminary issues dealt with in paragraphs 54-56 of the judgment. The applicant in this case is a minor. In line with its usual practice in similar situations, the Chamber has accepted that the child's parent, in this case the mother, may act as the child's representative in the proceedings before the Court, notwithstanding the fact that the complaint arises from a dispute between the mother and the father relating to custody and contact rights concerning the child. Furthermore, the lawyer engaged and instructed by the mother for the proceedings before the Court has previously acted for the mother in the domestic proceedings.

2. I have addressed the issue of a child's representation as an applicant before the Court in previous separate opinions (see *A and B v. Croatia*, no. 7144/15, 20 June 2019, §§ 18-21 of the joint separate opinion by myself and Judge Eicke, and, in particular, *Strand Lobben and Others v. Norway* [GC], no. 372823/13, 10 September 2019, joint dissenting opinion by myself and Judge Nordin on the question of the first applicant's right to represent the second applicant, §§ 1-11 on the general remarks).

3. I will not repeat the reflections and arguments set out in those opinions on this occasion. It is sufficient to reiterate them by reference. Although the problem of the child's representation manifests itself in the present case in a procedural situation which in one respect is different, namely in that the child alone is the applicant before this Court, the main considerations in my view remain very similar. In this case, it is clear that the underlying conflict is one between the child's mother and the father. The domestic authorities have found that the mother has developed a "symbiotic relationship" with the child and her influence on the child has even been characterised as "emotional abuse" and "dangerous for the child's development" (see paragraphs 13, 17 and 21 of the present judgment). Under such circumstances, it is doubtful whether the mother can be considered capable of properly and genuinely representing the best interests of child as a legal subject in his own right.

4. Indeed, it is striking that the Chamber by the present judgment condemns the fact that the child was not properly represented in the impugned proceedings at domestic level, but fails to acknowledge the same problem in the proceedings before the Court. Despite the findings referred to above, the Court does not discern any conflict of interest between the mother and the applicant on the subject matter of the complaint. Yet in the light of the underlying conflict, there is no reliable basis for determining whether the recourse to the proceedings taken by the mother on behalf of the child, including those before the Court, is indeed in the child's best interests. Similarly, the examination of the complaint on the basis of

submissions made under instructions by the mother, rather than by an unbiased representative of the child, is problematic.

5. In view of the fact that it will be necessary to develop an appropriate overall solution to the question of the representation of child applicants in proceedings before the Court and to do so in cooperation with the States Parties, I have gone along with the examination of the complaint as presented.

6. On the basis of the material before us, I concur with the conclusions reached on the merits of the case.