



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

SECOND SECTION

CASE OF SUUR v. ESTONIA

(Application no. 41736/18)

JUDGMENT

Art 8 • Respect for family life • Ending of applicant's joint custody of child and restrictions on contact • Domestic decision-making processes guided by aim of finding amicable solution in the best interests of the child and with meaningful participation of the applicant • Relevant and sufficient reasons given by domestic courts in ending joint custody • Applicant's meetings with child subject to mother's knowledge and consent • Relevant and sufficient reasons for decision against forced contact between applicant and child • Future meetings possible and no restriction on other forms of contact • Possibility to revise contact arrangements

STRASBOURG

20 October 2020

FINAL

20/01/2021

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

In the case of Suur v. Estonia,

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

Jon Fridrik Kjølbro, *President*,

Marko Bošnjak,

Egidijus Kūris,

Ivana Jelić,

Arnfinn Bårdsen,

Darian Pavli,

Peeter Roosma, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to:

the application against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Tarvo Suur (“the applicant”), on 29 August 2018;

the decision to give notice to the Estonian Government (“the Government”) of the application;

the parties’ observations;

Having deliberated in private on 15 September 2020,

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

INTRODUCTION

1. The case concerns the applicant’s complaint under Article 8 of the Convention regarding the ending of joint custody over his son, the granting of full custody to the child’s mother and the limiting of his contact rights with the child. The case also addresses the question of restoration of the relationship between the applicant and his son after not having had contact for several years.

THE FACTS

2. The applicant was born in 1986 and lives in Abja-Paluoja. He was granted legal aid and was represented by Mr R. Hallemaa, a lawyer practising in Tartu.

3. The Government were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

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

5. The applicant has a son, R.S., who was born in 2008, from a relationship with K.T. In 2009, when R.S. was one year and nine months old, the relationship between the applicant and K.T. ended. Their son continued to live with his mother. K.T. had a new cohabiting partner with

whom she had lived for approximately five years by the time the custody proceedings began in 2015 and with whom R.S. appeared to have a good relationship – in the domestic proceedings, K.T.’s cohabiting partner was referred to as the “stepfather” of R.S. Prior to the commencement of the proceedings which form the subject matter of the case at hand, the applicant last saw his son in January 2011.

6. The applicant is certified as partially incapacitated for work (*osaline töövõimeetus*) and receives an allowance from the State as his only income. He has been making monthly payments of 45 euros to K.T. to support his son. It appears that at some point after 2009 the applicant opened bank accounts in the name of his son and used them to make bank transfers while his own accounts were frozen owing to debts.

7. On 28 October 2015 K.T. lodged an application with the Pärnu County Court, seeking the termination of their joint custody (*ühine hooldusõigus*) over their son. She asked the court to grant her full custody over his person and over his property (*täielik isiku- ja varahooldus*). The applicant objected to the proposal. He argued that, *inter alia*, K.T. had changed her place of residence and phone numbers, which had hindered his contact with his son. He added that he had found out about his son’s whereabouts from the Internet in early 2015, but – considering the child’s interests and well-being – had not wanted to interfere with his life.

8. On 15 April 2016 the applicant lodged a counter-application concerning contact arrangements with the child (*avalduisuhetlemise korra kindlaks määramiseks*). According to the applicant, his relationship with K.T. was conflictual. K.T. had not allowed him to meet his son, ignoring his wish to maintain contact with the child. He considered that K.T. had portrayed him in a negative light to their son. As R.S. had been very young when his parents’ relationship had ended, it was unlikely that he had any bad memories of his own of his father from the period prior to the break-up.

9. At the hearing on 19 June 2016 the applicant stated that after he had lost contact with his son (in 2011) he had not turned to the authorities, hoping instead that he and K.T. would be able to resolve the matter by themselves. He agreed with all the decisions K.T. had hitherto made with regard to R.S. He also agreed to the partial transfer of the right of custody to the effect that K.T. would have custody over the child’s property (*varahooldusõigus*) and the power of decision regarding the child’s “place of stay” (*viibimiskoht*) in the territory of Estonia.

10. During the proceedings before the Pärnu County Court, Pärnu City, as the guardianship authority (*eestkostetasutus*), Tarvastu Rural Municipality, where the applicant resided, and the child’s guardian *ad litem* (*määratud esindaja*) submitted their written opinions.

11. V.K., a lawyer who acted as the child’s guardian *ad litem*, relying on the documents in the case file, proposed that the living arrangements as they had been until then should be maintained and that the child should not be

forced to communicate with his biological father, of whom he was wary (*pelgab*). As the child was estranged from his father, the guardian did not support a contact arrangement which would involve the applicant being left alone with the child. Instead he suggested that meetings could take place in a public place and in the presence of either the mother or a social worker.

12. The Pärnu City Government (*Pärnu Linnavalitsus*), after having met both of the parents, having made a home visit to R.S.'s home and having talked to him, considered it important to maintain the child's habitual living arrangements, as they provided him with a sense of security. The City Government considered the ending of joint custody to be an extreme measure and thought it possible to find a compromise in the case, provided that the parents cooperated, prioritised the interests of the child and took into account his readiness to have contact with his father. As R.S. had expressed an unwillingness to meet his father, one way to facilitate their contact was to organise their meetings in the presence of the other parent so as to ensure that the child felt secure. It was noted that K.T. had expressed willingness to support her son's contact with the applicant, provided that it did not hinder his well-being. The Pärnu City Government noted that it had offered the parents the possibility to meet at the premises of the city's child protection service to try to find solutions. They had also informed the parents of the possibility either to have joint counselling or to refer R.S. to therapy.

13. Tarvastu Rural Municipal Government (*Tarvastu Vallavalitsus*), after visiting the applicant's place of residence and after having talked to K.T. on the phone, concluded that the ending of joint custody would be premature. In order to facilitate contact between the applicant and his son, the first meetings could take place in an environment familiar to R.S. and in the presence of someone he knew.

14. On 24 May 2016, after holding a hearing in the presence of all the parties to the proceedings, the Pärnu County Court decided to end joint custody over R.S. and grant full custody to K.T. It also partially allowed the applicant's request to fix contact arrangements with his son. The court decided that in 2016 the meetings were to take place not less than once a month for two to three hours at a time, and in 2017 for six to seven hours at a time, at a place familiar to the child and in the presence of his mother or someone else he knew. The meetings were to be organised by telephone or email at least one week before they were supposed to take place. The applicant could meet his son outside the fixed contact hours in the event that R.S. expressed a willingness to do so. The applicant and his son were to participate in father-son family therapy organised by Pärnu City Government. The applicant appealed.

15. On 17 July 2016 the Tallinn Court of Appeal, after obtaining opinions from the Pärnu City Government, the Tarvastu Rural Municipal Government and from V.K., quashed the decision and remitted the case to

the Pärnu County Court. The court considered that the first-instance court had not assessed all the relevant circumstances and evidence and had not sufficiently reasoned its decision. It referred to the possibility of K.T.'s reluctance playing a role in the applicant's not having had contact with his son and in the latter's negative memories of his father. It added that the contact arrangements set out in the impugned decision had not taken into account the mother's earlier refusals to facilitate communication. The court stressed the importance of finding out the child's own wishes.

16. On 19 August 2016 the Pärnu County Court proposed that the parties settle the case and gave them a deadline of 7 September 2016 for submitting compromise proposals. It appears that a compromise was not reached.

17. On 18 October 2016 the Pärnu County Court interviewed R.S. He stated that he did not want to have contact with the applicant, even if someone else was present at the meetings. He was not sure of the reason for that, but thought it might be due to the fact that the applicant had not shown any interest in him. He mentioned that his stepfather had told him that the applicant had got angry with K.T. and had yelled at her.

18. It appears from the documents in the case file that during the court proceedings the applicant and K.T. attended some form of family counselling. At least one of those meetings took place in the presence of R.S. On 18 October 2016 the applicant notified the Pärnu County Court of the fact that K.T. had cancelled the latest counselling session with a family therapist, Ü.P., without informing him and had not responded to his request to arrange another session.

19. On 25 October 2016, after holding a hearing where the applicant and K.T. agreed to the suspension of the proceedings (V.K. and the Pärnu City Government also supported that suspension), the Pärnu County Court stayed the proceedings for three months. Its aim was to direct the applicant and K.T. to participate in out-of-court family counselling with a psychologist-family therapist (*psühholoog-pereterapeut*), A.T., in order to find an agreement as to custody rights and contact arrangements. The court ordered that R.S. be included in the counselling so that his relationship with his father could be restored.

20. Six counselling sessions took place. R.S. attended two of those sessions. On both of those occasions his mother and her cohabiting partner were present and on one of those two occasions R.S. was able to meet the applicant.

21. According to the opinion of the psychologist-family therapist A.T., submitted on 9 February 2017, it had become evident during the counselling that the applicant was a complete stranger to R.S., who had been very reluctant to meet with his father, furthermore stating that he did not want to meet him again. K.T. had said that the meeting had caused stress for the child. A.T. had consulted the school psychologist and had learned that R.S. had been anxious and tense in school on the days following the meeting.

A.T. concluded that in the given circumstances it was not in the interests of R.S. to continue meeting with his father.

22. On 8 March 2017 the court proceedings were resumed and the court invited all the participants to submit their opinions.

23. Pärnu City Government, after having talked to both of the parents, considered that it was justified to modify the right of custody so as to reflect the actual living arrangements of R.S. Maintaining joint custody might hinder the child's safe and stable living environment. In their opinion, ordering court-mandated contact arrangements between the applicant and R.S. was not in the latter's interests as he had expressed reluctance to communicate with his father.

24. Tarvastu Rural Municipal Government did not support the termination of joint custody, but considered that it was necessary to give K.T. the right to decide over matters concerning the child's person and property (*otsustusõigus isiku- ja varahooldust puudutavates küsimustes*). They also found that as R.S. did not, at that moment, want to meet with his father, it was not possible to order enforceable contact arrangements. However, they considered it necessary to find solutions for future communication so that R.S. could meet his father should he so wish.

25. R.S.'s guardian *ad litem* did not support the applicant's request for the court to fix contact arrangements, as forced communication was not in the child's interests. He considered that K.T.'s application for full custody was justified.

26. On 20 March 2017 the applicant requested that the family counsellor A.T. be heard at the court and that counselling be extended by six months, but with Ü.P. as counsellor. He considered that the counselling provided by A.T. had been inadequate and had not yielded the results for which it had been set up.

27. On 31 March 2017 the applicant lodged an application with the court, asking for the appointment of a special guardian (*erieestkostja* – see paragraph 45 below), as the measures that had been taken until then had not attained the purpose of facilitating contact between him and R.S.

28. On 28 April 2017 A.T. was heard. She noted that during the counselling session where R.S. and the applicant had both been present the child had been very stressed. Taking this into account, she had proposed not to have any further meetings between the applicant and his son. In her experience in such circumstances it could be possible to restore the relationship between the child and the estranged parent, but it required willingness on the part of all parties. If the child were pressured to meet the parent, it could result in him refusing any further contact. However, if the communication were to take place in the form of text messages and emails, the child would be left with a choice as to whether to respond or not.

29. On 19 May 2017, taking into account the submissions of Pärnu City Government, Tarvastu Rural Municipal Government and R.S.'s guardian *ad*

litem, the Pärnu County Court decided to terminate joint custody over R.S. and granted full custody to K.T. The court reasoned that it had been the mother who had raised the child since the applicant and K.T. had broken up, R.S. had not seen his father for several years and the child had been unwilling to meet his father. Moreover, the applicant had opened bank accounts in the name of his son and used them for himself while his own accounts had been frozen due to debts. The court noted that the applicant had admitted at a hearing that he agreed to everything that K.T. had hitherto decided in respect of their son.

The court dismissed the applicant's application for the fixing of contact arrangements and, of its own motion, partly restricted the applicant's contact with the child, allowing meetings with the knowledge and consent of K.T. only. The court explained that generally the parent who did not have custody had the right to contact with his or her child. However, this right could be restricted if communicating with that parent was not in child's interests. Given the circumstances of the case at hand, the court decided that ordering mandatory contact arrangements between the applicant and R.S. would pose a threat to the child's mental health and development. It was not necessary to limit communication by means of letters, emails, phone calls or text messages, as this left the child with the choice of whether to respond or not. The court also dismissed the application to appoint a special guardian by explaining that a special guardian could not organise communication between the parent and the child in a way that contradicted the child's interests. The applicant appealed.

30. On 22 September 2017 the Tallinn Court of Appeal, after having received opinions from Pärnu City Government and the child's guardian *ad litem*, dismissed the applicant's appeal. Noting that it had been justified to end the joint right of custody over R.S., the Tallinn Court of Appeal found that the applicant had mainly challenged the lower-instance court's decision in so far as it concerned his contact rights with the child. The court underlined that the child's unwillingness to meet with his father – which he had expressed on several occasions – was decisive in this regard. The court considered that a nine-year-old was capable of expressing his will and noted that it did not have grounds to consider that the child had been influenced when making his statements. It was not uncommon that the child was not ready to communicate with the parent who had been absent from his life for several years. The fact that forced communication would damage the child had been proven by the opinion provided by A.T., the reliability of which the court did not have grounds to question. The court did not consider it necessary to ask for further opinions from Ü.P., the school psychologist or a psychiatrist whom the child had allegedly been seeing. The applicant still had the possibility to meet R.S. with the consent of K.T. but this required cooperation and understanding from both parents. The applicant was free to suggest means and ways of communication which would be acceptable to

the child and which would not entail the latter being forced. As the main reason for not fixing contact arrangements at the time in question was the child's unwillingness to communicate with the applicant, it was irrelevant to address the applicant's claim that R.S. had been estranged from his father as a result of the actions of K.T. and that the latter had influenced the child's feelings about his father. The applicant's request to extend the counselling sessions with Ü.P. was dismissed, as it had been proven that continuing the meetings was not in the child's best interests.

31. The applicant appealed to the Supreme Court. He claimed that during the proceedings K.T. had not responded to his messages on social media or to his emails concerning his son. In addition, without informing the applicant, K.T. had changed her place of residence and R.S.'s school. The applicant submitted additional evidence to that effect. It appears that K.T. also submitted documents concerning SMS exchanges and email exchanges between herself and the applicant.

32. On 6 April 2018 the Supreme Court, after having received written opinions from all the parties to the proceedings, dismissed the applicant's appeal on points of law. Addressing the termination of the joint right of custody over R.S., the Supreme Court stressed that despite the full right of custody being granted to one parent, under section 143 of the Family Law Act (*perekonnaseadus*), the other parent retained the right and the obligation to communicate with the child. The Supreme Court went on to modify the reasoning of the Tallinn Court of Appeal concerning the contact arrangements between the applicant and R.S. The Supreme Court found that, contrary to what the Tallinn Court of Appeal had stressed, it was not the will of the child but rather the interests of the child that were conclusive when deciding on the contact arrangements between the child and his father. In the case at hand, the courts had in substance found that, under the circumstances and at that point in time, it was indeed not in the interests of R.S. to have to communicate with the applicant. The child had to be afforded time to adapt to the new situation. Forcing him to have contact with his father might lead to the opposite outcome where the child might refuse any contact altogether, which would make restoration of the relationship in the future even more difficult. The applicant's claim that he had been estranged from his child owing to the actions of K.T. did not alter that finding. The Supreme Court refused to admit the additional evidence referred to in paragraph 31 above, stating that it was not for it to examine evidence.

33. One judge of the Supreme Court gave a dissenting opinion, noting that the Pärnu County Court had, of its own motion, practically excluded any contact between the applicant and his son. He noted that neither the child's guardian *ad litem* nor the involved local authorities had requested such measures. Moreover, the Pärnu County Court had restricted contact more extensively than the same court had done in its first decision on the

matter, which the Tallinn Court of Appeal had quashed. In a situation where the parents were arguing over custody and contact rights, contact between the child and the parent who did not have custody could not be left to be decided by the parent with whom the child lived. In his opinion, the courts had not fulfilled their task to facilitate the restoration and continuation of the child-parent relationship. The lower-instance courts had essentially justified the need to restrict contact by referring to the child's wishes and had based their conclusions on the claims made by K.T., not on the evidence. The judge furthermore considered that the statements R.S. had made at a hearing had not been based on his personal experience but rather on what he had heard from his mother and stepfather. He also pointed out that the opinion given by A.T. had been based on the claims made by K.T. and by the school psychologist, who had not been examined by the court. It would have been pertinent to examine Ü.P., the other family therapist, who had offered counselling in the case and who had considered it possible to restore communication between the applicant and his son.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Relevant domestic legislation

1. Code of Civil Procedure

34. Article 219 § 2 of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik* – hereinafter “the CCP”) concerns court-appointed representatives (guardians *ad litem*). Article 219 § 2 (3) provides that in a family matter a representative must be appointed if the case concerns deprivation of custody over the person in full.

35. Article 552 § 2 provides that in proceedings concerning minors or guardianship, the court must obtain the opinion of a rural municipal government or city government and send it the transcripts of the orders whereby the proceedings were terminated.

36. Article 552-1 § 1 provides that in matters concerning a child the court has to interview a child of at least ten years of age in person unless otherwise provided by law. The court can also interview a younger child.

37. Article 558 § 1 provides that in proceedings concerning the parental rights over a child, the court has to allow the parents to make their case (*kuulab kohus vanemad ära*).

38. Article 561 concerns the resolution of the matter by agreement (*asja lahendamise kokkuleppel*). Article 561 § 1 provides that in proceedings concerning a child, the court has to try, as early as possible and at each stage of the proceedings, to direct the participants towards settling the matter by agreement. The court has to hear argument from the participants as early as possible and to draw their attention to the possibility of seeking the assistance of a family counsellor in order to reach a common position on

taking care of and assuming responsibility for the child. Article 561 § 2 states that the court may suspend the proceedings concerning a child if this does not result in a delay which might endanger the interests of the child and the participants agree to participate in extra-judicial counselling or if, in the court's opinion, there are prospects to resolve the matter by settlement between the persons concerned owing to another reason.

2. Family Law Act

39. Section 116 sets out the principles of parents' right of custody. Section 116(2) provides that parents have the obligation and the right to care for their minor child. The parent's right of custody includes the right to care for the person of the child (*isikuhooldusõigus* – custody over person) and for the property of the child (*varahooldusõigus* – custody over property) and decide on matters related to the child.

40. Section 123 provides that when hearing any matter concerning a child, the court makes a decision primarily in the interests of the child, taking into account all the circumstances and the legitimate interest of the relevant persons.

41. Section 123-1(1) provides that in the event of changes in the right of custody (*hooldusõiguse muutuste korral*), a parent's custody over the child will be restored on the basis of an application on the part of the parent if restoration of custody corresponds to the interests of the child.

42. Section 137 concerns the termination of joint custody. Section 137(1) lays down that if parents who have joint custody live permanently apart or no longer wish to exercise joint custody for any other reason, either of them has the right to apply to the court in non-contentious proceedings (*hagita menetlus*) for custody over the child to be partially or fully transferred to him or her. A court may resolve a dispute concerning custody also in proceedings concerning divorce. Under section 137(2) a court has to dismiss such an application if i) a child who has reached at least 14 years of age objects to the transfer of custody, or ii) if there is reason to believe that termination of the joint right of custody and granting the right of custody solely to the applicant does not correspond to the interests of the child. Section 137(3) provides that in the event of termination of joint custody, the court decides on the grant of custody to one parent on the basis of the interests of the child and takes into account, *inter alia*, the mental and financial readiness of each parent to raise the child, their emotional relationships with the child and their current commitment to caring for the child and the future living conditions of the child.

43. Under section 138(1), which deals with the transfer of custody, if only one parent has custody, the other parent may apply to a court for custody over the child to be partially or fully transferred to him or her. The court allows the application if transfer of custody corresponds to the interests of the child, if a child who has attained at least 14 years of age does

not object to it and if the parent requesting transfer of custody is suitable and able to exercise it. If only one parent has custody on the basis of a court decision, the other parent may request transfer of custody if the circumstances on the basis of which the court decision was made have changed significantly, or he or she may request restoration of joint custody.

44. Section 143 concerns contact rights with the child (*suhtlemise õigus*). A child has the right to maintain personal contact with both parents. Both parents have the obligation and the right to maintain personal contact with their child (section 143(1)). A parent must refrain from any action which hinders the child's relationship with the other parent or would make the raising of the child more difficult (section 143(2)). Under section 143(2-1), in the event that parents are separated (*vanemate lahuselu korral*), the parents have to agree on the contact arrangements of the separated parent with the child. If there is a dispute between the parents, the contact arrangements are determined by a court at the request of a parent. Section 143(3) provides that a court may restrict or terminate contact or restrict or terminate the enforcement of earlier decisions made in that connection. In accordance with section 143(3-1) the court may order that a parent has access to a child in the presence of a suitable third person. Section 143(5) provides that the court may apply the above measures on its own initiative.

45. Section 209 concerns special guardians (*erieestkostja*). The first sentence of section 209(1) provides that a special guardian is appointed to a person under parental care or to whom a guardian has been appointed for the act which cannot be performed by the parents or the guardian.

3. Child Protection Act

46. Section 21(1) of the Child Protection Act (*lastekaitseadus*) provides that when adopting decisions affecting a child and choosing between different options for such decisions, the best interests of the child must be ascertained and must be the primary consideration. Section 21(2) provides that in order to ascertain the best interests of the child, it is necessary i) to establish all the relevant circumstances concerning the situation and person of the child and other information which is necessary to evaluate the effect of the decision on the child's rights and well-being; ii) to explain the content and reasons for the planned decision to the child, to interview the child in a manner that takes account of his or her age and development and to take his or her opinion into account as one of the circumstances following ascertaining the best interests of the child; iii) to assess all the relevant circumstances in aggregate and to form a reasoned opinion concerning the best interests of the child with regard to the planned decision.

B. Relevant domestic case-law

47. In judgment no. 3-2-1-45-11 of 7 June 2011 the Supreme Court explained that if the court granted full custody to one parent (*annab ainuhooldusõiguse täielikult ühele vanemale*), the other parent no longer enjoyed the right of custody in respect of the child (including determination of the child's "place of stay" or deciding essential matters concerning the child's life or the right of representation with regard to those matters). However, in line with the second sentence of section 143(1) of the Family Law Act, the parent without the right of custody had the obligation and the right to maintain personal contact with their child.

48. In judgment no. 3-2-1-83-11 of 9 November 2011 the Supreme Court underlined that both a child and a parent had reciprocal rights of contact regardless of whether the parent had custody of the child within the meaning of section 116(2) of the Family Law Act. The main purpose of the right of contact was to ensure the continuation and the development of personal relations between a parent and a child (primarily in a situation where the parent did not have custody of the child, but also where the parents had joint custody, but one of the parents was not living with the child). The Supreme Court also explained that regardless of whether the parents had joint custody or one of the parents had full custody, pursuant to section 143(2) of the Family Law Act the parents had to refrain from actions which hindered the child's relationship with the other parent or made the raising of the child more difficult. (The latter was also explained in judgment no. 3-2-1-32-11 of 30 May 2011. In that judgment the Supreme Court, moreover, stressed that parents had to exercise their parental rights and fulfil the parental duties in good faith).

49. The Supreme Court's judgment no. 3-2-1-6-12 of 14 March 2012 concerned a case where a father who had not had contact with his daughter for several years, had applied to the courts for the contact arrangements between him and his daughter to be fixed. The child, who had been unaware of the existence of her biological father, was approximately nine years old at the time. The Supreme Court reasoned that it was presumably in the interests of the child to know who his or her parents were and to have contact with the parent who did not have custody. Against that background, the parent with whom the child lived was obliged to allow and to encourage the child to have contact with the parent who did not have custody. The parent with custody could prevent the parent who did not have custody from having contact with the child only if such contact with the parent who did not have custody was not in the child's interests and would have a negative effect on him or her. In the case in question the Supreme Court found that it would have been premature to order contact arrangements between the parent who did not have custody and the child in a situation where the child, who was capable of understanding, was unaware of the existence of her

biological parent. By ordering contact arrangements in such a situation the court would respect the child's right and presumed interest to know her parent and to have contact with him, as well as the right of the parent who did not have custody to have contact with his child, but would fail to take into account the child's actual interest and readiness to have contact with a parent of whose existence the child had been unaware. It was not known how finding out the truth affected the child, whether and how fast the child adapted to the situation, what kind of contact the child developed with the parent who did not have custody, and what frequency of contact served the child's interests the best.

In that judgment the Supreme Court also explained the appointment and the role of a special guardian. The Court reasoned that in the circumstances where one of the parents refused to cooperate and did not allow the child to have contact with the other parent (thereby harming the child's well-being), a court could restrict that parent's right of custody in this particular matter and appoint a neutral third person – a special guardian under section 209 of the Family Law Act – to arrange the child's contact with the other parent. The special guardian would have the task of getting to know the child and both parents and deciding in a flexible manner, while taking into account the child's well-being and all relevant circumstances, when and how the child could have contact with the parent with whom he or she did not live.

50. In judgment no. 3-2-1-4-13 of 29 October 2014 the Supreme Court stated that if the parent with custody found that the contact arrangements between the child and the parent who did not have custody laid down in a court decision no longer met the interests of the child due to changed circumstances, this parent could apply to a court with a request to change the contact arrangements under section 143(3) of the Family Law Act. Only a court was competent to assess and decide whether the contact arrangements were in line with the child's interests within the meaning of section 123(1) of the Family Law Act.

51. In judgment no. 3-2-1-113-14 of 5 November 2015 the Supreme Court explained that in order to avoid any current or future disagreements between the parents regarding the contact rights with the child, the court had to make as specific arrangements as possible to that end by determining the time, duration, frequency, location of the meetings and the way the child was to be handed over. Matters concerning a parent's contact with child could not be left effectively undecided by requiring the parents to agree on certain aspects by themselves.

52. In judgment no. 3-2-1-138-16 of 11 January 2017 the Supreme Court noted that the decision to dismiss an application to have contact arrangements between a parent and a child ordered did not deprive a parent of the right to contact with the child. However, under sections 143(3)-(5) of the Family Law Act, the State could interfere with the right of contact between a parent and a child if contact with the parent was not in the child's

interests and was damaging his or her health and development. In that case, the court could restrict or terminate contact on its own initiative.

53. In judgment no. 2-16-5794 of 22 November 2017 the Supreme Court affirmed that if this was in the interests of the child and if the preconditions laid down in the second sentence of section 138(1) of the Family Law Act were met, it was possible to restore joint custody if it had been previously terminated.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. The applicant complained under Article 8 of the Convention that his right to respect for his family life had been violated by the domestic decisions to grant full custody over R.S. to K.T. and to restrict his contact with his son to only that of which K.T. had knowledge and had given consent.

55. Article 8 of the Convention 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 wellbeing 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

56. The Government, relying on the same arguments it had submitted under the merits, considered that the complaint was inadmissible as manifestly ill-founded.

57. The applicant made no specific comments as to the admissibility of the complaint.

58. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

59. The applicant asserted that the granting of full custody over R.S. to his mother K.T. had not been proportionate. He considered that this decision had arisen directly from K.T.'s reluctance to discuss matters concerning

their child with him. He admitted that he had lost contact with his son before the commencement of the domestic proceedings. However, he did not consider this to be a sufficient reason for finding that joint custody would harm the interests and well-being of R.S. The applicant expressed to the Court that he agreed to the partial transfer of the right of custody to K.T. (K.T. could be granted custody over the child's property; she could also determine his "place of stay" (*viibimiskohta määrata*) within Estonia and decide on everyday matters concerning R.S.; K.T. could also apply to courts to be granted the power to decide some other individual matters that the parents disagreed on). Against that background, the termination of joint custody had not been necessary.

60. The applicant argued that the domestic courts' decisions – which had made his contact with his son dependent on the child's will and K.T.'s consent – had effectively precluded any such contact.

61. The applicant considered that his son's memories of him had not been his own and that the unwillingness of R.S. to talk to him had to be attributed to the negative influence of K.T., who had portrayed the applicant in a bad light. The domestic courts had not ascertained the true reasons for the child's reluctance to communicate with his father and had based their decisions on K.T.'s statements and on the premature conclusions of A.T., not on actual evidence. K.T. had, moreover, refused to reply to the applicant's letters and other forms of reaching out during the proceedings. The courts had not sought opinions from any other experts who had met the child, nor had they extended the family counselling sessions. It had not been proven that the applicant's contact with R.S. would harm the child. The one time that he had been able to meet with R.S., at the therapy session with A.T. present, had not been sufficient to restore their relationship. V.K., the child's guardian *ad litem*, had been a legal specialist, not someone who would have had expert knowledge on assessing a child's mental state or determining the child's best interests. In the given case, V.K. had presented arguments based solely on the child's opinions, not his actual interests.

62. In conclusion, the applicant argued that the State had not made sufficient efforts to restore his relationship with his son and to ensure his access to him. He noted that he had not been able to have access to R.S. either during or after the domestic proceedings.

(b) The Government

63. The Government averred that there had not been a violation of the applicant's rights under Article 8 of the Convention.

64. The Government drew attention to the procedural steps that had been taken throughout the domestic proceedings in order to i) restore contact between the applicant and his son, ii) help K.T. and the applicant reach an agreement, and iii) guarantee that the child's interests were heard and taken into account.

65. Firstly, the domestic courts had throughout the proceedings cooperated with and asked for opinions from the relevant local municipalities – Pärnu City Government (as the guardianship authority of the child’s place of residence) and Tarvastu Rural Municipal Government (as the local government of the applicant’s place of residence) (see paragraphs 12-13, 15, 19, 22-24, 30, 32 and 35 above).

66. Secondly, the court had appointed a guardian *ad litem*, a lawyer, to protect the interests of R.S. (see paragraphs 11, 15, 19, 25, 30, 32 and 34 above).

67. Thirdly, during the proceedings, the Pärnu County Court had heard R.S. (see paragraph 17 above). The applicant as well as K.T. had had ample opportunity to express their opinions both in writing as well as orally during court hearings.

68. Fourthly, since the beginning of the proceedings the authorities had tried to guide the applicant and K.T. towards reaching an agreement and had contributed to the attempted restoration of the relationship between the applicant and his son. The applicant and K.T. had participated in counselling in the early stages of the proceedings as well as later when the Pärnu County Court had stayed the proceedings, as provided under domestic law, for that purpose (see paragraphs 12, 18, 20 and 38 above). The psychologist-family therapist A.T. had concluded that the continuation of meetings between the applicant and R.S. would not be in the latter’s interests (see paragraphs 21 and 28 above). The Government disagreed with the applicant’s statement that the domestic authorities had failed to take measures that would have enabled the applicant to restore his relationship with his son. The Government underlined, however, that R.S. had not seen his father from when he had turned three years old until after he had turned eight years old. It had not been shown that the applicant had tried to seek contact with his son between January 2011 and April 2016. It was thus understandable that the child had been reluctant to meet the applicant – a person that he had not known. Unfortunately, the provided counselling had not changed the child’s attitude towards the applicant.

69. Given the steps taken during the proceedings and the reasons provided by the domestic courts, the Government concluded that the decision to grant full custody over R.S. to his mother had been based on domestic law and had been justified and proportionate. In that connection the Government referred to the long-term separation of the parents; to the fact that it had been K.T. who had until then provided continuous daily care to the child; to the absence of a close relationship between the applicant and his son; to the previous misuse by the applicant of his custody over the child’s property; and to the lack of consensus between the parents. In such circumstances exercising joint custody would have been complicated.

70. Also, given that ordering mandatory contact arrangements between the applicant and R.S. would not have been – at that time – in the latter’s

interests, the decision not to do so had been justified. The obligation to facilitate contact between the applicant and his son had been an obligation of measures taken, not of results achieved. The Government stressed that not having custody or the fact that no contact arrangements had been fixed had not deprived the applicant of the right to have contact with his son. The domestic courts had not prohibited the applicant from having direct access to his child, but they had made it dependent on the child's mother having knowledge of it and giving consent. The applicant had the right to lodge a new application with the domestic courts, requesting that he be given custody again or asking that contact arrangements be fixed.

2. *The Court's assessment*

(a) **General principles**

71. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (see *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290).

72. Domestic measures hindering enjoyment of family life such as a decision granting custody over children to a parent constitutes an interference with the right to respect for family life (see *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 171, 27 September 2011).

73. The interference mentioned in the preceding paragraph constitutes a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society" (*Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII).

74. Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life (see *Diamante and Pelliccioni*, cited above, § 173).

75. As to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken with a view to their being reunited with their children, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures, but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A).

76. The Court reiterates that lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures to reconcile the conflicting

interests of the parties, keeping in mind the paramount interests of the child (see *Z. v. Poland*, no. 34694/06, § 75, 20 April 2010) which, depending on their nature and seriousness, may override those of the parent (see *Elsholz*, cited above, § 50). In particular, a parent cannot be entitled under Article 8 of the Convention to have measures taken which would harm the child's health and development (*ibid.*, § 50). The Court reiterates in this connection that the cooperation and understanding of all concerned will always be an important ingredient in such proceedings. While national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention (see *Hokkanen*, cited above, § 58).

77. However, the State's positive obligation is not one as to results, but one as to means employed (see *Ribić v. Croatia*, no. 27148/12, § 94, 2 April 2015). The key consideration is whether those authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case (see *A.V. v. Slovenia*, no. 878/13, § 74, 9 April 2019; see also, for example, *Hokkanen*, cited above, § 58).

78. In both the negative and positive contexts, 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 (see *Diamante and Pelliccioni*, cited above, § 174).

79. The Court finds it important to reiterate that while its case-law requires children's views to be taken into account, those views are not necessarily immutable and their objections, which must be given due weight, are not necessarily sufficient to override the parents' interests, especially in having regular contact with their child. The right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being considered and an examination being carried out to determine their best interests; such interests normally dictate that the child's ties with its family must be maintained, except in cases where this would harm the child's health and development (see *K.B. and Others v. Croatia*, no. 36216/13, § 143, 14 March 2017).

80. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation when deciding on custody. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of contact, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life

(see, *inter alia*, *C. v. Finland*, no. 18249/02, §§ 53 and 60, 9 May 2006, and *Elsholz*, cited above, § 49).

81. Where the measures in 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 residence disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretion. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance (see *Diamante and Pelliccioni*, cited above, § 174; see also, *inter alia*, *Hokkanen*, cited above, § 55).

82. Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on relevant considerations and is not one-sided, and hence neither is, nor appears to be, arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8 (see *W. v. the United Kingdom*, 8 July 1987, §§ 62 and 64, Series A no. 121; see also *Moog v. Germany*, nos. 23280/08 and 2334/10, § 75, 6 October 2016).

(b) Application of the above principles to the present case

83. The Court observes that the present case concerns, firstly, the granting of full custody over R.S. to his mother K.T. and, secondly, the applicant's right to have contact with his child after the ending of joint custody.

84. There is also no dispute that in the case at hand R.S. had been living with his mother after his parents' relationship had ended in autumn 2009 and that the applicant had not seen him since January 2011 when he had been approximately three years old. By the time the domestic proceedings started in autumn 2015, R.S. was approximately seven and a half years old.

85. It has not been contested by the parties that the domestic decisions related to the applicant's custody and contact rights constituted an interference with the applicant's family life. Nor has it been argued that the interference was not in accordance with the law. The Court considers that the measures pursued the legitimate aims of the protection of health or

morals and/or the protection of the rights and freedoms of others, namely of the child R.S.

86. It remains to be ascertained whether the measures were necessary in a democratic society. In determining this issue the Court will consider whether in the present case the domestic courts, in the light of the case as a whole and in the exercise of their discretion, based their decisions on relevant and sufficient grounds. The Court will firstly address the overall conduct of the decision-making process at the domestic level and then turn to the specific questions of the ending of joint custody and the applicant's right to have contact with R.S.

(i) Overall conduct of the decision-making process

87. As to the procedural steps taken in the domestic proceedings, the Court notes that a guardian *ad litem* was appointed in respect of R.S. and that throughout the proceedings (see paragraphs 10, 15, 19, 22, 30 and 32 above) the domestic courts sought opinions from the said representative as well as from the specialists of the local municipalities where either R.S. and his mother or the applicant lived. In the initial stages of the proceedings Pärnu City Government raised the possibility for the parents to undergo counselling or to meet at the premises of the city's child-protection service to try to find a solution (see paragraph 12 above). It appears from the case file that counselling indeed took place (see paragraph 18 above). It must also be highlighted that the Harju County Court, in accordance with domestic law, tried to guide the parties towards settling the matter by agreement by initially granting them a deadline to propose a compromise solution and later by suspending the proceedings so that the applicant and K.T., together with R.S., could participate in out-of-court family counselling with a psychologist-family therapist (see paragraphs 16, 19, 38 above). The Harju County Court interviewed R.S. (see paragraph 17 above) and, following an application by the applicant, the psychologist-family therapist A.T. was also examined (see paragraph 28 above).

88. The applicant has not argued, nor can it be discerned from the case-file material, that his meaningful participation in the proceedings was in any way hindered. He made his case in person before the Pärnu County Court (see paragraph 9 above) and made ample submissions in writing. While it is true that his applications to have a special guardian appointed and to continue family counselling with a different therapist (Ü.P.) were dismissed, the domestic courts provided relevant reasons for their decisions.

89. Based on the above the Court concludes that the domestic proceedings were guided by the overall aim of finding an amicable solution that would be in the best interests of the child. In doing so, the courts took into account the views expressed by R.S. (who, when appearing before the Harju County Court, was approximately eight and half years old). However, the domestic courts did not refer exclusively to the opinion of the child.

They took into account the overall circumstances as well as the opinions expressed by the specialists of the involved local municipalities and the child's representative. The applicant was placed in a position enabling him to put forward all arguments in favour of maintaining custody and obtaining contact to his child. The proceedings, which lasted approximately two and a half years at three levels of jurisdiction cannot be considered to have been unreasonably lengthy.

(ii) *Ending of joint custody*

90. When deciding to grant full custody over R.S. to his mother, the domestic courts referred in their reasoning to the fact that R.S. had lived with his mother K.T. ever since the relationship of his parents had ended in 2009. It had been K.T. who had raised R.S., whereas the applicant had not exercised any custody rights. The applicant had, however, agreed to everything that K.T. had decided in respect of their son until then. As regards the right to care for the property of the child (*varahooldusõigus*), the domestic courts noted that over the years the applicant had opened bank accounts in the name of his son and had used them for himself. The domestic courts also took into account the opinions expressed by Pärnu City Government, Tarvastu Rural Municipal Government and the child's guardian *ad litem*. The Court notes that from the very beginning of the proceedings Pärnu City Government and V.K. (the child's guardian *ad litem*) asserted that the habitual living arrangements of R.S. should be maintained. Although in the initial stages of the proceedings, the local municipalities had considered the ending of joint custody to be too severe and premature, as the proceedings wore on, Pärnu City Government came to support the application to grant full custody to K.T. V.K. was also in favour of that solution. Tarvastu Rural Municipal Government, although not supportive of the application to end joint custody, nevertheless considered it justified to give K.T. the right to decide over matters concerning the child's person and property.

91. Based on the above, and reiterating that the authorities have the benefit of direct contact with all the persons concerned, the Court finds that the reasons given by the domestic courts when ending joint custody over R.S. and granting full custody to his mother were relevant and sufficient. The Court notes that, contrary to what the applicant has claimed, the domestic courts did not end joint custody for the reason that it harmed the well-being of R.S. The Court acknowledges the applicant's argument that the ending of joint custody was not necessary as substantially the same outcome could have been achieved by partial transfer of custody to K.T. supplemented by her being granted the power to decide on some other individual matters that the parents disagreed on (see paragraph 59 above). However, the Court is not convinced that such a solution, owing to the fact that it would seem to entail further proceedings over granting the power to

decide some specific matters to one or the other parent, would have been in the best interests of the child.

(iii) Right of contact

92. Turning to the question of the applicant's right of contact with his son, the Court starts by highlighting that under Estonian law the fact that full custody was granted to the mother and that no contact arrangements were fixed did not, in itself, deprive the applicant of the right to contact with his son (see paragraphs 47, 48, and 52 above). In the present case the domestic courts, however, set a further requirement that the meetings between the applicant and his son had to take place with the knowledge and consent of the child's mother. The courts did not restrict the applicant's right to communicate with R.S. by means of telephone calls, letters, emails or text messages.

93. Given the specific factual background of the case, where the applicant had no contact with his son from when he was about three years old until he was over eight years old, the Court will firstly assess whether the domestic authorities took all necessary steps to facilitate contact between the applicant and R.S. The Court will then analyse the decision-making process that led the domestic courts to reach the decision in question and the reasons adduced by those courts.

94. As to the attempts to restore the relationship between the applicant and his son, the Court highlights that the national authorities' obligation to take measures to facilitate reunion is not absolute. The reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken (see, for example, *Kosmopoulou v. Greece*, no. 60457/00, § 45, 5 February 2004, and *Hokkanen*, cited above, § 58). The same was essentially noted by the Tallinn Court of Appeal (see paragraph 30 above).

95. In the present case, both the Pärnu City Government and the Pärnu County Court tried to convince the applicant and K.T. to find a solution that would be in the best interests of their child. It appears that the applicant and K.T. attended counselling sessions prior to the suspension of the proceedings (see paragraph 18 above) as well as during the period that the court proceedings were stayed precisely for the purpose (see paragraph 20 above). It was in this context that the applicant was able to meet his son. The Court observes that such meetings took place only on a limited number of occasions, but points out that the decision to stop any further meetings of that kind was taken on the advice of the psychologist-family therapist A.T. The latter had noted that the child had been reluctant to meet his father and that the meetings had caused him great stress. A.T. had thus concluded that their continuing would not be in the child's interests. Moreover, forcing R.S. to meet his father could, in the opinion of A.T., be counterproductive (see paragraphs 20, 21 and 28 above). No arguments have been put forward

that would make the Court question the reliability of the opinion provided by A.T.

96. Against this background, the Court accepts that on a practical basis, there may indeed come a stage where it becomes futile, if not counterproductive and harmful, to attempt to force a child to conform to a situation which, for whatever reasons, he or she resists. Noting also that coercive measures against children are not desirable and must be limited in this sensitive area (see for example *Hokkanen*, cited above, § 58) the Court considers that the domestic courts' decision not to oblige R.S. to attend any more counselling sessions with his father, conducted either by A.T. or Ü.P., was justified. Accordingly, as the positive obligation of the State to restore and facilitate the contact between the applicant and his son was not one as to results, but one as to means, the Court accepts that, in the circumstances of the case at hand, domestic authorities took all necessary steps that could have been reasonably expected from them.

97. Considering that the attempts to revive the relationship between the applicant and R.S. had not produced the results hoped for, the domestic courts dismissed the applicant's application to fix contact arrangements and allowed him to meet his son with K.T.'s knowledge and consent. The Court observes that in reaching such a decision the domestic courts took into account the views of R.S., who had expressed his reluctance to meet with the applicant both to the child-protection specialist of Pärnu City Government and to a judge of Harju County Court (see paragraphs 12 and 17 above). However, the domestic courts did not base their decision exclusively on the child's opinion. They took into account the factual circumstances as a whole (including the fact that R.S. had been estranged from his father for many years), analysed the arguments put forward by both of the parents (including the applicant's arguments that K.T. was influencing the child), took into account the opinion provided by A.T. (who was also examined in court) and assessed the opinions provided by the involved local municipalities as well as the child's guardian *ad litem*. As a result, the domestic courts found that it had been sufficiently established that (forced) contact between the applicant and his son would hinder the mental health and development of R.S.

98. Based on the above, the Court considers that the reasons put forward by the domestic courts were relevant and that they had a sufficient evidentiary basis to make the impugned decision not to force R.S. to have meetings with his father against his best interests. They did not, however, exclude that such meetings could take place, should the child overcome his reluctance, and subjected the meetings to the knowledge and consent of K.T., the child's legal guardian. Moreover, the domestic courts did not restrict other forms of contact between the applicant and his son. The Court notes that, as the circumstances may change over time, the domestic law does not exclude the possibility for the applicant to lodge another

application in the future for the revision of the contact arrangements, including the arrangements for physical meetings, between him and his son (see paragraphs 44 and 50 above).

(iv) Conclusion

99. Taking into account the conduct of the domestic decision-making process as a whole as well as the particular reasoning adduced in support of the domestic courts' decisions to end the joint right of custody over R.S. and restrict the applicant's right of contact, the Court finds that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 20 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President