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

FOURTH SECTION

CASE OF C. v. FINLAND

(Application no. 18249/02)

JUDGMENT

STRASBOURG
9 May 2006

FINAL

09/08/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of C. v. Finland,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 14 March 2006 and on 11 April 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 18249/02) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr C. ("the applicant"), on 18 April 2002. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr Waeber, a lawyer practising in Geneva. The Finnish Government ("the Government") were represented by their Agent, Mr Kosonen, Director in the Ministry for Foreign Affairs.

3. The applicant complained of the decision and procedure adopted by the Supreme Court in reversing the judgments of two lower courts which had awarded him custody of his children. He also complained of the extremely limited contact which took place during the proceedings and the failure to order any contact afterwards. He invoked Articles 6 and 8 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 20 January 2004 the Court invited the Government to submit observations on the applicant's complaints about the decision of the Supreme Court dated 19 October 2001 and limitations on access and rejected the remainder of his complaints as inadmissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. By a decision of 5 April 2005, the Court declared admissible complaints concerning the Supreme Court decision overturning the lower courts' decision awarding him custody of his children and concerning his access to his children admissible and rejected the remainder of the application.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1955 and lives in Cartigny, Switzerland.

10. The applicant and his wife, B., who was of Finnish origin, had two children, a boy T. born on 2 June 1987 and a girl A. born on 28 September 1989. The family lived together in Switzerland until 1993 when B. took the children to Finland where she took up residence with L. as her female partner.

11. On 10 June 1994, B. applied for divorce and for custody of the children.

12. On 10 October 1994 the parents reached an interim agreement whereby the children would stay in Finland with their mother for the moment and the applicant have the right to three supervised visits.

13. The applicant states that on 13 October 1994 he became aware that the children's maternal grandmother had made a complaint to the social services against B.'s female partner, L., alleging that she had sexually abused A. There is some indication in the documents that the applicant may also have lodged a complaint on this ground. The criminal charges lodged against L. were later dismissed by the courts.

14. Meanwhile, it appears that the applicant took proceedings with a view to having the children returned to Switzerland under the Hague Convention. However, by decisions of the Court of Appeal dated 7 December 1994 and by the Supreme Court dated 15 June 1995, the applicant's application for return was refused, principally on the ground that he had voluntarily entered into an interim agreement that the children remain in Finland with their mother.

15. On 20 August 1996, the District Court awarded sole custody of the children to the mother, finding that the children had lived with their mother in Finland since 1993 and that it was in their best interests to remain with her. On 8 July 1997, the Court of Appeal upheld this decision, as did the Supreme Court on 14 November 1997.

16. The applicant was however granted visiting rights. It appears that the children visited him in Switzerland during Easter and the summer of 1997 and met with him in Finland in 1998 (twice) and 1999 (three times).

17. On 30 August 1999, B., the mother, died. The children were then aged twelve and nine years respectively.

18. The applicant returned immediately to Finland. On 23 September 1999, he lodged a request that the children, still living with L., be placed in a foster home and that he be accorded visiting rights.

19. Applications for custody of the children were lodged by both L. and by the applicant. During October 1999, the children were interviewed twice by a team consisting of a child psychiatrist and two psychologists. They expressed their wish to stay with L. because they felt safe and were used to living with her. A. was reported as stating that she would like to meet the applicant occasionally but only when she wished, while T. was reported as stating that the applicant was not part of his family and that he neither wanted to meet him or live in Switzerland.

20. The applicant saw the children three times during September 1999 in supervised contact visits. There was another meeting outside the social workers' premises.

21. In a Social Welfare Board report dated 26 October 1999, it was stated that, following the mother's death, L.'s influence on the children had increased and the children turned to her for support. It was noted that the children were not able to act against L.'s will, because they were dependent on her at that time. Consequently, the children were in a state of conflict, as they were not allowed to like the applicant. The report considered that the lack of contact with their close relatives endangered the development of their identity.

22. On 21 December 1999, after oral hearings at which the applicant, L. and another 18 witnesses, including a number of social workers involved in the case, were heard, the District Court awarded custody to the applicant. It observed *inter alia*, that according to the evidence, L. had been involved in bringing up the children since their return to Finland. According to a number of social workers involved in the case, the applicant was considered fit to be a custodial parent as, for example, in dealing with conflicts he had always put the children's best interests first. The meetings between the children had also gone well. It concluded that in fact both L. and the applicant were fit as custodians.

23. As regarded the views of the children, the District Court recalled that according to a statement of 23 February 1998 given by a social worker

during previous proceedings, T.'s wishes were not entirely his own; he had been influenced by B., his mother. His wishes were in contradiction with what he had told the social worker about the meetings with the applicant which had taken place. The social worker had noted that the fact that B. did not want T. to travel to see the applicant was significant and pointed out that it would be very important for the children's psychological development that they develop a more constructive view of the applicant. It recalled the evidence of a friend of B. and L., who had given evidence before the court, had stated that the children's attitude towards the applicant had begun to be more positive from the summer of 1998, but that no meetings had taken place as from March 1999, apparently due to the fact that the children's activities were given priority and the meetings with the applicant tended to be proposed at short notice. T. had told her that it would be alright to meet with the applicant if he could decide when. A. had told her that she would like to meet with the applicant some day, but not at that time. T.'s attitude towards meeting the applicant was therefore fairly positive. Following B.'s death, everything had changed when the applicant came to see his children. As he allegedly had said that the law would make the children move to live in Switzerland, they did not want to meet with him anymore. According to this witness, the children feared moving to Switzerland.

24. The District Court considered that T.'s attitude during the recent interviews was in contradiction with what had happened during the meetings with the applicant, which had all gone well. It found that none of the persons heard before the court had said that the children feared the applicant and concluded that, as the atmosphere in which the children had been living had obviously affected their wishes and hopes, it was not possible to analyse what their true views really were. Therefore, their expressed wishes could not be decisive when deciding the case. Noting that the case should be decided in accordance with the children's best interests, it decided that, given the strained relations between L. and the applicant, custody should be awarded to the latter. It was evident that L. would not be able to encourage the relationship between the children and the applicant enabling them to stay in contact. Therefore, the District Court ordered that custody be awarded to the applicant.

25. Pending L.'s appeal against the decision, the enforcement of the order was suspended by the Court of Appeal on 22 December 1999. According to the evidence of various social workers, the children had reacted to his expressed intention of taking them to Switzerland by refusing to meet with him unless L. was present. The applicant allegedly refused to meet with the children under these terms. The applicant's attempts to enforce contact visits also apparently failed due to the children's refusal to see him.

26. On 3 April 2000, the Court of Appeal overturned the decision concerning the suspension and requested the Social Welfare Board and its

Swiss counterpart to report on the case. During the period June-September 2000, pursuant to the court's request, the children were interviewed five times by social workers, three times in the presence of L. and twice alone. The social workers' efforts to arrange a meeting between the children and the applicant were unsuccessful due to the children's opposition. It was reported by the social worker in later oral evidence that the children continued to express their wish to live with L. During the interviews, the children had turned to L. for support and been dependent on her. The children's memories of the applicant were, however, good. Nothing suggested that the children would have had any reason to feel unsafe in the applicant's company. According to one of the social workers at the meetings, the wishes that the children expressed were more dependent on the wishes of L. than their own will. According to the evidence given by other witnesses in the Court of Appeal, including other social workers, the children expressed their wish to be left alone and that they wanted to stay in Finland every time the applicant was brought up for discussion. They seemed to fear moving to Switzerland.

27. Meanwhile, it appears that the applicant applied to the District Court for its original order to be enforced. This request was refused on 31 August 2000. His appeal to the Court of Appeal was later rejected on 28 June 2001 as meanwhile it had reached a fresh decision in the case. An application by the applicant to have the children placed in a foster home away from L. was also dismissed by the Social Welfare Board on 5 April 2000 and his appeal rejected by the Administrative Court of Helsinki on 19 December 2000.

28. On 23 March 2001, after an oral hearing over four days during February and at which the applicant and L. were heard as well as eleven other witnesses from the District Court proceedings and four new witnesses, the Court of Appeal upheld the District Court's judgment. It ordered that the children move to live with the applicant on 16 August 2001, after a transitional period during which the children could meet with the applicant one weekend per month and one week during the summer.

29. In its judgment, the Court of Appeal agreed that both L. and the applicant were fit to have custody: nothing suggested that they would not be fit. Given the ages of the children, it considered that their view had to be taken into account, but it was also evident that the strained relationship and litigation between the applicant and B., and later on L., had had influence on their view. It considered that the negative attitude towards meeting with the applicant was based on the fear of having to move to Switzerland. Nothing suggested that the children feared the applicant as such. Although the children were as mature as other children their age, they could not however be given the absolute right to decide on their future, particularly in light of their extremely difficult situation at that time. Notwithstanding the law on enforcement, the court did not consider that in deciding on custody it was bound to follow the opinion even of a child aged 12 or more. Concluding

that the decision should be based on what was in their best interests, it found that the relationship between the children and the applicant was very important for a well-balanced development. It furthermore found that the fact that the applicant had said that he would allow the children to keep in touch with L. was in the best interests of the children. While it was true that the children appeared closer to L. and their environment (including their home, school, hobbies and close personal relations) would stay the same if custody was awarded to L., the Court of Appeal concluded, nonetheless, that the children's views did not correspond to their best interests. A situation which would lead the children and the applicant drift further apart was not in their best interests. Accordingly, it ordered that the applicant be awarded custody from 16 August 2001 after a transitional period of increased contact with the children.

30. The applicant visited Finland in March, April and May 2001, requesting visits with his children. On 30 March 2001, the applicant arrived in Helsinki and requested to see the children the same day. The social worker contacted L. to inform her of this and reported that the children refused. They allegedly wanted L. or another person to be present whereas the applicant refused any third party involvement. On only one occasion, in May 2001, did a visit take place when it was agreed between the parties that the children see the applicant at their maternal grandmother's. However, only T. appeared, accompanied by a friend and one of L.'s lawyers. On this occasion, an incident occurred, the accounts of which vary but to which the police were called. T. subsequently informed his social worker that he was afraid of his father, who had tried, T. alleged, to keep him in the grandmother's apartment by force and stated that he did not wish to see him again. The children did not appear at the next meeting in May 2001. They had already informed him that it would serve no purpose for him to come to Helsinki as they did not wish to see him. The social workers had several meetings with the children during this period and also made contact with their school seeking to persuade the children to attend therapy sessions. The children were recorded as stating that the applicant only made critical comments and demands and held strong views that they did not wish to live their friends and the environment they knew and that they did not trust their father. T. stated that he feared that his father would attempt to force them to leave Finland.

31. L. applied for leave to appeal. On 20 June 2001, the Supreme Court granted L. leave to appeal and suspended the enforcement of the Court of Appeal's order. L. applied for an oral hearing, requesting that the parties, and possibly also the children, be heard. In his submissions to the Supreme Court in reply, the applicant applied for interim visiting rights and for the current psychological state of the children to be examined. He also requested that if L.'s request for an oral hearing was granted the Supreme Court should rehear the evidence presented before the lower courts.

32. On 19 October 2001, the Supreme Court gave judgment on the outstanding issues (Supreme Court Reports 2001:110). It re-iterated that it had rejected the request for an interim order as being purposeless and the request for a psychological examination as being unnecessary. It also rejected the request for an oral hearing as unnecessary in the circumstances and for the reasons set out in its judgment.

33. The Supreme Court recalled that, according to the Custody Act, the issue of custody had to be decided with regard to the child's best interests and that if the custodial parent of the children died, custody could be given either to the other parent or to another person, depending on where the best interests of the child lay. It agreed with both the lower courts that the applicant and L. were both fit to act as custodians. Both children however had said that they wanted to stay in the environment which they knew and with L. Their views had been thoroughly examined before both the District Court and the Court of Appeal and although the conflict between the adults had apparently disturbed the relationship between the children and the applicant, there was nothing to suggest that their wish to remain with L. was not their own independent opinion, in particular given their age and maturity.

34. The Supreme Court referred to section 2 of the Act on the Enforcement of Decisions concerning Custody and Access Rights and recalling that T. was 14 and A. was 12, found that a custody decision which required the children to move would not be possible to enforce. Having regard to the purpose of awarding custody, it would not be in the children's best interests to issue a custody order to a parent to whom they could not be transferred against their will. As the relations between the applicant and L. were bad, there was no reason to consider that it would be possible for the applicant to have custody while they continued to live with L. as that would render it impossible to take practical decisions concerning the children's lives. In the circumstances of this case, it was therefore not in the best interests of the children to transfer custody to the applicant against their will but custody should be awarded instead to the person with whom they were currently living.

35. The Supreme Court went on to remark that future contact visits could be carried out under agreement or court order but that given the age of the children it would be dependent on their willingness to see the applicant. It underlined that according to the Custody Act, the custodian of children was under an obligation to co-operate in order to promote and maintain relationships between children and a parent. It did not make any order on the point. The applicant had not made any application in that regard.

36. The Supreme Court therefore overturned the decisions of the lower courts and awarded custody to L.

37. On 16 April 2002, the Administrative Court of Helsinki dismissed the applicant's renewed request for the children to be placed in a foster home.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Custody and access

38. Custody of children is governed by the 1983 Act on Child Custody and Right of Access with regard to Children (*laki 361/83 lapsen huollosta ja tapaamisoikeudesta, lag 361/83 ang. vårdnad om barn och umgängesrätt* – "the 1983 Act"). Section 1 provides that the aim of such custody is to ensure the child's balanced development and well-being, regard being had to the latter's special needs and wishes, as well as to encourage a close relationship between the child and the parents.

39. The court may order that custody of a child be entrusted to one or more persons together with, or instead of, the parents (section 9 § 1). It may transfer custody from the parents to other persons only if, from the child's point of view, there are particularly strong reasons for doing so (section 9 § 2). It is also empowered to decide on access (section 9). The aim of access is to secure a child's right to maintain contacts with a parent with whom he or she is not living (section 2).

40. In deciding on matters of custody and access the competent court must take into account the wishes and interests of the child in accordance with the following considerations: primary emphasis must be placed on the interests of the child and particular regard should be had to the most effective means of implementing custody and access rights in the future (section 9 § 4 and section 10 § 1); the child's views and wishes must, if possible and depending on its age and maturity, be obtained if the parents are unable to agree on the matter or if the child is being cared for by a person other than its custodian or if it is deemed necessary in the latter's interests; the consultation must be carried out in a tactful manner, taking into account the child's maturity and without causing harm to its relations with the parents (section 11).

2. Enforcement of custody and access rights

41. Section 2 of the Act on the Enforcement of Decisions concerning Custody and Access Rights (*laki 619/1996 lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta, lag 619/1996 om verkställighet av beslut beträffande vårdnad om barn och umgängesrätt*), which entered into force on 1 December 1996, provides that if a child has reached the age of twelve, enforcement must not take place against the

child's will. Enforcement must not take place against the will of a younger child, if the child is sufficiently mature for its wish to be taken into account.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

42. The applicant complained that the Supreme Court wrongly overturned the judgments of two lower courts which had awarded him custody of his children and that he was not given adequate contact with his children during the proceedings or any order for contact made after the proceedings. Article 8 of the Convention provides as relevant:

> "1. Everyone has the right to respect for his ... family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' observations

1. The applicant

43. The applicant submitted that the Supreme Court had found it in the best interests of the children to place them with L. despite the fact that a medical report showed that she suffered from psychiatric problems linked to alcohol and that she had deliberately blocked the children's contact with their father. The court accorded an unreasonable weight to the opinion and age of the children. The children had been under the influence of L. who had cut their links with their father over two years yet the court did not order any examination of the substance or voluntariness of their views but merely relied on the fact that the youngest child had turned twelve. In doing so it overturned the decisions of two lower courts without further explanation or reasoning, although those courts had found it was in the children's best interests to be with their father. The court applied the criteria of age automatically without regard to issues of maturity or voluntariness of the views expressed. It made no reference to findings that the children's views had been influenced by L. While children's views had to be taken into account, they did not have to be regarded as decisive. The applicant submitted that under L.'s influence they had not been free to form their own

opinion but had been manipulated. Prior to the mother's death, he had had excellent relations with the children, visiting Finland and obtaining their visit to Switzerland on two occasions. They had no reason to fear him or refuse to see. It was L. who turned the children against him and told them that he would force them to go to Switzerland and put them in a children's home, in order to keep them with her.

44. The applicant pointed out that he had enjoyed the right to have contact with the children but that L. had deliberately flouted the court decisions giving him that right. Nor had the authorities taken any step to enforce his right. He referred to the fundamental importance of a child's relationship with its biological parents and argued that generally custody should be given to such a parent who is best placed to ensure the emotional security and psychological welfare of the child. It would require compelling circumstances where one parent died to take custody from the remaining parent. The reports showed that the applicant was a competent parent, with understanding of the children's needs, whereas the social and judicial authorities' views that L. was a fit parent were contradicted by her medical file, showing her serious and longstanding mental problems, which included violent delusional thoughts concerning the applicant and the maternal grandmother. As regarded access during the proceedings, he pointed out that the Court of Appeal had, without informing his lawyer, suspended the enforcement of the District Court the day after it issued. He could not have made an application for access pending the Court of Appeal decision as this would have been tantamount to renouncing his own right of custody and recognising that L. had the right to keep them. The Supreme Court then banned enforcement of the Court of Appeal decision without taking any steps to provide for contact.

45. Further, in reaching its decision on custody, the Supreme Court also failed to make any order concerning access or to make any investigation into the issue and in so doing effectively approved the situation brought about illegally by L., who had no rights in respect of the children.

2. *The Government*

46. The Government acknowledged that the impugned measures interfered with the applicant's right to respect for his family life but submitted that they were "in accordance with the law" and pursued the protection of health and morals of the children in question, namely to provide them with stable and safe living conditions and secure their development. They further submitted that the measures were necessary in a democratic society. They pointed out that the national authorities had the benefit of contact with the persons concerned and that a parent was not entitled under Article 8 to have measures taken which would harm a child's health or development.

47. The Supreme Court, which had access to all the evidence that had been adduced in the lower courts, found in its judgment that it was not in the interests of the children to issue a custody order to a parent to whom they could not be transferred against their will. Domestic law required that the children's wishes and opinions be taken into account. When the Supreme Court gave its decision on 19 October 2001 T. was fourteen and A. twelve. They had lived permanently in Finland for eight years and had lived with their mother's partner, L., since their mother's death on 30 August 1999. The two children had been consistent in their views throughout the proceedings, as shown by the various reports of the Social Welfare Office and the report of the conciliators which were based on meetings with the children. The Government relied *inter alia* on the report dated 3 November 1999 where the children were recorded as expressing their wish clearly to live with L., saying that they felt safe with L. and were used to living with her. They referred to cases where the domestic courts had been entitled to take into account the views of children who were sufficiently mature (*Hokkanen v. Finland*, judgment of 23 September 1994, Series A, no. 299-A, § 62; *Sommerfeld v. Germany*, no. 31871/96, ECHR 2003-VIII, § 65).

48. Similarly, the Supreme Court acknowledged that it was not possible to enforce contact against the children's expressed will. Since the custody order could not have been enforced against their will, the children would otherwise have been left with L. rendering decisions about their school and health problematic as the applicant lived in Switzerland and relations between him and L. were bad. As the children's views had been repeatedly and thoroughly examined, the Supreme Court has sufficient reasons to assess the consequence of any custody order in the applicant's favour and to whether the children's views could be considered to be based on their independent will. On the basis of the evidence, it reached the view that their wish to remain with L. was their own and independent opinion. The applicant had full opportunity, orally and in writing, with the assistance of counsel to put forward his interests and he had access to all relevant information.

49. The Government submitted that the weight given by the Supreme Court to the de facto difficult of enforcing custody against the children's will this did not indicate that the legislation prevented the courts reaching a decision on custody which contradicted a child's wishes. It was only one factor, albeit a significant one. There had been no need to obtain further expert evidence as to the children's views as these had been repeatedly and thoroughly examined already, with appropriate expertise in social welfare, child psychiatry and psychology. In addition, the children had protested against the continual questioning and were fatigued with the procedures.

50. As concerned access, the Government noted that as during the proceedings the courts had awarded custody to the applicant there had been no reason for them to issue an order on access. The applicant did not make a

request for an interim order before the Court of Appeal. When the Court of Appeal ordered that the children live temporarily with L. until enforcement of its custody decision, it issued an order on access. This remained in force till the Supreme Court suspended enforcement of the Court of Appeal order. Access visits had been disrupted when the applicant had stated that he was going to take the children to Switzerland and both children had been disturbed by the applicant's conduct. The social welfare authorities did make efforts to arrange meetings but they failed as the children categorically refused and the applicant refused any visits in which L. or a third party was involved. The applicant did not request the Supreme Court to make an order for future access and that court noted in its decision found that any future contact depended on the will of the children and reminded the custodian that she had to contribute to the creation and maintenance of contact with the applicant. The Government therefore argued that the authorities had not failed to respect the applicant's rights in this respect.

B. The Court's assessment

1. Concerning the refusal of custody

51. The parties did not dispute that the decision refusing the applicant custody of his children amounted to an interference with his right to respect for his family life, as guaranteed by Article 8 § 1. The Court takes the same view. Nor did they question that the decision had a basis in national law and was aimed at protecting the "health or morale" and the "rights and freedoms" of the children. The decision thus may be regarded as "in accordance with the law" and pursuing aims that are legitimate under paragraph 2 of Article 8. It remains to be examined whether the refusal of custody can be considered "necessary in a democratic society".

52. In determining that question, the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and *Kutzner v. Germany,* no. 46544/99, §§ 65-66, ECHR 2002-I; see also Article 3 of the Convention on the Rights of the Child cited in *Sahin v. Germany* [GC], no. 30943/96, §§ 39-41, ECHR 2003-VIII).

53. 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 has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII; and *Kutzner,* cited above, § 67).

54. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of parents and that, in the balancing process, particular importance should 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 of the Convention to have measures taken as would harm the child's health and development (see *Elsholz,* cited above, § 50; and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V; see also *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I, and *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII).

55. Turning to the present case, the Court recalls that the custody dispute which the Finnish courts were called upon to resolve lay between the applicant, the father of the two children and L. who was the partner of their deceased mother. While significant weight must be placed on the applicant's rights therefore as their father, the Court would observe that these proceedings followed a previous set of bitterly fought proceedings for custody between the father and mother of which the children could not have been ignorant. Further, it has to be recognised that the children had lived in their home with L. since 1993. It was therefore entirely in keeping with the principles outlined above that the Finnish courts examined whether the children's best interests lay in remaining with L. or with the applicant as being awarded custody.

56. That said, notwithstanding the past and continuing acrimony between the adults which took its toll on the children, there was no finding by the domestic courts that the applicant was in any way unfit as a father or not capable of providing for their needs and putting their interests first. Contact visits had taken place without significant difficulty while the mother was still alive, and even in 1999 during the District Court proceedings and the evidence before the courts showed that until then the relationship between the applicant and his children was, on the whole, good and beneficial. The decisions of the two lower courts, the District Court and the Court of Appeal, accordingly gave custody to the applicant, considering that the later negative views given by the children were influenced by L and the conflict between the adults and could not be regarded as decisive of their best interests. The Supreme Court reversed those decisions awarding custody to L. Although it is true that it is the function of higher appellate courts to review, and if necessary quash, lower court decisions and the mere fact that they might take a different view does not, in itself, raise any issues,

the Court must nonetheless, given the importance of the Supreme Court's decision for the applicant, examine whether it was supported by relevant and sufficient reasons. The Court considers that it cannot satisfactorily assess whether those reasons were "sufficient" for the purposes of Article 8 § 2 without at the same time determining whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 64; *Elsholz,* cited above, § 52; and *T.P. and K.M. v. the United Kingdom* cited above, § 72).

57. Firstly, the Court notes that the Supreme Court gave decisive weight to the children's expressed wishes that they remain with L. in Finland, referring to legislation which prevented the enforcement of decisions against the will of children over the age of 12. It is generally accepted that courts must take into account the wishes of children in such proceedings. On a practical basis, there may also come a stage where it becomes pointless, if not counter-productive and harmful, to attempt to force a child to conform to a situation which, for whatever reasons, he or she resists. It must be noted that all court instances in this case essentially agreed as to the consistency and strength of the children's views. The reasons relied on by the Supreme Court were clearly relevant therefore.

58. The weight to be attached to the childrens' views was, however, an issue which had been examined in some depth in the proceedings in the lower courts which assessed that, notwithstanding their wish to remain with L., it was in their best interests for custody to be given to the applicant, their father. The Court of Appeal indeed emphasised that it was not bound to follow the opinions of a child even where aged 12 or more. The Supreme Court, however, placed exclusive weight on the views expressed by the children without considering any other factors, in particular the applicant's rights as a father, effectively giving the children, who had both reached the age of 12, an unconditional veto power, and reversing the decisions which had hitherto been in the applicant's favour. Furthermore it did so without holding an oral hearing in which it might invite the parties to address the matter or without taking any steps to clarify, through further evidence or expert opinion, any divergent interpretation of the evidence or whether greater harm would be caused to the children's welfare by a decision in the applicant's favour than a decision in L's favour which would effectively deprive them of a relationship with their father. The decision was reached in a manner which understandably left the applicant with the impression that L., the mother's partner, had been allowed to manipulate the children and the court system to deprive him unjustifiably of his parental role.

59. The Court concludes therefore that the decision-making procedure failed to strike a proper balance between the respective interests and that there has been a violation of Article 8 of the Convention in that respect.

2. Concerning access

60. The Court recalls that while that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII; and *Kutzner,* cited above, § 67).

61. The Court notes that the Government pointed out that the applicant did not make any application for access visits before the Court of Appeal and that the applicant sought to explain that he had not done so as he considered that this would have been tantamount to recognising L.'s claim to custody. He appears to take the view that it was for the courts *ex officio* to take the necessary steps to maintain ongoing contact between himself and his children. The Court recalls that contact visits did take place successfully during the District Court proceedings but that during the Court of Appeal proceedings and pending its order for the transition of custody attempts contact meetings were attended by various difficulties. By this time, for whatever reason, the children were refusing to meet with him alone and the applicant resisted any suggestion of L.'s participation in visits. Against that background, the Court considers that the Supreme Court's refusal of interim access visits may be regarded as supported by relevant and sufficient reasons. As regards the failure of the Supreme Court to provide for contact after its own decision giving custody to L., it does not appear that the applicant had made any application for such or that he has made subsequent application before the courts. Against the background of the children's continued resistance it might well be that there would also be relevant and sufficient reasons for a decision refusing to given defined contact. Until however the courts rule on an application by the applicant the matter is somewhat speculative.

62. The Court finds therefore that there is no indication that the courts failed to respect the applicant's right to respect for family life as regards the issue of access to his children. It follows that there has been no violation of Article 8 in that regard.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

63. The applicant complained that the Supreme Court did not hold an oral hearing or hear further witnesses, the children and expert evidence as to their views on residence and access, before issuing its decision overturning the decisions of the lower courts granting him custody of his children.

64. Article 6 of the Convention provides as relevant:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

A. The parties' observations

1. The applicant

65. The applicant submitted that the evidence before the lower courts showed that the best interests of the children lay in giving custody to their father and that their opposition to this measure was based on views which had not been independently formed. The Supreme Court should not have reversed the lower court findings without convincing reasons and the applicant had had a right to be heard before it did so. Similarly before ruling on the alleged views of the children, who were caught in a conflict between adults, they should have been examined by experts who assess the reliability of their expressed wishes. He denied that his request for a hearing could be interpreted as conditional. That he wished to be heard was implicit in the request for all witnesses to be reheard; his counsel had merely objected to L.'s request that the children be examined by the court itself rather than an expert. He concluded that as a result the Supreme Court's decision had been arbitrary.

2. The Government

66. As regarded Article 6, the Government pointed out that there was no absolute right to an oral hearing. The Supreme Court was under no obligation to do so under domestic law. It had been L. who had applied for an oral hearing. The applicant had only approached the matter conditionally, stating that if they granted L. an oral hearing he requested the court to rehear all the evidence from the lower courts. In the circumstances, he could reasonably be regarded as having waived his right to an oral hearing. The Supreme Court rejected L.'s request for a hearing as unnecessary. It was already accepted in both lower courts that L. and the applicant were fit custodians. As regarded the applicant's request for the current psychological state of the children to be examined, it found this was also unnecessary as the children had firmly and consistently said that they wished to remain in a familiar environment with L. In their view, therefore, there was no unfairness disclosed by the procedure before the Supreme Court.

B. The Court's assessment

67. The Court notes that the lack of an oral hearing was an essential, and integral, part of its finding of a violation of Article 8 of the Convention (see paragraph 58 above). In the circumstances of the present case no separate issue arises under Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant referred under the head of pecuniary damage to goods and assets which had belonged to his ex-wife and which had been appropriated on her death by her partner L. Emphasising that he had been deprived of his rights as a father, he claimed EUR 100,000 as non-pecuniary damage and interest thereon since the Supreme Court decision.

70. The Government submitted that the applicant's claims for damage related to movable property and financial assets have not been specified and were not in any event linked to the violations in issue. As regarded non-pecuniary damage, they did not consider that more than EUR 6,000 should be awarded.

71. The Court finds no causal connection between the pecuniary damage claimed and the violations found in the case. It makes no award in this respect. As regards non-pecuniary damage, the applicant has undoubtedly suffered a real loss of opportunity in addition to anxiety, stress and feelings of injustice. The Court awards EUR 10,000 under this head.

B. Costs and expenses

72. The applicant claimed costs relating to his attendance at various court hearings and meetings with the social services in Finland and the cost of travel to attend such as well as for contact sessions (EUR 2,341), the fees of his lawyer in the Finnish custody proceedings (EUR 48,035.93), the fees of his lawyer in proceedings taken to safeguard interests in the real property jointly owned by himself and his ex-wife (EUR 5,831) and the fees of his lawyer in the proceedings in Strasbourg (EUR 21,870.05). He claimed a total of EUR 78,077.98 and interest thereon.

73. The Government submitted that any award should take into account the fact that part of the application had been rejected as inadmissible and pointed out that costs concerning distribution of property before and during the marriage, as well as certain travel costs, were not related to any alleged violation. Further they argued that the sum claimed was excessive as to quantum and that the hours worked had not been clearly specified. They considered no more than EUR 18,000 was appropriate.

74. The Court recalls that where there has been a violation of the Convention it may award the applicant not only actual and necessary costs of the proceedings in Strasbourg, insofar as reasonable in quantum, but also those incurred before the domestic courts for the prevention or redress of the violation (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom* (*Article 41*), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). It does not find that the costs of travel to meetings and contact or those incurred to safeguard property interests can be regarded as related to the latter head. The fees of the lawyer in the Finnish custody proceedings on the other hand largely concerned the applicant's attempts to regain custody of his children and accordingly vindication of his rights under Article 8 of the Convention. The bills presented by the applicant are specified as to the items of work, the time taken and the hourly rate. Taking into account however that not all the work claimed was directly related to custody matters, the Court awards the sum of EUR 41,000. In the circumstances, under this heading, interest is not appropriate. As regards the costs claimed for Strasbourg, the bills presented specify the items of work but do not explain either the hours worked or the rate applied. As part of the application was declared inadmissible and the overall figure claimed is high when compared to other Finnish cases and having regard to the procedure adopted in this case which was dealt with by written submissions alone, the Court awards EUR 15,000 in this respect.

75. The Court awards EUR 56,000 for legal costs and expenses, inclusive of value-added tax.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 in respect of the decision of the Supreme Court refusing the applicant custody of his children;

2. *Holds* that there has been no violation of Article 8 of the Convention as regards the alleged failure to provide sufficient access visits to the children;

3. *Holds* that no separate issue arises under Article 6 of the Convention as regards the lack of oral hearing before the Supreme Court;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 56,000 (fifty six thousand euros) 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 May 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President