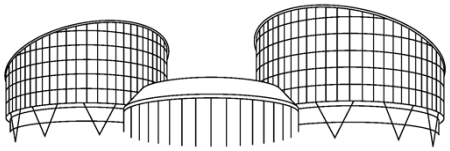

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BUCHS v. SWITZERLAND

(Application no. 9929/12)

JUDGMENT

STRASBOURG

27 May 2014

FINAL

27/08/2014

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

In the case of Buchs v. Switzerland,

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

Guido Raimondi, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Egidijus Kūris,
Robert Spano, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 15 April 2014,

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

PROCEDURE

1. The case originated in an application (no. 9929/12) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Stanislaw Jean Garcia Buchs ("the applicant"), on 3 February 2012.

2. The applicant was represented by Mr N. Perret, a lawyer practising in Nyon. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

3. The applicant alleged that the domestic courts had infringed his right to the enjoyment of his family life and discriminated against him as a father on the ground of his sex.

4. On 7 September 2012 the application was communicated to the Government.

5. On 1 February 2014 the Court changed the composition of its Sections (Rule 25 § 1). This case remained with the Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Cully, Canton of Vaud.

7. The applicant is the father of three children. His eldest daughter, born in 1986, is from a former relationship and lives with him. In 1995 the applicant married his (now ex-)wife, with whom he had two more children, born in 1996 and 1999.

8. The applicant and his wife separated in 2002. The separation was pronounced by the Civil Court of the District of East Vaud (*Tribunal Civil de l'Arrondissement de l'Est Vaudois* – hereinafter "the Civil Court") on 16 May 2002 and the mother was given custody (*garde*) of the two children, particularly in view of their young age (the younger child was three at the time of the decision). In turn, the applicant was granted extensive contact rights, which he had to exercise by agreement with his wife. He confirmed that since then his children usually stayed with him every Thursday after school until Friday morning, and every other week, from Thursday after school until Monday morning. Additionally, they spent half of the school holidays – around seven weeks a year – with him. He calculated that that amounted to approximately 42% of the time. His daughter from his former relationship resided with him.

9. On 11 January 2005 the applicant filed for divorce with the Civil Court. After his wife's reply to the court on 8 March 2005, the couple submitted a joint petition for divorce on 17 January 2006. In addition, both parties applied for sole parental authority (*autorité parentale exclusive*) over and custody of the children.

10. In order to decide to whom parental authority should be awarded, the Civil Court commissioned an expert opinion from the psychiatry and psychotherapy service for children and adolescents in the Canton of Vaud. The expert's report, based on several interviews with the parents as well as with the children, was issued on 18 July 2006. It revealed that owing to major disagreements between their parents, both children were caught in conflicts of loyalty towards them, which they tried to resolve by wishing to divide their time equally between the parents. Furthermore, while the applicant wished for shared parental authority (*autorité parentale conjointe*) for the children, his wife opposed it. She justified her opposition by alleging that the applicant had attempted to pressure her and had made incessant requests regarding the children. She feared that he would use shared parental authority to increase his influence over the children in order to distance them from her. In this regard, she also mentioned that he had used inappropriate strategies to obtain custody of his eldest daughter, who was living with him, and had influenced the daughter negatively against her mother. However, the applicant's wife was largely in favour of the children maintaining contact with their father and supported his extensive contact rights. Regarding the applicant, the expert observed that while he acknowledged that he had regular contact with his children, he had also expressed the feeling that he was not accepted as the other parent and had been made to feel like a mere "paying father". The expert also noted that the

couple disagreed on many child-related issues, which had had a negative impact on the children. In view of the fact that the applicant's wife was a good mother and had shown her willingness to cooperate with the applicant, the expert recommended that parental authority be awarded to her and that the applicant be granted extensive contact rights. Furthermore, the youngest child had expressed the wish to stay close to his mother and the children were socially well integrated at their mother's place and at the local school.

11. The applicant contested the expert opinion and the Civil Court therefore ordered a second one. On 31 March 2008 the second expert, also specialised in child and adolescent psychiatry and psychotherapy, confirmed the findings of the first expert. He based his findings on numerous documents received from the Civil Court and the parents, as well as on various interviews conducted with all the family members. At the outset he observed that despite the fact that two years had elapsed between the drawing up of the first and second expert reports, the applicant and his wife had maintained their conflict and had been unable to find any common ground for agreement regarding the children. Furthermore, they both had difficulties recognising each other's parenting abilities. Nevertheless, the expert acknowledged that both parents had good parenting skills and were able to create an adequate environment for their children. Owing to the on-going tensions between them, however, the expert found that there was no common ground for shared parental authority and custody and that that would therefore not be in the best interests of the children, who were still caught in conflicts of loyalty towards their parents. The expert further recommended that the applicant should not be awarded sole parental authority over the children. In his view, the applicant still appeared to be very affected by the divorce proceedings. He had criticised the parenting skills of the children's mother on various occasions and had shown that he had difficulties in distinguishing his feelings towards her from those aroused by the separation from his children. Despite having exercised extensive contact rights with the full support of his wife, he still claimed that he sometimes felt like a mere "paying parent". In that context, the expert also mentioned the inappropriate ways in which the applicant had obtained custody of his eldest daughter. The expert concluded that it was in the best interests of the children for the courts to award parental authority to the mother and to maintain the applicant's extensive contact rights. That solution would furthermore provide continuity for the children.

12. Following that expert opinion, the applicant informed the Civil Court by letter of 27 May 2008 that he was withdrawing his application for parental authority and custody. At the subsequent hearing, the Civil Court questioned various witnesses, who testified that the applicant was fully exercising his contact rights and was undertaking many activities with the children. They also stated that the parents' relationship had remained conflictual and that the applicant felt much more animosity towards his

ex-wife than she did towards him. By a final judgment of 15 December 2009 the Civil Court pronounced the divorce of the parties and awarded parental authority over and custody of the children to the mother, while maintaining the applicant's previous extensive contact rights.

13. On 9 January and 2 February 2010, the applicant lodged a "partial appeal" against the Civil Court's judgment with the Appeal Court of the Canton of Vaud (*le Tribunal Cantonal, chambre des recours, Canton de Vaud* - hereinafter "the Appeal Court"). He complained that the granting of parental authority to his ex-wife by the Civil Court was not in accordance with the European Court's judgment in the case of *Zaunegger v. Germany* (no. 22028/04, 3 December 2009). He claimed that parental authority could not be withdrawn from a father who had, since the separation from his wife in 2002, extensively proved his parenting abilities. He reproached his ex-wife for behaving inappropriately towards the children in several respects and claimed that that was why he disagreed with the award of sole parental authority to her. Lastly, he stated that he no longer had the financial means to be represented by a lawyer.

14. The Appeal Court dismissed the applicant's appeal by a judgment of 9 February 2010, ruling that under Article 133 § 1 of the Swiss Civil Code (hereinafter "the Civil Code" – see paragraph 20 below), on divorce proceedings, parental authority could only be awarded to one of the parents. The maintenance of shared parental authority would require, under Article 133 § 3 of the Civil Code (see paragraph 20 below), a joint request by both parents, and shared parenting could not be imposed on a parent who opposed it, such as the mother in the present case. The Appeal Court also found that despite the applicant's criticism of his ex-wife's parenting abilities, there were no grounds for changing the award of parental authority. Furthermore, such a solution would be contrary to the experts' findings. As provided for in Article 133 § 2 of the Civil Code (see paragraph 20 below), the judge's paramount consideration when deciding on parental authority was what was in the child's best interests. All relevant circumstances had to be taken into account, including any possible joint request by the parents for shared parental authority and, where possible, the children's views. In cases such as the present one, in which experts had recognised that both parents had good parenting abilities, a parent's willingness to cooperate with the other parent in the children's best interests was conclusive. As shown by the experts' opinions before the Civil Court, it had been the mother in the present case who had shown fewer difficulties in cooperating with the father. The Appeal Court therefore upheld the Civil Court's judgment.

15. In his appeal to the Federal Supreme Court, the applicant held that, owing to Article 133 § 1 of the Swiss Civil Code (see paragraph 20 below) and his wife's refusal to make a joint request, he had not been given the opportunity to apply to the domestic courts for shared parental authority.

Referring to the case of *Zaunegger* (cited above), he stated that every father should be able to apply to the domestic courts for shared parental authority, even if the mother was opposed to it, as that was in the children's best interests.

16. The Federal Supreme Court dismissed the applicant's appeal on 11 August 2011. It held that it was doubtful whether the applicant had sufficiently substantiated his appeal. Even assuming that he had done so, his case differed substantially from *Zaunegger* (cited above). First, while in *Zaunegger* the parents had not been married, in the present case the applicant was a divorced father. Second, Swiss law not only provided that the applicant, like his (ex-)wife, could apply for sole parental authority but both parents had also been treated equally. Unlike the German law regarding parents of children born out of wedlock, as established in *Zaunegger*, Article 133 § 1 of the Swiss Civil Code (see paragraph 20 below) did not privilege one of the parents on the basis of his or her sex when awarding parental authority, and the mother had no right to veto the father's request in this regard. Under Article 133 § 3 of the Swiss Civil Code (see paragraph 20 below), the decision was based solely on the children's best interests. The Federal Supreme Court concluded that the applicant's case could not be compared to *Zaunegger* because there was no indication that he had been treated differently, when deciding on parental authority, from the children's mother.

17. On 21 June 2013 the Swiss Parliament adopted amendments to the Civil Code provisions on parental authority, which will enter into force on 1 July 2014. Accordingly, shared parental authority will be the rule, independently of the parents' civil status. To continue with shared parental authority after divorce will hence no longer require a joint request by the parents. However, if the judge considers that it is in the child's best interests, parental authority can still be awarded to only one parent. The implementation provisions of this amendment to the Civil Code further provide that in cases decided under (former) Article 133 of the Civil Code (see paragraph 20 below), where parental authority had been awarded to only one of the parents, the other parent or both together can apply to the child protection authority for shared parental authority. Moreover, the parent from whom parental authority had been withdrawn in the divorce proceedings may also apply to the court on his or her own motion if the divorce was finalised after 1 July 2009.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

A. Relevant domestic law

18. The statutory provisions on custody and contact are to be found in the Swiss Civil Code.

19. Parental authority (Article 296 of the Civil Code) comprises upbringing, education and legal representation of the child *vis-à-vis* third persons (Articles 301 to 306 of the Civil Code). It also includes the administration of the child's property (Article 318 of the Civil Code). The domicile of a child under parental authority is furthermore deemed to be that of the parents or, if the parents have different places of residence, that of the parent who has custody of the child (Article 25 of the Civil Code).

20. When married, the father and the mother exercise parental authority over a minor child jointly (Article 297 § 1 of the Civil Code). In the event of the parents' divorce, the court awards parental authority to one parent and, in accordance with the provisions governing the legal effects of the parent-child relationship, rules on access entitlements and the maintenance contribution of the other parent (Article 133 § 1 of the Civil Code). Furthermore, when awarding parental authority and determining access arrangements, the child's welfare is the paramount consideration for the courts. Due account is therefore taken of any joint request submitted by the parents and, wherever feasible, to the child's opinion (Article 133 § 2 of the Civil Code). If the parents have concluded a valid agreement regulating their contributions to child care and the division of maintenance costs, at their joint request the courts may award parental authority to both of them, provided this is in the child's best interests (Article 133 § 3 of the Civil Code).

21. Parents who are not granted parental authority or custody and their minor children are mutually entitled to reasonable access to each other (Article 273 of the Civil Code). Non-custodial parents should be informed of special events in the child's life and consulted before important decisions affecting its development are taken (Article 275a § 1 of the Civil Code). They are also entitled to obtain information concerning the child's condition and development from third parties involved in its care, such as teachers and doctors, in the same manner as the person with parental authority (Article 275a § 2 of the Civil Code).

B. Relevant comparative law

22. The Court has examined the national laws of a selection of twenty-nine Member States of the Council of Europe other than Switzerland. It appears that all twenty-nine Member States provide for

shared parental authority by divorced parents if they have submitted a joint request or if the domestic courts have so decided.

23. In addition, provisions comparable to those in force in Switzerland at the time of the domestic decisions in this case (see paragraph 20 above), exist in sixteen of those twenty-nine Member States, where the domestic courts favour shared parental authority if the parents have submitted a joint request (which can also be the result of mediation) in the divorce proceedings.

24. Moreover, like in Switzerland at the time of the domestic decisions, in seventeen of the Member States surveyed, the domestic judge could also award parental authority to only one of the parents if it was in the child's best interests. Meanwhile, the other parent was granted contact rights and the right to be consulted regarding important decisions in the child's life.

THE LAW

I. APPLICATION OF ARTICLE 37 § 1 (b) OF THE CONVENTION

A. The parties' submissions

25. By letter of 21 January 2014 the Government invited the Court to strike the case out of its list of cases, in accordance with Article 37 § 1 (b) of the Convention. The Government relied in this connection on the fact that on 1 July 2014 the amendments to the Civil Code provisions on parental authority will enter into force and that according to the implementation provisions of this amendment, the applicant will have the possibility, within a period of a year, to apply to the competent authority to be awarded shared parental authority (see paragraph 17 above). As the award of parental authority in the applicant's case will therefore be examined anew by the domestic authorities, the Government considered that the present case had been resolved.

26. The applicant did not submit any observations on the way in which Article 37 § 1 (b) would affect his application.

B. The Court's assessment

27. In order to ascertain whether the Government's request under Article 37 § 1 (b) can be accepted in the present case, the Court must answer two questions in turn: firstly, whether the circumstances complained of directly by the applicant still obtain; and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have been redressed (see *Sisojeva and Others v. Latvia* (striking out) [GC],

no. 60654/00, § 97, ECHR 2007-I, and, more recently, *Melnītis v. Latvia*, no. 30779/05, § 33, 28 February 2012).

28. The Court notes that in the present case the applicant has made two specific complaints. First of all, the applicant complained that the domestic decisions refusing shared parental authority had infringed his right to respect for his family life under Article 8 of the Convention. Secondly, he complained, under Article 14 read in conjunction with Article 8 of the Convention, that the application of Article 133 of the Civil Code regarding shared parental authority amounted to unjustified discrimination against divorced fathers on the grounds of their sex.

29. As concerns both complaints, the applicable test entails establishing whether the domestic decisions refusing to grant the applicant shared parental authority will persist after 1 July 2014, when the amendments to the Civil Code provisions on parental authority will enter into force. The Court must then consider whether the measures envisaged by the authorities constitute redress for the applicant's complaints. In this connection, the Court has to determine whether the domestic authorities have adequately and sufficiently redressed the situation complained of (see *Sisojeva and Others*, cited above, § 102, and *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, § 33, 20 December 2007).

30. It is clear to the Court that the situation complained of by the applicant has not ceased to exist. While the Court considers that the amendments to the Civil Code provisions on parental authority and its implementation provisions might be relevant for establishing the applicability of Article 8 and Article 14 in conjunction with Article 8 of the Convention for the period from 1 July 2014 onwards, it considers that it has as such no incidence on the application of Article 37 § 1 (b) of the Convention, as it will not change the award of parental authority to the applicant without further steps. To have the question of shared parental authority reassessed by the domestic authorities, the applicant would need to institute domestic proceedings, the outcome of which would be uncertain.

31. In addition, the Court observes that the legislative amendments will enter into force on 1 July 2014. Therefore, it cannot be said that these measures are capable of offering adequate and sufficient redress for the effects of possible violations of Article 8 and Article 14 in conjunction with 8 of the Convention during the time between the final domestic decision in the present case and 1 July 2014. Furthermore, one of the applicant's children is now eighteen years old and the second one almost fifteen years old. The legislative amendments in question will therefore have no legal effect at least as far as the applicant's relationship with his first child is concerned.

32. It follows that the conditions for applying Article 37 § 1 (b) of the Convention, in so far as the complaints under Article 8 and Article 14 in

conjunction with Article 8 of the Convention are concerned, have not been met.

33. Accordingly, as the matter has not been resolved and it is not necessary to further examine whether Article 37 § 1 in fine is applicable to the present case the Court dismisses the Government's request to strike the application out of its list of cases.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicant complained, under Article 8 of the Convention, that the domestic decisions refusing shared parental authority had infringed his right to respect for his family life.

Article 8 provides:

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

A. Admissibility

35. The Government argued that the applicant had not exhausted domestic remedies regarding a violation of Article 8 of the Convention, taken on its own. They observed that he had not invoked any Convention Articles in his appeal to the Federal Supreme Court. He had simply stated, referring to the case of *Zaunegger* (cited above), that every father should be able to apply to the domestic courts for shared parental authority, even if the mother is opposed to it, as this is in the children's best interests. Considering that in *Zaunegger* the Court had found a violation of Article 14 taken in conjunction with Article 8 of the Convention, the Federal Supreme Court had examined the compatibility of the Appeal Court's decision with those provisions taken together. As the Court had not examined Article 8 taken on its own and the applicant had not invoked that Convention Article, the Federal Supreme Court had not done so either.

36. The applicant did not submit any observations on the admissibility of his application.

37. The Court reiterates that in assessing whether domestic remedies have been exhausted, account should be taken not only of the formal remedies available in the legal system concerned, but also of the particular circumstances of the case in question (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV).

There should be a degree of flexibility in the application of the rule. It is not necessary to demonstrate that the arguments were advanced in exactly the same terms before the domestic courts as before this Court, provided that the substance of the complaint has been aired in domestic proceedings in accordance with any formal requirements (see, for instance, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I; *Vučković and Others v. Serbia* [GC], no. 17153/11, § 72, 25 March 2014).

38. The Court considers that the applicant, who was not represented by a lawyer before the Federal Supreme Court, referred to the case of *Zaunegger* because it was comparable to his case as it also concerned the issue of shared parental authority. As a layman, he did not invoke any Convention Articles. Since he claimed, in substance, that every father should be able to apply for shared parental authority even if the mother opposed it, the Court finds, contrary to the Government's observation, that the applicant not only alleged that he had been discriminated against compared with his ex-wife under Article 14 in conjunction with Article 8 of the Convention, but also invoked his right to respect for family life taken on its own. The Court therefore holds that, with regard to Article 8 of the Convention, he has satisfied the requirements of Article 35 § 1, and therefore rejects the Government's preliminary objections.

39. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

40. The applicant claimed that according to the Court's case-law in *Zaunegger* (cited above), every father, whether married or not, should be able to apply to the courts for shared parental authority, even if the mother has opposed it. He claimed that this should be done in the best interests of the children. He has not submitted any further observations.

(b) The Government

41. The Government did not contest that the refusal to award the applicant parental authority constituted an interference with his right to respect for family life. However, they maintained that, under Article 8 § 2 of the Convention, the infringement had a legal basis in domestic law and was proportionate to the legitimate aim pursued.

42. With respect to the legal basis for awarding divorced parents shared parental authority, the Government reiterated that under Article 133 of the

Civil Code (see paragraph 20 above) the judge had to take all relevant circumstances into account when assessing what was in the best interests of the child in awarding parental authority to one of the parents. Only if the parents had submitted a joint request for shared parental authority as well as a declaration regarding their shared participation in the education of the child, child support costs and contact rights, could shared parental authority be granted – on condition that it was in the child's best interests. However, in the absence of a joint request, shared parental authority could not be awarded.

43. In this regard, the Government reiterated that once the amendments to the Civil Code provisions on parental authority entered into force, the applicant would have the opportunity to apply for shared parental authority again (see paragraph 17).

44. Regarding the legitimate aim of the interference with the applicant's right to respect for family life, the Government maintained that it could be deduced from the memorandum of the Swiss Federal Council on the amendment to the Civil Code of 15 November 1995 (*Message du Conseil fédéral concernant la révision du code civil Suisse du 15 novembre 1995)* that it had been considered to be in the child's best interests to grant shared parental authority only if the parents had submitted a joint request. This measure was aimed at protecting the "health or morals" and the "rights and freedoms" of the child and thus pursued legitimate aims within the meaning of paragraph 2 of Article 8.

45. Lastly, with a view to the necessity of the interference with the applicant's right under Article 8 of the Convention, the Government reiterated that the domestic courts had obtained two expert opinions and had heard several witnesses in order to find the most appropriate solution for the children. On those occasions, the applicant had also been interviewed. Only after having thoroughly assessed all the relevant circumstances had the domestic courts awarded parental authority to the mother, while the applicant was granted extensive contact rights. That decision corresponded entirely to the experts' recommendations with a view to the children's best interests. In addition, in accordance with Article 275a § 1 of the Code Civil (see paragraph 21 above), the applicant maintained the right to be informed about special events in the children's lives and to be consulted before important decisions were taken. The Government doubted whether the applicant would have been awarded shared parental authority, even if the domestic law had provided for it automatically after divorce. The second expert in particular had explicitly advised against granting the applicant and his ex-wife shared parental authority as he felt that it would not be in the children's best interests.

46. The Government concluded that the domestic decisions entirely satisfied the requirements of Article 8 of the Convention and were within the wide margin of appreciation the Court had granted Member States in its

case-law in such matters (see *Glaser v. the United Kingdom*, no. 32346/96, § 64, 19 September 2000).

2. The Court's assessment

47. The Court observes, at the outset, that the Government did not contest that the withdrawal of parental authority interfered with the applicant's right to respect for his family life under Article 8 of the Convention. The Court, having regard to its case-law, endorses that assessment. Any such interference 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 that provision and can be regarded as "necessary in a democratic society".

48. The Court accepts that the decisions at issue had a basis in national law, namely Article 133 of the Civil Code (see paragraph 20 above), and that they were aimed at protecting the best interests of the applicant's two children, which is a legitimate aim within the meaning of paragraph 2 of Article 8 (see *Keegan v. Ireland*, judgment of 26 May 1994, § 44, Series A no. 290, and *Görgülü v. Germany*, no. 74969/01, § 37, 26 February 2004). It therefore remains to be determined whether the decisions could be regarded as "necessary in a democratic society".

(a) General principles

49. The Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify the measures taken were "relevant and sufficient" and whether the decision-making process was fair and afforded due respect to the applicant's rights under Article 8 of the Convention. Undoubtedly, consideration of what is in the best interests of the children 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 *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V; *Sahin v. Germany* [GC], no. 30943/96, § 64, ECHR 2003-VIII; *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII (extracts); *Görgülü v. Germany*, no. 74969/01, § 41, 26 February 2004; and *Wildgruber v. Germany* (dec.), no. 32817/02, 16 October 2006).

50. 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. In particular, when deciding on custody, the Court has recognised that the authorities enjoy a wide margin of appreciation (see, amongst many others, *Glaser*, cited above, § 64).

51. The Court reiterates that a fair balance must be struck between the interests of the child and those of the parent and that, in striking such a balance, particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent (see *Hoppe v. Germany*, no. 28422/95, § 49, 5 December 2002). Accordingly, the parent cannot be entitled under Article 8 to have measures taken that would harm the child's health and development (see *Elsholz v. Germany*, no. 25735/94, § 50, ECHR 2000-VIII, and *T.P. and K.M.,* cited above, § 71).

(b) Application of these principles in the present case

52. In the present case the Court finds that the domestic courts carefully considered the questions of awarding parental authority and contact rights. They confirmed that in principle, for harmonious development, the children must have contact with both parents, to the extent that this was consistent with the best interests of the children. Accordingly, the domestic courts found that where, as in the present case, a conflict appeared to exist between the parents, it would not be in the best interests of the children to award shared parental authority. They took into account not only the fact that the children's mother was opposed to it, but also the applicant's difficulties in accepting the separation from his wife, his insistence on the recognition of his rights and his attempts to pressure the children's mother. They also considered the mother's willingness to cooperate with the applicant in the exercise of his extensive contact rights and they had particular regard to the conflicts of loyalty towards their parents in which the children were caught. The Civil Court relied on two expert opinions and on the evidence given by the parents and witnesses at the hearing (see 10 - 12 above) and the judgment given by the Civil Court was upheld by the Appeal Court and the Federal Supreme Court (see paragraphs 14 and 16).

53. Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicant was involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests (see *W. v. the United Kingdom,* judgment of 8 July 1987, § 64, Series A no. 121; *Elsholz,* cited above, § 52; and *T.P. and K.M. v. the United Kingdom,* cited above, § 72).

54. The Court notes that, in particular in the first-instance proceedings, the applicant was interviewed by experts on various occasions, and, assisted by a lawyer, had the opportunity to present his arguments in writing and orally to the Civil Court. As regards the proceedings before the Appeal Court, the Court notes that the applicant was given the opportunity to put

forward in writing any views which, in his opinion, would be decisive for the outcome of the proceedings.

55. In the light of the foregoing, and having regard to the thorough assessment of the children's best interests made by the domestic courts, the Court is satisfied that the contested decisions were based on reasons which were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8. The Court further holds that the procedural requirements implicit in Article 8 of the Convention were complied with and that the applicant was involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests. The Court therefore considers that, when awarding parental authority to the children's mother and granting the applicant extensive contact rights, the national authorities acted within the margin of appreciation afforded to them in such matters. Furthermore, the Court considers that the exclusion of shared parental authority where one of the parents opposes it also falls within the margin of appreciation, taking into account the lack of any consensus in this area, the fact that the experts in any event found that it was not desirable in the specific circumstances and the fact that the applicant in any even enjoyed extensive contact rights.

56. Accordingly, there has been no violation of Article 8 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

57. The applicant complained, under Article 14 read in conjunction with Article 8 of the Convention, that the application of Article 133 of the Civil Code (see paragraph 20 above) regarding shared parental authority amounted to discrimination against divorced fathers on the grounds of their sex.

Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

59. The applicant maintained (see paragraph 40 above) that according to the Court's case-law in *Zaunegger* (cited above), every father, if married or not, should be able to apply to the domestic courts for shared parental authority, even if the mother has opposed it. He claimed that that should be done in the best interests of the child.

(b) The Government

60. At the outset, the Government argued that, contrary to the Court's judgments in the cases of *Zaunegger* (cited above) and *Sporer v. Austria* (no. 35637/03, 3 February 2011), the possibility of applying for shared parental authority without the consent of the children's mother did not exist in Swiss law, either for the applicant or for other fathers in comparable situations. Therefore, no inequality in the sense of the Court's jurisprudence existed in Swiss law.

61. Under current Swiss law, the maintenance of shared parental authority after divorce was the exception to the rule that it was normally awarded to only one parent. Under Article 133 of the Civil Code, shared parental authority could be granted only if the parents had submitted a joint request and were willing and able to cooperate in matters regarding the child. The legislator's reasoning behind that provision was not to enable one of the parents to oppose the other parent's exercise of parental authority by a veto right, but to oblige the parents to show their willingness to exercise it jointly.

62. Neither parent was privileged over the other in the awarding of parental authority. In particular, the mother did not dispose of any priority right to be granted parental authority. The paramount consideration when deciding on parental authority was the child's best interests. In the present case, the applicant, like his ex-wife, was able to exercise his right to apply to the domestic courts for sole parental authority. Based on their concurring requests, both parents had then benefited from a complete assessment of their parenting abilities as well as other relevant circumstances. The domestic law had hence not drawn a distinction between the applicant, as father, and his ex-wife, as mother, nor had he been treated differently from fathers of children born out of wedlock.

63. The Government further reiterated that even if the domestic courts had, based on the domestic law, the possibility to award shared parental authority without a joint request, it was very unlikely that they would have granted it in the present case. As established by the expert opinions, to have done so would not have been in the best interests of the children. According

to the Government, the absence of a joint request in the present case reflected the situation foreseen by the applicable law where the parents were not ready to exercise shared parental authority, and where awarding parental authority to only one parent was in the children's best interests.

2. The Court's assessment

(a) General principles

64. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, as a recent authority, *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008).

65. It is the Court's established case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Burden,* cited above, § 60).

66. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic v. Austria*, 27 March 1998, § 38, *Reports* 1998-II, and *Zaunegger*, cited above, § 50).

67. However, very weighty reasons need to be put forward before a difference in treatment on the ground of gender or birth can be regarded as compatible with the Convention. The same is true for a difference in treatment of the father of a child born out of wedlock as compared with the father of a child born of a marriage-based relationship (see *Zaunegger*, cited above, § 51, with further references).

(b) Application to the present case

68. The Court notes that in the case at hand, the applicant, in his capacity as a father, complained in substance that he had been treated differently from his children's mother, in breach of Articles 8 and 14 of the Convention, in that he had had no opportunity to obtain shared parental authority in a divorce suit without the latter's consent.

69. The Court further notes that the applicant has not elaborated on the extent to which he had been treated differently from fathers of children born out of wedlock. As established by the Government (see paragraph 61 above), under the Swiss law in force, no father, whether married or not, had the possibility to request shared parental authority if the children's mother was opposed to it. The Court therefore holds that the applicant has not sufficiently substantiated his claim of unequal treatment compared with other fathers in similar situations. The Court will therefore proceed to assess the current case only under the aspect of different treatment on the basis of gender, according to Article 14 in conjunction with Article 8 of the Convention.

70. In this regard, the Court observes that the wording of the relevant provision of Swiss law does not apply different standards in respect of the awarding of sole parental authority to the mother or the father. Under Article 133 § 1 of the Civil Code (see paragraph 20 above), both parents have the right to apply for sole parental authority. If they do, as in the present case, the domestic courts then proceed to evaluate all the relevant circumstances and the parties' parenting abilities in order to find the most appropriate solution in the children's best interests.

71. As alleged by the applicant, it was however impossible for the domestic courts to award him shared parental authority, based on the domestic provision in force, because the children's mother was opposed to it. Contrary to the case of *Zaunegger* (cited above), which concerned a father of a child born out of wedlock, it was however not the mother who, in the absence of a joint request, maintained sole parental authority and hence possessed the right to veto the applicant's request for shared parental authority. In the absence of a joint request, both parents maintained, for the course of the divorce proceedings, shared parental authority and had the right to apply for sole parental authority to the domestic courts (see paragraph 9 above).

72. The Court considers that the Government have convincingly established that the reasoning behind the requirement of a joint request for shared parenting was to oblige the parents to show their willingness to cooperate in child-related matters even after divorce. Both parents were thereby treated equally and it was not only the mother but both parents who had the right to oppose shared parental authority. The Court is therefore satisfied that the requirement of a joint request does not draw on any distinction based on the parents' gender, so that no difference of treatment exists either in the law or in the decisions applying it.

73. There has accordingly been no violation of Article 14 of the Convention, taken together with Article 8 in the instant case.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF PROTOCOL NO. 7 TO THE CONVENTION

74. The applicant complained, under Article 5 of Protocol No. 7 to the Convention, that he had not enjoyed the same rights as his (ex-)wife with regard to the awarding of parental authority in the divorce proceedings.

Article 5 of Protocol No. 7 reads as follows:

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

75. With respect to the applicant's appeal to the Federal Supreme Court (see paragraph 15 above), the Government argued that he had not exhausted domestic remedies regarding his claim under Article 5 of Protocol No. 7 to the Convention. According to them, the applicant had never claimed that the domestic law had treated him differently from his spouse when awarding parental authority.

76. The applicant has not submitted any observations on the admissibility of this claim.

77. Considering that the applicant's appeals to the domestic courts as well as his application to this Court were not very well substantiated and that he did not invoke any Convention Articles before the domestic instances (see paragraph 22 above), the Court agrees with the Government that he has not exhausted domestic remedies with respect to his complaint under Article 5 of Protocol No. 7 to the Convention.

78. Consequently, it follows that this complaint is inadmissible according to Article 35 § 1 and must be rejected in accordance with Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints concerning Article 8 and Article 14 in conjunction with Article 8 of the Convention admissible;

2. *Declares*, by a majority, the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention;

4. *Holds*, unanimously, that there has been no violation of Article 14 in conjunction with Article 8 of the Convention.

Done in English, and notified in writing on 27 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi President