



Inability of a mother to exercise custody of her son living in Greece and refusing to return to France with her: no violation

In today's **Chamber** judgment¹ in the case of **M.K. v. Greece** (application no. 51312/16) the European Court of Human Rights held, by a majority of five votes to two, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the inability of M.K., the mother of two children, to exercise custody of one of her sons (A.) despite a decision by the Greek courts awarding her permanent custody. Her ex-husband lives in Greece with their two sons, while M.K. lives in France.

The Court found in particular that the Greek authorities had taken the measures that could reasonably be expected of them in order to comply with their positive obligations under Article 8 of the Convention. Among other things, they had taken into account the overall family situation, the way it had changed over time and the best interests of the two brothers, and especially of A. The latter, who had been 13 at the time, had clearly expressed to the Greek authorities a wish to remain with his brother and father in Greece.

In the Court's view, the wishes expressed by a child who had sufficient understanding were a key factor to be taken into consideration in any judicial or administrative proceedings affecting him or her. The right of children to be heard and to be involved in the decision-making in any family proceedings primarily affecting them was also guaranteed by several international legal instruments. In particular, Article 13 of the Hague Convention provided that the authorities could refuse to order the return of a child if the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his or her views.

Principal facts

The applicant, M.K., is a Romanian national who was born in 1968 and lives in France. She has two sons, I. and A., born in 2000 and 2003 respectively from her marriage to A.V. Her sons and her ex-husband live in Greece.

Following M.K. and A.V.'s divorce, the Ioannina Court of First Instance awarded custody of the couple's two children to the applicant (judgment no. 330/2008). In October 2011 M.K. left for France to take up a post as a paediatrician. She gave temporary custody of her children to her mother, in the latter's home in Greece.

At the end of the first weekend following M.K.'s departure, her ex-husband exercised his right of contact but did not return the children to their grandmother. He also requested the Court of First Instance to transfer the children's place of residence to his home. His request was refused on the grounds that the children were to follow their mother to France (judgment no. 1829/2011).

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In January 2012 M.K. succeeded in bringing one of her sons (A.) to France. Her second child (I.) continued to live with his father. In July 2013, at M.K.'s request, the Charleville-Mézières family affairs judge decided that A. should have his residence in France, and awarded contact rights to his father (A.V.), to be exercised in Greece.

In May 2015, after the Easter holidays, A.V. refused to return A. to the applicant, who lodged a criminal complaint for child abduction. In September 2015 the Ioannina Court of First Instance ordered A.V. to return A. to his mother in France. That judgment (no. 404/2015) became final.

In October 2015 the Charleville-Mézières family affairs judge gave a decision finding that the parents should exercise joint parental responsibility in respect of A. The judge also reiterated that it had been decided that the child should live with his mother, and awarded the father contact rights and the right to overnight visits. The judgment did not mention the fact that the child had a brother whose habitual residence was in Greece. A.V. did not appeal and the decision became final.

M.K. subsequently brought several actions seeking to be reunited with her son (A.). She also requested the Ioannina public prosecutor's office to award temporary custody of A. to social services until the child was returned, but her request was refused. During the proceedings A. was heard on several occasions by the Greek authorities (the court, social workers and psychologists). He stated clearly and consistently that he wished to remain in Greece with his brother until the latter had finished secondary school and decided where he would study. A. said that he felt lonely in France. He also said that the conflict between his parents made him tired and sad, and that he was angry at his mother for insisting that he should return to France against his wishes. A. is currently living at his father's home in Greece, together with his brother and his paternal grandmother.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), M.K. complained that the Greek authorities had not complied with the judgments in her favour given by the Greek and French courts regarding the custody of her son. She further alleged that they had refused to facilitate the child's return to France and had failed to act on her complaints against her ex-husband for child abduction.

The application was lodged with the European Court of Human Rights on 1 September 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Kristina **Pardalos** (San Marino), *President*,
 Linos-Alexandre **Sicilianos** (Greece),
 Krzysztof **Wojtyczek** (Poland),
 Ksenija **Turković** (Croatia),
 Armen **Harutyunyan** (Armenia),
 Pauliine **Koskelo** (Finland),
 Jovan **Ilievski** ("the former Yugoslav Republic of Macedonia"),

and also Renata **Degener**, *Deputy Section Registrar*.

Decision of the Court

Article 8 (right to respect for private and family life)

The Court noted at the outset that several judicial decisions – two of which were final² – had awarded custody of A. to his mother, M.K., and that there had been interference with the exercise of the latter's right to respect for her family life. It went on to make the following observations.

Firstly, when M.K. had applied to the public prosecutor requesting that social services be awarded temporary custody of the child until he was returned, the prosecutor had forwarded the request the same day to the competent department and had also instituted proceedings. Social services had responded swiftly and had spoken with the child. A., who was 13 at the time, had told them that he wanted to stay with his father, at whose home he lived with his brother and paternal grandmother, until his brother had finished secondary school and decided where he wanted to study. A. had also complained about missing four weeks of school, saying that he wanted to attend school in Ioannina (Greece), and had reiterated that he did not want to return to France. In addition, the social worker's report had stressed that it was vital for the parents to reach a compromise and to cease upsetting their children's psychological well-being, especially that of A. Moreover, in the Criminal Court proceedings A. had stated that he wished to remain with his brother and father, adding that he felt safer with them although he loved his mother. Lastly, a psychologist who had assessed the social worker's findings noted in his report that A. had expressed a clear and consistent wish to remain in Greece with his brother in order to maintain his relationships there and carry on with his activities. A. had reportedly also said that the conflict between his parents made him tired and sad, and that he was angry at his mother for insisting that he should return to France against his wishes. Furthermore, the psychologist had advocated not separating the children, who described their relationship as a source of mutual support and assistance.

Secondly, in particular on account of the very confrontational relationship between M.K. and A.V. and the fact that M.K. was living in France, the authorities had been unable to focus their efforts on cooperation and negotiation between them³, or on mediation⁴. Moreover, at the relevant time A. had reached the age of understanding, and his clearly expressed wish to remain in Greece inevitably had to carry significant weight when the authorities considered the various options. As a general rule, children's best interests precluded any coercive measures concerning them, and Article 13 of the Hague Convention provided that the judicial or administrative authorities could refuse to order the return of a child if the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his or her views.

Thirdly, as no formal decision had been given by the French courts ordering the child's return, Article 11(8) of the Brussels IIa Regulation⁵ was not applicable; that Article allowed the authorities in the State of origin to appeal against a non-return decision given by the authorities in the State to which the child had been taken. Furthermore, the Regulation allowed the requested State to take the child's interests into consideration, as the Greek authorities had done in the present case.

Fourthly, the 2015 judgment had not taken into consideration the fact that A. had a brother who was still in Greece and that the two brothers were very close. It had therefore not taken account of the overall family situation. Furthermore, the situation had changed radically over the years, to the point where A. no longer wished to follow his mother to France. He had expressed a very firm wish,

² Judgment no. 404/2015 of the Ioannina Court of First Instance, and judgment of 2 October 2015 of the Charleville-Mézières family affairs judge.

³ In accordance with Article 7 of the Hague Convention.

⁴ A mediation-based approach is advocated by the Recommendation of the Committee of Ministers of the Council of Europe on family mediation adopted on 21 January 1998.

⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("the Brussels IIa Regulation").

both to the social workers and the Criminal Court, to remain with his brother and father. These factors could not be overlooked in assessing the approach of the Greek authorities, who had taken into consideration the overall family situation, the way it had changed over time and the best interests of both brothers, and particularly of A., who by that time was already 13. The wishes expressed by a child who had sufficient understanding were a key factor to be taken into consideration in any judicial or administrative proceedings concerning him or her. The right of children to be heard and to be involved in the decision-making in any family proceedings primarily affecting them was also guaranteed by several international legal instruments⁶.

Consequently, in view of the foregoing considerations and the margin of appreciation left to the respondent State in the matter, the Court held that the Greek authorities had taken the measures that could reasonably be expected of them in order to comply with their positive obligations under Article 8 of the Convention. There had therefore been no violation of that provision.

Separate opinions

Judges Wojtyczek and Koskelo each expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

⁶ Article 12 of the International Convention on the Rights of the Child; Articles 3 and 6 of the European Convention on the Exercise of Children's Rights (Council of Europe); Recommendation CM/Rec(2012)2 of the Committee of Ministers of the Council of Europe; Article 24(1) of the Charter of Fundamental Rights of the European Union.