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

FOURTH SECTION

DECISION

Application no. 15706/08
Richard KAISER
against Austria

The European Court of Human Rights (Fourth Section), sitting on 13 December 2016 as a Chamber composed of:

András Sajó, *President,*
Vincent A. De Gaetano,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 11 March 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Richard Kaiser, is a German national who was born in 1964 and lives in Passau. He is represented before the Court by Mr Thomas Krankl, a lawyer practising in Vienna.

2. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

A. The circumstances of the case

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

4. The applicant is the father of E., A., and K., all of whom were born in wedlock in 2002, 2003 and 2005 respectively.

1. Proceedings regarding an interim injunction ordering the applicant to refrain from contacting his children

5. In 2006 the applicant was living with his wife and his children in Vienna.

6. At the request of the applicant's minor children, represented by the Vienna Youth Welfare Service (*Amt für Jugend und Familie*), the Favoriten District Court (*Bezirksgericht Favoriten*) issued on 3 March 2006 an interim injunction for the duration of three months ordering the applicant to leave the joint household and the immediate surroundings of the family's apartment, prohibiting him from returning to the apartment and contacting his wife and children, ordering him to avoid any meetings with them, and banning him from the children's kindergarten.

7. Having heard the children's mother, the applicant and a social worker, the Favoriten District Court noted that the children's mother had alleged repeated sexual abuse by the applicant in respect of his eldest daughter (then four years old) and had testified that she had found skin abrasions on her daughter and that on one occasion her genital area had been smeared with blood. The applicant had denied any misconduct. The District Court also took into account the findings of an initial examination of the applicant's eldest daughter by a clinical psychologist at a children's hospital in Vienna. The girl had told the psychologist that she had suffered severe abuse at the hands of her father and had illustrated graphically what she had meant using anatomically correct puppets. The District Court found the girl's mother's testimony in respect of the events clear, credible and trustworthy. Overall, the seemingly substantiated allegations of extensive sexual abuse by the applicant indicated a real risk for the children's wellbeing. The child had been taken into psychological care. Since the children and their mother had a need to be provided with housing, the court ordered the applicant to leave the joint apartment. The applicant did not lodge an appeal against this decision. Therefore, it became final.

8. On 30 March 2006 the applicant's wife brought an action for divorce.

9. In May 2006 the children, at the time represented by their mother, lodged a request for the extension of the interim injunction; the Favoriten District Court, referring to the case file and to the pending criminal investigation in respect of the applicant (see paragraph 10 below), on 16 June 2006 granted that request and extended the interim injunction until

the conclusion of the divorce proceedings. The applicant did not lodge an appeal against this decision.

10. In addition to the request for an interim injunction against the applicant, the Vienna Youth Welfare Service filed criminal information with the Vienna Public Prosecutors' Office that was based on information supplied by the children's mother and the report of the psychologist (see paragraph 7 above). The applicant was indicted on charges of sexual abuse of minors and abuse of a relationship of authority by the Vienna Public Prosecutor's Office. The child, represented by a lawyer, took part in the criminal proceedings as a private party (*Privatbeteiligter*). On 18 October 2006 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen Wien*) acquitted the applicant of the charges of sexual abuse of minors and abuse of a relationship of authority. It found that the witnesses heard in the course of the oral hearing had not been able to verify the suspicions. Furthermore, a psychological expert, ordered by the court to examine the applicant's daughter, had stated that the child's ability to recount past events or experiences was not sufficiently developed. Therefore, the criminal court declined to hear the child, even with the assistance of an expert. Because of the lack of evidence, the criminal court could not determine the relevant facts in regard to the accusations. The applicant was acquitted, having been given the benefit of doubt. This decision became final.

11. On 13 November 2006 the applicant, referring to his acquittal, lodged a request with the Favoriten District Court for the lifting of the interim injunction. However, on 18 April 2007, the Favoriten District Court refused that request. It found that a request under section 399 of the Enforcement Act to lift an interim injunction (see paragraph 33 below) could only be successful if the need to protect the legitimate interests of the person concerned had ended. This would be the case if the circumstances which had made the granting of the decision necessary had changed. However, the Regional Court had acquitted the applicant, pursuant to Article 259 § 3 of the Code of Criminal Procedure (*Strafprozeßordnung*, hereinafter, the CCP – see paragraph 22 below), only because the applicant's guilt could not be established by a criminal court. However, the applicant had supported his request solely by referring to his acquittal and had not tried to demonstrate to the District Court why and how any risk to the children had ceased to exist. Therefore, there was no reason to lift the interim injunction.

12. The applicant lodged an appeal with the Vienna Regional Court for Civil Matters (*Landesgericht für Zivilrechtssachen Wien* - the "Regional Court") on 7 May 2007. On 6 June 2007 the Regional Court dismissed the appeal, finding that – contrary to the applicant's belief – his acquittal in the criminal proceedings was not in and of itself sufficient to substantiate the absence of the perceived risk that had served as the basis for the interim

injunction. The Regional Court noted that an acquittal rendered by the criminal courts had no binding effect on the civil courts. In and of itself, the applicant's reference to his acquittal was not sufficient to prove that the basis for believing that the applicant's children were at risk had ceased to exist. The Regional Court upheld the District Court's finding that the objective of the interim injunction – namely to secure the well-being of the children – had not become redundant, referring again to the fact that the acquittal had only resulted from the application of the *in dubio pro reo* principle, and that there still existed a suspicion of sexual abuse; this sufficed to justify the assumption that there continued to be a risk to the wellbeing of the child. Furthermore, the applicant had based his appeal only on the alleged binding force of the acquittal and had not submitted any facts why the risk would have ceased to exist by a change in the situation.

13. The applicant lodged an extraordinary appeal on points of law. On 23 October 2007 the Supreme Court (*Oberster Gerichtshof*) dismissed that appeal. Referring to its own jurisprudence it upheld the reasoning of the lower courts that whether an interim injunction could be lifted depended on whether the need to afford protection had ceased to exist in the light of a change in circumstances; a change concerning only the evidence provided could not be automatically understood as constituting such a reason. The question of whether the applicant's acquittal had changed the level of risk in respect of the right of the child to physical safety had to be answered in the negative. The assessment of evidence in the criminal proceedings had to be considered as fresh evidence in the civil proceedings but did not as such constitute a reason for lifting the interim injunction. If, after assessing the fresh evidence, the suspicion of abuse persisted, the level of risk could not be deemed to have changed.

14. The Supreme Court also confirmed that an acquittal on criminal charges had no binding effect on the civil courts. As regards those of the applicant's arguments that were based on Article 6 § 2 of the Convention, it referred to the European Court of Human Rights' case-law, in particular the judgment in *Rushiti v. Austria* (no. 28389/95, 21 March 2000), but distinguished that case from the present one: in *Rushiti*, the Court had assumed a link between the criminal responsibility of the accused and the right to compensation for detention to such a degree that the decisions on the latter issue could be regarded as a consequence and, to some extent, the concomitant of the decision on the former (*ibid*., § 27). However, in the present case such a link was missing with regard to the civil jurisdiction because (i) the criminal proceedings concerned a public law claim, and (ii) the accused's opponent was the State. The victim of the criminal act in question was not a party to the proceedings and in general, the criminal courts did not rule on victims' claims for damages. A binding effect of an acquittal on civil courts would constitute a violation of the principle of equality of arms under Article 6 of the Convention in respect of the victim if

he or she tried to lodge subsequently a claim for damages before the civil courts. The distinction between civil and criminal matters resulted from the different subjects dealt with. The binding effect of a conviction was justified by the fact that in such a case a criminal court had established the accused's responsibility and guilt. However, in the case of an acquittal, the establishment of the facts remained open. To then prevent the victim from pursuing a possible civil claim would represent a violation of the victim's fundamental rights. In the instant case, the acquittal could therefore only serve as an indication of a diminution of the risk for the children, but no more.

15. On 2 March 2009 the divorce proceedings were concluded with final effect. On 19 May 2009 the Favoriten District Court refused a request for the extension of the interim measure and lifted it.

2. Proceedings related to the custody of the children

16. In addition to his request for the interim injunction to be lifted, the applicant on 13 November 2006 lodged a request with the District Court of Vienna for regular contacts to be arranged between himself and his three children at the Youth Visiting Café; alternatively, he requested the provisional arrangement of a weekly visiting right, to be exercised at the parent-child-meeting point (*Eltern-Kind-Treff*) of the Vienna Family Association (*Wiener Familienbund*).

17. For the purpose of being able to assess the situation, the Favoriten District Court ordered a report from the Youth and Family Office on 4 January 2007. On 3 May 2007 – the Youth and Family Office having failed to deliver such a report – the court urged it to do so.

18. On 31 May 2007 the Vienna Youth Welfare Service submitted the report, stating in its conclusion that contact between the children and their father was very important, but that, in view of the problematic overall situation, the visits should take place in the protected environment of the Youth Visiting Café. The mother had initially opposed the idea of the applicant having contact with the children, but had then stated that she could agree to accompanied visits in a protected environment and in her presence. The applicant had referred to his acquittal and stated his desire to re-establish a relationship with his children. The social worker confirmed that the children were living in a safe and healthy environment with their mother, but also referred to the importance of a relationship between the children and their father. Regular contact every fortnight would offer the children a good opportunity to become re-acquainted with their father and was thus considered positively by the social worker. On 5 June 2007 the report of the Youth and Family Office arrived at the court and was subsequently served on the applicant.

19. In a hearing before the Favoriten District Court on 4 July 2007, the applicant and the children's mother agreed on a preliminary settlement with

the following provisions: preliminary sole custody for the three minor children was granted to the children's mother. The applicant was granted the right to regular accompanied contact – normally every two weeks for two hours on the premises of the Vienna Family Association. The visits were also attended by the children's mother and a social worker from the Association. Because of this agreement, the proceedings in respect of contact rights were suspended pending a final decision in the divorce proceedings.

20. On 9 February 2010 the applicant and his former wife agreed before the Favoriten District Court on the staying of the proceedings in respect of custody, contact rights and alimony (*Ruhen des Verfahrens*). The applicant informed the Court that since February 2010 he and his former wife had agreed amicably on arrangements for the applicant's contact with his three children. The applicant, in the meantime, had moved to Germany and travelled to Vienna during the school holidays in order to see his children.

B. Relevant domestic law

1. Relevant provisions of the CCP in force at the relevant time

21. Under Article 47 § 1 of the CCP, a victim of a criminal offence could join criminal proceedings as a private party (*Privatbeteiligter*) only with regard to his or her civil claims. Such a private party was, *inter alia*, entitled to have access to the various case files from the pre-trial stage onwards, had to be summoned to the hearings, and could submit evidence to the Public Prosecutor.

22. Article 259 § 3 of the CCP provided as follows:

> "The accused shall be acquitted by judgment of the court:
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> ...
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> 3. where the court finds that the act that gave rise to the prosecution is not an offence under the law or that the alleged offence has not been made out or that it has not been established that the accused committed the act of which he is accused or that circumstances exist which deprive the act in question of its criminal character or that the continuation of the prosecution is ruled out on grounds other than those set out in paragraphs 1 and 2."

23. In the event of an acquittal, a private party was not entitled to a remedy in criminal proceedings. Under Article 366 § 1 of the CCP the criminal court had to refer such a private party to the civil courts in respect of his or her claim for damages if the accused had been acquitted (*Verweis auf den Zivilrechtsweg*).

2. Relevant provisions of the CCP in force at the relevant time and their interpretation by the courts

24. Article 268 of the Code of Civil Procedure (*Zivilprozessordnung*) provided that civil courts, when deciding a case which had previously been submitted to a criminal court, were bound by the facts established by a criminal court in the event that that court had found the accused guilty. This provision was found to be contrary to Article 6 of the European Convention on Human Rights by the Constitutional Court (decision of 12 October 1990, no. G73/89). The Constitutional Court stated that a criminal conviction to be binding on a civil court was arbitrary and therefore contrary to Article 6 of the Convention. Therefore, the Constitutional Court set aside the provision.

25. In its decision of 17 October 1995, no. 1 Ob 612/95, the Supreme Court found, after conducting a comprehensive analysis of the legal arguments raised in national and international academic debate, that, even in the absence of an explicit provision stipulating the binding effect of criminal convictions, a convicted person must accept his conviction by a criminal court as an established fact and shall not be entitled to argue before a civil court that he did not commit the offence of which he was convicted. Therefore, a conviction by a criminal court should have a binding effect with regard to the convicted person, so that nobody might argue that the facts differed from the ones already established and which had been the basis for that criminal conviction.

26. In its decision of 20 November 1996, no. 7 Ob 2309/96a, the Supreme Court confirmed the principles outlined in its decision of 17 October 1995 and elaborated on the question of whether civil courts should be bound by the findings of a criminal court when proceedings heard by that criminal court had ended with an acquittal. It found that because of the weak position the CCP granted to a private party in criminal proceedings, it would violate the victim's rights under Article 6 of the Convention if the outcome of criminal proceedings were to have a binding effect on civil law proceedings (that is to say if civil courts were to be bound by the findings of a criminal court). For example, a private party had no remedy against the acquittal of an accused. Moreover, under Article 366 of the CCP (see paragraph 23 above), the criminal court had to refer a private party to the civil courts in respect of his or her claim for damages if the accused was not convicted. This provision would be meaningless if the victim of an offence were to be referred to the civil courts in respect of his claim for damages but had to accept the finality of the acquittal in the subsequent civil proceedings. Therefore, an acquittal in criminal proceedings could have no binding effect in civil law proceedings dealing with the same circumstances.

27. In the following decisions, the Supreme Court further developed its case-law on this question and found that neither the ending of criminal proceedings by preliminary settlement (*Diversion*, decision of

23 September 2004, no. 2 Ob 186/04y) nor by final closure of the case by the Public Prosecutor (*Verfahrenseinstellung*, 9 September 1999, no. 8 ObA 218/99p) had a binding effect regarding the facts of the case on civil law proceedings and that the civil courts had to establish anew all the facts of the case.

3. Relevant provisions in regard to interim injunctions in force at the relevant time and their interpretation by the courts

28. Interim injunctions for the purpose of the prevention of violence within the family were a civil law matter under Austrian law, as laid down in the Enforcement Act (*Exekutionsordnung*).

29. Since provisional legal protection had to be provided without delay, the prerequisites for ordering an injunction needed only to be certified (*bescheinigen*), which meant to show predominant probability but they did not need to be proved beyond reasonable doubt (*beweisen*). The degree of plausibility of the circumstances supporting a request for an injunction was thus less strict than in the criminal proceedings. It was sufficient for the party requesting the injunction to submit details of the circumstances from which the existence of the alleged risk could reasonably be assumed (section 389 of the Enforcement Act, in connection with Article 274 of the Code of Civil Procedure). Under section 78 of the Enforcement Act certain parts of the provisions of the Code of Civil Procedure (such as the provisions dealing with the parties, the oral hearing or the finding of facts) were applicable if the Enforcement Act did not provide otherwise. Persons affected by an interim injunction had the right to lodge an appeal (*Rekurs*, see Article 514 of the Code of Civil Procedure).

30. Section 382b § 1 of the Enforcement Act, as in force at the relevant time, provided as follows:

> "The court is required to act upon a request [lodged] by a near relative (*naher Angehöriger*) of a person who launches or threatens to launch a physical attack or displays conduct severely affecting the psychological health of the near relative, thus making further cohabitation unbearable for the relative. In such a case, the court must
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> 1. order that person to leave the common flat and its immediate surroundings, and
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> 2. prevent that person from returning to the flat and its immediate surroundings, if the flat serves the near relative's urgent need of accommodation."

31. Under paragraph 2 of this provision, a court could also prohibit such a person from staying in clearly defined areas and order him or her to avoid meeting and coming into contact with the near relative unless this would have run counter to the serious interests of the person.

32. Under paragraph 4 of this provision, such an interim injunction was not limited to proceedings for divorce or the annulment of a marriage; however, in respect of proceedings that did not concern divorce or

annulment such an interim injunction could not exceed a total duration of three months. The institution of such divorce proceedings or proceedings for the annulment of a marriage was a prerequisite for an extension beyond the above-mentioned three-month limit.

33. Section 399 of the Enforcement Act listed the following conditions for the amendment or lifting of an interim injunction:

> "1. if the order exceeds the scope that is necessary to secure the interests of the person in whose favour the order was granted;
>
> 2. if those circumstances of the case that had been the basis for ordering the interim injunction have changed to the extent that the continuance of the order is no longer needed to protect the interests of the person in whose favour the order was granted ..."

34. Given that there were remedies (*Widerspruch, Rekurs*) by which to contest a decision within the proceedings for granting an interim injunction, the amendment or lifting of an interim or "final" injunction under section 399 of the Enforcement Act could not be requested on the basis of a claim that the interim injunction had been issued unlawfully (decisions of the Supreme Court of 1 June 2010, no. 1 Ob 61/10t, and of 20 October 2011, no. 2 Ob 81/11t). Moreover, because the aim of an interim injunction was not to examine a past but to pre-empt a future risk, a review *ex post facto* of the proceedings in respect of the granting of an interim injunction was not possible (Supreme Court's decisions of 10 May 1995, no. 9 Ob 1577/94, and of 29 October 2009, no. 7 Ob 50/09t).

COMPLAINTS

35. The applicant complained under Article 6 § 2 of the Convention about the assessment of his acquittal in the criminal proceedings by the civil courts and under Article 8 of the Convention that his contact and visiting rights had been disproportionately limited.

THE LAW

A. Complaint under article 6 § 2 of the Convention

36. The applicant complained that the decisions of the civil courts refusing his request for the interim injunction to be lifted had violated the presumption of innocence laid down in Article 6 § 2 of the Convention. This provision reads as follows:

"2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

1. Arguments of the parties

37. The Government submitted that the subject matter of the present proceedings was not the criminal proceedings against the applicant but the question of whether the interim injunction issued under section 382b of the Enforcement Act should have been set aside exclusively because of the applicant's acquittal in criminal proceedings – this despite the fact that the applicant had not specified any change of circumstances which might have ameliorated the dangerous situation facing the children.

38. The Government further submitted that proceedings in respect of interim injunctions (such as those in the present case) did not constitute a "charge" within the meaning of Article 6, nor was there a direct link between the criminal proceedings and the proceedings to ensure the protection of the children against violence within the family. The fact that both sets of proceedings had been based on the same circumstances did not constitute a sufficient link. Criminal proceedings pursued different aims than proceedings for the granting (or extension) of an interim injunction, which only aimed to provide protection against violence. Criminal conduct was not a prerequisite for an interim injunction, which required neither proof of the commission of an offence nor the finding of guilt. In the instant case, an interim injunction was ordered in circumstances where there were no specific grounds for criminal liability but where the conduct of the defendant rendered further cohabitation untenable. Moreover, it could not be inferred from the acquittal that the risk for the children had ceased to exist. The rejection of the applicant's request for the interim injunction to be lifted did not contradict or call into question the acquittal by the criminal court. As no link between the criminal proceedings against the applicant and the proceedings for the lifting of the interim injunction existed, the Government requested that the complaint under Article 6 § 2 be declared inadmissible *rationae materiae*.

39. The applicant contested that request and stated that the result of the criminal proceedings should have had an effect on the proceedings under consideration.

2. The Court's assessment

40. The Court reiterates that Article 6 § 2 safeguards "the right to be presumed innocent until proved guilty according to law". Viewed as a procedural guarantee within the context of a criminal trial, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof, legal presumptions of fact and law, privilege against self-incrimination, pre‑trial publicity, and premature expressions (by the trial court or by other public officials) of a defendant's guilt. However, in

keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged (see *Vella v. Malta*, no. 69122/10, § 38-39, 11 February 2014).

41. In this regard, the Court has found that the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases (*Allen v. the United Kingdom* [GC], no. 25424/09, § 103-104, ECHR 2013-IV).

42. In the past the Court has been called upon to consider the application of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings, either by way of discontinuation or after an acquittal, in proceedings concerning, *inter alia*, the imposition of civil liability to pay compensation to the victim (see *Ringvold v. Norway*, no. 34964/97, § 36, ECHR 2003‑II; *Y. v. Norway*, no. 56568/00, § 39, ECHR 2003‑II; *Orr v. Norway*, no. 31283/04, §§ 47-49, 15 May 2008; *Erkol v. Turkey*, no. 50172/06, §§ 33 and 37, 19 April 2011; *Vulakh and Others v. Russia*, no. 33468/03, § 32, 10 January 2012; *Diacenco v. Romania*, no. 124/04, § 55, 7 February 2012; *Lagardère v. France*, no. 18851/07, §§ 73 and 76, 12 April 2012; and *Constantin Florea v. Romania*, no. 21534/05, §§ 50 and 52, 19 June 2012). In these cases, concerning the victim's right to compensation from the applicant who had previously been found not guilty of the criminal charge, the Court had held that where the decision on civil compensation contained a statement imputing criminal liability, this would create a link between the two proceedings such as to engage Article 6 § 2 in respect of the judgment on the compensation claim (see *Ringvold*, cited above, § 38; *Y. v. Norway*, cited above, § 42; *Orr*, cited above, § 49; and *Vella*, cited above, § 42).

43. Accordingly, the Court has to examine whether the proceedings under consideration gave rise to a "criminal charge" against the applicant and, in the event that this was not the case, whether the proceedings were subsequent to criminal proceedings and if so whether they were linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2.

44. In this respect the Court observes that the applicant did not complain that the proceedings in respect of an interim injunction concerned a "criminal charge" within the autonomous meaning of the Convention.

45. The proceedings in respect of the lifting of the interim injunction prohibiting contact between the applicant and his children were classified under domestic law as civil law proceedings. They did not have any preventive or repressive character, as the purpose of the interim injunction was not to punish criminal conduct but to safeguard the interests of potential victims of a physical attack or conduct severely affecting their psychological health. In these proceedings, the burden of proof was less strict than in the criminal proceedings (see *Ringvold*, cited above, § 38, *Allen*, cited above, § 123, *N.A. v. Norway*, no. 27473/11, § 45, 18 December 2014 and *Vella*, cited above, § 56) Moreover, no criminal sanction was imposed on (or threatened towards) the applicant. The Court therefore considers that the proceedings for the extension of the interim injunction did not give rise to a "criminal charge" within the autonomous meaning of the Convention. It is therefore the second aspect of the protection afforded by Article 6 § 2 which must be examined in the present case.

46. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant concerned must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt (see *Allen*, cited above, § 104).

47. In the past, the Court has been called upon to consider the application of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings, either by way of discontinuation or after an acquittal (see the list of examples in *Allen*, cited above, § 98).

48. In the case of *O.L. v. Finland* ((dec.), no. 61110/00, 5 July 2005) the applicant's daughter had been taken into public care because of alleged sexual abuse. In parallel, because of these allegations, proceedings for a public care order and criminal investigations against the applicant had been commenced. The latter ended when the public prosecutor decided not to prefer charges against the applicant because there was insufficient evidence. The public care order had been upheld. The Court observed that the criminal investigations were not, as such, decisive for the issue of public care, and nor was there any link or dependence between the two, given that the decision to place the applicant's daughter into public care was legally and factually distinct from the public prosecutor's decision. Regardless of the

conclusion reached in the criminal investigations against the applicant, the public care case had not been a direct sequel to the former. The Court concluded that Article 6 § 2 was not applicable to the proceedings relating to the public care of the applicant's daughter.

49. In the present case, the Court cannot take into consideration the first set of proceedings for the granting of an interim injunction because the applicant did not challenge the decision of 3 March 2006 (see paragraphs 6 and 7 above). Nonetheless, the Court observes that these proceedings were instituted at the same time and not subsequent to the criminal investigations. The purpose of these proceedings was to evaluate the risks of the children suffering harm in the future and not to punish the applicant for any possible criminal acts committed in the past. Because of its interim nature and the need for a quick decision to prevent a situation arising which might endanger the children, the degree of probability required for verifying the circumstances supporting the request was less strict (see paragraph 29 above). Further, the extension of the interim injunction was linked to civil proceedings for the arrangement of custody and visiting rights and not to the outcome of any criminal proceedings. Moreover, the interim injunction became final even before the criminal trial took place. Evidence was taken separately and the applicant did have the opportunity in each set of proceedings to argue his case. Therefore, the proceedings for the granting of an interim injunction did not constitute a sequel to the criminal proceedings. There existed neither in law nor in fact any link or dependence between the two proceedings.

50. After his acquittal in the criminal proceedings, the applicant lodged a request under section 399 of the Enforcement Code to have the interim injunction lifted (see paragraphs 11 and 33 above). He supported his request solely by referring to his acquittal.

51. The Court notes that the then commenced proceedings were not aimed at reconsidering or examining the outcome of the criminal proceedings. The domestic courts had not been obliged to analyse the criminal judgment or to engage in a review or evaluation of the evidence in the criminal file. Further, the applicant's participation in some or all of the events leading to the criminal charge was not a matter for examination in these proceedings. Moreover, the national courts did not have to reassess the evidence which had constituted the basis for the granting of the interim injunction, but merely to evaluate whether there had occurred any change in the situation as regards the risk to the applicant's children. Therefore, the proceedings under section 399 of the Enforcement Code aimed at lifting the interim injunction must be perceived as a sequel to the proceedings for the granting of the interim measure but not as a sequel to the criminal proceedings.

52. The Court further observes that the applicant had not challenged the initial order and its extension. When he requested to have it lifted under

section 399 of the Enforcement Code (see paragraph 33 above), the national courts had to examine the changes of circumstances that allegedly occurred after the decision to grant an interim injunction had become final. Any evidence supporting this finding had to be submitted by the applicant. When referring to his acquittal, the applicant did not provide any evidence or arguments in respect of the relevant question but merely requested a reassessment of the evidence which had already formed the basis for the granting of the decision.

53. The Court therefore concludes that there was no sufficiently strong link between the concluded criminal proceedings and the proceedings for the lifting of the interim injunction. The purpose of the latter proceedings was to evaluate the risks of the children suffering harm in the future and not to punish the applicant for any possible criminal acts committed in the past. Moreover, in the proceedings before the civil courts, these courts in no way stated that the applicant was criminally liable with regard to the charges which he had been acquitted of. By stating that the possibility of sexual abuse could not be excluded their decisions were thus not incompatible with, and did not "set aside", the Vienna Regional Criminal Court's judgment of 18 October 2006 (see, *mutatis mutandis*, *O.L. v. Finland*, decision cited above, with further references).

54. It follows that Article 6 § 2 of the Convention is not applicable to the injunction proceedings at issue. Accordingly, the application is to be rejected as inadmissible *ratione materiae* within the meaning of Article 35 § 3 (a) and § 4 of the Convention.

B. Complaint under Article 8 of the Convention

55. The applicant complained that his right to respect for his family life had been violated because his contact and visiting rights concerning his children had been disproportionally limited. He relied on Article 8 of the Convention, which reads as follows:

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

56. The Government submitted that the applicant had not exhausted the domestic remedies in respect of this complaint, as he and the children's mother had agreed on 4 July 2007 before the Favoriten District Court on arrangements for the custody and maintenance of their children (see paragraph 19 above). The applicant had willingly renounced his right to

have a request for contact and visiting rights determined by a judicial decision, which he could have challenged on appeal.

57. The applicant contested this and stated that, because of the dismissal of his request for the lifting of the interim injunction, he had not been able to see his children until 4 July 2007 (and then only under supervision).

58. The Court reiterates that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted. An applicant must have provided the domestic courts with the opportunity which is in principle intended to be afforded to Contracting States, namely the opportunity of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and which, at the same time, are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among many other authorities, *M.A. v. Austria*, no. 4097/13, § 79, 15 January 2015, and *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII).

59. The Court observes that the applicant claims that his contact and visiting rights concerning his children were disproportionately limited. However he did not appeal against the interim injunction when it was initially issued on 3 March 2006 (see paragraph 7 above), nor when it was extended in May 2006 (see paragraph 9 above). While proceedings in respect of his request for the lifting of the interim injunction were pending he applied for a court order regulating his contact and visiting rights (see paragraph 16 above); subsequently, on 4 July 2007, he reached a provisional agreement with the children's mother concerning the extent of those contact and visiting rights and, on 9 February 2010, following his divorce, a final agreement (see paragraph 19 and 20 above). Thus, as the Government have argued (see paragraph 56 above), at no time did the applicant make use of remedies by which he could have challenged a court order regulating contact with his children that he might have considered insufficient.

60. The Court further observes that the applicant did not argue and there is no indication that the remedies open to him – an appeal against the interim injunction and against the decision to extend it, as well as an appeal against the court decision in the proceedings on his request for the granting of contact and visiting rights – were inadequate and ineffective in the particular circumstances of the case. Under these circumstances, the Court does not see any reason to disagree with the Government's allegation that the applicant had at his disposal effective remedies, which he did not use

(see *Šoć v. Croatia*, no. 47863/99, § 91, 9 May 2003, and *ATV Privatfernseh-GmbH v. Austria* (dec.), no. 58842/09, § 31, 6 October 2015).

61. The Court therefore concludes that the applicant has not exhausted all domestic remedies available to him, as required under Article 35 of the Convention. It follows that this complaint too is inadmissible and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 12 January 2017.

Andrea Tamietti
Deputy Registrar

András Sajó
President