CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF SOPHIA GUÐRÚN HANSEN v. TURKEY

(Application no. 36141/97)

JUDGMENT

STRASBOURG

23 September 2003

FINAL

23/12/2003

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

In the case of Hansen v. Turkey,

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

Sir Nicolas BRATZA, *President*,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 19 June 2001 and on 3 September 2003,

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

PROCEDURE

1. The case originated in an application (no. 36141/97) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Ms Sophia Guðrún Hansen ("the applicant"), on 14 April 1997.

2. The applicant was represented by Mr H. Kaplan, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged, *inter alia*, that the Turkish authorities had failed effectively to enforce her right of access to her children in accordance with their positive obligation under Article 8 of the Convention. She further alleged that she had been deprived of her right to see her children as a result of discrimination, in particular on the ground that she was a Catholic and of Icelandic nationality.

4. The Commission decided on 27 May 1998 to bring the applicant's complaints concerning her right to respect for her family life and discrimination on the ground of her nationality and religion to the notice of the respondent Government, in accordance with Rule 48 § 2 (b) of its Rules of Procedure.

5. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

6. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

7. By a decision of 19 June 2001, the Court declared the application admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Icelandic Government, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2).

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1) and this case was allocated to the new Section IV.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1959 and lives in Iceland. She is the mother of two daughters, V.A, who was born in 1981, and A.A, who was born in 1982. At the time of their births the applicant was living in Reykjavik with Mr Halil Al, a Turkish citizen. The children were born out of wedlock.

11. On 13 April 1984 the couple married in Iceland. Halil Al obtained Icelandic citizenship three years later.

12. The applicant and Halil Al separated in November 1989 and Halil Al moved from the house they shared in February 1990.

13. In June 1990 Halil Al went to Turkey with the two girls for a holiday. The applicant gave her consent to allow her daughters to accompany their father to Turkey. In August 1990 the applicant received a telephone call from Halil Al, who told her that her daughters would not be returning to Iceland. From that point on Halil Al refused to communicate with the applicant. Over the following months the applicant received no information about the children or their condition in Turkey.

A. Divorce and custody proceedings in Iceland

14. The applicant applied to the Icelandic authorities for a decree of divorce and custody of her two daughters.

15. On 11 January 1991 the Ministry of Justice issued a separation licence and provisionally granted custody of the children to the applicant.

16. On 10 April 1992 the Ministry of Justice decided that the applicant should be granted custody of the children in view of the fact that they had been living with their mother since their parents separated and that Iceland had always been their home. The Ministry based its decision on the opinion of the Reykjavik Child Welfare Committee, which made an overall assessment of the applicant's and Halil Al's financial situation and living conditions.

17. On the same date the Ministry of Justice issued a divorce decree, under which Halil Al was to pay the applicant maintenance for each child until the age of eighteen and the children were to have access to their father under arrangements to be determined by mutual agreement between the parents.

B. Divorce and custody proceedings in Turkey

18. On 25 October 1991 the applicant brought an action before the Bakırköy Civil Court of General Jurisdiction (*Asliye Hukuk Mahkemesi*) in Istanbul in which she sought a divorce and custody of her daughters.

19. At a hearing held on 12 March 1992 V.A and A.A appeared before the court. V.A stated as follows:

> "I want to remain in the custody of my father. Sophia was my mother once upon a time. She is not my mother anymore. She was bad to me. She has left us alone. She was going out with other men. I love my father."

A.A stated:

> "I want to remain in the custody of my father. Sophia was my mother once upon a time. I do not want her anymore. She has left us alone. We were frightened. She was always going somewhere. I love my father."

20. On 12 November 1992 the Bakırköy Civil Court of General Jurisdiction declared the applicant and Halil Al divorced and granted custody of the children to the father. It considered in accordance with Law no. 2675 that the applicable law in the case was Turkish law.

21. The Civil Court considered that the children had expressed the wish to stay with their father, who tended to their emotional needs and gave them a decent education. The children had adjusted to their life in Istanbul and to their father's environment. If they were removed from their surroundings, they would suffer psychologically and emotionally. It was therefore in the children's best interest to remain with their father, who had sufficient

income to support them and pay for their education. The Civil Court also granted the applicant visiting rights allowing her to see the children every July for thirty days.

22. The case attracted the attention of the media and the general public and a group of Turkish and Icelandic reporters were in court when it gave its decision.

23. The applicant appealed. On 23 February 1993 the Court of Cassation quashed the decision of the Civil Court on the grounds that it had failed to clarify whether the applicant had obtained Turkish citizenship and whether Halil Al had obtained Icelandic citizenship as a consequence of their marriage. It had also failed to establish whether the couple's marriage had been recognised and certified in Turkey.

24. On 7 October 1993 the Civil Court decided not to follow the Court of Cassation's decision. In its opinion the nationality of the couple bore no relevance to the case before it. Furthermore, the case-file revealed that the couple had been married in accordance with Icelandic law and, therefore, it was unnecessary to consider whether the marriage had been certified by the Turkish authorities.

25. On 30 March 1994 the Joint Civil Divisions of the Court of Cassation (*Yargıtay Hukuk Dairesi Genel Kurulu*) quashed the decision of 7 October 1993. It held that the couple's nationality and the question whether their marriage had been recognised in Turkey were the main issues in the case. The Civil Court's task was to clarify those facts so that it could decide on the applicable law in the light of the rules governing conflicts of laws and the provisions of Law no. 2675.

26. The case was remitted to the Bakırköy Civil Court of General Jurisdiction.

27. In a letter dated 8 February 1995 the Civil Court requested the Ministry of Foreign Affairs to inform it whether the marriage certificate issued by the Icelandic authorities on 13 December 1984 had been certified by the Turkish authorities.

28. In a letter of 18 April 1995 the Ministry of Foreign Affairs informed the Civil Court that the marriage certificate issued on 13 April 1984 by the Register of Births, Marriages and Deaths in Iceland and the divorce decree issued on 10 April 1992 by the Ministry of Justice had been certified by the Turkish Embassy in Oslo.

29. At a hearing on 20 April 1995 the applicant withdrew her divorce petition and asked the Civil Court to rule on the issue of custody.

30. In its decision of the same date the Civil Court referred to its correspondence with the Ministry of Foreign Affairs, which confirmed that Halil Al had both Turkish and Icelandic citizenship and that the applicant had not obtained Turkish citizenship as a consequence of their marriage. It dismissed the divorce petition. It held that it did not, therefore, have jurisdiction to decide the issue of custody.

31. On 28 November 1995 the Court of Cassation quashed the decision of 20 April 1995. In the opinion of the Court of Cassation, the first instance court should have decided which parent would be granted the custody of the children pursuant to the provisions of Law no. 2675 and Article 312 of Civil Code. It was necessary to determine who would have the parental authority over the children because they had been registered as "children born out of wedlock" (*gayri sahih nesepli*) in the Turkish Register of Births, Marriages and Deaths.

32. The case was once again remitted to the Bakırköy Civil Court of General Jurisdiction.

33. On 13 June 1996 the children were brought to the courthouse for a hearing along with fifteen other girls all wearing the same headscarves and black sunglasses as the applicant's daughters. A group of people gathered in front of the courthouse chanting slogans and waving banners calling for the children to be allowed to remain with their father in Turkey. The applicant and her lawyers were harassed by the crowd.

34. At the hearing the applicant's lawyer requested the court to sit in camera, as that would serve the children's best interest. The court rejected the request on the ground that the circumstances of the case did not require the exclusion of the public. The applicant's lawyer further requested the court to invite the Ambassador of Iceland, the Icelandic Consul in Istanbul, the translators and other Icelandic nationals to attend the hearing. The court accepted that request.

35. At the hearing V.A stated as follows:

> "I have been staying with my father for almost six years. I am happy with my father. I do not want to stay with my mother. I want to enjoy the Islamic way of life. That's why I want to stay with my father. My mother tried to kidnap me. That's why I do not want her. I do not want to stay with her. I am having an Islamic education. At the same time I go to a public school. I cannot say the name of the school for security reasons. I am not under the pressure of my father."

A.A stated:

> "I have been staying with my father for six years. I am happy with him. I am happy being with him. I have no worries. My stepmother Mülkiye Al is staying with us. My father takes care of us. My stepmother helps him. I do not want to see my mother. I do not want to say the name of my school. I am afraid that my mother will intervene."

36. The applicant's lawyer alleged that the children were under the influence of their father and not giving testimony of their own free will. He submitted that the children should undergo a psychological examination by child therapists. The court did not rule on that request.

37. Having regard to the statements of the children and other evidence before it, the Civil Court decided to award custody of the children to their father and granted the applicant visiting rights. It reached the following conclusions:

38. During the proceedings the children had stated on several occasions that they had been living with their father for six years and were happy being with him. They did not want to see their mother and feared that she might kidnap them. The case-file showed that the children had no psychological, mental or physical problems. Their father had given them sufficient financial support, they had adjusted to their father's environment and were happy to live with him. In the light of those facts the children's interest would best be served by their remaining with their father. However, it was also necessary to satisfy the children's maternal needs. Therefore, having regard to the distance between Turkey and Iceland and the children's summer holidays, the applicant should be granted visiting rights every July and August for sixty days.

39. On 18 November 1996 the Court of Cassation upheld that decision.

40. The Court of Cassation rejected an application by the applicant for rectification of the judgment on 31 March 1997.

41. The applicant brought civil proceedings against Halil Al claiming that he had abused his authority as the children's guardian (*velayetin nezi davası*).

42. At a hearing held on 5 May 1998 the children appeared before the Bakırköy Civil Court of General Jurisdiction.

43. V.A stated:

> "I am living with my father. He takes care of my sister and me. I do not agree to seeing my mother because I do not want to see her. I do not sympathise with my mother because she did not show any interest or concern during my childhood. I am studying at a private school. I do not want to disclose its name for security reasons. I want to remain in the custody of my father. I do not agree to my mother's request [to see us]. I am aware that it is a criminal offence to refuse to see my mother. In 1997, I met my mother at the request of police officers. I do not have any involvement in the Kadri cult."

A.A stated:

> "I have been living with my father for eight years. My sister is also living with us. My father has always fulfilled his parental duties. My sister and I did not want to live with our mother because we were not happy with her. She never took care of us. I want to stay with my father. I am continuing my studies at a private school. I am not going to tell the school's name. If I do, my mother might follow us. I met my mother in 1992 and 1997 because I wanted to see her. My mother forced me to testify against my father in the proceedings before the Bakırköy 8th Civil Court of General Jurisdiction."

C. Proceedings concerning the enforcement of access

44. On 12 March 1992 the Bakırköy Civil Court of General Jurisdiction provisionally granted the applicant access to her children on the first and third Saturday of every month. However, she was able to see her children on

only two occasions. Her subsequent attempts to have access were unsuccessful.

45. On 4 June 1992 Halil Al informed the Bakırköy Enforcement Officer (*İcra Müdürü*) that his daughters would be staying in Sivas between 6 June 1992 and 6 September 1992 for their summer holidays. He also communicated his addresses in Istanbul and in Sivas.

46. While staying in Sivas, Halil Al informed the Enforcement Officer that the family had prolonged their stay because V.A. was ill and that they would now be staying in Sivas until 4 October 1992.

47. In the meantime, the Magistrate's Court (*Sulh Ceza Mahkemesi*) in Bakırköy acquitted the applicant, on 6 October 1992, of a charge of attempted kidnapping of the children on 17 October 1991, following a complaint by Halil Al.

48. On 12 November 1992 the Bakırköy Civil Court of General Jurisdiction dissolved the applicant's marriage and granted custody of the children to their father and access to the applicant. Having regard to the need to satisfy the children's maternal needs, the distance between Turkey and Iceland and the children's summer holidays, the court held that the applicant should be granted visiting rights every July for thirty days (see, paragraph 21 above).

49. Subsequently, Halil Al requested the office of the Bakırköy Enforcement Judge (*İcra Tetkik Mercii Hakimliği*) to stay the execution of that decision. He submitted that the Court of Cassation had quashed the decision of the first-instance court and that, therefore, the execution proceedings should be halted. In the meantime, the applicant applied to the Bakırköy Civil Court of General Jurisdiction for access to her children since the Court of Cassation had quashed the decision of the first-instance court (see, paragraph 23 above).

50. On 30 June 1993 the Bakırköy Civil Court of General Jurisdiction provisionally granted the applicant visiting rights from 5.00 p.m. on every Friday to 5.00 p.m. on every Sunday. The court noted that the children could visit their mother in the apartment that she had rented in Istanbul.

51. Between 2 July and 10 September 1993 the enforcement officers went to Halil Al's home eleven times. However, on none of these occasions did they manage to find him or the children. On two occasions the doorkeeper of the building told the officers that Halil Al had gone to Sivas with his daughters for a holiday.

52. The applicant filed several complaints. The Bakırköy Public Prosecutor instituted criminal proceedings against Halil Al on the ground that he had failed to comply with court orders.

53. On 19 January 1994 the Bakırköy Criminal Court of First Instance (*Asliye Ceza Mahkemesi*) sentenced Halil Al to three months and ten days' imprisonment. The penalty was converted into a fine of 500,000 Turkish Liras.

54. Attempts by the applicant to see her children on 15 July 1994, 22 July 1994, 29 July 1994, 5 August 1994, 19 August 1994, 26 August 1994, 2 September 1994 and 9 September 1994 all failed. The officers did not find the children at their home on any of those dates.

55. On 16 September 1994 the enforcement officers forcibly entered Halil Al's house and found the children's stepmother. Halil Al arrived later. He told the officers that only V.A was at home. The officers left without taking V.A with them since A.A was not there.

56. When the officers returned to Halil Al's house on 23 September 1994 they again found the children's stepmother. The children and their father were absent. Halil Al again refused to comply with the access arrangements on 30 September 1994, 14 October 1994, 21 October 1994 and 25 November 1994.

57. On 10 October 1994 the Court of Cassation upheld the decision of the Bakırköy Criminal Court of First Instance of 19 January 1994 (see, paragraph 53 above).

58. On 6 January 1995, 20 January 1995, 3 February 1995, 10 March 1995, 24 March 1995 and 7 April 1995 Halil Al again failed to comply with the access arrangements. He was not found at his home on any of those dates.

59. On 14 April 1995 the applicant arrived at Halil Al's house accompanied by enforcement officers. The children's grandfather, who was at home, said that the children were at school but he did not know which school. The enforcement officers searched the house but could not find the children.

60. On 13 June 1996 the Bakırköy Civil Court of General Jurisdiction granted the applicant visiting rights every July and August for sixty days (see, paragraph 38 above).

61. The Bakırköy Enforcement Officer sent an official letter to Halil Al on 10 July 1996 inviting him to be present at his home on 12 July 1996 at 5.00 p.m.

62. On 11 July 1996 Halil Al requested the office of the Bakırköy Enforcement Judge to set aside the order for enforcement of access rights. On 12 July 1996 the judge rejected that request. However, the officers who visited Halil Al's home did not manage to find the children or Halil Al.

63. In a letter of the same day Halil Al informed the Enforcement Office that V.A was in Erzurum and A.A was in Sivas for a holiday and that the applicant could visit the children in those cities.

64. On 19 July 1996 the enforcement officers were again unable to find Halil Al at his home. The doorkeeper of the building told them that the children had left home early in that morning.

65. The applicant lodged three complaints with the office of the Bakırköy Public Prosecutor on 12 July 1996, 20 August 1996 and 11 September 1996.

66. On 24 July 1996 the Bakırköy Public Prosecutor filed a bill of indictment with the Bakırköy Criminal Court of First Instance, accusing Halil Al of non-compliance with court orders.

67. In a letter of 26 July 1996 the Bakırköy Enforcement Officer informed the local police station of a visit planned on the same date and requested a policeman to accompany the officers. In their subsequent visits a policeman accompanied the enforcement officers.

68. On 4 September 1996 the Bakırköy Public Prosecutor filed a further bill of indictment with the Bakırköy Criminal Court of First Instance, again accusing Halil Al of non-compliance with court orders.

69. When they attended the premises on 13 September 1996 the children's grandfather told the officers that the children had not come back from Sivas. The officers noted that the children's beds were made.

70. On 20 September 1996 the enforcement officers did not find anyone at Halil Al's home. A neighbour told them that she had not seen anyone come in or out of the house for a long time.

71. The applicant's subsequent visits on 5 October 1996, 18 October 1996, 26 October 1996, 1 November 1996, 8 November 1996, 15 November 1996, 22 November 1996 and 29 November 1996 were also in vain. The children were not at their father's home on any of those dates.

72. According to the Icelandic Government, an exceptional meeting had been arranged between the applicant and her children on 1 December 1996 following previous discussions between the Turkish and Icelandic authorities and pressure imposed on the Turkish authorities by the Icelandic Foreign Ministry and the Ambassador of Iceland to Turkey who was also present at the meeting.

73. On 7 March 1997 the Bakırköy Criminal Court of First Instance convicted Halil Al of non-compliance with court orders and sentenced him to three months and 26 days' imprisonment.

74. In a letter of 27 March 1997 the Turkish Ministry of Foreign Affairs informed the Ministry of Justice that the applicant would be coming to Turkey on 29 or 30 March 1997 and requested it to take the necessary steps so that she could exercise her access rights without hindrance.

75. On 10 April 1997 the applicant urged the office of the Bakırköy Public Prosecutor to have Halil Al arrested.

76. On 21 August 1997 the applicant's lawyer travelled to Divriği in the province of Sivas in order to meet the applicant's daughters. Halil Al arrived at the meeting point with his daughters. When the children left their father they started shouting and were reluctant to travel with the applicant's lawyer. They said that they did not want to see their mother anymore because she had never been a real mother to them. They refused to get into the car when the applicant's lawyer told them to do so. He requested assistance from the police officers and asked if they would accompany them to Ankara. However, the police officers refused, saying that they would only

escort him to the boundaries of Sivas province. The applicant's lawyer declined to travel with the children, as he feared for their safety owing to terrorist activity in the region.

77. The applicant lodged another criminal complaint with the office of the Bakırköy Public Prosecutor. On 24 September 1997 the Bakırköy Criminal Court of First Instance dismissed the applicant's claims and acquitted Halil Al. It noted that the children had repeatedly expressed their reluctance to see their mother and stayed in friends' houses just before the scheduled visits in order to avoid seeing her. They were not under the influence of their father and genuinely did not want to see their mother. The court held that there was no evidence on which to convict Halil Al.

78. On an unspecified date the Ministry of Justice notified the Ministry of Foreign Affairs that the applicant had been informed that she could see her children in Sivas, Ankara or Kayseri and that it would be more appropriate for her to go to one of these cities in order to satisfy the children's maternal needs. However, the applicant had not considered visiting her children in those cities. The Ministry of Justice further emphasised that, as a general rule, a claimant should make use of the relevant legal procedures and apply to the competent authorities in order to exercise his or her access rights. In the present case, however, the applicant had not made use of the legal procedures that were available to everyone.

79. The Bakırköy Criminal Court of First Instance brought the criminal proceedings that had begun on 4 September 1996 (see, paragraph 68 above) to an end. In a decision of 13 January 1998 it convicted Halil Al of non-compliance with court orders and sentenced him to four-months' imprisonment. The penalty was converted into a fine of 1,200,000 Turkish Liras.

80. By letters of 8 June 1998 and 8 July 1998 the Ministry of Justice requested the public prosecutors in Sivas and Divriği to take the necessary measures to facilitate the access arrangements specified in the order of the Bakırköy Civil Court of General Jurisdiction. The Ministry of Justice also informed the Ministry of the Interior that the applicant's lawyer's efforts to have access to her children had been hampered during the meeting of 21 April 1997 because of security concerns. It was suggested that the Ministry of the Interior take the necessary measures in order to facilitate the applicant's meeting with her daughters the following July.

81. On 15 July 1998 the Bakırköy Criminal Court of First Instance again sentenced Halil Al to one month and five days' imprisonment. The penalty was converted into a fine of 350,000 Turkish Liras.

82. The applicant met her daughters on 8 July 1998 for four days in Divriği. However, Halil Al did not allow his daughters to see their mother for any longer period. The applicant returned to Iceland.

83. On 27 August 1998 the applicant arrived in Divriği in order to meet her daughters. However, she was not able to see them.

84. The access rights became unenforceable when V.A reached the age of eighteen in June 1999 and A.A in October 2000, as the children were considered adults under Turkish law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Rules on Conflict of Laws (Law no. 2675)

85. The relevant provisions of Law no. 2675 (Law on Private International Law and Procedural Law - *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun*)

Section 12

"The capacity to marry and conditions for the validity of marriage shall be governed by the legislation in force in each party's country of origin at the time of the marriage. A marriage celebrated in the form prescribed by the legislation in force in the country where the marriage takes place shall be valid. A marriage celebrated in a consulate in accordance with the provisions of an international agreement shall be valid.

The general provisions relating to contracts of marriage shall be governed by the spouses' national law. If the spouses have different nationalities, the legislation in force in the place where they are domiciled shall apply. If the spouses are not domiciled in the same place Turkish law shall apply."

Section 13

"The grounds for divorce and judicial separation shall be determined by the spouses' national law.

If the spouses have different nationalities, the legislation in force where they are domiciled shall apply. If the spouses are not domiciled in the same place, the legislation in force where they reside shall apply. If the spouses do not reside in the same place, Turkish law shall apply. "

Section 16

"Affiliation proceedings shall be governed by the national law of the father. If it is not possible to determine the legislation in force under the father's national law, the affiliation proceedings shall be governed by the national law of the mother. If it is not possible to determine the legislation in force under the mother's national law, the affiliation proceedings shall be governed by the national law of the child."

Section 17

"The rights and duties of the mother and of a child born out of wedlock shall be governed by the legislation in force under the mother's country of origin. The rights and duties of a father and of a child born out of wedlock shall be governed by the legislation in force in the father's country of origin."

Section 20

"The law governing custody of the children shall be the law under which the divorce was obtained."

86. At the material time Turkey was not a party to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (the Convention came into force in respect of Iceland on 1 November 1996 and in respect of Turkey on 1 June 2000) or to the Hague Convention on the Civil Aspects of International Child Abduction (the Convention came into force in respect of Iceland on 1 November 1996 and in respect of Turkey on 1 August 2000).

B. Civil Code

87. At the material time Article 137 of the Civil Code provided:

"The judge shall take the necessary provisional measures concerning, in particular, ... the protection of the children ... in a pending divorce or judicial separation case."

88. At the material time Article 148 of the Civil Code provided:

"When issuing a decree of divorce or judicial separation the judge shall decide at the same time which parent will have custody of the children and which parent will be granted access rights.

The parent to whom custody is not given shall pay allowances for the maintenance and support of the children and exercise his or her access rights without any hindrance."

C. The Enforcement and Execution of Court Decisions and Bankruptcy Procedures Code

89. Article 25 (a) of the Enforcement and Execution of Court Decisions and Bankruptcy Procedures Code (*İcra ve İflas Kanunu*) provides:

"The enforcement officer shall issue an enforcement order requiring access to be given as specified in the court order. In the enforcement order the enforcement officer shall specify that access must not be hindered and that a failure to comply will constitute a criminal offence under Article 341.

A person who fails to comply with access arrangements specified in the enforcement order shall be liable to prosecution under Article 341."

90. Article 341 of the Enforcement and Execution of Court Decisions and Bankruptcy Procedures Code provides:

"A person against whom an enforcement order has been issued hides the child when required to give access or abducts the child following the enforcement of access rights shall be liable on conviction to between one and three months' imprisonment on a complaint by the person entitled to access."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

91. The applicant complained that the Turkish authorities had failed to enforce effectively her right of access to her children in accordance with their positive obligation under Article 8 of the Convention, which 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. The parties' submissions

1. The applicant

92. The applicant complained that the Turkish authorities had failed effectively to enforce her access rights to her children despite numerous attempts she had made to see them between 1992 and 1998. She had traveled to Turkey from Iceland more than a hundred times in six years with the aim of seeing her daughters. However, her efforts had remained unsuccessful because her former husband had consistently refused to comply with the access arrangements. She pointed out that the Turkish authorities had failed to take effective steps to locate her daughters, who had been hidden by their father prior to each visit by the enforcement officers.

The applicant maintained that eighteen sets of criminal proceedings had been instituted against her former husband on account of his failure to

comply with the court orders. However, he had been let off lightly, only having to pay small fines and escaping more severe punishment.

2. The Government

93. The Government maintained that the national authorities had done everything within their power to ensure that the applicant could exercise her access rights. They submitted that in a case involving enforcement of access rights a fair balance had to be struck between the competing interests of the children and of the community as a whole. The children had expressed their reluctance to see their mother many times in the course of the divorce and custody proceedings and at the meeting in Divriği on 21 August 1997 when they firmly refused to travel with the applicant's lawyer. In such circumstances the authorities were also under an obligation under Article 8 of the Convention to protect the interests of the children who were mature enough to have their views taken into account. The failure to enforce access rights was first and foremost the result of the father's refusal to co-operate and the Government could not be held responsible for his conduct. Secondly it was the result of the children's refusal to see the applicant, again a matter for which the Government could not be blamed.

In any event, the applicant could have requested the enforcement officers to enter her former husband's house forcibly, but had only done so on her visit of 16 September 1994. The Government further pointed out that the applicant's former husband had been convicted and sentenced repeatedly for failure to comply with court orders.

The Government concluded that, in view of the difficult circumstances of the case, the Turkish authorities had done everything that could reasonably be expected of them to enforce the applicant's right of access to her children.

3. The intervening Government

94. The Icelandic Government agreed with the applicant. They submitted that the Turkish legislation did not provide sufficient protection for the applicant's rights guaranteed by Article 8 of the Convention and, in particular, that the Turkish authorities had failed to enforce the applicant's access rights swiftly in accordance with the court decisions by taking the necessary effective measures.

95. The only measure the Icelandic Government considered the Turkish authorities had taken was to accompany the applicant to her former husband's house in order to find out whether the children were there. No steps had been taken to establish the children's whereabouts or to mediate between the applicant and her former husband with a view, for instance, to arranging a meeting between them or establishing a basis for communication. The Turkish authorities had made no attempts to ensure the

involvement of social-welfare or similar authorities in the proceedings in order to facilitate access.

B. The Court's assessment

96. The Court notes, firstly, that the applicant's complaints concerned her alleged inability to have access to her two daughters, V.A and A.A, from 1990 onwards. It is not disputed that these matters concern "family life" within the meaning of Article 8 of the Convention.

97. That being so, it must be determined whether there has been a failure to respect the applicant's family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective "respect" for family life (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, § 49). In this context, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action (see, *Eriksson v. Sweden*, judgment of 22 June 1989, Series A no. 156, pp. 26-27, § 71; *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A no. 226-A, p. 30, § 91; *Olsson v. Sweden (no. 2)*, judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90; *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55; *Nuutinen v. Finland*, judgment of 27 June 2000, *Reports of Judgments and Decisions* 2000-VIII, p. 83, § 127, *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, *Reports of Judgments and Decisions* 2000-I, p. 265, § 94 and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 58).

98. However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see *Hokkanen,* cited above, p. 22, § 58 and *Ignaccolo-Zenide,* cited above, p. 265, § 94).

99. The Court, therefore, has to ascertain whether the national authorities took all such necessary steps to facilitate execution as could

reasonably be demanded in the special circumstances of the case (see *Hokkanen*, cited above, § 58; *Ignaccolo-Zenide*, cited avove, § 96; *Nuutinen v. Finland*, cited above, § 128) and whether the national authorities struck a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law (see *Nuutinen*, cited above, § 129).

100. In this connection, the Court also reiterates that, in a case like the present one, the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the granting of parental responsibility, including execution of the decision delivered at the end of them, require urgent handling as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them (see, *Ignaccolo-Zenide,* cited above, p. 267, § 102).

101. The Court observes that the applicant lodged her request for divorce and custody of her children on 25 October 1991. The proceedings were concluded six years and five months later on 31 March 1997. In the meantime, on 12 March 1992 the applicant was provisionally granted access on the first and third Saturday of every month. However, she was able to see her children only on two occasions between 12 March and 12 November 1992. On the latter date the first order was made for the applicant to be granted access every July for thirty days. This arrangement became irrelevant when the Court of Cassation quashed the decision of the first instance court on 23 February 1993. On 30 June 1993 the applicant was again provisionally granted visiting rights from 5.00 p.m. on Fridays to 5.00 p.m. on Sundays. That arrangement remained in force until 13 June 1996, when the applicant was granted visiting rights every July and August for sixty days.

102. Between March 1992 and August 1998 the applicant was able to see her children on only four occasions although the enforcement officers and the applicant made more than fifty visits to the children's home. On two occasions the applicant, and on one occasion the applicant's lawyer, went to Divriği, a city in the east of Turkey, to see her daughters.

103. In the course of those proceedings the children were exposed to immense pressure as the custody and divorce proceedings had attracted media and public attention. Even in such difficult circumstances, however, the authorities did not take any measures to enable the applicant to enjoy access while the lengthy proceedings were pending. In particular, they failed to seek the advice of social services or the assistance of psychologists or child psychiatrists in order to facilitate the applicant's reunion with her daughters and to create a more cooperative atmosphere between the applicant and her former husband (see, *Ignaccolo-Zenide,* cited above, p. 269, § 112).

104. In this connection, the Court notes that the children had expressed a reluctance to see their mother on several occasions, both during the divorce

and custody proceedings and during the enforcement proceedings. The Government pointed out that the national authorities were not responsible for the children's refusal to see their mother and the father's non-compliance with the orders of access. Although it is true that there were occasions when the children had firmly refused to see their mother - notably at the meeting in Divriği - the Court is of the opinion that the children were never given any real opportunity to develop a relationship with her in a calm environment so that they could freely express their feelings for her without any outside pressure.

105. As to the handling of the enforcement procedures by the Turkish authorities, the Court notes that on each scheduled visit the applicant's former husband arranged to be absent with the children when the enforcement officers arrived. However, the authorities did not take any steps to locate the children with a view to facilitating contact with the applicant. In the face of Halil Al's consistent refusal to comply with the access arrangements, the authorities should have taken measures to allow the applicant access, including realistic coercive measures against her former husband of a type which were likely to lead to compliance.

106. Although measures against children obliging them to re-unite with one or other parent are not desirable in this sensitive area, such action must not be ruled out in the event of non-compliance or unlawful behaviour by the parent with whom the children live (see, *Ignaccolo-Zenide,* cited above, p. 268, § 106).

107. The Court does not agree with the Government's submission that the Turkish authorities did everything that could reasonably be expected of them to enforce the applicant's right of access to her children. It finds that the fines imposed on the applicant's former husband were neither effective nor adequate. As to the Government's suggestion that the applicant could have asked the enforcement officers to enter Halil Al's home by force, the Court finds that, even if this was so, it does not absolve the authorities from their obligations in the matter of enforcement, since it is they who exercise public authority (see, *Ignaccolo-Zenide,* cited above, p. 269, § 111).

108. Having regard to the foregoing, the Court concludes that the Turkish authorities failed to make adequate and effective efforts to enforce the applicant's access rights to her children and thereby violated her right to respect for her family life, as guaranteed by Article 8.

109. It follows that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

110. The applicant alleged that she had been deprived of her right to see her children as a result of discrimination, in particular on the ground that she

was a Catholic and of Icelandic nationality. She relied on Article 14 of the Convention, which provides:

> "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."

111. The Court finds on the material before it that the applicant's complaints are unsubstantiated and that there is no basis on which to find that she was subjected to discrimination on the ground of her religion or nationality.

112. There has, accordingly, been no violation of Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

113. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

114. The applicant requested a total amount of 478,209.46 US dollars (USD), equivalent to 529,913 euros (EUR), in respect of pecuniary damage, broken down as follows:

(i) USD 243,355.25 for travel costs between Iceland and Turkey and accommodation expenses between 1992 and 2001 for the purpose of exercising access rights;

(ii) USD 84,600 for expenses incurred for the rent of an apartment in Istanbul;

(iii) USD 5,286.65 for expenses incurred during the applicant's stay in Istanbul in respect of heating, electricity, gas and water;

(iv) USD 69,668.07 for telephone expenses in Turkey;

(v) USD 22,268.61 for telephone expenses in Iceland including the purchase of access to a telephone directory and data processing from the telephone directory;

(vi) USD 42,171.63 for expenses incurred by the "Börnin Heim (Bring the Children Back) Project" in Iceland, including office rent and equipment, security services and expenses incurred by "Support for Sophia Hansen";

(vii) USD 10,626.94 for postage expenses;

(viii) USD 232.31 for miscellaneous expenses.

115. The Government submitted that the amount claimed by the applicant was excessive and that there existed no causal link between the complaints raised before the Court and the alleged damage.

116. The Court observes that a sum of USD 169,526.57, which was not subtracted from her claims under pecuniary damage, was raised on behalf of the applicant by public collection in Iceland, thus relieving her of liability to that extent. The Court finds the remaining sum claimed by the applicant in respect of pecuniary damage to be excessive.

117. However, taking into account the length and complexity of the enforcement proceedings and the fact that the applicant was prevented from exercising her access rights, the Court, is of the opinion that she must have incurred a significant expense as a result of her former husband's failure to comply with court orders.

118. Having regard to the above considerations and making an assessment on an equitable basis as required by Article 41, the Court awards EUR 50,000 to the applicant.

119. The applicant sought USD 200,000, equivalent to EUR 221,624, in compensation for non-pecuniary damage due to the anxiety and distress she had experienced on account of her failure to gain access.

120. The Government submitted that the amount claimed by the applicant was excessive.

121. The Court sees no reason to doubt that the applicant suffered distress as a result of the non-enforcement of her access rights and that sufficient just satisfaction would not be provided solely by a finding of a violation. Having regard to the sums awarded in comparable cases (see, *Ignaccolo-Zenide*, cited above, §117, *Hokkanen*, cited above, p. 27, § 77; see also, *mutatis mutandis*, *Elsholz v. Germany* [GC], no. 25735/94, § 71, ECHR 2000-VIII, *Kutzner v. Germany*, no. 46544/99, § 87, ECHR 2002-I and *Sylvester v. Austria*, cited above, § 84) and making an assessment on an equitable basis as required by Article 41, the Court awards the applicant EUR 15,000.

122. In sum, the Court awards the applicant EUR 15,000 for non-pecuniary damage.

B. Legal fees and expenses

123. The applicant requested a total amount of USD 116,875.74, equivalent to EUR 129,511, in respect of legal fees and expenses, broken down as follows:

(i) USD 22,350 for lawyer's fees relating to the proceedings in Iceland;

(ii)USD 2,875.74 for lawyer's fees for the proceedings in Turkey;

(iii) USD 60,900 for costs and expenses concerning the divorce, custody and enforcement proceedings in Turkey, including lawyer's fees and travel expenses;

(iv) USD 30,750 for the lawyer's fees and costs and expenses related to the proceedings in Strasbourg.

124. The Court finds that the lawyer's fees relating to the proceedings in Iceland do not concern the enforcement of access rights. The Court, therefore, rejects the applicant's claims under this head.

125. As to the domestic proceedings, the costs and expenses of the enforcement proceedings and proceedings in Strasbourg were incurred necessarily. They must, accordingly, be reimbursed to the extent that they are reasonable (see, *Ignaccolo-Zenide*, cited above, §121 and *Sylvester v. Austria*, cited above, § 121).

126. The Court finds that the costs claimed are excessive. Making an assesment on an equitable basis and considering, in particular, that the case was complex, it awards the applicant EUR 10,000 for legal costs and expenses.

127. In sum, the Court awards the applicant EUR 10,000 under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that there has been no violation of Article 14 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 50,000 (fifty thousand euros) in respect of pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;

(iii) EUR 10,000 (ten thousand euros) in respect of costs and expenses;

(iv) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 23 September 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President