



Dismissal of the applicant's appeal on points of law for formal reasons which were attributable to the prosecutor deprived him of access to a tribunal

In today's **Chamber** judgment¹ in the case of [Henrioud v. France](#) (application no. 21444/11) the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, and

No violation of Article 8 (right to respect for private and family life) of the Convention.

The case concerned the applicant's inability to secure the return of his children to Switzerland, who had been taken to France by their mother.

The Court found that the applicant had been deprived of his right of access to a tribunal because the Court of Cassation had been excessively formalistic in declaring his appeal on points of law inadmissible on the ground of non-compliance with a formal condition attributable to the public prosecutor with the Court of Appeal.

The Court further found that the applicant had not provided the Court of Appeal with the requisite information for contesting his tacit acceptance of the failure to return his children.

Principal facts

The applicant, Jean Michel Henrioud, is a Swiss national who was born in 1966 and lives in Auvernier (Switzerland).

Mr Henrioud's wife left the matrimonial home with her children to settle in France despite an injunction prohibiting her from leaving Swiss territory delivered by the President of the Boudry civil court. Subsequently, the President of the civil court withdrew the injunction on the ground that Mr Henrioud's wife had not been apprised of it until after her departure.

Mr Henrioud appealed against that decision with the Civil Court of Cassation of Neuchâtel Cantonal Court, alleging a violation of the Hague Convention on the Civil Aspects of International Child Abduction. He also submitted a request to the Federal Justice Office for the return of his children, which was forwarded to the French authorities. The Prosecutor with the Bordeaux Regional Court summoned the mother to appear with a view to a finding that the children were being held unlawfully in France so that he could order their immediate return to their father's home. The court rejected this request because the mother had not been aware of the order prohibiting her from leaving Swiss territory at the time of her departure, and also because the order had subsequently been cancelled.

The prosecutor appealed against that judgment. Mr Henrioud lodged an application to be joined to proceedings with the Court of Appeal, requesting the immediate return of his children. He did not, however, mention his appeal against the decision to cancel the order prohibiting the mother from

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

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

leaving Switzerland. The Court of Appeal upheld the first-instance judgment on the grounds that Mr Henrioud had tacitly accepted the non-return of his children as he had not appealed against the decision to cancel the preventive order. The prosecutor and the applicant appealed on points of law with a view to demonstrating the lack of tacit acceptance of the non-return of the children. The Court of Cassation declared the prosecutor's and the applicant's appeals on points of law inadmissible on formal grounds.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a tribunal), Mr Henrioud complained of the violation of his right of access to a tribunal on the grounds of the inadmissibility of his appeal on points of law.

Relying on Article 8 (right to respect for private and family life), Mr Henrioud submitted that the French authorities had neither shown the requisite diligence during the impugned proceedings nor expended sufficient or adequate efforts to ensure respect for his right to the return of his children.

The application was lodged with the European Court of Human Rights on 4 March 2011.

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

Josep **Casadevall** (Andorra), *President*,
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Vincent A. **de Gaetano** (Malta),
André **Potocki** (France),
Helena **Jäderblom** (Sweden),
Síofra **O'Leary** (Ireland),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 6 § 1 (right to a fair trial)

The Court noted that the Court of Cassation had declared inadmissible on the ground of non-compliance with a formality both the main appeal on points of law submitted by the State Prosecutor with the Bordeaux Court of Appeal and the appeal on points of law lodged by Mr Henrioud. The Prosecutor had not appended the act of notification of the impugned appeal judgment to his appeal on points of law within the time-limit as required by Article 979 of the Code of Civil Procedure applicable at the relevant time. The Court found that the Code of Civil Procedure was unclear as to whether Mr Henrioud, as joint plaintiff, was actually required to provide such an act of notification, but it did not question the relevant findings of the Court of Cassation, and noted that at all events Mr Henrioud had been represented by a lawyer specialising in cassation proceedings.

The Court observed that the admissibility criterion in issue had been recently revoked by decree. It pointed out that the Hague Convention invited the States' Central Authorities to introduce, or foster the introduction of, judicial proceedings for the return of children. In France the competent agency transmitted the file to the public prosecutor's office, which played a central role in the procedure. As regards the parent whose child had been removed, he or she could apply directly to the judicial authorities, but this was not compulsory. The Court therefore held that as Mr Henrioud had been informed of the appeal on points of law lodged by the State Prosecutor, he could legitimately have considered that the latter had complied with the requisite conditions for its admissibility. The Court also noted that the State Prosecutor had acknowledged that the notification

had been effected out of time and had demanded an exceptionally flexible approach to implementing of the procedural regulations in view of the importance of the case for the protection of the child's best interests.

The Court therefore held that the Court of Cassation had been excessively formalistic in declaring Mr Henrioud's appeal on points of law on the grounds of negligence which had been attributable to the State Prosecutor. It found that there had been a violation of Article 6 § 1 as regards Mr Henrioud's right of access to a tribunal.

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

The Court pointed out that since the complaint concerning the appeal on points of law had been assessed under Article 6 § 1, it did not consider it necessary to consider it under Article 8.

As regards the proceedings before the Court of Appeal, the Court noted that Mr Henrioud had at no stage mentioned his appeal against the cancellation of the prohibition on the mother leaving Swiss territory. The Court consequently considered that Mr Henrioud, who had been a voluntary joint plaintiff and been represented by counsel, had not provided the Court of Appeal with the requisite information to contest his tacit acceptance of the situation. The Court therefore found that there had been no violation of Article 8.

Article 41 (just satisfaction)

The Court held that France was to pay Mr Henrioud 12,000 euros (EUR) in respect of pecuniary damage and EUR 3,085 in respect of costs and expenses.

The judgment is available only in French.

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Press contacts

echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Nina Salomon (tel: + 33 3 90 21 49 79)

Inci Ertekin (tel: + 33 3 90 21 58 77)

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