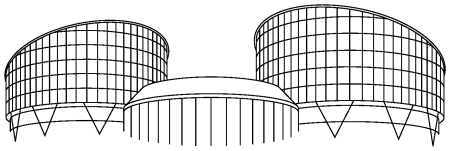

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 13553/09
Yelena Vladislavovna GRUZDEVA
against Russia

The European Court of Human Rights (First Section), sitting on 8 July 2014 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Dmitry Dedov, *judges*,
and Søren Nielsen, *Section Registrar*,

Having regard to the above application lodged on 19 February 2009,

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, Ms Yelena Vladislavovna Gruzdeva, is a Russian national, who was born in 1978 and lives in the city of Rostov-on-Don, the Rostov Region.

2. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

1. Events prior to the child residence proceedings of 2008

3. The applicant married V.G. in 1996. Two children, a boy and a girl, were born to the couple in 2002 and 2006 respectively. The family lived together in a house acquired during the marriage.

4. On 20 February 2008, due to growing tensions between the applicant and her husband, she left the house together with the children and moved into a rented apartment. Her husband continued to reside in the house.

5. On 12 March 2008 a court dissolved the marriage between the applicant and her husband. The issue of the children's residence was not resolved in the course of the divorce proceedings.

6. According to the applicant, she reached an oral agreement with her husband that the children would stay with her. Shortly after the divorce, the applicant initiated civil proceedings for the division of marital property, including the house (see paragraphs 28-30 below).

7. On 20 March 2008 babysitter T., who was staying with the children in the applicant's rented apartment, took them to the applicant's former husband. According to the applicant, this was planned by her former husband and took place with his assistance.

8. On 21 March 2008, during the night, the applicant entered the house with the help of the police and took her daughter back. It appears that she could not, for some reason, take her son.

9. The applicant subsequently took her daughter to her mother's home (her daughter's maternal grandmother). She lived in another town. The applicant submitted that shortly after the incident her former husband sent their son with the babysitter to another town as well.

10. From 24 March until 15 April 2008 she was neither able to see nor contact her son. V.G. subsequently allowed the applicant to see her son for two hours every week.

2. First-instance proceedings

11. On an unspecified date the applicant brought civil proceedings against her former husband, seeking a residence order in respect of her two children. The applicant's former husband lodged a counterclaim and also asked the court to grant a residence order in respect of the children in his favour.

12. At a preliminary hearing, the Voroshilovskiy District Court, Rostov-on-Don ("the District Court") ordered the Department of Education for the Voroshilovskiy District of Rostov-on-Don's child welfare board ("the Department of Education") to prepare reports on the living conditions of the applicant and her former husband.

(a) Reports by the Department of Education

13. On an unspecified date the Department of Education made a report on the living conditions of the applicant's former husband. The report described the former matrimonial home in detail. The house had three floors and measured 478 sq. m.

14. On 24 April 2008 the Department of Education drew up a report on the applicant's living conditions. The report stated that the sanitation conditions of and services supplied to the two-room rented apartment where the applicant and her daughter were living at the time were satisfactory. The applicant's daughter had a separate room with a bed, a wardrobe and toys.

15. On 24 April 2008 K., the deputy head of the Department of Education, wrote her final remarks following the inspection of the applicant's living conditions and those of her former husband. In the remarks K. stated that the Department considered that the children should reside with their father. The reasoning for that conclusion was as follows:

> "V.G. is well off and [is able to] offer very good living conditions, there is a separate furnished room for each child in his house, a gym, a swimming pool, [and] the children's babysitter lives in the house. V.G. is very attached to the children, loves and cherishes them and wants to support and develop them. V.G. is of good character, and does not have bad habits.
>
> Gruzdev A. [the applicant's son], currently living with his father, is tidily dressed, is [a] cheerful, well-brought-up, communicative, well-developed [child], [he] can read, [and] quickly assemble 'Lego' models. There is a quiet and kind atmosphere in the family. The child is surrounded with love, attention and care."

16. During the trial the applicant lodged a motion for a repeated inspection of her living conditions to be carried out. On 27 June 2008 the Department of Education produced a second report which stated that the applicant, who worked as a senior customs inspector, earning 20,000 Russian roubles a month, and her daughter were living in a two-room flat in an apartment block. The flat measured 40 sq. m. During the summer the child's maternal grandmother stayed with them. At the time of the inspection the applicant's daughter had gone with her maternal grandparents to the seaside. One room of the apartment had two beds for the applicant's children, another one had cushioned furniture. The kitchen furniture and a gas oven belonged to the landlord, whilst a table, a refrigerator and a number of other electrical appliances belonged to the applicant. There were children's clothes, shoes and toys in the wardrobes in the corridor.

(b) Judgment of 3 July 2008

17. During the trial the District Court questioned witnesses Sh., D. and K., who gave evidence for the applicant and who stated that the applicant was considered to be of good character at work. Witness K. confirmed that the applicant's son lived with his father and the applicant's daughter lived

with her maternal grandparents. K. also stated that the applicant's former husband was a bad father.

18. The District Court also questioned a representative of the Department of Education, who stated that a residence order in respect of the children should be made in favour of their father.

19. Witnesses Ya., T., G. and T.K. gave oral evidence for the applicant's former husband to the District Court to the effect that V.G. had always duly performed his paternal duties, had fully supported the family, and had established good living conditions for the children. The witnesses also noted that V.G. was the head of a business and could set his own working schedule, in order to spend more time with his children, and could also afford to employ a babysitter. The witnesses asserted that the applicant had not fully performed her parental duties and that most of the time the babysitter had taken care of the children, who had often been anxious and had cried in the applicant's presence.

20. On 3 July 2008 the District Court granted a residence order in respect of the children to their father. The court relied on the reports and final remarks of the Department of Education and the statements made by its representative during the trial. The court also accepted the oral evidence given by witnesses Ya., T., G. and T.K. for the applicant's former husband, as it considered that they were not concerned by the outcome of the case. At the same time, the court rejected the statements of K. that V.G. was a bad father, as they contradicted the facts of the case and the evidence led by V.G.

21. The District Court reasoned as follows:

> "... Having analysed all the evidence, the court concludes that V.G. can create the conditions most favourable for the upbringing and development of his children, which will [...] correspond to the children's best interests ...
>
> Witnesses Sh. and D., questioned during the trial, who are the colleagues of Gruzdeva Ye.V. [the applicant] stated that [the applicant] is considered to be of good character at work, [is] polite, [and] has not received any reprimands from her superiors. These witnesses stated to the court that they knew that [the applicant] had a family and children ... D. stated that she knew that after the divorce the [applicant's] son stayed with his father, and [the applicant] had taken her daughter, but [that] the girl was not living with her, as [the applicant had] sent her to [live with her] parents, and [the applicant] would visit her at the weekend. [The applicant] did not deny these facts during the trial.
>
> Witnesses for the other party Ya., T., G. and T.K., questioned during the trial, stated that V.G. ... had always duly performed his paternal duties, had fully supported the family, had established good living conditions and had constructed the house with the needs of children in mind. Moreover, these witnesses stated that V.G., being the head of a business, could set his own working schedule, which would allow him to devote more time to the upbringing, education and development of his children and to spend more time with them. V.G. can afford to employ a babysitter, who has taken care of the children from birth. At the same time the witnesses asserted that [the applicant] had not fully performed her parental duties, since the babysitter had taken care of

them most of the time. [T]he children would stay with the babysitter when [the applicant] repeatedly left on her own business and went on holiday, the children had often been anxious and had cried in the presence of [the applicant], [whereas] the father had always looked after the children, had played and spent his free time [with them] ... These witnesses are not concerned by the outcome of the case and therefore the court considers their statements to be credible.

Thus the court considers the [applicant's] argument that her address should be determined as the children's residence to be unsubstantiated, as it has been established during the trial that this dwelling does not belong [to her], but [rather] has been rented to her for the period from 20 February 2008 until 20 January 2009, [and] she is not registered at this address. Moreover, from the time of dissolution of the marriage her son has lived with his father in the house where they had all lived as a family before, while her daughter, who was taken by [the applicant], does not live with her, having been sent to [live with the applicant's] parents, [thus] depriving the girl of the opportunity to see both her father and her brother.

The court is not convinced by [the applicant's] argument that [her former husband] is unable to provide for the proper support, upbringing and development of the children, as [the applicant] has not provided any reliable evidence in support [of this argument].

The statements of K. ... that V.G. is a bad father and that the children should reside solely with their mother cannot be taken into account, since her statements contradict the facts of the case and the evidence provided by the [defendant, V.G.]...

In these circumstances the court ... basing its decision on the best interests of the children... [the] finances and family status of the parents, [and] taking into account the final remarks of the Department of Education ... rules that a residence order should be granted in favour of their father V.G. ..."

3. Appeal proceedings

22. In July 2008 the applicant complained to the Rostov-on-Don Department of Education and the Rostov Region Ministry of Education that the final remarks made by employees R. and K. on behalf of the Department of Education had been improper and solely based on her former husband's financial situation, without taking into account her situation, personality and relationship with the children and her role in their upbringing.

23. On 8 August 2008 the Department of Education informed the applicant that an internal investigation had confirmed some of the applicant's allegations and R. had been subjected to a disciplinary sanction. On 20 August 2008 the Rostov Region Ministry of Education informed the applicant by letter that it had been established in the course of the internal investigation conducted by the Rostov-on-Don Department of Education that R., when preparing the final remarks concerning the official recommendation as to the residence of the applicant's children, had not thoroughly studied the issue and had not reflected in the remarks the facts relating to the applicant's personality and her relationship with the children. R. had been subjected to a disciplinary sanction in the form of a warning. It also noted that the final remarks of the Department of Education had not

served as the sole basis for the judgment, since the court had analysed the totality of the evidence.

24. The applicant appealed against the judgment of 3 July 2008, arguing that when deciding on the issue of residence the first-instance court had only taken into account the financial situation of her former husband. The court had not assessed the evidence provided by her, namely that she was the co-owner of the house the children were living in, the proceedings for division of marital property were pending and her stay in a rented apartment was only temporary. The applicant challenged the court's conclusion that she had given her daughter to her grandparents and had not been taking part in her upbringing as unsubstantiated, submitting that the court had ignored her explanation of the reasons for the girl's temporary stay with her grandmother. According to the applicant, she had had to leave the girl with her maternal grandparents for the fear that her husband may abduct her. In addition, the applicant pointed out that she had taken maternity leave to take care of the child from July 2008 until May 2009. The applicant complained that the first-instance court had treated the evidence led by her former husband more favourably and had not taken into account the testimony of K. The applicant argued that the first-instance court had not assessed the evidence showing that she had supported and taken care of the children, namely the evidence that she was employed at a customs office, including a salary slip, and had not taken into account the children's minor age and their attachment to her. The applicant pointed out that the first-instance court had based its judgment on the flawed final remarks of the Department of Education. The applicant complained that the first-instance court had not explained why it had rejected the evidence concerning her former husband's bad character and had not taken into account the fact that he had not let her come to the house to see the children.

25. On 1 September 2008 the Rostov Regional Court rejected the applicant's appeal as unfounded. It ruled as follows:

> "... [T]he first-instance court correctly assessed the evidence, including the reports on the inspections of the parties' living conditions and the Department of Education's final remarks of 23 April 2008, which had been supported during the hearing by their representative, and considered the totality of the evidence.
>
> The court considered that all necessary conditions for the children to live with their father were satisfied, taking into account their interests, age and needs, their attachment to the father, [and] their father's ability to establish the optimal conditions for their upbringing and psychological and social development.
>
> Moreover, the court rightly ... pointed out that [the applicant] had not proved her allegations.
>
> The court considers the appellant's arguments that living with their father would not be in the children's interests to be unsubstantiated...
>
> According to the Department of Education's final remarks of 23 April 2008, V.G. is [able to provide the children with] good housing conditions, there is a separate

furnished room for each child in his house, a gym, [and] a swimming pool. He loves the children and is able, in the court's opinion, to establish the [optimal] conditions for their upbringing, development and healthy living.

In these circumstances the court concluded that V.G. can ... raise the children and that living with their father would to a greater extent correspond to their best interests, as he is considered to be of good character in everyday life and at work and he has established appropriate living conditions for the children.

In addition, the court established during the trial that [the son] was in fact living with his father in the house while [the daughter], who had been taken by her mother, does not live with [the applicant] in the same apartment, but stays with relatives in another town.

In these circumstances the court rightly concluded that [the applicant] ... was not in fact living with the child.

The appellant's reasons for not being able to live with her daughter cannot be taken into account ... since the present dispute concerns the granting of a residence order in favour of one of the parents and not [other] relatives, especially [relatives] living in a different town.

The fact that [the applicant] took maternity leave to take care of the child after the first-instance hearing does not in any way affect the legality of the first-instance judgment for the following reasons.

Firstly ... at the time of examination of the case at first instance the applicant was not on maternity leave ... the girl ... was staying with relatives although [the applicant] had taken her from her father to live with her. At the same time, [the applicant] had highlighted in her claim that the child, due to her minor age, needed to stay with her mother (and not with [other] relatives). The court considers that, in view of the family situation, [namely] the parents' divorce, the girl should have been living with one of her parents, since she needed their support and protection...

In addition, the court takes into account the fact that before the first-instance judgment ... [the applicant] had not considered it necessary to take maternity leave to care for the child, or to be with the children.

The court also takes into account the fact that in spite of the children's minor age at the time, [the applicant] returned to work after the birth of her daughter. She had not considered [them] to be worthy of her attention in the period when the family had been together and had had a stable income, and [went back to work from] maternity leave [she had taken] to take care of the baby, who was only one year old at the time, and the second child, who was five years old.

During the appeal hearing [the applicant] stated that she had been forced to interrupt her maternity leave because her husband had not been giving her any money, but this claim is refuted by the materials of the case, which describe the living conditions of the family ... [and by] the witness testimony, and the appellant has not provided any evidence in support of this claim at the appeal hearing. The applicant has not previously made this claim...

It is also important that the children can stay together at their father's home.

In view of the above-mentioned reasons, the appellant's argument that the court had only considered the financial situation of V.G. cannot be taken into account.

The first-instance court when resolving the dispute ... and assessing the evidence in the case proceeded from [standpoint of] the best interests of the children only and

considered the ... situation from the point of view of which one of the parents offered greater opportunities for raising the children, had communicated with them more often, had spent more time with them, and could take care of them better.

When making its findings the court relied, among other things, on the pre-trial behaviour of the parties towards the children.

The argument of [the applicant] that the house ... is part of the common marital property and that she has initiated proceedings for its division is not relevant... The marital property ... was not the subject matter of the dispute. The dwelling where the children's mother currently resides is not her property, it has been rented to her for the period from 20 February 2008 until 20 January 2009, she is not registered [as having her permanent residence] there.

At the same time the right of the children's mother to live in the house ... has been established by a court judgment and, taking into account the fact that the children and their father live in the house, [she] will be able to see her children.

Moreover, she can subsequently lodge a [further] application for a residence order if the circumstances (the basis of the claim) change.

It should also be noted, that ... the maternity leave records, the records of witness statements and the other documents attached to the appeal submissions cannot be taken into account by the appeal court, since ... the appeal court can only consider new evidence in the case that could not have been submitted to the first-instance court. There is no evidence that [the applicant] could not have submitted the [relevant] documents to the first-instance court."

4. Agreement of 11 November 2008

26. On 11 November 2008 the Department of Education brokered an agreement between the applicant and V.G. (entitled Agreement no. 1) setting out the following contact schedule between the applicant and her children:

"1. On Tuesdays from 6 p.m. to 8.30 p.m. children are with [the applicant].

2. On Wednesday at 4 p.m. V.G. takes the boy to school.

3. At 6 p.m. [the applicant] takes the boy.

4. On Friday at 6 p.m. [the applicant] takes the boy home and until 11 a.m. on Sunday he stays [with his mother].

5. The [children's] toys and other such objects are to be divided.

6. The number of holidays is divided in half. With the other parent's consent ... the children may be taken outside of the city.

7. Responsibility for the health and safety of the children is borne by both parties.

8. During their annual leave period each party has the right to spend 20 days with the children.

Remarks: In case of an extraordinary situation each parent is under the obligation to warn the other two hours in advance of a change to the schedule. It is necessary to take joint and coordinated action in respect of the health of the children, both psychological and physical; [and to ensure that they] undergo medical examinations on time."

27. Subsequently both parties on several occasions petitioned the Department of Education, citing their dissatisfaction with the established contact schedule. In particular, the applicant submitted fifteen affidavits, signed by witnesses, allegedly confirming her former husband's refusals to let her enter the marital home in July and August 2008.

5. Court proceedings for the division of marital property

28. On 9 April 2009 the applicant brought court proceedings against V.G. for division of their marital property.

29. By a judgment of 12 May 2009 the District Court granted the applicant's claims in part, having decided that the applicant now owned half of the marital house and a car. The first-instance judgment of 12 May 2009 was upheld on appeal by the Regional Court on 13 July 2009.

30. It appears that thereafter the applicant and V.G. commenced renovation and construction works on the former marital home with a view to residing in it as two separate families. By September 2009 all of the relevant renovation and construction works were completed.

6. Child residence proceedings of 2009

31. On 18 May 2009 the applicant again sued her former husband V.G., seeking a residence order in respect of her two children.

32. In the applicant's statement of claim, which she modified and updated on a number of occasions during the course of the court proceedings, she raised her previous arguments again and also referred to various changes in the relevant circumstances.

33. The applicant argued, in particular, that she now owned half of the former matrimonial home, a car, a flat and a plot of land, had a steady monthly income of some 24,990 Russian roubles (RUB) (573 euros), whilst the financial situation of her former husband had deteriorated, in that he had lost the business premises he had formerly owned, was no longer self-employed and was now in receipt of a modest salary at a private company and, lastly, had issues with honouring his personal debts.

34. The applicant also alleged that V.G. had repeatedly breached the agreement of 11 November 2008, had hurt the children, could not handle them on his own and had to have recourse to nannies, which he frequently changed, and that the applicant's views in this respect were ignored. Furthermore, after the divorce proceedings V.G. had started living with a young woman, marrying her on 20 November 2009 and moving out of the matrimonial home.

35. In his response to the applicant's claims, V.G. explained that he had moved out pending the renovation of the house, that he was still well off, as he earned between RUB 30,000 and 50,000 each month (688 to 1,146 euros) and that the applicant's maintenance payments were not spent

on the children, but rather were put aside. He also referred to expert reports (see below) confirming that he was a good father and that his relationship with the children was good.

(a) Report of 3 June 2009

36. On 3 June 2009 the Department of Education produced a report on an inspection of the applicant's living conditions. It stated that at the time the applicant was living in a rented apartment consisting of two rooms with an overall surface area of 40 square metres and a living area of 25 square metres. One of the two rooms was used a room for children, with many books and toys. It was clean and at the time of the inspection the applicant's son A. was there, clean and neatly dressed.

(b) Report of 26 June 2009

37. On 26 June 2009 the Department of Education produced a report on an inspection of V.G.'s living conditions. At the time V.G. was living in a rented three-room apartment with his then partner and future wife, A.S., and the two children, A. and D. The apartment was well-equipped and had a room for the children.

(c) Report of 30 June 2009

38. On 30 June 2009 a child welfare centre run by the local council produced a report on a psychological examination of the applicant, V.G. and their children that it had conducted. The report concluded that both children felt love and emotional attachment to both parents, and that both children needed to be able to properly communicate with both parents. The report stated that there were no concerns as regards the parenting styles of either their mother or their father.

39. At the same time, it noted some concerns in terms of the applicant's behaviour in that she had dragged the children into the conflict between the parents, had a generally heightened level of protectiveness towards the children and a somewhat inconsistent parenting style. As regards their father, the report noted that he was also excessively protective of the children.

40. The report also concluded that the conflict had affected negatively the psychological state of the children, especially their son A., and that the level of conflict might lead to the children developing physical health problems. It was also noted that a conflict-free relationship between the parents was a significant factor in the psychological health of both children.

41. Overall, the report concluded that at this point a change of residence for the children was not recommended, because their adaptation to new conditions might worsen the effect of the stress factors on them.

(d) Report of 28 April 2009

42. On 28 April 2009 psychologist B. examined the children and compiled a report, which concluded that the boy A. did not present any significant mental health problems but that he had minor personality problems in the form of a heightened level of anxiety, which could be a reaction to a traumatising family situation. As regards the girl D., the doctor did not detect any problems at all.

(e) Report of 22 July 2009

43. In a report of 22 July 2009 the Department of Education stated that it favoured the children residing with their mother, given that she owned a three-room apartment in the town of Belaya Kalitva in the Rostov Region and a one-half share of the former matrimonial home in the city of Rostov-on-Don.

(f) Reports of 17 September 2009

44. After the renovation of the former matrimonial home was over, the applicant and her former husband (together with his new family) moved back into the building, each of them occupying one half of the house, in accordance with the property split provided for in the previous court decisions (see paragraphs 28-30 above). Shortly afterwards the Department of Education inspected their respective homes.

45. In its report of 17 September 2009 the applicant's home was said to contain two living rooms, a shower, two WCs and a swimming pool. Each child had a separate room and was provided all necessary home comforts. The report stated that the applicant "did not create obstacles to communication between the children and their father". Both children lived with their father, but "missed their mother, wanted to see her more often and loved her". The living and parenting conditions were "good and comfortable", her relationship with the children was "generally good, based on trust and [was] open [in nature]".

46. On the same date the Department of Education issued a report on the living conditions offered by V.G.'s family. His part of the house was similar in size and had three living rooms. The relationship between father and children was described as "good, taking their interests into account". The children loved him, and respected, supported and loved each other. The living and parenting conditions established by V.G. for the children were described as being "very good, regard being had to the age and gender of the children", the relationship between the children being "good and based on trust".

47. Basing themselves on the results of the inspections of 17 September 2009, the Department of Education took the view that regard being had to

all relevant factors it would be advisable for the children to reside with their mother.

(g) Report of 2 November 2009

48. On 2 November 2009 the Department of Education again inspected the applicant's living conditions and on 16 November 2009 her former husband's living conditions, concluding that they were equally good in both homes.

(h) Court proceedings

49. The applicant's action for a residence order was examined by the District Court at court hearings which took place between 9 and 15 October and on 25 November 2009. The court questioned twenty one witnesses, including officials of the Department of Education, the doctors who had been involved in the expert reports detailed above and expert witnesses from various authorities. Expert E.V., in charge of the report of 30 June 2009, gave evidence in court in the presence of the parties, speaking in favour of not changing the residence arrangements and confirming the reasons given in the report of 30 June 2009.

50. On 4 December 2009 the District Court delivered a judgment, dismissing the applicant's claim in full. The court relied on the evidence presented by the parties to the court and examined during the hearings and concluded that it would be equally beneficial for the children to live with either parent. Having regard to the home environment offered by V.G. to date, the court considered that it was more favourable for the children's upbringing and development. At the same time, the applicant's submissions to the effect that her former husband was deficient in supervising the health of the children were refuted and rejected as unfounded.

51. The court reasoned as follows:

> "... The court, examining the report of the Department of Education on the need to change the residence of the children, comes to the opinion that [the Department's] findings were made only on the basis of the amelioration of the [applicant's] housing and finances.
>
> [The applicant's] claims that [her former husband's] situation has worsened are not confirmed by the materials of the case... Apart from that, [the applicant] is a State official and being busy at work is [thus] unable to give the children due attention, whilst [her former husband] is a director of a firm, choosing his work schedule for himself, which is confirmed by the case-file materials. He can spend more time educating and developing [the children], whilst [they] are also given constant care and attention by [V.G.'s] family, namely their grandfather, uncle and V.G.'s wife, the atmosphere in the family being positive. The children love their family members and meet with them frequently.
>
> [The applicant] in court confirmed that she has contact with her children five times a week, which refutes her arguments that [V.G.] has been blocking contact with the children.

The respondent has created a new family, which is confirmed by his marriage certificate, but this fact has no negative bearing on his relationship with the children, he cares about them and loves them just as much. Moreover, the witnesses questioned in court confirmed that [V.G.'s new] wife had a positive and caring relationship with the children. V.G. does not affect his children in a negative way, and this has never been mentioned in any of the [expert reports].

The time to date has demonstrated that the children growing up with V.G. has not [impacted on them] negatively and that, quite the contrary, they are growing up in a loving and caring [environment].

Overall, the court has not established any relevant and sufficient grounds for changing the residence arrangements. The court, in taking this decision, has had regard to the best interests of the children and their age, their attachments to all members of their extended family, their parents' capacity to create the optimal conditions for the children's education and development..."

52. The first-instance judgment of 4 December 2009 was upheld on appeal by the Regional Court on 4 March 2010, which stated that:

"...The judicial panel is unable to agree with [the applicant], who sought to have the first-instance judgment quashed on the grounds that [her finances and living conditions had considerably improved, whilst those of her husband had deteriorated].

Under [applicable domestic law] the mere fact that a parent has an advantage in [terms of] finances and living conditions cannot in itself be viewed as grounds compelling [the court] to grant the claim.

Moreover, [the applicant] failed to present any evidence which could confirm that V.G. has been evading his duty to maintain and educate his children or is unable to provide for them...

[The applicant] has not substantiated her claims about the deterioration of V.G.'s relationship with the children, that his new wife has a conflict of interests vis-à-vis the children or the existence of any threats to their physical or mental well-being...

Apart from that, the judicial panel takes into account the proximity at which the respective parents reside from each other and the absence of any impediments to contact between [the applicant] and the children..."

B. Relevant domestic law

53. Article 65 (on the exercise of parental rights) of the Family Code of the Russian Federation of 29 December 1995 provides as follows:

"3. The place of the children's residence, if the parents live apart, shall be established by an agreement between the parents.

In the absence of an agreement, a dispute between the parents shall be resolved in court, proceeding from the [standpoint of the] children's best interests and taking into account the children's opinions. In doing so, the court shall take into account the child's affection for each of his parents and for his brothers and sisters, the child's age, the moral and other personal characteristics of the parents, the existing relationships between each of the parents and the child, and [each parent's] ability to create optimal conditions for the child's upbringing and development (the parent's kind of activity and work schedule, their financial situation and family status, etc.)."

54. Article 66 (on the exercise of parental rights by the parent residing separately from the child) of the Code provides as follows:

> "1. The parent residing separately from the child shall have the right to communicate with the child and to take part in his upbringing and education.
>
> The parent with whom the child lives shall not prevent the child communicating with the other parent, unless such communication would damage the child's physical and mental health or his moral development.
>
> 2. The parents shall have the right to enter into a written agreement concerning the way in which the parent residing apart from the child may exercise his or her parental rights.
>
> If the parents cannot reach an agreement, upon an action being brought by one (or both) of the parents the dispute shall be resolved in court with the participation of the [competent] guardianship or trusteeship authority.
>
> 3. In the event of failure to abide by the court's decision, the measures stipulated by civil procedure legislation shall be applied to the respective parent. In the case of persistent failure to comply with the court's decision, the court shall have the right, upon the claim of the parent residing separately from the child. to take a decision ordering that the child be handed over to that parent, proceeding from the [standpoint of the] child's best interests and taking into account the child's opinion.
>
> 4. The parent residing separately from the child shall have the right to obtain information on his or her child from educational establishments and medical centres, from social welfare institutions and from other similar institutions. Such information may only be refused if the parent presents a threat to the child's life and health. Refusal to provide information may be disputed in court."

COMPLAINTS

55. The applicant complained under Articles 6 and 8 of the Convention that in deciding in favour of her former husband the courts had only reflected the arguments led by him in their judgments and had not properly protected the best interests of her children. She also complained that the domestic courts had deprived her of her parental rights to reside with and care for her two children in the first set of child residence proceedings and had refused to change the residence arrangements in the second set of child residence proceedings.

THE LAW

56. The applicant complained about the courts' decisions to grant a residence order in respect of her two minor children in favour of her former husband and their subsequent refusal to change the child residence arrangements. She considered that the decisions in her case had been one-

sided and generally unfair and relied on Articles 6 and 8 of the Convention, which as far as relevant provide as follows:

Article 6

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)"

Article 8

"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."

57. The Court observes that the applicant's complaints under Article 6 § 1 of the Convention are closely linked to her substantive complaints under Article 8. The Court, being master of the characterisation to be given in law to the facts of the case (see *Dolhamre v. Sweden*, no. 67/04, §§ 80-81, 8 June 2010, and *Saleck Bardi v. Spain*, no. 66167/09, § 31, 24 May 2011), deems it appropriate to examine the applicant's complaints under the latter provision (see *Kutzner v. Germany*, no. 46544/99, §§ 56 and 57, ECHR 2002-I; *V.A.M. v. Serbia*, no. 39177/05, § 115, 13 March 2007; and *Z. v. Slovenia*, no. 43155/05, § 130, 30 November 2010).

A. The parties' submissions

58. The Government disagreed with the applicant. They argued that the decisions in the applicant's cases had been in full compliance with applicable domestic law, had been taken in the best interests of the children and had taken full account of all of the relevant circumstances of the case.

59. The applicant maintained her complaints. She considered that the domestic courts should have granted her a residence order in respect of her children in both sets of child residence proceedings. The applicant criticised the domestic courts in the first set of proceedings for having reached unfounded conclusions about her personality based on relatively minor episodes involving the interruption of her maternity leave and the decision to leave her daughter in her parents' care in a different town. She also disagreed with the courts' assessment of the parents' respective financial situations and referred to the outcome of the subsequent proceedings for the division of the marital property, which had enabled her to establish favourable housing conditions and finances for the benefit of her children. The applicant considered that the aforementioned factors had been given

undue weight in the overall assessment of the case. As regards the second set of child residence proceedings, the applicant simply disagreed with their outcome, stating that children should live with their mother.

B. The Court's assessment

1. General principles

60. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even when the relationship between the parents has broken down (see *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290). Family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and upbringing of minor children. The care and upbringing of children normally and necessarily require that the parents (or a single parent) decide where the child should reside. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8 (see *Nielsen v. Denmark*, 28 November 1988, § 61, Series A no. 144).

61. Domestic measures hindering enjoyment of family life such as a decision granting a residence order in respect of children to a parent constitutes an interference with the right to respect for family life (see, for example, *Hoffmann v. Austria*, 23 June 1993, § 29, Series A no. 255-C, and *Palau-Martinez v. France*, no. 64927/01, § 30, ECHR 2003-XII).

62. Any such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *W. v. the United Kingdom*, 8 July 1987, § 60, Series A no. 121).

63. Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life, even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see *Zawadka v. Poland*, no. 48542/99, § 53, 23 June 2005). The Court has repeatedly held that Article 8 includes a right for parents to have measures taken with a view to their being reunited with their children, and an obligation on the national authorities to take such measures. This also applies to cases where

contact and residence disputes concerning children arise between parents (see *Kosmopoulou v. Greece*, no. 60457/00, § 44, 5 February 2004).

64. In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see *W. v. the United Kingdom*, cited above, § 59, and *Keegan*, cited above, § 49).

65. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation when deciding on child residence matters (see, *inter alia*, *C. v. Finland*, no. 18249/02, § 53, 9 May 2006, and *Wildgruber v. Germany*, (dec.) nos. 42402/05 and 42423/05, 29 January 2008). However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of contact, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relationship between the parents and a young child would be effectively curtailed (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V (extracts)).

66. Where the measures in issue concern parental disputes over their children, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact and residence disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretionary powers. Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance (see *Zawadka*, cited above, § 54; *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). Moreover, a lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures to reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child (see *Zawadka*, cited above, § 67), which, depending on their nature and seriousness, may override those of the parents (see *Hoppe v. Germany*, no. 28422/95, § 49, 5 December 2002).

67. Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. A national authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on relevant considerations and is not one-sided, and hence neither is, nor appears to be, arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and

affords due respect to the interests protected by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8 (see *W. v. the United Kingdom*, cited above, § 62 and 64 *in fine*). In conducting its review in the context of Article 8 the Court may also have regard to the length of the domestic authority's decision-making process and of any related judicial proceedings. An effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere passage of time (ibid., § 65; see also *H. v. the United Kingdom*, 8 July 1987, § 90, Series A no. 120).

68. It is of paramount importance for parents to always be placed in a position enabling them to put forward all arguments in favour of obtaining contact with the child and to have access to all relevant information which is at the disposal of the domestic courts (see *Sahin v. Germany* [GC], no. 30943/96, § 71, 8 July 2003, and *Kosmopoulou*, cited above, § 49). It is, moreover, for the authorities to show that there are compelling reasons for refusing a data subject's request to be provided with a copy of their personal data files (see *Tsourlakis v. Greece*, no. 50796/07, § 44, 15 October 2009).

2. Application of the above principles to the present case

69. In the present case the Court notes that following the applicant's divorce from V.G. in March 2008 she became involved in court proceedings with her former husband over where their under-aged children should reside (see paragraph 11 above). By a final judgment of 1 September 2008 the Rostov Regional Court granted a sole residence order in respect of their children, aged two and six at the time, in favour of V.G. (see paragraphs 21-25 above). From the case file it is clear that after the entry into force of the judgment the applicant maintained regular daily contact with the children on the basis of her agreement with V.G. of 11 November 2009 (see paragraphs 26-27 above). In May 2009 the applicant again sued her former husband, this time asking the courts to change the residence arrangements concerning her children in her favour. By a final judgment of 4 March 2010 the Rostov Regional Court rejected her claim and left the previous residence arrangements intact (see paragraphs 51-52 above).

70. It has not been contested by the parties that the domestic decisions in both sets of child residence proceedings constituted interference with the applicant's family life which was in accordance with the law, and the Court considers that in both sets of proceedings the measures pursued the

legitimate aims of the protection of health or morals and/or the protection of the rights and freedoms of others, namely the children and the parents. It remains to be ascertained whether these measures were necessary in a democratic society.

71. The Court notes that in this sphere its review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced by the domestic courts in each set of child residence proceedings were relevant and sufficient (see *Olsson v. Sweden (no. 1)*, 24 March 1988, § 68, Series A no. 130).

72. Turning to the first set of child residence proceedings, the Court notes that the domestic courts continually reiterated the importance of the best interests of the children. They based their decisions on a number of further considerations, such as: the relationship between the parents and between the parents and the children; their respective finances and abilities to provide adequate housing accommodation for the children and to deal with the inherent problems of child residence cases, particularly when it transpired that the parents after separation remained, for the most part, hostile towards each other; the attitude and availability of the parents; and the specific home environments involved. The domestic courts also relied on two reports of the Department of Education, the submissions of their officials and statements from a number of witnesses for both parties who knew the applicant, her former husband and the children personally (see paragraphs 17-21 above). Furthermore, both parties made written and oral submissions before the courts and were allowed to make motions and air all their concerns, which the courts undoubtedly took into consideration.

73. The Court would note that despite the applicant's criticism the domestic courts based their decisions on various pieces of evidence and different factors, which included, among other things, findings concerning the applicant's personality and the parents' respective finances and housing situations. At the same time, it cannot be said that these considerations were given any undue weight in the courts' assessment to the detriment of other relevant circumstances. In this respect, the Court would observe that the appeal court responded in detail to the applicant's criticism, having underlined that the decision of the first-instance court had been based on the totality of the evidence and had paid due regard to all the relevant circumstances of the case (see paragraph 25 above).

74. Regard being had to the evidence and specific reasons adduced by the courts in this case, the Court finds it reasonable that they considered it necessary – for the protection of the children's best interests – to make a residence order in respect of both of the applicant's children in favour of their father. It is also noted that the domestic courts did not exclude a

change in the children's residence if circumstances so required (see paragraph 25 above). Furthermore, the relevant authorities took due care to encourage the parents' reconciliation and co-operation in the best interests of their children (see paragraph 26 above).

75. As regards the second set of child residence proceedings, the Court notes that in these proceedings the domestic courts also consistently reiterated the importance of the best interests of the children. They took into account various changes in the finances, housing and family situations of both parties which had occurred since the judgments of 3 July and 1 September 2008. Their decisions were based on a series of detailed and complete reports from various services and experts on different aspects of the relationships between the parents and the children, and their new living and housing conditions. The reports were drawn up following requests by both parties and the domestic courts and were a result of the monitoring performed by the experts and competent services. They allowed the courts to assess in depth and dynamically the relationship between the parents, the relationships between each parent and the children, and other relevant aspects of the situations of all of those involved, including the changes in the housing arrangements and finances of both parents (see, for example, paragraphs 22, 28, 38 and 50 above). Furthermore, the domestic courts also relied on statements from a number of witnesses for both parties, and the parties were given the opportunity to make written and oral submissions and otherwise make their case before the courts.

76. In the end, the domestic courts decided not to change the residence arrangements, even despite some noticeable changes in the applicant's and her husband's finances and housing conditions. Having examined the parties' arguments and the evidence, the domestic courts made a careful assessment of all relevant factors, taking due account of the ability of both parents to establish positive finances and good living conditions for the children. At the same time, the domestic courts considered that the conditions created by the father to date had been more favourable and that at that point there was no need to change the children's residence (see paragraph 50 above).

77. Regard being had to the reasons adduced by the courts in the second set of child residence proceedings, the Court finds it reasonable that they considered it necessary – for the protection of the children's best interests – not to change the residence arrangements, with the result that both children continued to reside with their father. It is also notable that the applicant has been able to maintain regular and frequent contact with the children. Like the domestic courts (see paragraph 52 above), the Court refers in this respect to the proximity of the respective homes of the parents (see paragraphs 30 and 44 above) and the contact schedule agreed to by them on 11 November 2008 (see paragraphs 26-27 above).

78. The Court notes that, throughout both sets of proceedings, the applicant, represented by counsel, had the opportunity to present her arguments in writing and orally (see paragraphs 11-25 above). Indeed, she presented ample submissions to the domestic courts – as evidenced by the voluminous documentation submitted to the Court.

79. Having regard to the state's margin of appreciation in this sphere, and having considered both cases as a whole, the Court is satisfied that the domestic courts' procedural conduct of the case ensured that they had sufficient material on which to reach decisions based on relevant and sufficient reasons, while adequately involving the applicant in the decision-making process.

80. Accordingly, the Court finds that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and rejects it pursuant to Article 35 § 4.

For these reasons, the Court by a majority

Declares the application inadmissible.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President