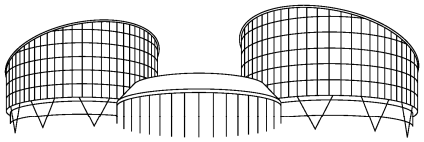

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ZDRAVKOVIĆ v. SERBIA

(Application no. 28181/11)

JUDGMENT

STRASBOURG

20 September 2016

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 Zdravković v. Serbia,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 23 August 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28181/11) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Ms Nataša Zdravković (the applicant changed the name in the course of the proceedings), on 21 April 2011.

2. The applicant was represented by Ms D. Jovanović, a lawyer practising in Beograd. The Serbian Government ("the Government") were represented by Ms V. Rodić, their Agent at the time.

3. The applicant alleged that Serbian authorities did not do enough to enforce two separate interim court orders awarding her access rights and custody over her minor child. She also complained about the alleged protracted length of the custody proceedings.

4. On 18 November 2013 the complaints concerning the length of the custody proceedings and the non-enforcement of the interim orders were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. The applicant was born in 1973 and lives in Belgrade.

6. The applicant and S.S. ("the respondent") married in 1998. Their son V.S. was born in August 1999. They lived in the respondent's parents' house in a neighbourhood of Belgrade.

7. In May 2008 the applicant moved to her parents' house in the same neighbourhood. V.S. continued living with his father and his paternal grandparents.

B. The applicant's interim access rights

8. On 19 May 2008 the applicant filed a request for interim custody with the competent first-instance court.

9. On 8 July 2008 the first-instance court rejected the applicant's request for interim custody, but granted her extensive access rights in respect of the child pending the final outcome of the custody proceedings. This interim access order was immediately enforceable.

10. It appears that the interim access order was respected, with some resistance on the part of the child, until 13 August 2008, when the child ran away from the applicant during a visit and went back to the respondent's house.

11. On 22 September 2008 the enforcement judge ordered enforcement of the said access order. After several failed attempts by the applicant to spend time with the child in accordance with the order, the enforcement judge sent a bailiff on 18 and 20 November 2008 to make an unannounced visit to monitor the applicant's attempt to make contact with the child. During the visit, the bailiff informed the enforcement judge that the respondent had brought the child to the front gate of the house, but the child had refused to leave with the applicant, even after the respondent tried to persuade him, and had gone back inside. After receiving the report, the enforcement judge scheduled an enforcement hearing for 5 December 2008.

12. On 5 December 2008 the enforcement judge ordered a child support team from V.S.'s school to implement a system of psychological preparation to assist the child's acceptance of contact with his mother.

13. On 9 January 2009 the enforcement judge asked the Social Care Centre to contemplate initiating corrective monitoring of the respondent's exercise of parental rights in the light of the respondent's substantial influence on the child's hostility toward his mother.

14. On 7 April 2009 the Social Care Centre placed the respondent under formal corrective supervision (*korektivni nadzor nad vršenjem roditeljskog prava*). On 19 June 2009 the Social Care Centre, with the approval of the enforcement judge, applied the same measure to the applicant so as to enhance the parents' collaboration with a view to satisfying the child's emotional needs.

15. In the meantime, on 5 June 2009, the enforcement judge heard a psychologist working with the child. The psychologist advised the judge that interviewing the child within the proceedings would not be in his best interest.

16. Due to the respondent's failure to prepare the child appropriately for the contact with his mother, on 4 May 2009 the enforcement judge ordered the respondent to pay a fine in the amount of 10,000 Serbian dinars (RSD) and on 6 June 2009 a fine in the amount of 150,000 RSD, both within three days. On 5 October 2009 the competent second-instance court rejected the respondent's appeals against the fines. On 19 February and 10 May 2010, after the failure of the applicant to pay the fines, the enforcement judge ordered their mandatory enforcement.

17. On 26 November 2009 the Social Care Centre asked the enforcement judge to postpone enforcement of the access order for three months in view of the pending parental therapy. The Centre further asked for, and the judge approved, a further three months of therapy, stating that an improvement in the child's attitude as well as in the parents' relationship had been achieved. The Centre also proposed to the applicant and the respondent to stay the ongoing court proceedings until the therapy had ended. They observed that the court proceedings, in which the parents acted as opponents, jeopardised the progress achieved to date. It would appear that the applicant and the respondent did not accept this recommendation.

18. The parental therapy, which at that time had already lasted for six months, included 23 sessions in which the Social Care Centre's professionals continuously and intensively worked with the applicant, the respondent, the child and the paternal grandparents to reach mutually acceptable arrangements and enforce the interim measures in line with the best interest of the child.

19. On 13 July 2010 the custody judgment of 24 November 2009 became final (see paragraph 33 below) and the decision on interim custody rights came to an end. The enforcement proceedings were later formally terminated by the enforcement judge on 28 February 2011. The enforcement judge, however, explicitly ordered continuation of the enforcement in respect of the fine of June 2009.

C. The applicant's interim custody rights

20. On 25 October 2008 the applicant lodged a new request for interim custody after the Mental Care Institute (*Institut za mentalno zdravlje*, hereafter "MCI") conducted an examination of the parental capacity of both parties at the request of the first-instance court. The MCI report recommended that custody be awarded to the applicant.

21. On 11 November 2008 the first-instance court granted interim custody to the applicant and ordered the respondent immediately to surrender the child to her. It also quashed the part of the interim order of 8 July 2008 containing its decision not to grant custody to the applicant. The rest of the interim access order remained in force.

22. On 4 December 2008 the enforcement court ordered enforcement of the interim custody order. The respondent appealed on 26 December 2008, claiming that the child himself did not want to live with the applicant. The appeal was rejected on 29 September 2009.

23. The first attempt to reunite the applicant with the child took place on 22 December 2008. The enforcement judge, a bailiff, several representatives of the Social Care Centre, two uniformed policemen, three plain clothes policemen, the applicant and her lawyer all entered the courtyard of the respondent's house, expecting that the child would be surrendered. The judge and the Centre's representatives explained to the child in front of the others that he should leave and go with his mother to her house, but the child rejected the planned reunion and went back inside. The respondent allegedly would not allow the enforcement to take place in the house. He maintained that he had informed the child that various officials would come, but had not prepared him for reunion. The applicant refused forceful removal of the child. The enforcement judge noted that the child was not yet prepared for a transfer of custody and postponed the enforcement until January 2009 at the Social Care Centre's premises. The enforcement judge asked the parties and the Social Care Centre's representative to prepare the child adequately for the next reunion.

24. On 15 January and 4 February 2009 the enforcement judge adjourned the custody transfer scheduled for those dates as it was awaiting an opinion from the Social Care Centre regarding the formal corrective supervision of the respondent, as requested in the interim access enforcement proceedings (see paragraph 14 above).

25. The enforcement judge re-scheduled the transfer of custody for 1 April 2009 at the Social Care Centre's premises. The attempt of transfer was conducted in the presence of the enforcement judge, the psychologist, the psychiatrist and the lawyer from the Social Care Centre and police officers. The child again refused to be separated from his father. The police explained that they could not forcefully remove the respondent from the premises to enable the social experts and the judge to facilitate a

conversation with the child in his absence, since the child was clinging on the father, crying and refusing to let him go. It appears that the applicant was also against the use of force (according to a report to the enforcement judge by the Social Care Centre of 31 March 2010, the applicant refused the possibility of the use of force throughout the proceedings). The Social Care Centre recommended that psychotherapeutic support be provided for the child. The enforcement of the custody transfer was postponed. Shortly afterwards, the respondent was placed under the corrective supervision of the Social Care Centre (see para. 14 above).

26. On 5 June 2009 the enforcement judge held a hearing which appears to have been the last one within these enforcement proceedings.

27. The applicant petitioned the enforcement judge to fine the respondent for obstructing her contact with the child, hoping that this would compel him to surrender the child.

28. On 26 June 2009 the enforcement judge imposed on the respondent a fine in the amount of 150,000 RSD for failing to appropriately psychologically prepare the child for the reunification. It would appear that the fine has been paid.

29. On 12 February and 31 March 2010 the Social Care Centre informed the enforcement judge that its psychological therapies in respect of the family in question had produced no results (see paragraphs 17-18 above). According to their reports, it became clear that the respondent had cooperated in form only and had in fact failed to take steps to encourage the child to have substantive contact with the applicant.

30. On 13 July 2010 the custody judgment of 24 November 2009 became final and the decision on interim custody rights came to an end. From that moment, efforts to enforce the final custody judgment commenced (see paragraphs 38-42 below). On 25 March 2011 the enforcement judge formally terminated the enforcement proceedings.

D. Civil proceedings (divorce, custody and child maintenance)

31. On 19 May 2008 the applicant lodged a civil claim requesting the dissolution of her marriage with S.S., sole custody of V.S. and maintenance.

32. On 24 November 2009 the first-instance court dissolved the applicant's marriage, granted her sole custody of V.S. and specified the respondent's access rights.

33. On 13 July 2010 and 18 January 2011 the second-instance court and the Supreme Court of Cassation, respectively, upheld this judgment.

E. The constitutional appeal proceedings

34. On 28 December 2009 the applicant filed a constitutional appeal with the Constitutional Court of Serbia (*Ustavni sud Republike Srbije*). She relied on various Articles of the Constitution, Articles 6, 8 and 13 of the Convention and Articles 3 and 9 the UN Convention on the Rights of the Child. She sought redress for the protracted length of the custody and subsequent criminal proceedings and the non-enforcement of the judicial interim access and custody decisions in her favour which, she claimed, violated her rights to a fair trial and to family life. She also complained that she had not had any legal avenue available to expedite those proceedings.

35. On 22 July 2010 the Constitutional Court rejected the applicant's appeal.

36. As regards the protracted length of the custody proceedings, the Constitutional Court considered that the first-instance court had acted diligently, without any substantial periods of inactivity. It found the case to have been particularly complex, as the expert findings regarding the best interests of the child had conflicted with the latter's own wish as to who to live with.

37. It also found that the non-enforcement of the interim access and custody orders during the same period had been attributable to the particular complexity of the case, as the child had objected to being reunited with the applicant. It found that the enforcement court had undertaken, without any delay, all necessary measures, including fining the respondent, for the purpose of enforcing effectively the applicant's rights.

F. Other relevant facts as submitted by the parties

1. Enforcement of the final custody judgment

38. The judgment of 24 November 2009 became enforceable on 27 September 2010 and the enforcement order was issued on 29 November 2010.

39. The first forcible transfer of custody was scheduled for 9 March 2011, but the child refused any kind of contact with the applicant. The court noted that the respondent had failed to prepare the child for reunion. The applicant explicitly refused to countenance the use of force against the respondent and the child as the means of enforcement. The enforcement was therefore adjourned.

40. On 23 March 2011, upon the initiative of the Social Care Centre, the applicant and the respondent signed an Agreement on Access Rights designed to assist the re-establishing of contact between the applicant and V.S. in order to facilitate the enforcement of the custody judgment.

41. Despite this agreement, on 25 March 2011 the enforcement court imposed a fine on the respondent in the amount of RSD 100,000 because of

his failure to comply with the judgment of 24 November 2009. It also ruled that the respondent was to be given three days from the date of receipt of that order to surrender the child voluntarily to the applicant and with the added condition that, should he fail to do so, he would have to pay a further fine of RSD 150,000. The respondent did not comply with the order and it seems that the fine in the amount of 100.000 RSD was subsequently imposed and paid.

42. The court scheduled a new forcible transfer of custody for 9 March 2011. In preparation for the enforcement, the Social Care Centre's psychologist drew up a detailed plan of action. The psychologist's assessment, after working with the child, was that such a transfer would be impossible or highly traumatic for the child and the enforcement was postponed once again.

2. Revision of the custody judgment of 24 November 2009

43. On 9 February 2011 the respondent filed a claim for revision of the judgment of 24 November 2009, seeking sole custody of V.S. He also requested an interim custody order to the same effect.

44. On 24 June 2011 the Social Care Centre provided the first-instance court with an expert opinion. The Social Care Centre acknowledged that there had been no mechanisms available to facilitate a forcible physical transfer of child custody to the applicant in view of the respondent's refusal. According to the report, the only feasible proposal would be for the child to continue living with his father. Even though, taking into account the chronology of events, parental capacity, justice and equity, the opposite proposal would be more appropriate, it could propose only this arrangement "not as an expression of their wish, but as the sole solution which is possible to impose and enforce in practice". A change of residence would in any event have a negative impact on the child's development.

45. On 20 June 2012 the first-instance court granted sole custody to the respondent, ordered the applicant to pay child maintenance and specified the applicant's access rights as eight hours every weekend, as well as specified periods of school holidays.

3. Criminal proceedings against the respondent

46. On 29 August 2008 and 23 June 2009 the applicant filed criminal complaints against the respondent for parental child abduction and continuous non-compliance with the interim access and custody orders. On 2 June 2009 and 28 September 2010 the competent prosecutor's office charged the applicant with those crimes. None of the scheduled hearings was held. In September 2011 the first-instance court stayed the criminal proceedings as the prosecutor's office had dropped the charges. The applicant subsequently took over the prosecution as subsidiary prosecutor.

On 20 June 2012 the first-instance court, in a reasoned judgment, acquitted the respondent. It found, on the basis of numerous testimonies, three expert opinions, four expert reports from the civil proceedings case-file and other documentary evidence that the respondent always made the child available for enforcement, that he never physically or verbally, actively or passively obstructed enforcement at any point, and that there were no indications that the child ever showed signs that he was under pressure or undue influence not to have contact with his mother. On 25 October 2012 the second-instance court upheld this judgment.

4. Contact between the child and the applicant

47. It would appear that the applicant and her son have re-established contact with each other since the signing of the Agreement on Access Rights of 23 March 2011 and the revision of the custody judgment of 20 June 2012. It would appear that they have been meeting every weekend for at least an hour without supervision. The child still lives with the respondent.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Enforcement Procedure Act (*Zakon o izvršnom postupku* published in the Official Gazette of the Republic of Serbia – OG RS – no. 125/2004)

48. Article 45 provides for fines of up to 150,000 RSD which the enforcement court can impose on the enforcement debtor in case of non-compliance with any of the court's instructions or orders within the enforcement proceedings. Article 224 provides that the enforcement court must take particular care concerning the interests of the child when conducting enforcement proceedings. It also sets a deadline of three days for voluntary compliance with the enforcement order and authorises the enforcement courts to impose fines should the debtor fail to comply. In the event of failure to persuade the debtor to comply even after the imposition of the fines, paragraph four provides for the possibility of physical removal. Article 226 provides that the enforcement of the decisions related to the parental access or custody rights must be conducted with the assistance of the Social Care Centre's team of experts.

B. Family Act (*Porodični zakon* published in the OG RS no. 18/2005)

49. Article 80 regulates the authority of the Social Care Centre to conduct corrective supervision of parental duties. Article 204 establishes that proceedings relating to family disputes which involve a child are

urgent. Article 230 provides for the compulsory mediation and conciliation proceedings which must be conducted in parallel with divorce proceedings if the latter were not initiated by mutual agreement of the marital partners. It further provides that mediation and conciliation are conducted with the expert assistance of the Social Care Centre. Article 270 provides that civil courts, when deciding about awarding or retracting parental rights, must obtain the opinion from the Social Care Centre's experts.

C. Criminal Code (*Krivični zakonik* published in the OG RS no. 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009)

Abduction of Minor

Article 191

"1. Whoever unlawfully detains or abducts a minor from a parent, adoptive parent, guardian or other person or institution entrusted with care of the minor or whoever prevents enforcement of decision granting custody of a minor to a particular person, shall be punished with a fine or imprisonment up to two years.

2. Whoever prevents enforcement of the decision of a competent authority setting out the manner of maintaining of personal relationships of a minor with parent or other relative, shall be punished with a fine or imprisonment up to one year."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 6 AND 8 OF THE CONVENTION

50. The applicant complained under Articles 6 § 1 and 8 of the Convention about the non-enforcement of the interim custody and access orders. She further complained, relying on Article 6 § 1 of the Convention, of the protracted length of the custody proceedings.

51. The relevant provisions of the said Articles read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 8

"1. Everyone has the right to respect for his [or her] private and family life,....

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... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

52. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Regarding the non-enforcement of the interim access and custody orders, both considered under Article 6 § 1 of the Convention

53. The Government argued firstly that the impugned proceedings had involved particularly complex and sensitive issues, further complicated by the fact that the applicant's child had consistently refused to go to live with the applicant. Secondly, the domestic authorities had made every effort to enforce the two interim orders in question whilst trying to protect the best interests of the child. Finally, the applicant had been resolute in rejecting a forcible transfer of custody in situations where such a transfer would have been possible, and instead favoured a gradual process of reunification through the imposition of fines and the assistance of the Social Care Centre.

The applicant reaffirmed her complaints.

54. The Court refers to its settled case-law to the effect that Article 6, *inter alia*, protects the implementation of final, binding judicial decisions which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 510-11, § 40; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003; and *Damnjanović v. Serbia*, no. 5222/07, § 67, 18 November 2008).

55. The Court also notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps to execute a final court judgment as well as, in so doing, ensuring effective participation of its entire apparatus, failing which it will fall short of the requirements laid down in Article 6 § 1 (see, *mutatis mutandis*, in the child custody context, *Damnjanović*, cited above, § 68, and *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 174-189, ECHR 2004-V).

56. The Court notes that the interim access order had remained unenforced from 22 September 2008, when its execution was ordered, until 13 July 2010 when it came to an end. The interim custody order remained unenforced from 4 December 2008 until 13 July 2010 when it came to an end. They, therefore, lasted approximately one year and ten months in

relation to the applicant's interim access rights and approximately one year and eight months in relation to the applicant's interim custody rights. Secondly, these two sets of enforcement proceedings ran concurrently, since the domestic courts took the view that maintaining the interim access order would be an effective measure enhancing the likelihood of re-establishing contact between the child and the applicant before their reunion, given the circumstances of the case. Thirdly, the child, between nine and twelve years old at the time, had been unwilling to spend time with the applicant and had made it clear that he wanted to continue living with the respondent. Fourthly, the respondent himself had, for the most part, been uncooperative. Fifthly, the Social Care Centre, itself a State body which works closely with the civil and the enforcement courts, had played a constructive role in the proceedings. Sixthly, the domestic courts had imposed fines on several occasions in an attempt to secure the respondent's compliance. Lastly, the enforcement judge had ordered the physical transfer of custody to the applicant on several occasions, but the applicant, although she had acted with much diligence throughout the proceedings, had ultimately been unable physically to assume custody of the child in the absence of his explicit consent to this effect and the applicant's consistent refusal of the forcible measures.

57. In view of the above, the Court concludes that the State has taken all necessary steps to enforce the final custody judgment in her favour. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

2. Regarding the non-enforcement of the interim access and custody orders, both considered under Article 8 of the Convention

58. The Government maintained that there had been no violation of Article 8. They contended that the domestic courts had done everything in their power to have the decisions on interim access and custody rights enforced. They emphasised the active and constructive role of the courts and the Social Care Centre, which had finally led to regular meetings, at least, between the applicant and the child. They further maintained that the domestic authorities had had to strike a careful balance between the applicant's undisputed right to have a connection with her child and the best interests of the child, who was refusing any contact with her. They also maintained that the applicant's explicit and consistent refusal of the use of force against the respondent and the child expressed both during the enforcement attempts and during the parental therapy sessions, while understandable and commendable under the circumstances, had contributed to the inability of the domestic authorities to enforce the decisions. In any event, the child was strongly opposed to living with the applicant and the applicant's contact with the child improved only after the threat of a transfer of custody ceased following the 2011 Agreement on Access Rights and the revision of the 2009 judgment.

59. The applicant reaffirmed her complaints. She furthermore asserted that the child had been systematically manipulated by the respondent into refusing contact with her and argued that the authorities should have taken more preparatory steps in order to secure the re-establishment of meaningful contact and the transfer of custody.

60. The Court notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

61. Moreover, even though the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in an effective "respect" for family life. In both contexts, regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole; in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

62. In relation to the State's obligation to implement positive measures, the Court has held that Article 8 includes for parents a right that steps be taken to reunite them with their children and an obligation on the national authorities to facilitate such reunions (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII; and *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR 2003-V).

63. What is decisive is whether the national authorities have taken all such necessary steps to facilitate the execution as can reasonably be demanded in the specific circumstances of each case (see, *mutatis mutandis*, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A; *Ignaccolo-Zenide*, cited above, § 96; *Nuutinen*, cited above, § 128; and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003).

64. In this context, the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit (see *Ignaccolo-Zenide*, cited above, § 102).

65. Finally, the Court has held that, although coercive measures against children are not desirable in this sensitive area, the use of sanctions cannot be ruled out in the event of unlawful behaviour by the parent with whom the child lives (see *Ignaccolo-Zenide*, cited above, § 106).

66. It was common ground that the bond between the applicant and her child fell within the scope of "family life" within the meaning of Article 8 of the Convention.

67. The Court notes that the interim access order had remained unenforced from 22 September 2008, when its execution was ordered, until

13 July 2010 when it came to an end. The interim custody order remained unenforced from 4 December 2008 until 13 July 2010 when it came to an end. Secondly, the Court notes the constructive approach taken by the domestic courts in deciding to run the two sets of proceedings concurrently in order to facilitate re-establishment of the contact between the applicant and the child which was intended to result in their reunion. This also provided the domestic authorities with additional possibilities, such as in-school counselling of the child, corrective supervision of parental rights, supervised meetings between the applicant and the child and parental therapy, all of which were implemented in a diligent and timely manner. Thirdly, the domestic courts had resorted to fining the respondent on several occasions in an attempt to secure his compliance. Fourthly, while the domestic courts were unable to enforce all the aspects of the access order because of the respondent's lack of cooperation and the child's refusal to be alone with the applicant, they gradually re-established the contact between them. Lastly, but most importantly, on at least two occasions – on 22 December 2008 and 1 April 2009 – the authorities attempted a physical transfer of custody under threat of the use of force, but the applicant was unable to physically assume custody of the child as he refused to leave the respondent and on one occasion ran away.

68. In view of the above, the Court finds that the State has taken the necessary steps to enforce the interim custody order in question. There has, accordingly, been no violation of Article 8 of the Convention.

3. Regarding the length of the custody proceedings, considered under Article 6 § 1 of the Convention

69. The Government reiterated their argument that the impugned proceedings had involved particularly complex issues since the child did not want to live with the applicant. They further maintained that the domestic courts had acted diligently, that the first-instance judgment had been delivered one year and six months after the initiation of the proceedings, that the second-instance court had taken less than seven months to decide on appeal – after which the custody judgment had become final and enforceable – and that the Supreme Court had delivered its decision within six months of the delivery of the second-instance judgment.

70. The applicant reaffirmed her complaints.

71. According to the Court's case-law, the reasonableness of the length of proceedings has to be assessed, in particular, in the light of the complexity of the case and of the conduct of the applicant and of the relevant authorities. In cases relating to civil status, what is at stake for the applicant is also a relevant consideration and special diligence is required in view of the possible consequences which excessively lengthy proceedings may have, notably on enjoyment of the right to respect for family life (see, among other authorities, *Laino v. Italy* [GC], no. 33158/96, § 18,

ECHR 1999-I; *Maciariello v. Italy*, 27 February 1992, § 18, Series A no. 230-A; and *M.C. v. Finland* (dec.), no. 28460/95, 25 January 2001).

72. Turning to the present case, the Court notes that the impugned proceedings commenced on 19 May 2008, that the final judgment was delivered by the second-instance court on 13 July 2010 and that the Supreme Court of Cassation, acting as a court of third instance, delivered its judgment on 18 January 2011. The overall length of these proceedings, which were conducted before three levels of jurisdiction was, therefore, one day short of two years and eight months. The Court further notes that the first-instance court swiftly issued the orders on interim measures that were immediately enforceable, that no significant delays imputable to authorities have been detected in the conduct of the proceedings, and that the case was of some complexity, given the child's refusal to live with the applicant or even to maintain contact with her.

73. In the overall circumstances, whilst taking into account what was at stake for the applicant and her son, the Court does not find that the length of the proceedings was excessive. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention;

3. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 20 September 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Luis López Guerra
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Pastor Vilanova and Serghides are annexed to this judgment.

L.L.G.
F.A.

DISSENTING OPINION OF JUDGE PASTOR VILANOVA

The Court has concluded, by a large majority (five votes to two), that there has been no violation of Articles 6 and 8 of the Convention in the present case. To my regret, I cannot agree with this decision.

Our case-law has acknowledged the right to the execution of final binding judicial decisions (see, among other authorities, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II), but has also found that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" (see *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

In the present case, the Serbian courts granted the applicant sole custody of her nine-year-old son on two occasions (the order of 11 November 2008 and the judgment of 24 November 2009 in which she was also granted a divorce) and, prior to that, she had been granted extensive access rights (order of 8 July 2008). Nevertheless, these judicial decisions have never been effectively executed, because of obstructive manoeuvres on the part of the child's father. Proof of the facts mentioned above is to be found in the remarkable reports by the Social Care Centre issued on 12 February and 31 March 2010 (see paragraph 29 of the judgment), according to which the father had cooperated in form only, failing to take any steps to encourage any contact between the child and the applicant. Currently, the applicant visits her child for only an hour per week (see paragraph 47) after the domestic courts granted custody to the father in the judgment of 20 June 2012 ...

The Court dismissed the applicant's complaints on the grounds that the Serbian authorities had done everything in their power to enforce the judicial decisions. More specifically, the majority of the Court reached this result by finding that: (a) the domestic courts had imposed fines on the child's father; (b) the applicant had refused the use of forcible measures to get her son back; (c) contact between the applicant and her son had been restored gradually; (d) supervisory measures had been adopted to rebuild ties; and (e) the child wanted to remain with his father.

To my regret, I am unable to agree with that solution.

The Court's case-law is well established regarding the positive obligation of States to reunite children with their parents by taking all necessary steps (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I, and *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR 2003-V). On that subject the Court has in the past noted that "the adequacy of the measures is to be judged by the swiftness of their implementation" (see *Karadžić v. Croatia,* no. 35030/04, § 62, 15 December 2005), with a view to avoiding the possible harmful effects that the passage of time can have on the relationship between the parent and the child (see *H.N. v. Poland*, no. 77710/01, § 73, 11 September 2005). Notwithstanding the margin of

appreciation enjoyed by States, what is relevant is the suitability of the decisions carried out by national authorities when exercising their power of appreciation (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A).

In my humble opinion, these procedural requirements have not been met on this occasion. It is true that the judge imposed two fines amounting to 1,000 euros (EUR) and EUR 1,500 on the applicant's former husband. It can be said that these measures have failed. The fines were not dissuasive, as is shown by the fact that the father decided to pay them rather than making any effort to return the child to his mother, who actually had legal custody of him. Besides, the economic capabilities of the father are not known to the Court. Regardless of this, the fines came very late (I deduce that the sums were paid, at the earliest, during the first half of 2010, whereas the order was supposed to be executed on 8 July 2008). Furthermore, despite the reluctance of the father to voluntarily execute the civil decisions adopted against him, the civil judge did not even consider initiating any criminal proceedings against him. By contrast, it was left to the applicant to institute criminal proceedings herself.

The fact that the mother rejected the use of force (in her child's interests) did not exempt the judge from fulfilling the positive obligations within the meaning of Articles 6 and 8. In the light of the non-voluntary execution of the judicial decisions by the father, it was the responsibility of the judge to properly exercise the functions emanating from his authority. However, he failed to intervene properly, as he had no personal involvement in the settlement of this conflict other than an unsuccessful journey to the child's (and father's) home (on 22 December 2008) and to the Social Care Centre's premises (on 1 April 2009). A new forcible transfer was planned to take place on 9 March 2011. We do not know the details of that last unsuccessful attempt. It is relevant to highlight that during a period of two and a half years the Serbian authorities scheduled only three dates for delivering effective justice to the applicant.

As for the argument concerning the gradual restoration of contact between mother and son, it lacks any convincing evidence.

The Court's judgment says that the Serbian authorities have done their best to execute the domestic court decisions in favour of the applicant. It turns out, however, that even the Serbian Ombudsman reminded the appropriate Social Care Centre officials "of their actual powers under domestic law and of measures that they could have envisaged to enable such a reunion" (see the report of 21 April 2011 communicating the application to the Government, paragraph 44).

In the same vein, I consider that there has been a breach of Article 6 owing to the non-execution of enforceable judgments and the slowness that characterised the decision-making process in the present case. The majority of the Court consider that the overall length of the proceedings, almost three

years, was due to their complexity as a result of the child's refusal to live with the applicant (see paragraph 72 of the judgment). I take the opposite view, especially considering the nature of the family interests in conflict and the experts' conclusions (see the Mental Care Institute's report of 27 May 2009, mentioned in the report communicating the application) emphasising the psychological pressure exerted by the child's father that made the statement by the infant pointless.

Consequently, the dismissal of the applicant's complaints amounts to legitimising the father's wrongdoing, discrediting the authority of *res judicata* and, more importantly, penalising the child, all of which factors raise a serious question affecting the interpretation of the Convention.

DISSENTING OPINION OF JUDGE SERGHIDES

1. With great respect to the majority I disagree with their finding that there has been no violation of Article 6 § 1 and Article 8 of the Convention in the present case, for the following reasons.

2. Under Article 6 § 1 and Article 8 of the Convention, especially read in conjunction with Article 1, the State has an inherent positive obligation to find ways and take all necessary preparatory, preventive, corrective or repressive steps or actions to enforce custody or access orders issued by its courts. Unlike any of the other provisions of the Convention that employ the terms "right" or "freedom", Article 8 employs the phrase "right to respect" with regard to family relations. This is due to the nature of family relations, which makes them so important and at the same time so delicate and sensitive, and, which should therefore be treated accordingly by the State when exercising its inherent negative and positive obligations to protect the rights arising from or concerning these relations. As has been held in *Iglesias Gil and A.U.I. v. Spain* (no. 56673/00, § 48, ECHR 2003-V), there are positive obligations inherent under Article 8 "in an effective 'respect' for family life", which are in addition to the essential object of this provision, namely to protect the individual against arbitrary actions by public authorities.

3. With regard to the above obligation, the majority pertinently remark in paragraph 62 of the judgment:

> "In relation to the State's obligation to implement positive measures the Court has held that Article 8 includes for parents the right that steps be taken to reunite them with their children and an obligation on the national authorities to facilitate such reunions ..."

Similarly, in *Kosmopoulou v. Greece* (no. 60457/00, § 44, 5 February 2004) the Court held:

> "As to the State's obligation to take positive measures, 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 for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures, but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (*Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299, p. 20, § 55)."

Furthermore, in *Sahin v. Germany* ([GC], no. 30943/96, §§ 39 and 41, ECHR 2003-VIII) the Court held*:*

> "The human rights of children and the standards to which all States must aspire in realising these rights for all children are set out in the United Nations Convention on the Rights of the Child. The convention entered into force on 2 September 1990 and has been ratified by 191 countries, including Germany.
>
> ...

> ... Moreover, States parties have to ensure that a child is not separated from his or her parents against their will unless such separation is necessary for the best interests of the child, and respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Article 9)."

On 12 March 2001 Serbia ratified the United Nations Convention on the Rights of the Child, to which reference is made by the Court in *Sahin.*

4. In paragraph 55 of the judgment in the present case, the majority refer to the obligation for the State to take all necessary steps to execute national judgments:

> "The Court also notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps to execute a final judgment as well as, in so doing, ensuring effective participation of its entire apparatus, failing which it will fall short of the requirements laid down in Article 6 § 1 (see, *mutatis mutandis*, in the child custody context, *Damnjanović*, cited above, § 68, and *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 174-189, ECHR 2004-V)."

In *Yuriy Nikolayevich Ivanov v. Ukraine* (no. 40450/04, § 51, 15 October 2009) the Court reiterated that "the right to a court protected by Article 6 would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party".

I believe that the above obligation of the State does not apply only to final judgments, but also to all orders of the national courts of a positive character, whether final or interim, since the rule of law is indivisible and observance of it is mandatory. Besides, the majority seem to have taken it for granted that the efficiency of a legal system extends to the execution of binding interim orders granting access and custody.

It is to be noted that on 24 November 2009 the first-instance Serbian court granted sole custody of the child to the applicant. This judgment, of a permanent character, replaced and repealed the interim access and custody orders of 8 July 2008 and 11 November 2008, respectively. On 13 July 2010 and 18 January 2011 the second-instance Court and the Supreme Court of Cassation, respectively, upheld the judgment of 24 November 2009.

In the present proceedings the applicant complained about the non-enforcement not only of the interim access and custody orders, but also of the final custody judgment in her favour. This complaint, however, was rejected at the admissibility stage, under Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies. Although it has been rejected and cannot be examined and determined again, that does not prevent the Court at this stage from looking at what happened after the judgment became final, which may shed light on what happened before, as regards the issue of non-compliance with the interim orders. This is justified, since usually there is continuity in family matters and issues, which can better be apprehended if seen in the context of the Aristotelian

notion of time, as motion in respect of "before" and "after" (Aristotle, *Physics*, Book IV, Part 11). It should be noted that the majority also refer to the subsequent events mentioned above.

5. As was held in *Guzzardi v. Italy* (6 November 1980, § 106, Series A no. 39), "... the Court may take cognisance of all questions of fact or of law arising in the course of the proceedings instituted before it; the only matter falling outside its jurisdiction is the examination of complaints held ... to be inadmissible...". This *ex officio* approach of the Court, which I fully endorse for the purposes of this opinion, is in conformity with the objective character of the Convention. The Court "has to examine in the light of the Convention as a whole the situation impugned by an applicant" and "in the performance of this task", it is "notably free to give to the facts of the case, as found to be established by the material" before it "a characterisation in law different from that given to them by the applicant" (see Leo Zwaak in P. Van Dijk *et al.* (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th edn., Antwerp-Oxford, 2006, p. 192 and note 394, referring to *Guzzardi*).

6. Based on the principle of the rule of law and that of the effectiveness of the Convention provisions, the positive obligation of the State to protect children is imposed not only on the judicial authority (judiciary), but also on the other two branches of State authority, the legislative and the executive, each one within the ambit of their powers, respecting each other. The preamble of the European Convention on the Exercise of Children's Rights provides:

> "Having regard to the United Nations Convention on the rights of the child and in particular Article 4 which requires States Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the said Convention."

The rule of law, to which the preamble to the European Convention on Human Rights refers, together with the principle of democracy, incorporates not only the rules of domestic substantive law and procedure and the decisions of the national courts, but also the provisions of the Convention and the case-law of this Court.

7. In its decision to communicate the application in the present case to the Government, the Court put additional questions to them, one of which was a request to "... explain the procedural and other measures available to the judicial, social welfare and law enforcement authorities in domestic law at the material time for enforcing custody arrangement such as the present one, i.e. in cases in which a parent allegedly refuses to cooperate or obstructs the enforcement of the custody decision in favour of the other parent or where the child/ren object/s [*sic*] to being reunited with the parent who has been awarded custody?". The Government were further invited "to submit relevant legislation demonstrating that the judicial and the social/children care systems were organised in such a way as to enable the

domestic courts/competent authorities to comply with the positive obligations inherent in effective 'respect' for family life before and after 2005".

Having examined the answer given by the Government, I am of the view that the Serbian legal framework failed as a whole, in relation to the facts of the case, to provide deterrent machinery or methods for enforcing access and custody orders and punishing non-compliance with or disobedience of such orders.

8. On four occasions, namely on 4 May 2009, 6 June 2009, 26 June 2009 and 25 March 2011, the Serbian civil enforcement court, on the basis of Articles 45 and 224 of the Enforcement Procedure Act, ordered the child's father (from now on referred to as "the respondent") to pay a fine on account of his failure to prepare the child in appropriate psychological terms for contact with his mother. On 5 October 2009 the competent second-instance Court rejected the respondent's appeals against the fines. It is to be noted that the power of the civil enforcement court to impose fines is quasi-criminal, because this penalty is comparable to a criminal-law punishment, although it is not of a particularly deterrent nature.

9. As is stated in paragraph 29 of the majority's judgment:

> "On 12 February and 31 March 2010 the Social Care Centre informed the enforcement judge that its psychological therapies in respect of the family in question had produced no results ... According to their reports, it became clear that the respondent had cooperated in form only and had in fact failed to take steps to encourage the child to have substantive contact with the applicant".

Only after the applicant had unsuccessfully exhausted all legal procedures for enforcing the orders in her favour, and only after she had signed an agreement on access and later on accepted the revision of the custody order, which had been in her favour, did she eventually re-establish some contact with her child. As the majority find in the judgment, there was a lack of cooperation on the part of the respondent (see paragraphs 56 and 67) "and the applicant's contact with the child improved only after the threat of the transfer of custody ceased, following the 2011 Agreement on Access Rights and the revision of the 2009 judgment" (see paragraphs 47 and 58). The above observations by the majority show the influence the father had on his child, as well as his passive resistance towards the enforcement of the courts' orders. The judicial ascertainment of a person's subjective interest or of the purpose motivating actions or omissions on his part is frequently difficult and it is not the task of this Court to decide on such matters. But the above observations by the majority are well justified, especially having regard to the following facts: (a) the national court granted the applicant custody of the child, considering her the most suitable parent to have custody; (b) the respondent did not encourage the child to have contact with his mother and because of this omission, or passive conduct or inaction, was repeatedly found to be in contempt and was punished by the civil

enforcement court; and (c) the child started having contact with his mother only after the father had obtained what he wanted. So, the maxim that facts are sometimes more powerful than words (*facta sunt potentiora verbis*) may be relevant here, as may the maxim that outward acts or actions sometimes indicate the thoughts and the intention hidden therein (*acta exteriora indicant interiora secreta*, 8 Coke's Reports 146). The fact that the applicant lodged her application with the European Court of Human Rights is a clear indication or proof that she signed the above-mentioned agreement not out of her free choice, but only when she realised that all of her requests for enforcement of the access and custody orders in her favour had proved unsuccessful, and that the only way for her to see her child was to sign the said agreement. It may not be irrelevant at all, here, while dealing with how the applicant was feeling when she signed the above-mentioned agreement, to refer to an allegation she made in the statement of facts set out in her application (especially in paragraphs 4-7), to the effect that the respondent was threatening her with physical and mental violence, which led her to live the matrimonial home. Similarly, it is mentioned in the statement of facts in the Court's decision to communicate the application to the Government (§ 4) that "[t]he applicant allegedly did not dare to take her son with her because of the threats made by the respondent, of which the police had been informed". Of course, it is not the duty of this Court to decide on the validity of these allegations.

10. Under Serbian civil law, the enforcement court could not order the imprisonment of the respondent (whether as an immediate or a suspended penalty) or impose any other custodial sentence, even of the smallest duration, since such penalties are not provided for by the civil law. It is true, therefore, that the same court which issued the access and custody orders did not have the effective means to enforce them. Since no other domestic legal or other measures proved effective, this omission or gap in the Serbian civil legal framework deprived the applicant, having regard to all the circumstances of the case, of a substantive method of securing the enforcement of decisions in her favour, which could have acted as a preventive, repressive or corrective measure or a deterrent to ensure that the father did not intentionally continue failing to prepare the child for reunification with his mother, and, in so doing, continue refusing to abide by the orders of the court. The issue here is not whether or not there is a consensus in the member States as to the penalties required for civil or criminal contempt of court. The issue is the examination of the effectiveness of the Serbian legal system in pursuing the State's positive obligation in relation to the facts of the case to protect the rights under Article 6 § 1 and Article 8 of the Convention, and it is only in this respect that the efficiency of all the measures taken and the available legal provisions may be relevant.

11. Article 224 of the Enforcement Procedure Act contains a very interesting and substantive method of enforcing access orders:

> "... If enforcement could not be accomplished by issuing and enforcing the decision on the fine, enforcement shall be conducted by taking the child away from the person who has custody of the child, and handing the child over to the other parent ..."

In the present case, however, the guardianship authority failed to bring an action against the father on the basis of the above provision as it had the power to do, but on 11 November 2008 the first-instance court granted custody to the applicant and ordered the father immediately to surrender the child to her. Thus, in effect the method provided for in Article 224 was followed, but it did not work, despite the best efforts of the enforcement judge and the Social Care Centre. This can be explained because the father was present during the attempt to hand the child to the mother, and, by his very presence, was in a position to exert a negative psychological influence or pressure on the child.

Unless this method of enforcement were to be to combined with a custodial sentence, even of a very short duration, or unless there was a threat of imprisonment or any other deterrent measure in the event of systematic manipulation of the child against his mother – as the applicant alleged had happened in the present case – it could be very difficult, if not impossible, for such behaviour, which may be characterised as a bad or inappropriate exercise of parental authority, to cease to exist. Without an arrest warrant or the fear of being imprisoned, there was nothing to deter the respondent from abiding by the court orders, even on 22 December 2008, when, among other people, the enforcement judge, a bailiff, two uniformed policemen and three plain-clothes policemen, all entered the courtyard of his house, expecting that the child would be surrendered (see also paragraph 23 of the judgment). What he did instead was to remain inactive and uncooperative. Two of the four fines imposed on him were at the highest level permissible by the legislature, namely 150,000 Serbian dinars (RSD) (around 1,217 euros), and on the fourth occasion, when a fine was imposed on him in the amount of RSD 100,000, an added condition was made by the Judge that should the respondent fail to surrender the child voluntarily to the applicant within three days from the date of the receipt of the order, he would have to pay a further fine of RSD 150,000. No penalty, however, of such a monetary character, irrespective of the amount involved, deterred the respondent from disobeying the orders. Had the penalty been custodial, instead, even with suspended application, the results might have been quite different.

What is most strikingly disappointing is that the fines imposed were not paid by the respondent (at least by the time the decision to communicate the application to the Government was taken) and have not been enforced by the State, through the institution of proceedings against the respondent entailing a penalty of imprisonment, a remedy available under the domestic law. That was a serious failure on the part of the State regarding the issue of effective enforcement of the orders in question. That the fines were not paid

and enforced is a fact that was included in the statement of facts of the decision of the Court to communicate the application (§§ 30 and 37) and was accepted by the respondent State, since in its written observations (§ 5), it states that "... it deems that the Statement of Facts provided by the Court is sufficiently detailed" and that "[o]n this occasion it will only indicate certain facts not mentioned by the Court".

12. It is, of course, within the margin of appreciation of every State to decide how to deal with offences for civil contempt in relation to a court's orders. However, it is to be noted that a violation of a court order regarding family relations is an offence with a negative impact not only on the harmonious administration of justice, but also on the interests of the children and their parents. Non-compliance with such an order may lead to the end of family life – in the present case, the end of family life for the applicant with her child and *vice versa*, with probably detrimental and traumatic results for both of them, especially the child. So the penalties for such violations should be strict with a deterrent effect.

As regards Article 2 of the Convention concerning the right to life, the Court stated the following in *Osman v. the United Kingdom* (28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII):

> "It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions." (See also *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 171, 14 April 2015).

What was said above in relation to Article 2 can also apply, by analogy and bearing in mind that the Convention is a living instrument, to situations coming under Article 8, like the present one, where without effective deterrent provisions and law-enforcement machinery, family life may end.

It is the task of this Court to exercise its supervisory jurisdiction and to afford international protection when a State exceeds its margin of appreciation and fails to provide an effective mechanism and legal system – civil and criminal, substantive and procedural – to protect the human rights guaranteed by the Convention. It is also the task of this Court to exercise its jurisdiction when the national legal procedures are unable to protect a child from being victimised, as in the present case. The role of this Court is to interpret and apply the provisions of the Convention (Article 32), always ensuring the observance of the engagements undertaken by the High Contracting Parties (Article 19).

13. Though there were four decisions of the civil court (not reversed on appeal) imposing fines on the respondent and finding that he had consistently failed to prepare the child appropriately for having contact with his mother, that was apparently not sufficient for the prosecutor's office, which dropped the charges against the respondent, and for the criminal

courts at first and second instance, which acquitted him, finding that he had "never physically or verbally, actively or passively obstructed enforcement at any point" (see paragraph 46 of the judgment).

14. Article 191 § 1 of the Serbian Criminal Code provides that "[w]hoever unlawfully detains or abducts a minor from a parent ... entrusted with the care of the minor or whoever prevents enforcement of [a] decision granting custody of a minor to a particular person, shall be punished with a fine or imprisonment of two years". Furthermore, Article 191 § 2 of the same Code provides that "[w]hoever prevents enforcement of the decision of a competent authority setting out the manner of maintaining of personal relationships of a minor with parent ... shall be punished with a fine or imprisonment up to one year". However, the provisions of Article 192, though of a deterrent nature, did not actually deter the respondent, since the prosecutor dropped the charges against him, and the applicant was left to conduct the prosecution herself, with the result that the respondent was acquitted by the criminal court, even though he had never surrendered the child to the mother, as he had been obliged to do so by the relevant court orders, and even though he had been found by the civil courts (at first instance and on appeal) to have failed to comply with the access and custody orders by not appropriately preparing the child to meet his mother.

15. In paragraph 46 of the judgment, the majority observe that the first-instance criminal court acquitted the respondent. They further observe that that court:

> "[f]ound, on the basis of ... four expert reports from the civil proceedings case-file ...that the respondent always made the child available for enforcement, that he never physically or verbally, actively or passively obstructed enforcement at any point, and that there were no indications that the child ever showed signs that he was under pressure or undue influence not to have contact with his mother."

However, the finding of the criminal court that the respondent "never physically or verbally, actively or passively obstructed enforcement at any point" does not coincide with the condemnatory decisions of the civil enforcement court, or of the civil appeal court, to which reference was made above. It also does not coincide with what the enforcement judge did on 9 January 2009 in asking "the Social Care Centre to contemplate initiating corrective monitoring of the respondent's exercise of parental rights in the light of the respondent's substantial influence on the child's hostility toward his mother" (see paragraph 13 of the judgment), nor is it compatible with the reports of the Social Care Centre mentioned in the majority's judgment (see paragraph 9 above of this opinion), clearly indicating that "the respondent had cooperated in form only and had in fact failed to take steps to encourage the child to have substantive contact with the applicant". The statement of facts in the decision to communicate the application (§ 14) – which, as has been said before, was accepted by the Government in their observations as sufficient – includes the following passage, which shows

that the behaviour of the respondent was not only passively but also actively negative towards the orders of the court, actually alienating the child from his mother:

> "On 27 May 2009 the MCI submitted a fresh report, following the court's request, finding that the child's emotional development was highly jeopardised by his father directly disqualifying the applicant as mother in order to alienate the child from her. The child was constantly in fear and a conflict of loyalties. In view of the psychological pressure to which the child was being subjected by his father and the child's development, the experts concluded that his own statement should not be relevant for determination of the parties' parental capacities and what would be in his best interests."

One may wonder why the same failure or inaction by the respondent to abide by the orders of the court, if accompanied by *mens rea*, could be regarded by one court (the civil court) but not by another (the criminal court) as disobedience of court orders. But what the Social Care Centre noted in its above-mentioned report was more than a mere failure to act on the part of the respondent; it was rather an attempt by him to alienate the child from his mother.

16. The above difference, or rather inconsistency, between the criminal and the civil courts' approaches to the issue of contempt, and especially to the behaviour of the respondent, as described in the Social Care Centre reports, should have nothing to do with whether or not the burden or standard of proof or judicial assessment in the two types of proceedings is or may be different, and so this divergence cannot be justified on such a basis. In any event, the Social Care Centre reports seem absolutely clear, as has been shown above.

17. According to the case-law of the Court, the execution of a judgment given by a court must be regarded as a part of the "trial" for the purposes of Article 6 (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports* 1997-II), and a delay in the execution of a judgment may be justified in particular circumstances, but it may not be such as to impair the essence of the right protected under Article 6 § 1 of the Convention (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V). As clearly held in *Yuriy Nikolayevich Ivanov* (cited above, § 51), making reference to *Immobiliare Saffi,* "[t]he effective access to court includes the right to have a court decision enforced without undue delay". In *M. and M. v. Croatia* (no. 10161/13, § 179, 3 September 2015), the Court reiterated "[t]hat the ineffective, and in particular delayed, conduct of custody proceedings may give rise to a breach of positive obligations under Article 8 of the Convention ...".

The non-compliance by the respondent with the court orders began on 8 July 2008, when the interim access order was issued, and lasted until 20 June 2012, when custody was given to him, that is, for a period of almost four years. However, the relevant period for the issues under examination

lasted until 13 July 2010, when the custody order in favour of the applicant became final. Again, this period of two years without the applicant seeing her child was too long. I consider that this delay and the protraction of proceedings, through no fault on the applicant's part, was too long and unreasonable, thus impairing her rights under Article 6 § 1. The enforcement measures taken were bound to be futile, under the circumstances, without the availability of strict deterrent provisions on civil contempt and without any attempt to enforce the fines or to initiate the procedure under Article 224 of the Enforcement Procedure Act. As regards the criminal procedure, it took the first-instance criminal court about four and three years respectively to reach a final decision on 20 June 2012 on the criminal complaints filed by the applicant on 29 August 2008 and 23 June 2009 against the respondent for: (a) parental child abduction, and (b) continuous non-compliance with the interim access and custody orders. It is a remarkable coincidence that on the same date the first-instance criminal court acquitted the respondent (20 June 2012), the first-instance civil court granted the respondent custody of the child, following the agreement made by the parties on 23 March 2011 for the revision of the judgment of 24 November 2009, which, after a hearing, had granted the applicant custody. The decision of the Constitutional Court dated 22 July 2010 finding that there had been no delay in the criminal proceedings was given almost two years before the decision of the first-instance criminal court was taken, and thus did not consider this further delay of two years, which, however, cannot be taken into account for the purposes of the present proceedings, since domestic remedies have not been exhausted in relation to this delay. Even without taking into account this further delay of two years, the original two-year delay was in itself lengthy and unreasonable, violating Article 6 § 1, especially having regard to the nature of the complaints and the interests affected, as well as the fact that the enforcement of the access and custody orders remained unsuccessful, despite the repeated decisions requiring the respondent to pay fines.

18. Since the access and custody orders were positive (and not declaratory) orders, thus ordering the respondent to surrender the child to the applicant, it should have been the duty of the respondent to find a proper means of preparing the child and of obeying the orders. Though it may have been a defence to show that compliance with the orders was impossible, the burden of proving such impossibility should have been on the respondent and on the respondent State in accordance with the positive obligation it has to fulfil, irrespective of whether the proceedings for contempt were civil or criminal. Any other approach, I believe, would have led to the undesirable results encountered in the present case: (a) making the orders ineffective and letting them be disregarded; (b) damaging the interests of the child to whom the orders related, as well as the relations between mother and child; and (c) endorsing, in effect, the respondent's above-mentioned unacceptable

behaviour in manipulating the child. Here, it should be borne in mind that according to the Court's case-law, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see paragraph 60 of the judgment). No evidence was provided that contact between the child and his mother was impossible because of any inappropriate behaviour by the mother towards the child. On the contrary, the civil court decided on 24 November 2009 that it was for the benefit of the child to grant custody to the mother, finding her to be the most suitable parent in that respect. In addition, before the separation of the parents, the child did not appear to have had any problem with his mother. This shows that it was not impossible for the child to have contact with his mother, unless, of course, the father did not wish this to happen and influenced the child in this direction or displayed apathy in that regard. The fact that the enforceability of the order was solely or mainly dependent on the will of the respondent does not make the issue objectively impossible or complex, but rather necessitates the imposition of strict sanctions on him. The Government admitted in their observations that the respondent "certainly contributed to such an attitude of the child to a great extent" (§ 13). Even more importantly, when dealing with the "measures available to domestic authorities", they accepted (see the observations, § 33) that the passive behaviour of the parent the child was with – in the present case, the respondent – "implies behaviour that may be qualified as disturbance or aggravation or prevention of enforcement ... which should be sanctioned":

> "The parent the child is with, in the instant case the father, shall be obliged to prepare the child for his/her transfer to the mother, as the parent the child had been committed to by the court decision, and his non-acting in this sense implies behaviour that may be qualified as disturbance or aggravation or prevention of enforcement having the elements of conduct contrary to the law, which should be sanctioned."

Having regard to the facts of the case, what else could this extremely important admission mean – supporting this opinion – other than that the Serbian legal system has failed on the issue of enforcement? Especially in view of this admission, and without, of course, taking on the role of a national court, one may wonder whether such passive behaviour in relation to compliance with a positive order by a court could not, by itself, be sufficient to constitute *mens rea* in any contempt proceedings, whether civil or criminal. One may also wonder whether any other approach would not run the risk of indirectly impairing the essence of the rights guaranteed by Article 6 § 1 and Article 8 of the Convention, by leaving behaviour which violates these rights unpunished indefinitely. The domestic rule of law as a whole should promote and not suppress the human rights protected by the Convention.

19. The Court is very outcome-orientated, especially in protecting the right to respect for family life, and the principle that the State has a margin

of appreciation in choosing the means or measures it will use to enforce a decision should always be applied together with, and having due regard to, the principle of effectiveness and practical application of the provisions of the Convention. Otherwise, there would be a serious and unjustified reduction of the level of human rights protection, and in the present case an unjustified reduction of human rights in the field of family relations.

20. In examining whether the State's obligation to take all necessary steps to facilitate the execution of its courts' orders, or to find ways or means to enforce them, has been fulfilled, it must always be ascertained whether any alleged inability to enforce such orders is real or not, objective or subjective, or is due to the will or behaviour of the adult persons involved (parents and grandparents, and so on), and whether the situation can easily be changed if the will or behaviour of these persons changes.

21. Since, as regards the enforceability of the courts' orders in the present case, the applicant had obtained four civil decisions against the respondent, it is quite unclear why the prosecutor's office dropped the charges against the respondent and why none of the scheduled hearings was held (for these facts, see paragraph 46 of the judgment). It is obvious that the criminal-law enforcement machinery, by dropping the charges against the respondent, did not assist, even indirectly, in ensuring that the court orders were complied with and that the applicant's right to respect for her family life was secured.

22. The Ombudsperson reminded the Social Care Centre's officials of their powers under domestic law and of measures that they could have envisaged to enable such a reunion (see the decision to communicate the application, § 44), without, however, any positive result. Unfortunately, there was (and there still is) no Children's Commissioner in Serbia who could have been appointed as the special representative of the child in the present case so as to assist in the unification of the family and to make sure that the child's rights were implemented correctly at all times.

23. Obedience is the essence of the rule of law ("*obedientia est legis essentia*", 11 Coke's Reports 100) and the effect of the rule of law consists in its execution ("*juris effectus in executione consistit*", Coke on Littleton 289). I believe, without taking on the role of a first-instance court, that the disobedience by the respondent of the two interim orders, a finding which the civil court had already made, undermined the very administration of justice and the rule of law. It rendered the orders literally nugatory and totally deprived the applicant – the most suitable parent to have custody of the child – of her rights guaranteed under Article 6 § 1 and Article 8 of the Convention. Such behaviour, by any parent, is very serious and should entail strict sanctions, provided for in both civil and criminal contempt proceedings, with the aim not only of punishing the offender, but also of operating as a means of coercion ensuring compliance with such orders, while at the same time promoting, or preventing undue interference with,

the administration of justice. It is totally unacceptable to allow a situation, as in the present case, where a parent who, despite having been found in a court judgment to be unsuitable or not the most suitable parent to have custody of the child, was actually left to enjoy sole custody, making the child not wish to have any contact at all with the other parent, who had nevertheless been deemed the most suitable parent to have custody. And eventually, this bad or unsuitable parent, who was in continuous civil contempt of court, managed not only to be left unpunished by the criminal court, but also to be given custody of the child. The rule of law and the administration of justice lose their authority and validity if they are left, or appear to be left, at the whim of any person, as in the present case, who refuses to abide by the orders of a court.

24. It is to be noted that punishment or coercion in respect of a parent who does not comply with an access or custody order, thus acting against the interests of his or her child, differs from, and should not be confused with, coercion of a child, which should be avoided in all circumstances. Quite appropriately, the majority note (in paragraph 65 of the judgment) that, according to the Court's case-law, "although coercive measures against children are not desirable in this sensitive area, the use of sanctions cannot be ruled out in the event of unlawful behaviour by the parent with whom the child lives". But for such sanctions to be imposed, it would be necessary first for them to be provided for by law. It should also be clarified that the enforcement of a court's access or custody orders should not be taken as a measure contrary to the idea of child-friendly justice, the most appropriate form of justice in the interests of children.

25. The principle of proportionality, which is inherent in all the Convention provisions securing human rights, including Articles 6 and 8, should be employed in almost every family case which comes before the Court. A fair balance must be struck between the competing interests of the individuals (child and parents) and the community as a whole, which demands that the rule of law must be maintained. In the present case, however, the rights of the individuals were regulated by the domestic courts' orders; all that remained was to enforce those orders and maintain the rule of law. The rule of law should be respected not only by the parties concerned but by all the authorities of the State, which in the present case had the positive duty to enforce the courts' orders and reunite the applicant with her child.

26. Referring to previous case-law, the majority rightly acknowledge in the judgment (see paragraph 64) that "the adequacy of a measure is to be judged by the swiftness of its implementation, as passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit". This observation, however, with which I fully agree, is particularly important when the Court finds a violation of Article 8, as I have done in the present case. Family relations are continuous and sensitive

human relations and cannot be repaired retrospectively. Any obstruction to their continuity by one parent not abiding by a court order regulating family relations may destroy these relations, and may also flagrantly violate the right to respect for family life and the human dignity of the child and the parent whose contact with his or her child has been seriously damaged. The guarantees afforded by Article 6 § 1 of the Convention would be illusory if a Contracting State's national legal system allowed court orders granting access and custody to remain inoperative to the detriment of a child and his mother, as happened in the present case.

27. In *Malec v. Poland* (no. 28623/12, 28 June 2016), as in the present case, fines were imposed against a parent who did not comply with contact orders (including interim orders). In that case, the Court stated the following, which supports the present opinion, especially in showing that the State's positive obligations under Article 8 have to be fulfilled, even in the most difficult situations, and that lack of cooperation between separated parents is not a circumstance which can of itself exempt the authorities from these obligations:

> "71. In that connection, the Court observes that the applicant has never been considered as being unsuitable to maintain contact with N. or to take care of her during her visits. On the contrary, it has been found by the experts involved in the case that such contact was in N.'s interests and should be maintained ...
>
> 72. The difficulties in arranging contact were admittedly due in large measure to the animosity between E. and the applicant. The Court also notes the growing reluctance of the child to meet with her father. It is further mindful of the fact that contact and residence disputes are by their very nature extremely sensitive for all the parties concerned, and it is not necessarily an easy task for the domestic authorities to ensure enforcement of a court order where the behaviour of one or both parents is less than constructive. However, a lack of cooperation between parents who have separated is not a circumstance which can of itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child ...
>
> 73. In that regard, the Court observes that when the applicant's former wife failed to comply with the contact orders, the applicant began to file enforcement claims with the District Court. He has filed over 50 such requests ... and they eventually resulted in District Court ordering the mother to comply with the access arrangements and to the imposition of fines on two occasions ...
>
> 74. However, the Court reiterates that in cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit ... Firstly, as regards the swiftness of the enforcement proceedings, the Court notes that the domestic court examined the request of 7 March 2011 on 28 October 2011, when it ordered the mother to comply with the contact order ... Since she continued to prevent the applicant having any contact with N., the court eventually imposed a fine on her on 15 March 2012, that is, one year later ... Secondly, the Court points out that the enforcement proceedings initiated by the applicant on 23 August 2011, after several procedural decisions, were eventually

discontinued more than two and a half years later, on 24 April 2013 .... Thirdly, the proceedings instituted by the applicant on 20 February 2012, in so far as the applicant alleged that the mother failed to comply with the interim contact order, were discontinued a year later, on 28 February 2013 ...

75. Apart from noting the general difficulties resulting from the fact that the proceedings took place before three different courts ..., the Government did not submit any explanation for the particular delays in the examination of the applicant's requests. The Court finds that even though the applicant's enforcement requests led eventually to two decisions imposing a fine on the mother, the protracted examination of those requests and the obstruction to his contact resulted, as noted by the experts, in a further deterioration of the emotional bond with his daughter ...

76. The Court acknowledges that the task of the domestic courts was rendered difficult by the particularly strained relationship between the applicant and his former wife. However, while the Government referred in general terms to the conflict between the applicant and the child's mother as the source of the applicant's problems in maintaining contact with N. ..., there are no indications that this conflict affected the course of the enforcement proceedings or was the reason for the delays therein and their lack of effectiveness ...

78. Having regard to the facts of the case, in particular the passage of time, and the criteria laid down in its own case-law, the Court concludes that, notwithstanding the State's margin of appreciation, the Polish authorities failed to make adequate and effective efforts to enforce the applicant's parental rights and his right to contact with his child.

79. There has accordingly been a violation of Article 8 of the Convention."

28. In view of all the above, I conclude that the Serbian legal system or framework as a whole, faced with the issue of enforcement of the orders in question, was not effective, as it failed to provide an adequate and timely response consonant with the State's obligation under Article 6 § 1 and Article 8 of the Convention. In particular, the respondent State failed to provide an effective legal system and mechanism and to undertake all necessary measures to protect the rights of the applicant and the child under the above Convention provisions. I therefore find that there has been a violation of those provisions. Since I am in the minority, it would only be theoretical to assess the amount to which the applicant should have been entitled in respect of non-pecuniary damage on the basis of my findings.