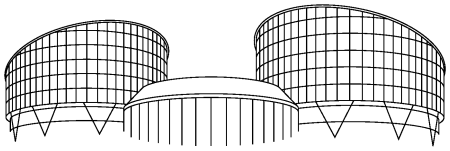

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF G.B. v. LITHUANIA

(Application no. 36137/13)

JUDGMENT

STRASBOURG

19 January 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 G.B. v. Lithuania,

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

András Sajó, *President,*
Boštjan M. Zupančič,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 15 December 2015,

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

PROCEDURE

1. The case originated in an application (no. 36137/13) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms G.B. ("the applicant"), on 17 May 2013.

2. The applicant was represented by Ms K. Pranevičienė, a lawyer practising in Kaunas. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. The applicant complained, in particular, that the court decisions concerning temporary custody of her daughters had not been enforced. She also complained about final court decisions refusing to grant her custody, and that there had been violations of a procedural nature. She relied on Articles 6 § 1 and 8 of the Convention.

4. On 30 June 2014 the application was communicated to the Government. Pursuant to Rule 47 § 4 of the Rules of the Court, the Court decided of its own motion to grant anonymity to the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975. When introducing her application to the Court, she lived in Meckenheim, Germany, where the applicant continues to reside to this day.

6. In 2001, in Germany, the applicant married E.B., a German citizen. Their marriage was registered in Lithuania in 2008. They have two daughters, who were born in 2002 and 2003. They all lived in Lithuania.

A. Divorce and custody proceedings

7. In January 2010 the Lithuanian authorities granted the applicant legal aid in connection with her intent to start divorce and custody proceedings. The following month the applicant applied to the Marijampolė District Court to have her marriage dissolved. She also asked for permission for both daughters to reside with her permanently, and for child maintenance from E.B.

8. In March 2010 Marijampolė Municipal Children's Rights Protection Service (*Vaiko teisių apsaugos tarnyba* – hereinafter "the Marijampolė service") informed the court in writing that the girls' answers regarding who they would like to live with were unclear. They wished to live with both parents. Given the girls' young age, and in the absence of information that the applicant was not performing her maternal duties properly, the service stated that residing with the applicant would not be against the children's interests.

9. The applicant's husband E.B. then lodged a counterclaim, asking the court to make a residence order in his favour.

10. The applicant then asked the court to grant a temporary protective measure – for the girls to temporarily reside with her until the case was decided on the merits. She submitted that the girls had no citizenship. Given the level of conflict between her and E.B., she feared that he might take the girls to Germany with him and she would then face obstacles in securing their return.

11. On 12 April 2010 the Marijampolė District Court allowed the applicant's request for a temporary protective measure. The girls were thus to stay with the applicant until the end of the custody proceedings. The ruling was upheld on 31 May 2010 by the Kaunas Regional Court. The latter court ruling, however, specified that the applicant's husband retained the right to have contact with his daughters at their place of residence or educational institutions.

12. On 19 April 2010 the Marijampolė service provided the court with conclusions indicating that the girls would not clearly state who they would like to live with. The father had suitable accommodation in which to raise them. The service concluded that the interests of the girls, "as future women (*kaip būsimoms moterims*)" would be better met if they lived together with the mother. Information obtained from doctors and educational institutions confirmed that the applicant took care of her daughters, who had (earlier) attended kindergarten and school in Marijampolė. The Marijampolė service nevertheless noted that its conclusions in the case could be revised if new circumstances emerged.

On 9 April 2010 the applicant also wrote to the Kaunas Municipal Children's Rights Protection Service (hereinafter "the Kaunas service") stating that on 6 April he tried to call his daughters on the telephone, but no one answered. The applicant, with whom the daughters had to be, did not answer her telephone either. The applicant noted that the older daughter attended school in Marijampolė, but she had not been seen at school as of 6 April. He went to the apartment which the applicant had been renting in Marijampolė, but found the doors locked. E.B. considered that the applicant abused her parental rights, obstructed him to communicate with his daughters even by telephone, and did not guarantee the girl's right to attend school. E.B. suspected that the applicant could have taken their daughters to Kaunas. He asked the Kaunas service to investigate the situation and promised his full cooperation.

In reply, on 27 April 2010 the Kaunas service noted that since March 2010 the applicant had been living with her daughters in Kaunas. Between April and June 2010 one of the girls attended kindergarten, and the other attended school. Conditions at the flat where the applicant lived in Kaunas were appropriate for the girls.

13. It transpires from a police report that on 4 June 2010 the applicant contacted Kaunas police to report that she had allowed E.B. to see their daughters in Kaunas that day but he had not returned them to her. The police established that the girls were with their father in Marijampolė. On 10 June 2010 a police officer visited E.B. and the girls in Marijampolė and found them to be safe. The officer telephoned the applicant and asked her to come and take the girls. She replied that she had already contacted a bailiff and would not be going to pick them up herself.

14. On 8 June 2010 the applicant made a further application for protective measures, asking the Marijampolė District Court to restrict her husband's right to see his daughters.

15. The Marijampolė District Court then deemed it necessary to ask both the Kaunas and Marijampolė services to provide information, and decided to hold an oral hearing to better establish whether any circumstances had evolved.

The Kaunas service provided conclusions on 22 June 2010, stating that by agreement of the parents the girls had met their father on 4 June, but he had not yet returned them. Their colleagues, child care specialists from the Marijampolė service, had visited the girls at their father's home. The girls explained that they liked and wished to be there; their interests or rights had not been compromised. The Kaunas service also noted that, in accordance with Article 3.164 of the Civil Code, a child who could express his or her views had to be heard and have his or her wishes taken into account, unless they were against his or her interests. For the Kaunas child care specialists, it was desirable to have an order in place setting out how the girls could have contact with their father pending the proceedings.

On 23 June 2010 the Marijampolė service informed the court in writing that earlier that month they had visited E.B.'s apartment twice, without prior notification, on 11 and 21 June. The girls had communicated with their father naturally and without tension. There was no reason to believe that they were physically or emotionally unsafe at their father's home. E.B. explained that on 4 June 2010 he took the girls on common agreement with the applicant. A couple of hours later, when he wished to return their daughters, the applicant could not be reached on her telephone. The applicant therefore took the girls to Marijampolė. The service considered that the applicant's suggestions that E.B. could kidnap the girls and take them to Germany were unfounded. The service also noted that it was unclear why the applicant would not call her daughters by telephone or come to Marijampolė and contact the service so that they could go and visit the girls together (a point remade in its separate letter to the applicant of the same date). The service also stressed that the manner in which both E.B. and the applicant chose to resolve their conflict – which, due to their complaints, required the girls to communicate with child care specialists and police officers – negatively affected the children.

16. On 28 June 2010 the applicant declared her place of residence as Kaunas.

The same month the Kaunas and Marijampolė services exchanged a number of letters with the applicant, replying to various requests for information and assistance. It was noted, *inter alia*, that she had been asked to visit the Marijampolė service to resolve the matter of the girls' return and to go to E.B.'s home with police officers to take the girls, but she had declined to do so. The child care specialists also noted having visited E.B.'s home, where the girls had been found. E.B. had explained to the child care specialists that his daughters did not wish to go to their mother's and that he did not want to take them there by force. The Marijampolė service enquired with the applicant why she herself had not been calling her daughters and had not applied to the service for assistance in meeting them. For the child care specialists, the manner in which the applicant chose to solve her dispute with E.B. negatively affected the girls' psychological well-being,

because they had to communicate with various authorities often. The applicant was also informed that it was the bailiff who was competent to enforce court decisions.

17. On 9 July 2010 the Marijampolė District Court decided the temporary protective measures application in the presence of the applicant, E.B., their lawyers and a child care specialist. Upon the recommendation of the latter, and given that the court hearing on the merits of the action was scheduled for 19 July, when deciding on the temporary protective measure the court also deemed it appropriate not to hear the children, to avoid causing them even more stress.

The court acknowledged that when the applicant had allowed her husband to see their daughters for three hours on 4 June 2010, he had not returned them to her home. It urged the parents to arrange the return of the girls to their mother and to reach an agreement on how E.B. would contact them until the final court decision in the divorce and custody proceedings. However, each parent had their own conflicting opinions, which only served to worsen the strained relations between them. The court noted that both parents had the right to raise their children and have contact with them, and there was no information to suggest that E.B.'s communication with his daughters would cause them harm. Nor was there any information that the applicant was failing in her duties as a mother. Accordingly, pursuant to Article 376 §§ 2 and 3 of the Code of Civil Procedure, which required the courts to aim to protect the interests and rights of minors (see paragraph 61 below), and taking into account the earlier court rulings that the girls should temporarily reside with the applicant (see paragraph 11 above), the court ordered E.B. to return his daughters to their mother. Should he fail to do so, the applicant could contact a bailiff, who would then take the girls and their documents and hand them over to the applicant. Until the end of the divorce and custody proceedings, the applicant's husband was granted contact with his daughters every other weekend from Saturday morning until Sunday evening, when he could collect them from the applicant's place of residence and spend time with them. He was forbidden only from travelling outside Lithuania with them.

On the same day, that is on 9 July 2010 the applicant was explained by the Marijampolė service that execution of court rulings belonged to the exclusive competence of a bailiff. Seven days later the court ruling became final and thus enforceable. Pursuant to the applicant's request of 19 July 2010, the following day the Marijampolė District Court issued her a writ of execution, which the applicant then transmitted to the bailiff on 26 August 2010 (also see paragraph 46 below).

18. Between July and September 2010 the applicant asked that E.B. be fined for non-compliance with a court order requiring him to hand the children over. She also asked the court to prohibit him from seeing his daughters. In turn, E.B. asked that they remain with him, arguing that they

refused to live with their mother. The Marijampolė service informed the court that from 1 September 2010 the girls started attending school in Marijampolė, and that situation had been caused by E.B.'s refusal to hand them over to the applicant. In September 2010, on the recommendation of the Marijampolė service, one of its psychologists saw the girls twice. She observed that they were attached to their father and had a good emotional connection with him. They also stated that they wished to stay with their father. The psychologist could not assess the emotional connection they had with their mother, because she could not be contacted. On 13 September 2010 the Kaunas service informed the court in writing that because the girls did not live in Kaunas, it did not know all the relevant circumstances of the case to assist the court in answering the question whether there were grounds for limiting E.B.'s paternal rights, in accordance with Article 3.180 of the Civil Code.

19. According to the Government, following complaints by the applicant alleging inactivity on the part of both the Kaunas and Marijampolė services, on 5 August 2010 the Ombudsperson for the Protection of Children's Rights (*Vaiko teisių apsaugos kontrolierius* – hereinafter "the Ombudsperson") issued a report. It noted that the relationship between the parents had broken down and that the applicant herself had been hostile. The report established that she instigated conflict, involved different State and municipal institutions in solving her relationship problems with her husband and gave little importance to her own personal responsibility, efforts and benevolence in looking for solutions in the best interests of her daughters. The report also indicated that she had applied to child care services and the police, submitted requests for assistance in taking the children, but as soon as they had provided her with opportunities she had refused them. It was recommended that she solve the questions of the girls' place of residence and contact by mutual agreement with the father, and in the children's best interests.

20. On 20 September 2010 the Marijampolė District Court held an oral hearing with the applicant, E.B., their lawyers and representatives of the Marijampolė and Kaunas services. Over the days that followed two more hearings were held and the girls were questioned by the judge in the absence of their parents and their lawyers. One of the girls testified that she wished to live with her father. The other testified that she missed her mother and wished that both parents lived together. She also stated that she otherwise preferred living with her father.

21. On 28 September 2010 the Marijampolė District Court dismissed E.B.'s request that the girls reside with him, and the applicant's request to forbid him from seeing them. The decision was upheld by the Kaunas Regional Court on 22 November 2010. The courts acknowledged that E.B. had not avoided his duties as a father, but it had not been established that he could provide better living conditions for the girls or raise them better.

Moreover, the girls' place of residence had already been decided by an earlier court ruling and it was not in their best interests to change that place every couple of months. The girls were not yet mature enough for their wishes alone to suffice to change their place of temporary residence.

22. On 23 of September 2010 the principal of the school the girls had been attending in Marijampolė since the beginning of that month informed the child care authorities that the applicant had been visiting the girls at school and communicating with them, their teachers, the school administration and social workers on a regular basis. On one occasion a social worker observed one of the applicant's meetings with the girls. They had talked to their mother warmly and sincerely, and had stated that they wished to live with both parents. The principal noted having been asked by E.B. to restrict the girls' contact with the applicant, but he had not acceded to that request because he considered that the girls should see and communicate with both parents.

On 3 February 2011, in reply to letters from the applicant asking for information about her daughters' achievements at school and requesting that it arrange a meeting with her daughters on school premises, the principal informed the applicant that the school had always been open for parents. He noted having urged the applicant since autumn 2010 to come to school as often as possible, and to communicate with her daughters and their teachers. However, 'the applicant had not heard that message (*deja, Jūs šito raginimo neišgirdote*)'. The principal stressed that the school was ready to help the applicant in every possible way if she showed initiative to see her daughters; no prior notification for her coming to school was necessary. For the school principal, the applicant's pleas were particularly odd, because it was only because of her that the girls were not fully fledged members of the school as they were not on the list of pupils. The applicant was well aware of that but had not made any effort to settle the matter. The principal concluded that if the applicant was serious about her daughters' future, he wanted her to think seriously and solve the problems which depended solely upon her.

23. Between October 2010 and April 2011 the Marijampolė District Court held at least five oral hearings, in which the applicant, E.B., their lawyers and representatives of child care services participated. The court granted a request by the applicant for a psychological assessment of the girls (see paragraph 25 below), had regard to letters from the institutions where the girls attended after-school activities, and questioned the principal and psychologist of the school.

24. At a court hearing on 29 April 2011 the principal testified to having admitted the girls to the school at E.B.'s request and in the girls' best interests, and that they came to school ready for lessons and well-presented. They were well taken care of, felt well at school and wished to study there. The principal also stated that the applicant could have come to school and

taken the girls with her at any time. However, the applicant came to school very seldom; the last time he had seen her there was in January 2011.

The school psychologist testified that she had told both parents that they could ask her for psychological assistance, but neither parent had followed up with such a request. Without parental agreement or a referral by child care specialists, no psychological assistance could be provided. The psychologist also testified that the girls' teachers had not contacted her with any particular concerns about the girls' well-being.

25. In August 2011 experts from the Vilnius City Child and Adolescent Forensic Psychiatry Department (*Vaikų ir paauglių teismo psichiatrijos skyrius*) examined the girls. The experts found in respect of both girls that it was not possible to establish which parent's place of residence would best meet the girls' interests, because equal communication with both parents, who were important to the girls, was important to them both. When observed with their father, the girls were positive, active and laughed a lot. Both girls' connection with their father was "positive, warm and strong". Their relationship with the mother was ambivalent and their feelings were torn (*dominuoja prieštaringi (ir teigiami, ir neigiami) jausmai*). Even so, there was no doubt that the mother was an important person for the girls. Having regard to the girls' age, maturity and psychological particularities, they were not yet able to formulate and express their own opinions and views as regards which parent they should live with. The girls' wish to live with their father was determined by objective factors, namely them living with him for more than a year and communication with their mother being insufficient. Unnatural hostility towards the mother had only traumatised them and parental alienation syndrome, enhanced by their father's influence, could be seen in their behaviour. Lastly, both girls were attached to each other, and separating them would be traumatic.

26. In August 2011 the applicant declared her place of residence as Meckenheim, Germany.

27. On 4 October 2011 the applicant asked the Marijampolė District Court to hear the case in her absence. She maintained all her civil claims. Moreover, in the applicant's words, "the forensic expertise having been performed, [paragraph 25 above] I consider that all the evidence in the case has been collected and examined, and that the case should be terminated immediately, and I therefore ask for it to be terminated in my absence because I am ill." The applicant agreed to her lawyer representing her interests from that point forward.

28. On 5 October 2011 the Marijampolė District Court held an oral hearing with the applicant's lawyer, E.B., his lawyer, and the child care authorities. During the hearing it came to light that the applicant had declared her place of residence as Germany, where she was expecting a child with another man. According to E.B.'s lawyer, those circumstances were relevant when deciding the girls' place of residence, especially given

the applicant's initial accusation of the girls being taken to Germany by their father (see paragraph 10 above). The court deemed it appropriate to postpone the hearing, so that the applicant could be questioned.

29. Later that month the applicant's lawyer provided the court with a medicate certificate issued in Meckenheim, about her client being at risk of premature birth if she experienced physical or psychological stress. The lawyer asked the court to hear the case without her client present, or to suspend the proceedings, until after the applicant had given birth.

30. On 24 October 2011 the court held an oral hearing without the applicant, but in the presence of her lawyer. She confirmed that her client had declared her place of residence as Germany, the father of her future child being a German national, but that she intended to return to Lithuania to live in Kaunas immediately after giving birth in Germany. The lawyer also confirmed that the applicant had not communicated with the girls during that school year.

E.B.'s lawyer regretted that the applicant could not be questioned at the hearing.

Relying on the forensic experts' conclusions about parental alienation syndrome, heightened by E.B.'s attitude towards the applicant, the Kaunas service noted that it would be more in the girls' interests to reside with their mother. It did not see the applicant's pregnancy as a factor to be taken into account when deciding the girls' place of residence. The service confirmed that the future child's father was a German citizen, which suggested that the applicant would live in Germany. Even so, E.B. was a German citizen but lived in Lithuania. The Kaunas service also noted that the applicant had approached them for a referral to psychologists so that she could find contact with her daughters easier. A referral was given to her and, as far as the Kaunas service was aware, the applicant had visited the psychologists for assistance. The service was of the view that the applicant had tried to establish contact with her daughters, but had been unsuccessful. She had probably not visited them at school for a while to avoid traumatising them.

31. At the same hearing the Marijampolė service representative noted that it had known the girls and their family history since 2008, when disagreements between the applicant and E.B. had started. The girls really thought clearly and their minds had developed in accordance with their ages. The representative thought that the girls' behaviour had been conditioned by their mother's actions as she did not visit them often at school or show interest in their lives, and therefore no emotional connection between them had been formed. The girls had been heard by the court about a year ago, where they had expressed their wishes (see paragraph 20 above) – the court had to remember that moment and have regard to the girls' opinion. Indeed, in 2006 the United Nations Children Rights' Committee had reproached Lithuania for not always hearing and paying attention to the child's opinion (see paragraph 65 below). The representative noted that no

one could ignore the fact that it was not known where the applicant, who was currently in Germany, was about to live. It was submitted that the psychologists' conclusions were contradictory (*yra prieštaringos*). The conclusions noted that E.B. was important to the girls; they had a warm, positive and stable relationship with him. When communicating with their father, the girls felt safe and were actively involved in shared activities. They could easily approach their father, hug him and tell him about their achievements at school, where they took prized places in mathematics competitions. The child care specialist emphasised that a child who was psychologically distressed could not have such achievements at school.

The Marijampolė service underlined that the circumstances had changed and thus it would always inform the court that it would provide the last conclusion during the last court hearing. Having communicated with the school, the school administration and the teachers, the Marijampolė service was finally persuaded that it was better for the girls to stay in that environment, to attend school and have friends; at home they were also receiving all that was necessary. The applicant, however, did not approach the girls after certain court decisions but first ran to the institutions or called the police, thus traumatising the girls a lot. In the words of the child care specialist, the applicant had not attempted to first meet with the girls or establish contact with them, and had not put in any effort herself. It was odd that a mother would go without seeing her daughters for a couple of months and not ask if they were prepared for school.

The Marijampolė service thus submitted that, in the light of the above considerations, E.B. could take care of the girls the best and provide them what they needed. To pull the girls out of the environment they were familiar with and where they had spent most of their time would cause them significant psychological harm. The girls could always choose to tell to their father later that they wish to live with their mother. At the end the Marijampolė service representative noted that, in her view, the child care specialists from Marijampolė had observed the girls more than the representatives from the Kaunas service.

32. On 8 November 2011 the Marijampolė District Court took a decision on the merits of the divorce and custody case. It observed that there was no information in the file to suggest that either parent was failing in their duties to raise their daughters or that their behaviour was immoral. Even so, they had not always acted with the children's best interests in mind, because during the court proceedings neither parent had attempted to find a compromise as regards their daughters' place of residence or their contact with them. The court emphasised that the children had to grow up in a safe environment they were used to. However, even though by a court order of 9 May 2010 the girls were to reside with their mother, the actual situation was that since 5 June 2010 they had been residing with their father. The girls themselves had expressed the wish to stay with him. The first-instance

court thus held that although the father could have had some influence over the girls' choice as to who they preferred to live with, it was not decisive. The girls had thus already stated on 11 June 2010 that they preferred living with their father (see paragraph 15 above). It was the court's view that such a short time (seven days) between those two dates was not sufficient for the girls' father to influence his daughters. It was thus clear that there was already then tension between the girls and their mother.

33. Lastly, the Marijampolė District Court noted that even though the applicant had declared her place of residence as Kaunas, since August 2011 she was also registered as living in Germany. For the court, the question where the father or mother would live with the children was irrelevant in any event because the girls spoke German; they had previously lived in Germany and thus could adjust to living there easily. What was essential when deciding the question of the girls' residence was to ascertain who the children were more attached to, and which parent devoted more attention to their interests. The children's wishes as to where to live could be disregarded only if they were against their interests. Given that there was nothing to suggest that either parent was neglecting their parental duties, the Marijampolė District Court deemed it most suitable to take into account the girls' wish to live with their father.

34. The first-instance court also ordered the applicant to pay the girls' father maintenance (60 euros (EUR) for each daughter per month) and set in place a contact order for the applicant to see her daughters. Even though both parents asked to see the children only two weekends per month and during the month of July, in accordance with Article 376 § 3 of the Code of Civil Procedure the court considered *ex officio* that such a time-frame would be too restrictive for the applicant to be able to build up contact with her daughters. A wider contact order, allowing the applicant contact not only during weekends but also State holidays and certain days during all school holidays was set in place. The court stressed to both parents their obligation to take care of the children and above all be an example to them.

The court also divorced the applicant and her husband.

35. On 7 December 2011 the applicant appealed against the first-instance court's decision. She contested the decision about the girls' place of residence. Without explicitly asking that a hearing be held, she asked for a re-examination of the evidence and witnesses to be called and questioned.

36. By a letter of 5 March 2012, the applicant also asked the Kaunas Regional Court to admit in evidence letters postmarked between November 2010 and January 2011 she had sent to her daughters in Lithuania from Germany, which had been returned to her in the post. The applicant claimed that E.B. had thus interfered with her right to be in contact with her children. She relied on Article 314 of the Code of Civil Procedure (see paragraph 59 below).

37. By a ruling of 22 March 2012 made in written proceedings, the Kaunas Regional Court left the lower court's decision unchanged. The court noted at the outset that pursuant to Articles 321 and 322 of the Code of Civil Procedure, appeals had to be heard in written proceedings unless the court deemed an oral hearing indispensable. As regards the applicant's request to have witnesses questioned, the court established that the applicant had not specified in her appeal what new circumstances essential for the case the requested witnesses could confirm, some of them having already been questioned at first instance. Nor had she explained why she had not submitted the request to the first-instance court. The court concluded that an oral hearing was not necessary, because the applicant had had the opportunity to point out all the circumstances necessary for an examination of the case to the first-instance court and also in her appeal.

The appellate court also refused to admit documents related to the applicant's correspondence with her daughters. According to it, those pieces of evidence had not been analysed in the first-instance court, which was a general requirement for evidence to be admitted in an appeal, or lodged with it.

38. As to the girls' place of residence, the Kaunas Regional Court dismissed as unfounded the applicant's plea that the first-instance court did not properly examine the evidence, which included the explanations by the child care authorities, psychologists' reports, witness testimony and the Ombudsperson's conclusions. On this last point the court observed the Ombudsperson's conclusion of 5 August 2010 stating that the applicant was conflictive and involved various authorities in her and E.B.'s conflict, without giving importance to her own responsibility and good-will in finding the best solutions for the children. It also observed that the first-instance court had examined the forensic expert reports about the girls' psychological state, where it was noted that they both wished to stay with their father. In addition, psychologists from the girls' school and the school principal were questioned. The applicant's lawyer herself admitted agreeing with the forensic expert reports, and did not ask for another expert examination to be conducted.

39. The Kaunas Regional Court also found that it was in the best interests of the children to stay with their father, who they had lived with since 5 June 2010. On that point it was also paramount that during the first-instance court hearing the girls had confirmed their wish to live with him. A fact on which the applicant had relied, that E.B. had prior convictions in Germany for sexual and drug-related offences committed in 1996 and 1998 did not have much significance for the case, because the convictions had expired in 2003. The applicant, for her part, had a criminal conviction in Lithuania for forgery of document and a criminal investigation against her for fraud had been terminated. What mattered was that she had left Lithuania for Germany; she had three addresses – in Kaunas, Marijampolė

and in Germany, which she had indicated as places where she lived, which suggested that she in fact had no habitual place of residence. Moreover, the applicant's contact with the girls was merely episodic, whereas the girls' father took proper care of them and actively participated in raising them. The girls lived with their father, attended school and had suitable living conditions. The evidence as a whole allowed for the conclusion that there was a close connection between the girls and their father. There was no evidence in the case file to the effect that E.B. abused his parental rights, and it was for the applicant to prove the opposite, which she had not done. Moreover, under Article 9 of the United Nations Convention on the Rights of the Child, a child had the right to be heard in all matters affecting him, which had been done in the present case. The appellate court also observed that in accordance with Article 2 of the aforementioned Convention and Article 3.156 of the Civil Code, both parents had equal rights and obligations towards their children. Accordingly, and contrary to the applicant's suggestion that she was closer to the girls because of their gender, the gender of a parent could not be a factor which determined who a child should reside with.

40. As to temporary protective measures, the Kaunas Regional Court observed that, as a rule, they were aimed at guaranteeing compliance with a future court decision. Accordingly, the first-instance court, when adopting a decision after examining merits of the case, was not bound by earlier decisions on temporary protective measures.

41. Following a complaint by the applicant, on 1 June 2012 the Ombudsperson issued a report dismissing allegations by the applicant about the partiality of the Marijampolė service because of its failure to provide her with information and consultations. The Ombudsperson relied on the Court's judgment in *Mihailova v. Bulgaria* (no. 35978/02, § 97, 12 January 2006), where it did not find a violation of Article 8, having found that irrespective of obstructions by the applicant's former husband, the applicant's own lack of understanding of the need for careful preparation as a precondition to effective enforcement of her custody rights played a significant role in the events. In the instant case, attempts had been made more than once to hand the children over to the applicant and meetings had been organised with psychologists, child care specialists and representatives of educational institutions as to enforcement of the court decisions to transfer the children. Moreover, the Ombudsperson had already examined the Marijampolė service's work in February 2010, and did not find that it did not take action to help the applicant to have contact with her children. The service also correctly placed the responsibility for the well-being of the children on both parents.

42. On 5 September 2012 the principal of the girls' school in Marijampolė issued a note stating that during the school year 2011/2012 the

applicant had not visited the school. She did not come to school on 1 September 2012 either.

43. On 18 October 2012 the Ombudsperson dismissed the applicant's repeated complaint accusing the Marijampolė service of failing in its duties to provide assistance and organise contact with the children. The Ombudsperson established that even though the contact order between the mother and the girls had been set in place as early as 8 November 2011 by the Marijampolė District Court, she had not yet tried to make use of it. Furthermore, the Marijampolė service had asked the applicant's lawyers to meet at its premises, offered to inform E.B. of that meeting and asked the applicant's lawyers for that purpose to choose a suitable date, but the applicant had not responded. For its part, the Kaunas service had also invited the applicant for a conversation so that she could express her wishes and preferences as to her contact with the girls, and so that the service could assist her. It was only when the applicant had not shown up that the Kaunas child care specialists had suggested to her lawyers that she communicate with the girls by letters via the Marijampolė child care specialists. It had also been indicated to the applicant that she had the opportunity to directly communicate with her daughters in the presence of a psychologist, and that could be discussed with the Marijampolė service. The girls' school in Marijampolė had also informed the Ombudsperson that the applicant had started communicating with the girls by letters since December 2011; between December 2011 and April 2012 three letters from her had been received, though the girls had refused to accept the last one. The school had thus suggested that the applicant choose another means of communicating with her daughters and asked the child care specialists to provide facilities for that purpose. Given the child care authorities and the school's suggestions for the applicant to communicate with her daughters directly (*tiesiogiai*), which the applicant had disregarded, it was not clear to the Ombudsperson why the applicant preferred to communicate with her daughters by letters. On this point the Ombudsperson pointed out that under Article 3.170 of the Civil Code parents who lived separately had the right and an obligation to communicate with their children and be involved in their upbringing; children, for their part, had a right to regular and direct contact with both parents, irrespective of their place of residence.

44. On 15 June 2012 the applicant lodged an appeal on points of law. Without arguing that the appellate court's decisions not to summon witnesses for examination and not to hold a hearing had affected the outcome of the litigation, she primarily challenged the lower courts' assessment of the evidence, insisting that they had erred in concluding that living with their father was in the best interests of the children. She also asserted that E.B.'s previous convictions in Germany for crimes of sexual violence and drug-related offences were significantly weightier in terms of his moral values than her conviction in Lithuania for forgery of documents.

The applicant was further dissatisfied with the appellate court's refusal to admit in evidence documents related to her correspondence with her daughters, which she obtained after she had already lodged her appeal.

In his written reply, E.B. argued that the lower courts had properly examined the entirety of the evidence. He submitted that the applicant had always known about his earlier convictions in Germany; however, they had expired a long time ago. It was unfair for her to bring up that issue now. E.B. also observed that the proceedings had been pending for more than two years. During that period the applicant had specified her claims and submitted requests to the court on more than one occasion. The Kaunas Regional Court's acceptance to re-examine the evidence and question witnesses would have only delayed the proceedings. Given that the applicant had not asked for an oral hearing, the appellate court's decision to pursue proceedings in writing had been reasonable.

45. In a final ruling of 14 December 2012, adopted in written proceedings, the Supreme Court observed that the child's interests were the primary consideration when examining custody cases. The cassation court also relied on the Court's judgment in *Neulinger and Shuruk v. Switzerland* ([GC], no. 41615/07, § 139, ECHR 2010), which said that an in-depth examination of the entire family situation was necessary to achieve the best result for the child. For the Supreme Court, such a result had been achieved in the present case. The lower courts had analysed the level of attachment to each parent and established that the girls, who lived with the father, were fond of him. Those courts had also noted psychologists' reports that the girls could entirely independently form their own opinion about which parent to live with, and had held that the children's opinion was one of the criteria when evaluating the entirety of evidence, and the girls had expressed such a wish during the court hearing. Even though the fact that the girls lived with their father could influence their formation of a negative opinion about their mother, it had not been established that the mother was barred from communicating with them; to be interested in their lives and visit them at school could thus form a positive opinion about her and make their emotional bond stronger. The first-instance court had also issued a contact order and thus the applicant's contact rights with her daughters had not been restricted. Even though the applicant had stated that she lived in Lithuania, the evidence showed that she had declared place of residence as Germany, where she had taken part in court proceedings so that the name of her third child could be registered. As to E.B.'s convictions in Germany, those offences had been committed in 1996 and 1998 and his convictions had expired a long time ago. There was no proof that he could have a negative impact on the girls. On the contrary, the girls studied well at school and took part in extracurricular activities. It followed that the courts had been correct in not giving particular weight to those convictions. Overall, it was thus in the best interests of the girls to stay with their father.

Lastly, whilst noting that when refusing to admit in evidence new documents submitted by the applicant the appellate court had not explained whether they were relevant to the merits of the case, the Supreme Court held that this did not affect the overall lawfulness of the appellate court's ruling.

B. Enforcement of the temporary protective measures order regarding the transfer of the two girls to the applicant

46. After the Marijampolė District Court's decision of 9 July 2010 stating that the girls should reside with the applicant became final, and following the applicant's request of 26 August 2010 transmitting her the writ of execution, the bailiff took measures to enforce it (also see paragraph 17 *in fine*). Meetings were organised with the child care specialists, representatives of the girls' school and psychologists. Both parents were involved in that process.

47. The first attempt to hand the girls over at their school in November 2010 failed because on that day the girls fell ill and did not go to school. The court then established that their absence was proved by medical certificates, and the court order for transfer did not specify where it would take place. Accordingly, the father could not be blamed for an unsuccessful transfer.

48. The next attempt to transfer the girls was made in January 2011, when it was decided that the girls would be handed over at their home. This attempt did not produce results because on that date the applicant was arrested on charges of forgery of documents.

49. The third attempt to hand over the girls was at their father's home in February 2011. It failed because, even though the bailiff, child care specialists, police and both parents were present, neither girl wished to leave with their mother. During the transfer the applicant asked to be left alone in the room with the girls, and her wish was granted. However, even after that the girls expressed a clear wish not to leave with her. In the report about that attempted transfer the bailiff underlined that the transfer of a child could not be equated to the transfer of an object. Taking into account the clearly expressed wishes of the children, and to avoid psychological trauma and to protect the children's interests, physical force could not be used in that situation. The child care authorities supported this argument. The bailiff's recommendation, based on Article 771 of the Code of Civil Procedure, was that the manner of enforcing the court order for transfer should be changed to preserve the children's interests. The bailiff's letter specified that her findings could be appealed against to the Marijampolė District Court. The bailiff then also asked the Marijampolė District Court to examine how the court order for the girls' transfer should be enforced without compromising their interests.

50. Eventually, by a decision of 20 June 2012 the bailiff discontinued the enforcement proceedings, because it had been decided that the girls should reside with their father (see paragraphs 39 and 45 above).

C. Conviction of E.B. for failing to comply with the temporary protective measures order and the prosecutor's refusal to start an investigation into alleged psychological harm

51. By a decision of 17 March 2011 in separate criminal proceedings, a court found E.B. guilty of failing to comply with the court order of 9 July 2010. He was fined approximately EUR 750 (2,600 Lithuanian litai). The court however dismissed a civil claim by the applicant for non-pecuniary damage, noting that the girls themselves had refused to go and reside with their mother. The court also noted that no evidence had been provided to prove the applicant's contention that the children's refusal to be handed over to their mother had been a direct consequence of E.B.'s actions.

52. Alleging that the girls' father had had a negative influence on their daughters, and relying on the psychologists' reports about parental alienation syndrome (see paragraph 25 above), on 8 September 2011 the applicant asked the prosecutor to start criminal proceedings in respect of E.B. for abusing his rights and duties as a parent (Article 163 of the Criminal Code, see paragraph 63 below).

53. By a decision of 16 September 2011, the prosecutor refused to initiate a pre-trial investigation. He noted that earlier that month Marijampolė child care specialists had visited E.B.'s home and the girls had eagerly communicated with them, without their father present. The girls felt comfortable and at ease; they had no demands. They had also explained that the applicant did not visit them or call. The prosecutor established that E.B. had not committed any unlawful acts in respect of his daughters. By a decision of 4 October 2011, the District Court upheld the prosecutor's decision.

II. RELEVANT DOMESTIC LAW

54. The relevant parts of the Law on the Fundamentals of Protection of Children's Rights (*Vaiko teisių apsaugos pagrindų įstatymas*) read as follows:

> **Article 4. General Provisions for the Protection of the Rights of the Child**
>
> "Parents, other legal representatives of a child, State, municipal government and public institutions and other natural and legal persons must abide by the following provisions and principles:
>
> (1) the legal interests of the child must always and everywhere be given priority consideration;

...

(4) every child shall be given the possibility to be healthy and develop normally, [both] physically and mentally, prior to his or her birth as much as afterwards, and upon birth, a child must also be guaranteed the opportunity to develop morally and to participate in life within society;

...

(7) parents and other legal representatives of a child must first [and foremost] safeguard the rights of the child."

55. The Civil Code provides that parents (the father and mother) have equal rights and duties in respect of their children, irrespective of whether the child was born to a married or unmarried couple, after divorce or judicial nullity of the marriage or separation (Article 3.156).

56. Other provisions of the Civil Code relevant to this case read as follows:

Article 3.3. Principles for the legal regulation of family relations

"1. In the Republic of Lithuania the legal regulation of family relations shall be based on the principles of monogamy, voluntary marriage, equality of spouses, the priority of protecting and safeguarding the rights and interests of children, raising of children in the family, the comprehensive protection of motherhood and [on the] general principles for the legal regulation of civil relations.

2. Family laws and their application must ensure the strengthening of the family and its significance in society, the mutual responsibility of family members for the preservation of the family and the education of children, the possibility for each member of the family to exercise his or her rights in an appropriate manner and to protect children of minor age from the undue influence of the other members of the family or other persons or any other such factor."

Article 3.170. The right of the separated parent to have contact with the child and be involved in the child's upbringing

"1. The father or the mother who lives separately from the child shall have a right to have contact with the child and be involved in the child's upbringing.

2. A child whose parents are separated has the right to have regular and direct contact with both parents irrespective of their residence.

3. The father or the mother living with the child may not interfere with the other parent's contact with the child or involvement in [his or her] upbringing.

4. If the parents cannot agree on the involvement of the separated father or mother in the upbringing of the child and contact the separated parent's contact and involvement in the child's upbringing shall be determined by the court.

5. The separated father or mother has the right to receive information about the child from all institutions and authorities concerned with the child's education, training, health care and protection ... Information may be refused only in cases where the child's life or health is at risk from the mother or father and in the cases provided for by law.

6. The refusal of authorities, organisations, institutions or natural persons to provide information to the parents about their children may be brought before the court."

Article 3.174. Disputes over a child's residence

"1. Applications for the determination of a child's residence may be filed by the child's father or mother, as well as by the parents or guardians/caregivers of a child's minor-aged parents who do not have full legal capacity.

2. The court shall resolve the dispute having regard to the interests of the child and the child's wishes. The child's wishes may be disregarded only if they are against [his or her] best interests...."

57. Other relevant domestic law as regards contact rights is reproduced in the judgment of *Z.J. v. Lithuania* (no. 60092/12, §§ 68-70, 29 April 2014).

58. Article 185 of the Code of Civil Procedure provides that a court must make its own decision about the probative value of evidence, based on a comprehensive and unbiased examination of that evidence in court.

59. The Code of Civil Procedure also stipulates that the appellate court refuses to admit as new evidence which could have been submitted to the first-instance court, unless the first-instance court refused to admit it without good reason or when the need to submit that evidence came to light later (Article 314).

60. At the relevant time, the Code of Civil Procedure provided that appeals should be decided in written proceedings, unless the court decided that an oral hearing was indispensable. The parties to the proceedings could submit a reasoned request to hold a hearing in their appeal or response to appeal, but such a request by the parties did not bind the court (Articles 321 and 322).

61. As to the court's role in family law cases and the transfer of children by court order, the Code of Civil Procedure reads as follows:

Article 376. The role of the court

"1. The court deciding the case has the right to collect evidence itself on which the parties do not rely, if it considers it necessary for a fair examination of the case.

2. The court must take measures to reconcile the parties, as well as aim to protect the rights and interests of children.

3. The court, having regard to the facts on which the claim is based and those disclosed during the court hearing, has a right to exceed the claim, that is, it may grant more than what has been asked, it may also adopt a decision regarding claims which, although they have not been submitted, are nevertheless directly linked to the essence and basis of the claim."

Article 764. Transfer of children named in a court decision

"1. If the [judgment] debtor does not within the time limit set by the court or the bailiff comply with a court order concerning the transfer of a child, the bailiff, having assessed the recommendations of the children's rights protection service, the police

and the psychologist, shall take a decision regarding the way the court order should be enforced... A copy of the bailiff's decision shall be sent to all parties of the proceedings and other relevant persons.

2. In implementing the court decision concerning the transfer of a child, the bailiff must carry out its duties in the presence of the [applicant] and a representative of the children's rights protection service. To guarantee the protection of the child's rights, a psychologist may be invited, at the request of any party to the civil proceedings or the children's rights protection service or by a decision of the bailiff.

3. If the debtor does not comply with the bailiff's order for the transfer of the child, the bailiff has the right to ask the court for permission to forcibly take the child.

4. Where forcibly transferring a child, the police must remove obstacles for the enforcement of the decision for transfer, and the representatives of the children's rights protection service shall take the child and hand him or her to the [applicant].

5. If a court rejects the bailiff's request for permission to forcibly take the child, the ruling must indicate how the child's transfer will proceed from that point forward.

6. Where enforcing the decisions mentioned [herein], protection of the child's rights must be guaranteed.'

62. Articles 2 and 3 of the Law on Bailiffs (*Antstolių įstatymas*) states that a bailiff is someone authorised and empowered by the State to carry out the enforcement of writs of execution, make findings of fact, or carry out any other tasks provided for by law (also see *Manic v. Lithuania*, no. 46600/11, § 71, 13 January 2015). A bailiff's actions or failure to act may be appealed against to the district courts (Article 510 of the Code of Civil Procedure).

63. The Criminal Code provides that a person who abuses parental rights by physically or mentally harassing a child, leaving him or her for long periods of time without care or maltreating him or her in a similar cruel manner will be punished by a fine, restriction of liberty, arrest or up to five years' imprisonment (Article 163).

III. RELEVANT INTERNATIONAL MATERIALS

64. The United Nations Convention on the Rights of the Child, ratified by Lithuania on 3 July 1995, and published in the Official Gazette (*Valstybės žinios*) on 21 July 1995, reads as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

Article 9

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the 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.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

65. In its Concluding Observations, adopted on 27 January 2006 upon consideration of the second periodic report of the Republic of Lithuania, the United Nations Children Rights' Committee noted:

"Respect for the views of the child

The Committee welcomes the efforts made by the State party to promote the respect of the views of the child, including the establishment of the Lithuanian Youth Parliament in 2000. It also notes the efforts made as regards children's participation in the schools. However, the Committee is concerned that these efforts are insufficient and that article 12 of the Convention may not be fully taken into account in practice in judicial and administrative decisions.

The Committee recommends that the State party:

(a) Take further steps to promote and facilitate respect for children's views and ensure their participation in all spheres of society, including in the family and schools;

(b) Take the necessary measures to ensure effective implementation of article 12 of the Convention, not only in court proceedings but also in various administrative decisions, including with respect to child protection services, custody proceedings and the placement of children in institutions;

(c) Effectively promote and encourage respect for the views of children below the age of 12 years, according to his/her evolving capacities;

(d) Provide educational information to, among others, parents, teachers, government administrative officials, the judiciary, children themselves and society at large, on children's right to be heard and to have their views taken into account; and

(e) Undertake a regular review of the extent to which children's views are taken into consideration and of the impact this has on policy, programme implementation and on children themselves. "

66. Other relevant international law as regards child friendly justice is reproduced in the judgment of *Z.J. v. Lithuania* (cited above, §§ 72 and 73).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

67. The applicant complained about the custody and court proceedings in Lithuania, in the wake of which her two daughters were placed to reside with their father. The applicant relied on Article 8 of the Convention. The relevant parts read as follows:

"1. Everyone has the right to respect for his 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 the rights and freedoms of others."

A. Admissibility

1. The parties' submissions

68. The Government argued that the applicant had failed to exhaust the available domestic remedies. Firstly, inasmuch as it concerned the enforcement of the court decision for protective measures, she had never complained to the domestic courts about the actions or inaction of the bailiff. Secondly, if she was of the view that the child care authorities had failed to duly perform their duties in the child custody proceedings, she could have asked the administrative courts to require those institutions to take specific action. Thirdly, the applicant could have started separate court proceedings for compensation from the State, had she considered that the child care authorities had failed to act with due diligence.

In the alternative, the Government submitted that the complaint was unfounded.

69. The applicant submitted that the bailiff, as the person who ought to have known the law, should have taken all the proper steps to enforce the court order for protective measures. She also stated that by not having competence to know every legal avenue to appeal, she had also seen no

reason to complain about the bailiffs' actions or inaction, because "the bailiff [had been] working and trying to enforce the court order". The bailiff had taken immediate action to enforce the court decision. Accordingly, there had been no need and no legal basis to appeal against the bailiff. Besides, the applicant had been residing in Kaunas, and had therefore often called and written to the bailiff in Marijampolė. She had also visited the girls at school, and had addressed the Ombudsperson, child care services and the police a number of times. Moreover, she had exhausted all the remedies in the divorce case, given that it had been examined at three levels of jurisdiction.

2. The Court's assessment

70. The Court considers that the Government's objection as to the non-exhaustion of domestic remedies are intrinsically linked to the merits of the applicant's complaint that the State authorities failed to act duly and thus breached her right to respect for family life. It therefore joins this objection to the merits.

71. The Court also notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

72. The applicant noted at the outset that in as early as spring 2010 courts at two levels of jurisdiction had ordered provisional measures in her divorce case, by deciding that the girls' place of residence was with their mother. Even so, soon afterwards the girl's father had taken their daughters away from her, thus completely trampling her right to have contact with them. The Lithuanian authorities, including child care services, the courts and the bailiff, for their part had failed to provide her with proper assistance so that those valid and enforceable court orders could be enforced.

73. The applicant was firstly dissatisfied with the Marijampolė service, which had changed its recommendation at the last court hearing on 24 October 2011 (see paragraph 31 above). The service, and the bailiff, had also missed the opportunity to take the girls from their father with the help of the police. In her observations to the Court, the applicant asserted that employing Article 764 of the Code of Civil Procedure (see paragraph 61 above) and taking children by force was indeed "absolutely normal practice" in Lithuania, of which she provided an example. However, the Marijampolė service had only unreasonably stated that to pull the girls out

of their familiar environment would cause them psychological harm. The applicant thus disputed the domestic courts' reliance on the conclusions of that service, and wished that the court had given more weight to the recommendations of the Kaunas service.

74. The applicant argued that although a child's opinion was very important, it was not a determining factor. Admitting that the Lithuanian courts had based their decisions upon the children's wishes, she also submitted that a child's wishes could not be considered when they were against his or her best interests, which was the situation in her case. In particular, the courts had not given sufficient weight to the forensic reports as to the girls' psychological state, and had overlooked the continuous damage caused to their minds because of them living with E.B. during the court proceedings. In this connection, the applicant also relied heavily on the finding in those reports that her daughters had developed parental alienation syndrome, which, in her view, was an important factor for the outcome of the civil litigation. The effects of this could have been avoided if the children had resided with her pending the civil proceedings. That being the case, the applicant admitted that the courts had found no evidence that E.B. had inappropriately exercised his authority in respect of their daughters.

75. The applicant also disputed the Government's argument (see paragraph 80 below) about having had a myriad of opportunities to take the girls. She did not use force against her daughters, for she did not want to traumatise them. Even so, she had always acted in good faith and in accordance with all possible legal and psychological means and had always sought to make amends. However, E.B. had always had control over them.

76. As to the Kaunas Regional Court's refusal to hold an appeal hearing, the applicant maintained that a hearing had been essential in order to have evidentiary material re-examined and witnesses questioned, "especially those who for unknown reasons were not questioned while the case was being heard at the Marijampolė [District] Court". She also contested the Kaunas Regional Court's finding about her not having a permanent place of residence. According to her, "the declared place of residence and the actual place of residence can differ".

77. In her observations on admissibility and the merits sent to the Court on 19 December 2014, the applicant stated that in October 2013 E.B. had moved to Germany to live there with their daughters. She noted that litigation was still going on in Lithuania (for increased financial support for the girls) and in Germany (for custody and contact), since E.B. allegedly sought to restrict the applicant's contact in Germany. For the applicant, if the Lithuanian institutions had been acting in accordance with the law and in the best interests of the children, we would not have the situation today where the mother of the children is forbidden from any contact and communication with them.

(b) The Government

78. The Government did not contest that the domestic court decisions establishing the girls' place of residence with their father constituted an interference with the applicant's rights under Article 8 of the Convention. Notwithstanding this, the decisions had basis in domestic law, namely Article 3.174 of the Civil Code, and pursued a legitimate aim – the best interests of the children, one of the most important factors according to the Court's case-law (the Government referred to *Pascal v. Romania*, no. 805/09, § 72, 17 April 2012; and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). The interference also was necessary and proportionate.

79. The Government acknowledged that attempts at enforcing court orders for protective measures and the girls' transfer to the applicant had been unsuccessful. Even so, those attempts had failed due to the children's reluctance to join their mother, the tense relationship between the parents and also because of the applicant's inconsistent behaviour. The children's reluctance to live with their mother was evidenced not only by the reports of child care services and psychologists, but also by those of bailiff and the courts' conclusions. It thus could not be imputed to the domestic authorities. For the Government, given that coercive measures against children were not desirable in such delicate situations, a more sensitive approach towards the children had been needed for the successful enforcement of the court orders. Such an opportunity had been provided to the applicant by the authorities in February 2011, but she could not herself persuade the girls to leave with her (see paragraph 49 above). In this connection, the Government reiterated that the applicant had not submitted any complaints to the courts as regards the inactivity of the bailiff. Eventually, the bailiff herself had asked the Marijampolė District Court to consider changing the enforcement order to protect the children's interests.

80. The Government regretted to note the negative attitude of the applicant towards her former husband, which had resulted in a situation where the children had become the victims. However, having regard to the "myriad of opportunities" for the applicant to take the girls, for instance from school or as provided by the bailiff, one could only doubt what the main reasons had been for her not to achieve such an aim. It seemed that she had been striving to achieve the return of the girls with the assistance of the State institutions only, abstaining from any personal involvement on her part. The absence of any prohibition or hindrances on her contacting her daughters to take an interest in their lives, bring them up and strengthen their emotional ties had been recognised by the courts. The State institutions, for their part, had also encouraged her contact with the children, by establishing the contact order and urging the applicant and her former husband to act in the best interests of the children in view of the mother's and the children's contact. It was of paramount importance that during the

civil proceedings the applicant had never been precluded from contacting the girls.

81. Contrary to the applicant's suggestion, child care services had been actively involved in the custody proceedings. Firstly, they had assisted the courts by allowing them to obtain all the necessary elements to decide the custody issue. The reports produced by child care services had been the result of constant monitoring of the situation. Even though the applicant had disputed the credibility of the Marijampolė service because during the last court hearing at first instance it had changed its recommendation, the Government argued that the service had always emphasised that its view could always change, should circumstances evolve (see paragraphs 12 and 31 above). It was therefore unsurprising that the Marijampolė service, like the bailiff, in the wake of the proceedings trying to enforce the court order for temporary measures, in which the service had actively taken part, had changed its opinion as regards who the girls wished to live with, as it became clear what decisions would be in the children's best interests. The Kaunas service, however, had not participated in the enforcement proceedings, thus "traditionally supporting the mother's side" and maintaining its initial recommendation.

82. The Government also pointed to child care services' active involvement in also assisting the applicant, by providing her with pertinent information and answering her queries to facilitate her and her daughters' reunion. They had thus at all times been closely involved in the situation. There was no evidence of child care services having been biased or having failed to act.

83. As to the decisions of the Lithuanian courts, which had had the benefit of direct contact with all the parties concerned, they had been reasonable and grounded. In reaching their conclusions the courts had thoroughly examined the family's situation: a great number of oral hearings had been held at first instance, the children had been listened to without parents present and numerous witnesses, including the applicant, E.B., psychologists, representatives of two child care services – which had more than once submitted various reports and conclusions – and the girls' school principal, had all been questioned. The courts had also relied on the conclusions of the forensic psychiatry experts and the Ombudsperson. For the Government, the courts thus had duly balanced the interests of the applicant and those of the children, which in the circumstances of the case overrode those of the parent.

84. In particular, the courts had had due regard to the children' wishes, who on as early as in June 2010 had unmistakably stated their preference to live with their father and had taken into account these wishes during all the proceedings at issue. The girls had also expressed this wish during the court hearing in the parents' absence, thus the courts could rely on personal impressions after having heard the children. The courts had also considered

environment as criteria – the girls had been used to living in their father's apartment. They had also attended school and after-school activities in Marijampolė, and had made friends there. They themselves had emphasised that a familiar environment was important to them. In contrast, the applicant's place of residence was ambiguous, whereas there was no evidence that the father had ever failed in his paternal duties.

85. The Government lastly stressed that Lithuanian court judgments concerning a child's place of residence could be reviewed at any time if the circumstances changed and it was in the best interests of the child.

86. In the light of the foregoing considerations, the Government were convinced that the Lithuanian authorities had taken all the necessary steps to facilitate the applicant's and her daughters' reunion and to respect her right to family life, as far as it could be reasonably demanded in the circumstances of this case, and had thus complied with their positive obligations under Article 8 of the Convention.

2. The Court's assessment

(a) Whether there was an interference

87. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII). In the instance case the Court considers – and this was acknowledged by the Government – that the non-enforcement of the court decisions for protective measures and those establishing the applicant's daughters should live with their father amounted to an interference with the applicant's right to respect for her family life, as guaranteed by Article 8.

88. Such an interference entails a violation of Article 8 unless it was "in accordance with the law", pursued an aim or aims that is or are legitimate under Article 8 § 2 and was "necessary in a democratic society" (see *W. v. the United Kingdom*, 8 July 1987, § 60, Series A no. 121).

(b) "In accordance with the law"

89. The Court observes that the interference had basis in domestic law, namely Article 4 § 1 of the Law on the Protection of Children's Rights and Articles 3.3 and 3.174 of the Civil Code, as well as in international law, namely the Convention on the Rights of the Child (see paragraphs 56 and 64 above; also see paragraph 104 *in limine* below).

(c) Legitimate aim

90. In the Court's view, the relevant legal acts are clearly designed to protect children and there is nothing to suggest that they were applied in the present case for any other purpose. The interference in question – intended as it was to safeguard the best interests of the applicants' daughters – had therefore, for the purposes of Article 8 § 2, the legitimate aims attributed to them by the Government (see also *Görgülü v. Germany*, no. 74969/01, § 37, 26 February 2004).

91. It therefore remains to be examined whether the authorities' inability to enforce the protective measure and transfer the girls to the applicant, as well as the making of the residence order in E.B.'s favour can be considered "necessary in a democratic society".

(d) "Necessary in a democratic society"

92. The applicant asserted that the Lithuanian authorities' failure to enforce the court decisions regarding protective measures had resulted in her being alienated from her daughters and eventually losing her custody rights. In the present case it is undisputed that following the Marijampolė District Court's ruling of 12 April 2010, upheld on appeal by the Kaunas Regional Court on 31 May 2010, setting out protective measures and granting custody of the girls in favour of the applicant pending the civil proceedings (see paragraph 11 above), the authorities were under a duty to take measures with a view to reuniting the applicant with her daughters. It is also clear that the steps actually undertaken did not lead to an effective reunion and that the courts eventually revised the custody arrangement and granted custody of the children to the applicant's former husband (see paragraph 45 above).

93. The fact that the authorities' efforts foundered does not, however, automatically lead to the conclusion that they failed to comply with their positive obligations under Article 8 of the Convention. The Court reiterates that the national authorities' duty to take measures to facilitate a reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned is always an important ingredient. Whilst the national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited, since the interests and the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention (see *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII; *Kosmopoulou v. Greece*, no. 60457/00, § 45, 5 February 2004). Furthermore, a change of relevant circumstances, insofar as it was not brought about by events imputable to

the State, may exceptionally justify the non-enforcement of a final child custody order (see *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 63, 24 April 2003).

94. The Court's task is therefore to determine whether the national authorities have taken all the necessary steps to facilitate a reunion as can reasonably be demanded in the special circumstances of the case. In so doing, it is not for the Court to substitute itself for the competent domestic authorities in regulating the dispute between the individuals involved, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretion. The Court must examine whether the reasons purporting to justify any measures taken are relevant and sufficient and, regard being had to the State's margin of appreciation, whether a fair balance was struck between the competing interests of the individual and the community, including other concerned third parties (see *Mihailova*, cited above, § 83, with further references).

95. The applicant has put much emphasis on parental alienation syndrome, which the girls developed against her when residing with their father (see paragraph 25 above). Without refuting that finding by the psychologists, the Court nevertheless takes notice of the first-instance court's conclusion that a very short time frame of seven days between the day when E.B. did not return the girls to the applicant and the girls already stating their preference not to return to their mother could not have cardinally changed the girls' view towards her (see paragraph 32 above). Even if one cannot exclude that within that short period the girls' views could have evolved, the Court cannot turn a blind eye to the fact that on as early as 10 June 2010, that is six days after E.B. did not return his daughters to the applicant, police assistance was offered to the applicant so that she could go to E.B.'s home and take the girls. Even so, the applicant did not avail herself of this opportunity to have the girls returned, but chose to place that burden on the bailiff's shoulders (see paragraph 13 above). This only confirms the Lithuanian authorities' argument that the applicant placed the task on the State and municipal institutions, instead of being proactive herself (see paragraphs 16 and 43 above).

96. As to the bailiff's failure to enforce the court order for protective measures, the Court considers that this was caused by objective reasons. The first attempt to hand over the girls failed because of their illness, a fact confirmed by the domestic court (see paragraph 47 above). The second attempt to hand over the girls did not produce results due to reasons attributable only to the applicant (see paragraph 48 above). Most importantly, the last and third attempt did not come to fruition because the applicant's daughters had clearly refused to leave their father's home, notwithstanding that the applicant was given an opportunity to talk to them alone, the authorities clearly having given her an opportunity to convince them to leave with her (see paragraph 49 above). The bailiff's subsequent

conclusion that physical force was not a measure to be used in such situations and that another method of enforcement was necessary to preserve the children's interests is tantamount to the Court's position that any obligation to apply coercion to facilitate the reunion of a parent and children must be limited (see *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A; *Z.J. v. Lithuania*, cited above, § 98, with further references). The Court lastly notes that the bailiff's conclusion was not challenged by the applicant (see paragraph 49 *in fine* above).

97. The Court also considers that the authorities, faced with the tense relationship between the parents, had a difficult task. Both the applicant and her former husband kept submitting numerous claims and counterclaims against each other (see paragraphs 7, 9, 10, 14, 18 and 21 above). The applicant even sought the involvement of the prosecution authorities, accusing her former husband of abusing their children, despite the fact that this was obviously unnecessary (see paragraphs 51 and 53 above). The parents' behaviour was therefore far from constructive.

98. Notwithstanding this, the Court has had occasion to hold that lack of cooperation between separated parents is not a factor 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 which, depending on their nature and seriousness, may override those of the parent (see *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 176, 27 September 2011).

99. In the instant case, the Court finds that the Lithuanian authorities' obligation to provide assistance in these highly conflictual proceedings was fulfilled. In fact, child care services, the Ombudsperson, the school and the domestic courts warned both parents a number of times that their interests should not triumph over those of the children (see paragraphs 15, 17, 19, 22, 34, 38 and 43 above). The psychologists from the Marijampolė service saw the girls twice (see paragraph 18 above). Child care services also assisted the courts as well as the applicant by making inquiries into the girls' living conditions at their father's home, answered the applicant's queries, made suggestions about how to enforce the court orders deciding the girls' place of residence was with their mother (see paragraphs 8, 12, 15, 16, 18, 41, 43, 46 and 49 above; contrast *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 112, ECHR 2000-I). Even though the applicant contested the impartiality of the Marijampolė service's conclusions and favoured those of the Kaunas service (see paragraph 73 above), the Court does not find the Government's explanation as to the eventual change in the Marijampolė service's view implausible (see paragraph 81 above). It also has regard to the Kaunas service's statement that because the girls lived in Marijampolė, the service did not know all the relevant circumstances about their lives (see paragraph 18 *in fine* above).

100. The school the girls attended in Marijampolė also placed at the parents' disposal the services of a psychologist (see paragraph 24 above). The principal encouraged the applicant to go to school and build up contact with her daughters, which seems particularly inviting (see paragraph 22 above). Indeed, the need for direct contact with her daughters and their right to be in direct contact with their parents had also been highlighted by the Ombudsperson (see paragraph 43 above).

101. It is also paramount that the first-instance court emphasised the need for contact between the applicant and the girls and decided to expand the contact order of its own motion so that the applicant could communicate with her daughters even more than she had asked in her civil claim (see paragraph 34 above). Above all, at no stage of the court proceedings was the applicant prohibited from being in contact with her daughters (see *Elsholz*, cited above, § 49, and *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I).

102. It is not for the Court to pass judgment as to why the applicant did not make much use of the possibilities provided to her by the Lithuanian authorities with a view to facilitating contact between her and her daughters. It can only note that her passivity as regards her contact with her daughters was established by the Lithuanian courts, their findings being based on an extensive examination of evidence provided by the girls' school and the child care authorities (see paragraphs 24, 30 *in limine*, 31, 39, 42, 43 and 45 above).

103. In the light of the foregoing, the Court finds that the Lithuanian authorities may not be reproached for having failed to perform their duty to assist the applicant, irrespective of her lack of cooperation (contrast *Zavřel v. the Czech Republic*, no. 14044/05, § 53, 18 January 2007). The Government's objection as to the applicant's failure to exhaust domestic remedies (see paragraph 68 above) must therefore be dismissed.

104. Having examined the Lithuanian courts' decisions as to the girls' custody rights, the Court also finds nothing to doubt that they were based on the best interests of the children (see paragraphs 32-34, 39, 40 and 45 above). The fact that the national courts relied on the conclusions and testimony of many different specialists (social services, psychologists and the school principal) is also of the utmost importance. Although the applicant challenged her former husband's moral values, the Lithuanian courts answered her queries (see paragraphs 39 and 45 above), and the Court sees no reason to call those findings into question. It further observes that although at the beginning of the custody proceedings the applicant lived in Lithuania, she later left for Germany (see paragraph 26 above). It shares the Lithuanian court's view that the applicant's place of residence, be it in Lithuania or in Germany, as such was not a decisive factor (see paragraph 33 above). What mattered was the uncertainty, which stemmed from the applicant's and her lawyer's untenable statements to the Lithuanian

courts, as well as to this Court (see paragraphs 30, 31, 33, 45, 39 and 76 above), as to where the applicant planned to live, that uncertainty evidently not being in the two girls' interests to have a stable place of residence (see paragraph 21 above). Indeed, it appears that the applicant had never returned to Lithuania in spite of her promise to the contrary (see paragraph 30 above). In this connection, the Court takes note of the applicant's statement that in October 2013 E.B. and the girls moved to Germany. However, this matter is not decisive for the Court, because that took place even after the custody proceedings in Lithuania had finished (see paragraphs 45 and 77 above). Furthermore, even if that information is accurate, the applicant's daughters are now even closer to her, because according to the information on the application form, the applicant also lives in Germany.

105. The Court has also consistently held that, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect for the interests safeguarded by that provision (see *W. v. the United Kingdom*, cited above, § 64; *Buscemi v. Italy*, no. 29569/95, § 58, ECHR 1999-VI; and *Elsholz*, cited above, § 52). In the instant case, the Court notes that the applicant, in person or through her lawyer, was present at a number of hearings where the protective measures and the merits of her civil claim were discussed by the Marijampolė District Court (see paragraphs 17, 20, 23, 28 and 30 above). With the benefit of assistance of the State-appointed lawyer, she had the opportunity to submit requests and evidence, present her arguments and comment on the other participants' submissions before the courts, both in writing and orally, and she also had the right to appeal. Eventually, at the end of the first-instance court proceedings the applicant herself acknowledged that all the evidence had been gathered and examined, asking the court to finish its examination of the evidence (see paragraph 27 above). Notwithstanding this, the first-instance court still deemed the applicant's participation indispensable to better establish the circumstances of the case, thus retaining its active role in the child care proceedings (see paragraphs 28 and 61 above). That being the case, the Court cannot but conclude that the applicant was thus placed in a position enabling her to put forward all arguments in favour of her being granted custody of the girls and she also had access to all relevant information relied on by the courts. In addition, the children themselves were heard by the court, the need to respect the views of the child having been underlined by the United Nations Children Rights' Committee (see paragraphs 20, 31, 39, 64 and 65 above; compare and contrast *Kutzner*, cited above, § 77). In these circumstances, and bearing in mind that as a general rule it is for the national courts to assess the evidence before them (see *Sahin v. Germany* [GC], no. 30943/96, § 73, ECHR 2003-VIII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 71, ECHR 2003-VIII

(extracts)), the Court is satisfied that the procedural requirements implicit in Article 8 of the Convention were complied with and that the applicant was involved in the decision-making process, seen as a whole, to a degree sufficient to provide her with requisite protection of her interests.

106. Finally, the Court observes that the Lithuanian courts have never concluded that the applicant was permanently barred from living with her daughters (see *Z.J. v. Lithuania*, cited above, § 105).

107. The Court reiterates its settled case-law stating that the State's obligations in relation to Article 8 are not of result but are of means (see *Pascal*, cited above, § 69, with further references). On the facts of this case, the Court cannot hold the Lithuanian authorities failed to make adequate and effective efforts towards the applicant's reunification with her daughters and thereby breached the applicant's right to respect for her family life.

There has consequently been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

108. The applicant also complained under Article 6 § 1 of the Convention about the written nature of the appeal proceedings before the Kaunas Regional Court and its decision not to examine supplementary evidence. The relevant part of this provision reads as follows:

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

A. The parties' submissions

109. The applicant claimed a violation of her right to a fair hearing, in that the Kaunas Regional Court had not admitted material related to her correspondence with her daughters for examination. The applicant submitted that she had learned about that evidence only after the time to lodge an appeal had passed. Furthermore, the Kaunas Regional Court and the Supreme Court ought to have been active and collected evidence themselves. However, they had not used their discretion, which had led to unfair and unfounded decisions.

110. The applicant was also dissatisfied that the Kaunas Regional Court had not held a hearing and had decided her case by way of written proceedings. She admitted to not having explicitly complained about the lack of an oral hearing before that court in her appeal on points of law. However, given that the Kaunas Regional Court in principle had had to solve the question of fact – which parent the girls were to live with – that question could not have been properly solved only on the basis of written material alone (the applicant relied on *Jucius and Juciuvienė v. Lithuania*, no. 14414/03, § 31, 25 November 2008). The applicant emphasised that she had never waived the right to an oral hearing. In her appeal on points of law

she had criticised the courts at the first two levels of jurisdiction for failing to assess the evidence in accordance with the best interests of the children. For the applicant, that was tantamount to her having criticised the Kaunas Regional Court for not having held a hearing.

111. The Government submitted that the applicant's complaints under Article 6 § 1 of the Convention were intrinsically linked to her complaint about her right to respect for family life, and thus did not merit a separate examination. The Government also pointed out that the applicant had not raised the issue of the absence of an oral hearing before the Supreme Court, and thus this complaint was inadmissible for failure to exhaust domestic remedies.

112. In the alternative, the Government pleaded that the Kaunas Regional Court had dismissed the applicant's request to introduce new evidence for reasons which were sound and fair. Having regard to the issues raised by the applicant in her appeal, those matters could adequately be resolved on the basis of ample written material gathered and examined by the first-instance court. The complaint about the fairness of proceedings before the Kaunas Regional Court was unfounded.

B. The Court's assessment

113. The Court notes that these complaints are closely linked to the complaint examined above and must therefore likewise be declared admissible. However, the essence of the merits of these elements has already been examined in detail and no violation of the applicant's right to respect for her family life has been established (see paragraph 107 above; also see, for a similar conclusion, *Jucius and Juciuvienė*, cited above, § 36). When examining the applicant's complaints under Article 8, the Court has also specifically found that her procedural rights have been respected (see paragraph 105 above). Consequently, the Court considers that it is not necessary to examine separately whether, in this case, there has been a violation of Article 6 § 1.

FOR THESE REASONS, THE COURT

1. *Joins to the merits*, unanimously, the Government's objections that the applicant's complaint under Article 8 of Convention is inadmissible for failure to exhaust domestic remedies, and dismisses them;

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

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

4. *Holds*, by five votes to two, that there is no need to examine the applicant's complaint under Article 6 § 1 of the Convention.

Done in English, and notified in writing on 19 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	András Sajó
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Sajó and Motoc is annexed to this judgment.

A.S.
F.A.

DISSENTING OPINION OF JUDGES SAJÓ AND MOTOC

We respectfully disagree with the majority's finding that there has been no violation of Article 8 in this case. Our position is that in the circumstances of the present case there has been a violation of Article 8.

The applicant's children were taken away by their father and the authorities did not take the necessary steps to return the children to their mother. In consequence, as recognised by the domestic authorities, the children came under the influence of their father, who turned them against their mother. The preference of the children determined the outcome of the custody issue. While the final judgment ordering that the children reside with their father cannot be considered to violate the Convention, the process itself shows that the domestic authorities failed to satisfy the positive obligations of the State to protect the children's best interests and the interrelated right of the mother and to execute domestic court orders, resulting in an irreversible violation of the applicant's right.

The process of alienation of the children from their mother is due to the failure of the authorities to execute the judgements which gave custody to the mother. We are not convinced by the reasons given by the authorities for not executing the judgments of the Kaunas Regional Court. On the basis of the facts we disagree with the assumption that there was a lack of proper activity on the mother's side. On the contrary, we find that the mother showed due diligence in her efforts to have the judgments executed and to maintain contact with the girls as much as was possible in the circumstances of the case. For instance, she went to their school several times and had a number of discussions with the school authorities about the two girls' schooling.

The domestic authorities reached their conclusion without taking into account the main psychological assessment, which shows that the children were suffering from parental alienation syndrome ("PAS"). In this respect the majority in the present case have not followed the case-law of the Court, especially as established in the Grand Chamber judgment of *Elsholz v. Germany* ([GC], no. 25735/94, ECHR 2000-VIII) and applied in *Kutzner v. Germany* (46544/99, ECHR 2002-I). In this sphere the Court's 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 were relevant and sufficient (see *Olsson v. Sweden (no. 1)*, 24 March 1988, § 68, Series A no. 130).

Moreover, in the present case the applicant's daughters did not show a very clear rejection of their mother (compare and contrast *Elsholz*). As mentioned in the partly dissenting opinion of Judge Ress in *Sommerfeld*

v. Germany ([GC], no. 31871/96, ECHR 2003-VIII (extracts)) "parental alienation syndrome" ("PAS") is a matter for consideration (see, for example, Richard A. Gardner in the *American Journal of Forensic Psychology* under the title "Should courts order PAS children to visit/reside with the alienated parent? A follow-up study" (2001, pp. 61-106) as referred to by the partly dissenting judges in *Sommerfeld v. Germany* (ibid.). This is a matter that is receiving an increasing amount of attention and the consideration of Gardner's parental alienation syndrome in the domestic proceedings has been considered as relevant and important by this Court in at least a dozen cases. Courts should address the question whether the parental alienation syndrome is present and what specific consequences such a syndrome could have on the child's development. The authorities have a positive obligation to prevent the development of that syndrome and they should not have tolerated the conditions which in the circumstances of the present case led to the development of that syndrome.

By proceeding in the manner in which they did, the members of the Chamber favoured a factual situation created by an illegal state of affairs and therefore gave priority to the facts and not to the law.