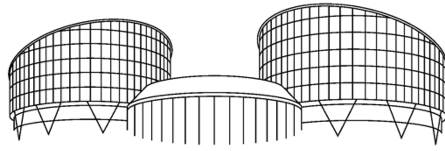

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF A AND OTHERS v. ICELAND

(Applications nos. 25133/20 and 31856/20)

JUDGMENT

Art 8 • Family life • Decision depriving parents of custody of their two children due to inability to properly care for them and children's wishes to remain in foster care, within State's margin of appreciation • Decision not based on sexual abuse charges of which the father was acquitted • Children's best interests of paramount importance in domestic decision-making • Reliance on extensive evidence and assessments from professionals • Less restrictive measures initially attempted • Sufficient diligence • Proceedings accompanied by adequate procedural safeguards • Impugned measure not irreversible but open to review • Contact between mother and children maintained

STRASBOURG

15 November 2022

FINAL

15/02/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of A and Others v. Iceland,

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

Georges Ravarani, *President*,
Georgios A. Serghides,
Robert Spano,
Darian Pavli,
Anja Seibert-Fohr,
Andreas Zünd,
Frédéric Krenc, *judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the applications (nos. 25133/20 and 31856/20) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Icelandic nationals, Mr A, Ms B, Ms X, and Mr Y ("the applicants"), on the various dates indicated in the appended table;

the decision to give notice to the Icelandic Government ("the Government") of the complaints concerning the right to respect for private and family life and to declare inadmissible the remainder of the applications;

the decision not to have the applicants' names disclosed;

the parties' observations;

Having deliberated in private on 18 October 2022,

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

INTRODUCTION

1. The present case concerns the first and second applicants' loss of custody of their two children, the third and fourth applicants, after the first applicant was prosecuted and acquitted of sexual abuse of the children.

THE FACTS

2. The first and second applicants were born in 1979 and 1976 respectively and live in Reykjavik. The first applicant was represented by Mr Jóhannes Ásgeirsson, a lawyer practising in Reykjavik. The second applicant was represented by Ms Þorbjörg I. Jónsdóttir, a lawyer practising in Reykjavik. The third and fourth applicants, who are the daughter and son of the first and second applicants, were born in 2008 and 2011 respectively.

3. The Government were represented by their Agent, Mr Einar Karl Hallvarðsson, State Attorney General.

4. The facts of the case may be summarised as follows.

I. INITIAL EVENTS

5. The first and second applicants are married and have two children together: a girl, X, the third applicant, and a boy, Y, the fourth applicant.

6. In October 2015 X's school notified the relevant municipal child protection committee ("the Committee") that X had, on her own initiative, confided in a teacher, describing domestic violence and worries about her mother and brother. X had also drawn a picture, showing how her father had petted her and her brother on their "private parts" and been somewhat "confused" with his hands. The teacher in question was a special education teacher with whom X had had therapy to deal with anxiety, increase her confidence and teach her to deal with her thoughts and feelings. When asked if she had previously wanted to confide in the teacher, X answered in the affirmative and stated that she hadn't dared to say anything sooner because then she hadn't known that her father was "getting confused". On a scale of 1 to 10, the girl answered that her father had "got confused" at a rate of 5 – often, but not very. When asked about a black part of her drawing, X explained "It's this – this is the penis which entered my vagina". The notification sent to the Committee by the school furthermore indicated that Y had also been harassed by the children's father.

7. The case was reported to the police on the same day. The first applicant was called in for questioning, arrested and placed in pre-trial detention for four days.

II. THE CHILDREN'S TESTIMONY DURING THE INVESTIGATION

8. After their father's arrest, X and Y were interviewed at the Children's House (*Barnahús*).

9. At her first interview at the Children's House in October 2015, X initially said she did not remember that her father had done anything wrong to her or that she had told the above-mentioned special education teacher about it. X was then asked to provide an explanation about the picture she had drawn (see paragraph 6 above). X explained that the drawing was of a girl, but she did not know if it was her, her friend or someone else, and that the girl in the drawing was crying. Thereafter, X burst into tears and was so devastated that it was necessary to take a break. When the interview restarted, X cried even more, shrugged her shoulders repeatedly and gave no direct answers as to whether her father had sexually abused her or her brother.

10. At her second interview at the Children's House in December 2015, X described how her father had touched her "private parts" with his penis and said that she was worried about her brother.

11. At her third interview at the Children's House in August 2016, X described how her father had touched her "private parts" with his finger and applied cream to them, and also touched her "private parts" with his penis. X

again expressed concern for her brother and said that she wanted him to live with her and her foster mother (see paragraphs 16-18 below) so that he would be safe from his father. During the interview, X wrote down "what dad had done" because "it was so hard to say".

12. At his first interview at the Children's House in October 2015, Y was asked if his father had touched his "tummy", his penis or his behind, and he shook his head in response to all of those questions.

13. After Y moved to a foster home in September 2016 (see paragraph 19 below), his foster mother signalled to the Committee that he suffered from urinary and bowel problems and that, when asked, he had told her that it was a secret that his father had applied cream to his genitals, and that his mother was not to be told. The Committee reported this to the police.

14. At his second interview at the Children's House in September 2016, Y said that his father had rubbed his penis and applied cream to it and also inserted a finger into his rectum. According to Y, his father had said that Y's mother must not be told.

III. INITIAL CHILDCARE MEASURES

15. At the beginning of the investigation into the case, childcare workers visited the family's home. According to their report, the home was in great disorder and the children were very badly cared for.

16. At the time, the second applicant was being treated for depression and anxiety at a rehabilitation centre. She agreed that the children should be temporarily placed outside the home for a period of a few weeks. When that temporary placement came to an end in December 2015, the children returned to the care of their mother, their father having moved out of the family home by then. According to the eventual Supreme Court judgment in the case, at that point, a plan for the further handling of the case was then drawn up, in accordance with which the children, especially X, should not have contact with their father while the criminal investigation was underway, except for some limited contact at Christmas and New Year. The first applicant objected to that finding in the Supreme Court's judgment, submitting that the only written plan in the case had made no mention of him. The Government acknowledged that instructions regarding the restriction of the first applicant's contact with the children had not been included in the written plan, but that the domestic courts had nevertheless found that such instructions had been given, on the basis of multiple witness statements.

17. During this time, the second applicant received various forms of assistance and counselling, had supervision at her home, agreed to unannounced visits by childcare workers and declared that she was willing to cooperate for the benefit of X. On 12 January 2016 a psychologist at the Children's House reported worries about the children's situation to the Committee. The report noted that X was in contact with the first applicant

and did not have support from the second applicant, and that owing to this situation, the counselling sessions which X was having were not likely to be effective. In conversations with a childcare worker and school staff at the time, the second applicant indicated that she considered that the suspicions of abuse were based on a misunderstanding, and that the school had overreacted in reporting these suspicions.

18. On 3 February 2016 the Committee ruled that X should be placed in temporary foster care (see paragraph 54 below) outside the family home for a period of two months. That ruling was confirmed by the Reykjanes District Court on 16 March 2016, which later granted an application to extend the placement by another six months. That extension decision was upheld by the Supreme Court on 19 May 2016. During X's temporary placement outside the family home, she had contact with the second applicant and Y once a week, for two hours at a time, under supervision.

19. In August 2016 the second applicant removed Y from nursery school and moved their legal domicile to another municipality. Owing to information indicating that Y was having extensive contact with the first applicant, on 1 September 2016 the Committee ruled that the boy should be removed from the home and placed in the same foster home as X, for an initial period of two months. A few days after that foster care placement began, the foster mother told the authorities about Y's problems, as well as what he had said about his father (see paragraphs 13-14 above). The Committee reported this to the police. The Committee also held a meeting with the first and second applicants about Y's issues, where the first and second applicants maintained that even though the first applicant could not reside in the family home during the investigation, their relationship was solid and their previous ideas about divorce had been misguided.

20. On 7 November 2016 a psychologist submitted a report to the Committee at its request, evaluating the second applicant's ability to have custody of X and Y. The report concluded that she lacked sufficient ability to have custody of the children, citing, *inter alia*, her negligence, indications that there had been possible violence, her emotional and interpersonal problems, and her decision to allow the first applicant to remain in the home and pressure X to change her statement, rather than side with her children and protect them. The psychologist found that there would be a considerable risk if the children were returned to the second applicant's care, and recommended that they remain in foster care, having contact with her under strict supervision.

21. On 22 November 2016 a psychologist at the Children's House wrote to the Committee, answering questions which it had asked about the course and status of X's treatment. The letter relayed the main points from X's three interviews at the Children's House, noting in particular that her description of events had been the same in her last interview in August 2016 as it had

been in her interview with the special education teacher in October 2015, and subsequently in conversations with her foster mother.

22. When the Committee did not submit an application to extend Y's foster placement before the expiry of the placement period, it decided that Y should be made subject to an emergency placement in the same foster home where he was already living. That emergency measure was approved by the Reykjanes District Court by a ruling on 22 December 2016, and the placement was extended by six months.

23. In December 2016 the Committee similarly decided that X's placement in the foster home should be extended, and that measure was approved by the Reykjanes District Court on 13 March 2017, thus the placement was extended by six months.

24. On 23 May 2017 the same psychologist at the Children's House wrote a statement regarding X's treatment. It stated that X was happy in her foster home and trusted her foster parents; that X was afraid of the first applicant because of the alleged sexual offences and fearful of his treatment of Y; and that the second applicant was sometimes "confused", referring to her allegedly having violent tendencies. It was reported that X had attended a total of twenty-two interviews at the Children's Home since 2 February 2016, and her well-being, behaviour and manner had changed drastically, in that she was no longer as withdrawn and shy as she had been at the start.

25. In spring 2017 a social worker was appointed as X and Y's spokesperson (see paragraph 53 below). After meeting with X six times, the spokesperson wrote a report to the Committee on X's wishes for her future situation: X wished to live with her foster parents "until she became a teenager" and was satisfied with both siblings having contact with their mother every two weeks. X had stated that Y should not have contact without her because she feared that the second applicant would hit him, although when asked, X said that she had neither seen such a thing nor heard her brother speak about it.

26. On 8 June 2017 two social workers submitted a report to the Committee in which they found that neither parent was fit to care for the children. The report proposed that the first and second applicants be deprived of custody by a court order.

27. On 28 June 2017 the spokesperson (see paragraph 25 above) wrote two reports on the interviews she had had with X and Y respectively, on the topic of their views on contact with the second applicant. According to the reports, X wished to continue to meet her mother every two weeks, together with her brother, but did not trust the second applicant alone with Y. Y wished to continue to see his mother together with his sister, but wanted contact to take place more often. Y wanted to continue living with the foster parents. Y had said little during the interviews and had stated that it was difficult to talk about the subject matter.

IV. CRIMINAL PROCEEDINGS AGAINST THE FIRST APPLICANT

28. As stated above (see paragraph 7), the first applicant was called in for questioning on 26 October 2015, arrested and placed in pre-trial detention for four days. He was questioned by police again on 29 October 2015, 22 December 2015 and 30 August 2016. He has always denied committing sexual offences against the children.

29. On 15 March 2017 an indictment was issued against the first applicant, charging him with sexual offences against X and Y. Firstly, he was accused of having, between ten and twenty times, inserted his penis into X’s genitals while she lay in her bed at night when she was six to seven years old, or from 2014 until the end of October 2015. Secondly, he was accused of having once, when Y was four or five years old, rubbed the boy’s penis in the bathroom of their home, and having inserted a finger into his rectum in the bedroom shortly afterwards.

30. By a judgment of 22 November 2017, the Reykjanes District Court acquitted the first applicant of all charges.

31. The district court found that the first applicant’s guilt had not been established beyond reasonable doubt, noting that he had consistently denied committing any sexual offences against his children, and that his testimony had not been lacking credibility. As regards the alleged offences against X, the district court noted that X’s statements about the events had not been entirely consistent, and that no other evidence collected, including the results of medical examinations and evidence collected in the family home, supported her testimony that her father had molested her. As regards the alleged offences against Y, the district court noted that Y’s testimony had not been consistent and that the alleged offences against him were not supported by any evidence other than the two children’s testimony.

32. The prosecution did not appeal against the district court’s judgment, and so the first applicant’s acquittal became final.

V. PROCEEDINGS TO DEPRIVE THE FIRST AND SECOND APPLICANTS OF CUSTODY

33. On 4 July 2017, prior to the delivery of the district court’s judgment in the criminal proceedings, the Committee concluded that the first and second applicants were not able to have custody of their children and that it would demand that they be deprived of custody by a court (see paragraph 54 below). An action to that effect was lodged with the Reykjavik District Court on 22 September 2017.

34. During the proceedings, the court appointed a psychologist to assess the parents’ ability to have custody of the children and the children’s situation. In a report dated 12 May 2018, the assessor noted that the children’s assertions that “something had happened” had been consistent, and the

psychologists who had interviewed the children had found that their statements concerning the treatment which they had allegedly suffered at the hands of their father were credible. The assessor found that the parents' ability to have custody was lacking, although the extent of that was difficult to assess owing to the children's placement in long-term foster care, and that there were signs of neglect in the care and upbringing of the children by their parents. Moreover, the report stated that the second applicant had become uncooperative with the childcare authorities prior to the acquittal judgment being rendered, that she had enabled a considerable amount of contact to take place between the children and their father, and that she had been untruthful to the childcare authorities in that regard. The assessor noted that both children had expressed a clear preference for remaining in the care of the foster parents, with whom they had formed a deep bond and with whom they experienced security and warmth. He found that the move to the foster home and the limited contact had resulted in further weakening of the children's bond with their parents, but noted that there were indications that that bond had not been as strong as normal to begin with. Reports by parties involved in the children's schooling and treatment demonstrated that both children were doing much better since being placed in foster care. Both children were genuinely afraid of their father. X expressed decisively that she thought it was not a good idea for her to live with her father, and her relationship with her mother seemed to be impaired. Y described a positive relationship with his mother, but said that when he had lived with her she had sometimes hurt him, and his father had as well. Neither child expressed a wish to live with the mother in the future, indicating that the prospect made them feel insecure. The assessor found it likely that the mother's mental distress had affected her ability to care for the children properly, and that despite the father's acquittal, the children still experienced fear and insecurity in relation to his possible presence. Because they did not feel safe with their father, and because their mother took his side, she was also unable to create an environment in which the children felt safe and secure.

35. By a judgment of 16 July 2018, the Reykjavik District Court allowed the Committee's application to deprive the first and second applicants of custody of the children. The first and second applicants appealed against that judgment to the Court of Appeal, which, in a judgment of 1 March 2019, quashed the judgment for procedural irregularity and remitted the case to the district court.

36. By a new judgment of 6 June 2019, the Reykjavik District Court again allowed the Committee's application to deprive the first and second applicants of custody of the children. The panel was composed of two professional judges and a psychologist, who served as a lay judge.

37. In its judgment, the district court relied on the report of the court-appointed assessor (see paragraph 34 above), statements by the children and other witnesses before the court, and documentation available in the case. The

district court found that the child protection authorities' proceedings had been lacking in several respects, including as regards a failure to properly pursue the maintenance of the connection between the second applicant and the children, and treating the first applicant's alleged sexual offences as if his guilt had been proven before a judgment in the criminal proceedings had been delivered. However, on the merits, as regards the first applicant, the district court found that the criteria in points c and d of section 29(1) of the Child Protection Act were fulfilled (see paragraph 54 below); regardless of his acquittal and the actual events that had taken place, both children had repeatedly described his behaviour towards them and expressed fear of him, and it had in any event been sufficiently proven that he was incapable of safeguarding the children's health and welfare. As regards the second applicant and her custody of X, her limited capabilities as a guardian and her failure to properly react to the situation in the family satisfied the criteria in points a and d of section 29(1) of the Child Protection Act. As regards the second applicant and her custody of Y, the district court found that the criteria in point d of the provision were fulfilled, considering Y's profound mistrust and fear of his mother and her history of looking to the first applicant for support, which would create a risk for Y if he were placed in her care once again. The court moreover referred to section 33(2) of the Child Protection Act (see paragraph 54 below) and the children's undeniable interests in not being separated, and found that, as matters stood, no less intrusive measures were possible.

38. The first and second applicants appealed against that judgment to the Court of Appeal, which overturned the district court's decision by a judgment of 1 November 2019. The panel was also composed of two professional judges and a psychologist, who served as a lay judge.

39. In its judgment, the Court of Appeal found that the Committee had erred in failing to reconsider its position on the matter of custody following the first applicant's acquittal in the criminal proceedings; instead, and in the light of his right to be considered innocent until proven guilty, the Committee should at that time have drawn up a new plan for dealing with the case and scheduling the children's contact with their parents, one or both of them, with the goal of reuniting the family, unless that were considered impossible owing to the children's interests. The Court of Appeal also found that there were conflicting reports concerning the children's wishes in the case, and that owing to their young age and the long-standing foster care placement, their wishes could not be given determinative weight. Ultimately, the Court of Appeal considered that the Committee had failed to demonstrate that it had not been possible to apply other measures less intrusive than permanent deprivation of custody after the first applicant's acquittal, in order to protect the family and the children's interests.

40. The Committee sought leave to appeal against the Court of Appeal's judgment to the Supreme Court, which granted the request. By a judgment of

10 March 2020, the Supreme Court overturned the Court of Appeal's decision, ruling to deprive the first and second applicants of custody of both children.

41. In its judgment, the Supreme Court criticised the Court of Appeal's judgment in several respects, including for entirely ignoring the report of the court-appointed assessor; for not giving reasons for its conclusion that there were "conflicting reports" concerning the children's statements and their wishes; for inaccurately concluding that X's October 2015 interview had given no information about the first applicant's alleged sexual offences; and for concluding on an insufficient basis that the children's wishes and statements had been influenced by others during their time in foster care, which, the Supreme Court noted, was contrary to the court-appointed assessor's explicit conclusion that there were no signs of indoctrination of the children in this regard. Lastly, the Supreme Court criticised the Court of Appeal for not hearing the children a second time in person, as had been requested by the Committee, but rather relying on its interview with them which had taken place eight months prior to the rendering of its November 2019 judgment.

42. Despite finding these faults with the Court of Appeal's judgment, the Supreme Court did not consider it viable to quash its judgment and remit the case for a fresh examination, in the light of the time-sensitive nature of the case and the children's interests.

43. The Supreme Court echoed the finding of the district court and the Court of Appeal that there had been certain deficiencies in the procedure before the Committee, but ultimately found that those deficiencies were not decisive in the assessment of the merits of the case.

44. On the matter of the first applicant's acquittal, the Supreme Court stated that, in the light of the facts of the case and the principles which should guide all decisions in childcare matters (see paragraph 53 below), his acquittal in a criminal case, when measured against the high standard of proof applicable to such cases, could not be determinative in the childcare proceedings. On the contrary, the facts of the childcare case had to be assessed in the light of the children's best interests and the applicable childcare rules and principles. This, the Supreme Court found, did not violate the right to be considered innocent until proven guilty.

45. With respect to the first applicant, with reference to the case documents and in particular the court-appointed assessor's report, the Supreme Court found it clearly established that both children had a severe fear of him, and that their health and development were likely to be at risk if they were in his care owing to his behaviour, which was likely to cause them serious harm within the meaning of point d of section 29(1) of the Child Protection Act (see paragraph 54 below).

46. With respect to the second applicant's custody of X, with reference to the case documents and the court-appointed assessor's report, the Supreme

Court found it established that her capabilities as a person with custody were limited, despite her efforts to improve. Her apparent neglect of the children was not, in the court's view, sufficient in and of itself to justify deprivation of custody. However, the very poor relationship between the second applicant and X, X's mistrust of the second applicant, X's repeated and unequivocal statements indicating that she wished to remain in the care of her foster parents, the second applicant's failure to react properly to the difficult position which X was in, and the fact that the second applicant was, and intended to remain, married to the first applicant, rendered point d of section 29(1) of the Child Protection Act applicable to the second applicant's custody of X as well.

47. With respect to the second applicant's custody of Y, the Supreme Court found that his position was somewhat different: Y had wished to remain with his foster parents but have more contact with his mother, and perhaps live with her. However, Y had also described severe mistrust towards his mother concerning her contact with the first applicant, whom Y feared. Moreover, it had been the court-appointed assessor's conclusion, supported by documentation, that it was in the children's best interests not to be separated, as was also provided for by section 33(2) of the Child Protection Act, and that this was their clear wish. In the light of this, and the children's fear that the second applicant would not provide them with the protection and support they needed because of their fear of the first applicant, the Supreme Court found that the second applicant should also be deprived of custody of Y on the same legal basis.

VI. CURRENT SITUATION OF X AND Y

48. Following the Supreme Court's judgment depriving the first and second applicants of custody of X and Y, custody of the children passed to the Committee and they remain in the foster home where they have lived since 2015. Under section 65 of the Child Protection Act, they are in permanent foster care, which entails the arrangement continuing until duties of guardianship cease under the law, although the measure may be reversed (see paragraph 54 below).

49. In December 2020 the Committee ruled on X and Y's contact with the second applicant, which was to take place four times a year for six hours at a time, around holidays and birthdays. In addition, Y should have one additional six-hour contact session with the second applicant, provided that he was willing to go without his sister. The contact would initially be supervised, but supervision would cease if the contact went well. The children's maternal grandmother should have the opportunity to take part in the mother's contact, in consultation with the mother. The Committee also ruled that the first applicant should have no contact with either of the children. In August 2021 that ruling was confirmed by the Welfare Appeal Committee.

50. In December 2020 the Committee also agreed to allow the children's paternal grandmother to have contact with X and Y twice a year, for two hours at a time. The first applicant was not to be present during contact.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

51. Article 71 of the Icelandic Constitution establishes a right to respect for private, home and family life. Paragraph 3 of Article 76 provides that the law must guarantee to children the protection and care necessary for their well-being.

52. Iceland has ratified the United Nations Convention on the Rights of the Child, which has been incorporated into national law in its entirety, along with its two optional protocols, as Act no. 19/2013.

53. The Child Protection Act no. 80/2002 sets out the framework for child protection work. Under section 1, children have a right to protection and care, and must enjoy their rights with due regard for their age and maturity. Under section 2, the aim of the Act is to ensure help for children living in unacceptable circumstances and children who place their health and development at risk. That aim must be pursued by strengthening families in their roles in bringing up children, and applying measures to protect individual children where applicable. Under section 4, the best interests of the child must be of paramount importance in child protection work, and child protection authorities must take account of children's views and wishes in accordance with their age and maturity. Child protection work must promote stability during childhood, seeking to maintain good cooperation with children and parents and maintaining consistency and equality. To the extent possible, general measures to support families must be applied before other steps are taken, and the least intrusive measure possible to achieve the legitimate aim pursued must be employed. Under section 33(2), common solutions must be employed for siblings where possible, in accordance with their needs and interests. Under section 46, a spokesperson can be appointed for a child in respect of whom a child protection investigation is initiated. Under section 47, parties to a child protection case must have the opportunity to express their views prior to a child protection committee's ruling, including with the aid of legal counsel, for which parties can be granted legal aid by the committee.

54. The Child Protection Act moreover provides as follows:

Section 29
Loss of custody

"A child protection committee may take court action for a parent or parents to be deprived of custody if the committee considers:

a. that daily care, upbringing or relations between parent and child are grossly defective, taking account of the age and maturity of the child,

...

c. that the child is mistreated, sexually abused or subjected to gross mental or physical harassment or humiliation in the home,

d. that it is certain that the child's physical or mental health or his or her maturity is at risk because the parents are clearly unfit to have custody, owing to, for instance, drug use, mental instability or low intelligence, or that the behaviour of the parents is likely to cause the child serious harm.

Deprivation of custody shall only be sought if it is not possible to apply other and less drastic measures for improvement, or if such measures have been tried without satisfactory results.

..."

Section 34
Review of arrangements

"...

If a parent ... has been deprived of custody under section 29, the parent, or a child aged 15 or older, may instigate court proceedings ... for the court order on deprivation of custody to be quashed, and for the parent to be granted custody ... once more.

An action under the second paragraph will only be allowed if such a change is deemed justified owing to changed circumstances, if it does not disrupt the stability of the child's upbringing, and if it takes account of the child's interests and needs. If a parent has been deprived of custody, legal action may only be taken if at least twelve months have passed since a final court order was last made.

..."

Section 65
Foster care

"...

Foster care may be of two kinds, permanent or temporary. 'Permanent foster care' entails the arrangement continuing until duties of guardianship under the law cease. The foster parents generally undertake duties of guardianship unless some other arrangement is deemed by the child protection committee to better serve the needs and interests of the child. A contract on permanent foster care shall not generally be concluded until after a trial period, which shall not exceed one year. 'Temporary foster care' entails the arrangement lasting for a limited time, when it can be expected that the situation may be improved so that the child will be able to return to his or her parents without substantial disruption of his or her personal circumstances, or when another remedial measure is expected to be available within a limited time. Temporary foster care shall not last a total of more than two years, save in absolutely exceptional cases when it serves the interests of the child.

The objective of foster care under the first paragraph is to ensure a child's upbringing and care within a family, in keeping with his or her needs. Good conditions shall be ensured for the child with the foster parents, and they shall treat the child with care and consideration, and seek to promote the child's mental and physical development. The

rights and obligations of foster parents shall be further specified in a foster care agreement.

...”

Section 74
Contact during foster care

“A child has a right to contact with his or her parents and others with whom he or she has a close relationship. Contact entails time spent together and other [forms of] communication.

Parents have a right to contact with their child in foster care, unless this is clearly contrary to the child’s interests and needs and incompatible with the objectives of the placement in foster care. In making this assessment, the estimated duration of the foster care placement should be taken into account, among other things. Those who consider themselves to have a close relationship with the child have the same right to contact with the child, provided that this is deemed beneficial for the child. A child who is 15 years or older may make his or her own application for contact.

When a child is placed in foster care, the child’s contact with parents and others with whom he or she has a close relationship shall be decided, taking account of what best serves the child’s interests. Should an agreement be reached, the child protection committee shall draw up a written agreement with those who are to have contact. ...

The child protection committee is empowered to rule on disputes regarding a child’s contact with parents and others with a close relationship to the child, [and] concerning the right to contact, the scope of contact rights and contact agreements. If, owing to special circumstances, the child protection committee is of the view that contact with the parents is contrary to the child’s interests and needs, it may rule that the parents shall not have contact rights. The child protection committee may also rule that others who consider themselves to have a close relationship with the child shall not have contact rights, if the committee believes that the requirements of the second paragraph are not met.

Those who are to have contact with the child may request changes to the agreement on contact rights. If it is not possible to reach an agreement on such changes, the child protection committee shall make a ruling.

Those who are to have contact with the child may demand that a child protection committee review its prior ruling on a contact right. The child protection committee is not obliged to deal with such a demand unless at least twelve months have passed since the prior ruling was rendered ...

A child protection committee may rule that a child’s place of residence be kept secret, for example *vis-à-vis* the parents, if necessary in the interests of the child.

Those who are expected to exercise contact rights may appeal against rulings under this section to the Welfare Appeals Committee.”

II. RELEVANT INTERNATIONAL LAW MATERIAL

55. The international law material relevant to the present case has been enumerated in *Strand Lobben and Others v. Norway* [GC], no. 37283/13, §§ 134-139, 10 September 2019.

THE LAW

I. JOINDER OF THE APPLICATIONS

56. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The first and second applicants complained that the loss of custody of their children had violated both their and their children's right to respect for their private and family life within the meaning of Article 8 of the Convention, which, in so far as relevant, reads 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Locus standi

58. The first and second applicants' initial applications indicated that they considered the deprivation of custody to have violated both their and the children's right to respect for their family life, although separate applications were not submitted on behalf of the children. Both the first and second applicants were specifically asked to address the issue of the children's rights separately, as well as their own *locus standi* to bring complaints on their behalf.

59. The first applicant did not address the issue of the children's rights in his observations, but stated that "although the case has to do with the right of the parents, it is our conviction that unifying the family will also be in the children's best interest".

60. The second applicant submitted that she had *locus standi*, and that despite her loss of custody of the children, she had a right under domestic law (see section 34 of the Child Protection Act, paragraph 54 above) to make applications in cases regarding them.

61. The Government submitted that the first and second applicants were not the children's legal representatives under domestic law, and that although that was not determinative for their *locus standi* to bring complaints on their behalf before the Court, there was additionally a conflict of interest between the parents and the children, which prevented the former from representing the interests of the latter. Moreover, the Government submitted that the

parents had not submitted separate application forms on behalf of the children.

62. The Court reiterates that it is necessary to avoid a restrictive and purely technical approach with regard to the representation of children before the Convention institutions; in particular, consideration must be given to the links between the child in question and his or her "representatives", to the subject matter and the purpose of the application and to the possibility of a conflict of interests (see *Moretti and Benedetti v. Italy*, no. 16318/07, § 32, 27 April 2010; see also *S.D., D.P., and T. v. the United Kingdom*, no. 23714/94, Commission decision of 20 May 1996, unpublished). In the context of Article 8 of the Convention, the Court has on several occasions accepted that parents who did not have parental rights could apply to it on behalf of their minor children (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, §§ 138-39, ECHR 2000-VIII), the key criterion for the Court in these cases being the risk that some of the children's interests might not be brought to its attention, and that they would be denied effective protection of their Convention rights (see, *mutatis mutandis*, *Lambert and Others v. France* [GC], no. 46043/14, § 94, ECHR 2015 (extracts)). However, where an application has been lodged before it by a biological parent on behalf of his or her child, the situation may nonetheless be that the Court identifies conflicting interests between parent and child (see *Strand Lobben and Others*, cited above, § 158).

63. In the light of the submissions of the first applicant, the Court considers that he does not seek to represent the children. As regards the second applicant, the Court considers that the matter of her *locus standi* to bring the present complaints on behalf of the children before the Court is closely linked to the merits of the complaint (see *E.M. and Others v. Norway*, no. 53471/17, § 36, 20 January 2022). It therefore joins the Government's preliminary objection in this regard to the merits.

2. Exhaustion of domestic remedies

64. The Government submitted that the first and second applicants had failed to exhaust domestic remedies, as their submissions before the domestic courts had not sufficiently referred to Article 8 of the Convention.

65. The first and second applicants contested this submission, noting that both the Court of Appeal and the Supreme Court had addressed Article 8. Moreover, the first applicant submitted that he had referred to Article 8 before the domestic authorities, and that the provision had been implicitly invoked in the case from the beginning. The second applicant submitted an overview of her oral submissions presented before the Supreme Court, which referred, *inter alia*, to Article 8 of the Convention.

66. The Court reiterates that in order to be considered to have exhausted domestic remedies, an applicant must raise her or his complaint "at least in substance" at domestic level, in a manner which affords the national courts

the opportunity to redress the alleged breach (see, among many authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 75, 25 March 2014).

67. The Court is satisfied that the applicants' complaint concerning family life was sufficiently raised at domestic level to afford the national courts the opportunity to redress the alleged breach of Article 8.

68. The applicants' complaint is therefore not inadmissible for failure to exhaust domestic remedies. The complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The first applicant

69. The first applicant complained that the measures taken by the Committee had been excessive, and that it had wrongfully taken the criminal proceedings against him into account when deciding on the necessary measures, despite his acquittal. He submitted that no evidence had been provided to prove the accusations of negligence on the part of the parents, and that a failure by the childcare authorities to respect their procedural obligations, such as regular visits and the creation of contact schedules, had resulted in erosion of the relationship between the parents and the children, which had in turn been used to justify the deprivation of custody.

70. Moreover, the first applicant submitted that the children's wishes had not been demonstrated to have related to anything other than the accusations relating to the charges of which he had been acquitted, and so could not be used to justify the deprivation of custody. He submitted that the initiation of the investigation in 2015 had been based on the report of a special education teacher who had had no specialist training in dealing with alleged sexual offences, and that X had never repeated her first description of events in subsequent interviews. He alleged that X's attitude towards him had become negative only when she had been removed from the family home, and had possibly been influenced by the foster parents. The first applicant also alleged that the children's loyalty to the foster parents might have affected their wishes.

71. Furthermore, the first applicant submitted that the current contact arrangement was overly restrictive, entirely depriving him of any right to see the children and granting only limited contact rights to the grandparents.

(b) The second applicant

72. The second applicant submitted that her and her children's right to respect for private and family life had been interfered with, and that that

interference had been excessive, as the childcare authorities had not demonstrated that less restrictive measures could not suffice to address the problems identified. The childcare authorities had failed to work with the second applicant within the home and to reunite the family as soon as possible, and had not taken sufficient account of the difficult position which she had been in when her husband had been charged with sexual offences against the children. Furthermore, the second applicant submitted that the limited contact she had been allowed with the children had had a detrimental effect on their relationship, and that the limitation had been without objective reasons. The actions taken by the childcare authorities had had the gravest impact on the children, as they had been isolated from their family, and priority should have been given to biological bonds in determining their best interests.

(c) The Government

73. The Government acknowledged that the measures taken had constituted an interference with the first and second applicants' right to respect for their family life.

74. The Government submitted that the interference had been in accordance with the law, namely point d of section 29(1) of the Child Protection Act (see paragraph 54 above).

75. The Government reasoned that the interference had pursued the legitimate aims of protecting health or morals, and protecting the rights and freedoms of the children, X and Y.

76. The Government moreover submitted that the interference had been necessary and had struck a fair balance between the conflicting interests of the parents and the children, ensuring that the best interests of the children had been given paramount importance in all domestic decision-making. The Government noted that the first and second applicants had been given the opportunity to express their views at all stages of the proceedings, had been represented by lawyers throughout, and that the proceedings had been accompanied by adequate procedural safeguards.

77. The Government referred to the findings of the Supreme Court as to the necessity of depriving both parents of custody of both children. The available evidence had clearly indicated that both parents lacked the ability to care for the children, that the children had a real fear of their father, and that they mistrusted their mother and her ability to protect them from him. Both children had consistently stated that they preferred to stay together, and with their foster parents. There was no evidence that the children's opinions had been influenced by their foster parents or by the childcare authorities. Less invasive measures other than deprivation of custody had been attempted over a period of two years before deprivation of custody had been sought, including the provision of support for the children and the mother, and the children's reintegration into the family home in December 2015. None of the

less invasive measures had sufficed to protect the well-being of the children, and so deprivation of custody had become necessary. That measure had been taken while taking into account the children's wishes in accordance with their age and maturity.

78. The Government emphasised that updated reports and information on the children's situation had been available at all stages of the proceedings. The Government also pointed out that despite their criticism of the report of the court-appointed assessor, the first and second applicants had not applied for a reassessment (*yfirmat*).

79. Lastly, the Government pointed out that deprivation of custody was a less severe measure than the children's adoption by the foster parents, as the former measure was reversible (see paragraph 54 above).

2. *The Court's assessment*

(a) General principles

80. The general principles applicable to the right to respect for family life in situations involving the separation of parents and children have been summarised in *Strand Lobben* (cited above, §§ 202-213).

(b) Application of those principles to the present case

(i) Whether there was an interference

81. The parties agree that the measures taken to remove X and Y from the first and second applicants' custody constituted an interference with the first and second applicants' right to respect for their family life. The Court sees no reason to find differently. Moreover, the Court finds that it cannot be called into question that the measures also interfered with the third and fourth applicants' right to respect for their family life. There has therefore been an interference with the right to respect for family life as guaranteed by Article 8 of the Convention.

(ii) Whether the interference was in accordance with the law

82. The Court notes that the basis for the deprivation of custody was clearly established in domestic law (see paragraph 54 above). The Supreme Court found in its judgment that despite procedural defects in the initial handling of the case by the childcare authorities, of which the first and second applicants have complained, the conditions for deprivation of custody were nevertheless fulfilled. The Court sees no reason to find otherwise. The interference was therefore in accordance with the law.

(iii) Whether the interference pursued a legitimate aim

83. The Court is satisfied that the interference with the applicants' right to respect for their family life sought the legitimate aim of the protection of health and morals and the rights of others.

(iv) Whether the interference was necessary in a democratic society

84. In a case such as the present one, domestic authorities are faced with interests that are often difficult to reconcile, namely the interests of the child and those of his or her birth parents (see *Haddad v. Spain*, no. 16572/17, § 58, 18 June 2019). In the pursuit of a balance between these different interests, the child's best interests must be a primary consideration (see *Moretti and Benedetti*, cited above, § 67; *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, §§ 287-8, 8 April 2021; and *Strand Lobben*, cited above, § 204). Moreover, a margin of appreciation must necessarily be afforded the domestic authorities in finding that balance (see *Strand Lobben*, cited above, § 211).

85. At the outset, regarding the first applicant's challenges to the facts as established by the domestic courts (see paragraphs 69-70 above), the Court reiterates that where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts, and as a general rule it is for those courts to assess the evidence before them.

86. The Court considers that the Supreme Court did not base its decision to deprive the first and second applicants of custody on a finding that the allegations against the first applicant were true, as the first and second applicants submitted. On the contrary, the Supreme Court recognised the final binding force of the first applicant's acquittal, but noted that that acquittal alone could not be determinative with regards to the outcome of the childcare proceedings. It proceeded to carry out an assessment of the facts of the case and the available expert evidence, without any further reference to the criminal proceedings against the first applicant or any allegedly criminal behaviour on his part.

87. Making criminal convictions conditional upon a high standard of proof and interpreting doubt in this regard in favour of the defendant is both an integral part of the Convention and the European legal tradition. However, that same high standard of proof, in general, does not, and in some cases should not, apply outside the context of criminal proceedings. In the case of child protection, the task of childcare authorities is to prospectively evaluate risks to children's best interests, not elements of criminal guilt. In that assessment, authorities should not be required to prove criminal negligence or endangerment beyond reasonable doubt in order to justify taking measures to protect children from harmful situations (see, for example, *L. v. Finland*, no. 25651/94, § 127, 27 April 2000). A conclusion to the contrary would

severely undermine the authorities' capability to discharge their positive obligation to protect children's lives and welfare (see, among many authorities, *A and B v. Croatia*, no. 7144/15, §§ 106-113, 20 June 2019, and *X and Others v. Bulgaria* [GC], no. 22457/16, §§ 176-192, 2 February 2021). Taking account of all the facts of the case in order to determine the children's best interests was therefore a reasonable decision by the domestic authorities, which might otherwise have been considered remiss in their duties to protect the best interests of the children.

88. The Court notes that the Committee does not appear to have reconsidered its position regarding the application for deprivation of custody in the light of the first applicant's acquittal (see *Haddad*, cited above, §§ 59-60). However, unlike the situation in *Haddad*, the decision to deprive the first and second applicants of custody was not based on the allegations of sexual abuse in respect of which the first applicant had been acquitted in the criminal proceedings. On the contrary, that decision was based on a large number of reports, assessments and witness statements, many of which were obtained after the conclusion of the criminal proceedings against the first applicant, and independently of those proceedings. In particular, considerable weight was given to the report of the court-appointed assessor (see paragraph 34 above), which was based on interviews with the parents, the children, staff at the children's school, the foster parents and the children's psychologists; psychological assessments of the parents; and observations of the children during contact sessions with the second applicant and the foster parents. That report was obtained after the conclusion of the criminal proceedings. The findings of the report (see paragraph 34 above), which the first and second applicants did not seek to have overruled by way of a reassessment, were that their parental abilities were lacking, that they were unable to care for the children in a manner that protected their sense of security and well-being, and that the children clearly wished to remain with their foster parents. Those findings were further supported by other expert reports.

89. The Court notes that the Supreme Court criticised the Court of Appeal for failing to hear the children in person again before rendering its judgment, relying instead on its interview with the children which had taken place eight months earlier, and for drawing unreasonable conclusions from that interview which ran counter to the conclusion of the report of the court-appointed assessor and numerous other reports in the case (see paragraph 41 above). However, domestic civil procedure does not provide for the hearing of witnesses before the Supreme Court, and so the Supreme Court itself did not hear the children in person. That fact was explicitly taken into account by the Supreme Court, which noted that despite this, the importance of resolving the issue without further delay, in the interests of the children, who at that point had been in a situation of uncertainty for a considerable amount of time, justified not quashing the Court of Appeal's judgment, but rather overturning

it on the merits. The Court finds that the conclusion was reasonable and sufficiently reasoned, and within the member State's margin of appreciation. Moreover, the fact that the children were not heard in person by the highest court was offset by new documents being adduced as evidence before the Supreme Court – documents which were obtained after the rendering of the Court of Appeal's judgment, including new reports from the children's spokespersons, the childcare authorities, the children's school, and the children's hospital, dated between November 2019 and February 2020. The Supreme Court's March 2020 judgment was therefore based on recent expert reports (see, *a contrario*, *Strand Lobben*, cited above, § 222). Similarly, the Reykjavik District Court's initial judgment was rendered merely two months after the report of the court-appointed assessor had been submitted, although the proceedings before the first and second-instance courts were delayed by the quashing of the district court's first judgment on procedural grounds (see paragraphs 35-37 above).

90. The Court appreciates that the present case involved a balancing exercise between competing interests in a very complex and delicate situation. In such situations, where it has been shown that domestic authorities acted with sufficient diligence, obtained and relied on relevant evidence and assessments from professionals, and gave the best interests of the children involved paramount importance, the Court would need strong reasons to substitute its own assessment for that of the authorities.

91. The Court is conscious of the intricate interplay of the family relationships involved, and considers that the domestic authorities were entitled to give weight to the siblings' interests in not being separated from one another, and to have regard to the mother's continued marriage to, and eventually apparent support of, the father.

92. Prior to seeking deprivation of custody, the domestic authorities made several attempts to take less restrictive measures (see *Strand Lobben*, cited above, § 211, and the sources cited therein). Attempts were made to temporarily remove the children from the home, provide support to the second applicant, and reintegrate the children into the home (see paragraphs 16-17 above). Thus, the domestic authorities explored the possibility of less restrictive measures prior to seeking deprivation of custody. Although there were certain deficiencies in the procedure before the Committee (see paragraph 43 above), the Court accepts that the initial childcare measures and subsequent proceedings for deprivation of custody, taken as a whole, demonstrated sufficient diligence on the part of the authorities. The proceedings for deprivation of custody were moreover accompanied by adequate procedural safeguards, where each parent was represented by counsel and a spokesperson was appointed for the children (see *Strand Lobben*, cited above, § 207).

93. Unlike the situation in *Strand Lobben* (cited above), the present case does not concern an irreversible measure of adoption of the children away

from their biological parents. Deprivation of custody, although in principle a permanent measure, may be reviewed at the request of the parents or the children after twelve months (see paragraph 54 above). Thus, in the event of a change in circumstances, custody could be regranted to one or both of the parents if that were considered to be in the children's best interests. The second applicant enjoyed contact rights with the children during the proceedings, and despite the deprivation of custody, she continues to do so, as do the children's grandmothers (see, *a contrario*, *Scozzari and Giunta*, cited above, § 170). As to the first applicant's contention related to him not being afforded contact rights (see paragraph 71 above), the Court reiterates the findings of the Supreme Court. That court found it clearly established that both children had a severe fear of the first applicant, and that their health and development were likely to be at risk if they were in his care owing to his behaviour, which was likely to cause them serious harm within the meaning of point d of section 29(1) of the Child Protection Act (see paragraph 45 above). Therefore, the Court considers that the national authorities were entitled to take the view that the first applicant should not enjoy contact rights with his children.

94. As regards the second applicant's standing to complain on behalf of the two children, a question joined to the merits (see paragraph 63 above), the Court reiterates that where an application has been lodged with it by a biological parent on behalf of his or her child, the situation may nonetheless be that the Court identifies conflicting interests between parent and child (see paragraph 62 above). The Court considers that in the circumstances of the present case, such a conflict of interest may clearly arise. It should moreover be noted that at domestic level, a spokesperson was appointed for the children in the proceedings (see paragraphs 25 and 27 above). That representative spoke with the children in person and gave evidence before the domestic courts (see *E.M. and Others*, cited above, §§ 63-65).

95. The Court therefore concludes that the Government's preliminary objection is well-founded and that the second applicant's complaints on behalf of the children are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a), and must be rejected pursuant to Article 35 § 4.

(v) Conclusion

96. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities acted within their margin of appreciation in finding that it was necessary to deprive the first and second applicants of custody in order to protect the legitimate interests at stake.

97. There has accordingly been no violation of the first and second applicants' right to respect for their family life.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications:

2. *Joins to the merits* the Government's objection to the second applicant's standing to lodge the application on behalf of the third and fourth applicants and *upholds* it;

3. *Declares* the complaint under Article 8 of the Convention admissible in so far as it concerns the first and second applicants and the remainder of application no. 31856/20 inadmissible;

4. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 15 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Georges Ravarani
Registrar	President

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by	Anonymity and Notes
1.	25133/20	A v. Iceland	19/06/2020	**A** 1979 Reykjavik Icelandic	Jóhannes ÁSGEIRSSON	Anonymity granted
2.	31856/20	B and Others v. Iceland	13/07/2020	**B** 1976 Reykjavik Icelandic **X** 2008 Icelandic **Y** 2011 Icelandic	Þorbjörg Inga JÓNSDÓTTIR	Anonymity granted