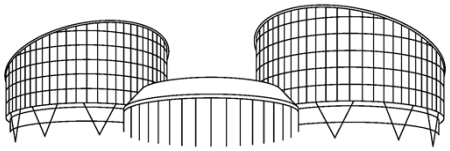

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF A.M. AND OTHERS v. RUSSIA

*(Application no. 47220/19)*

JUDGMENT

| |
|---|
| Art 8 • Family Life • Restriction of applicant's parental rights and deprivation of contact with her children on gender identity grounds • Domestic courts' failure to conduct in-depth examination of entire family situation and of relevant factors • Predominant reliance on psychiatric expert findings without close scrutiny despite absence of supporting scientific research on transgender parenthood and demonstrable harm to children • Lack of balanced and reasonable assessment of competing interests<br>Art 14 (+ Art 8) • Discrimination on gender identity grounds • Lack of convincing and sufficient reasons for difference in treatment *vis-a-vis* parents whose gender identity matched sex assignment at birth |

STRASBOURG

6 July 2021

**FINAL**

22/11/2021

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

**In the case of A.M. and Others v. Russia,**

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

Paul Lemmens, *President,*
Dmitry Dedov,
Georges Ravarani,
María Elósegui,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 47220/19) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national Ms A.M. ("the applicant") on her own behalf and on behalf of her children, Mr M.M., and Ms K.M. on 4 September 2019;

the decision to give notice to the Russian Government ("the Government") of the complaints concerning Article 8 § 1 and Article 14 of the Convention and to declare the remainder of the application inadmissible;

the decision not to have the applicant's name disclosed;

the decision to give priority to the application (Rule 41 of the Rules of Court);

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by Transgender Europe jointly with ILGA Europe, by Human Rights Watch and by the Human Rights Centre of Ghent University, all of which were granted leave to intervene by the President of the Section;

Having deliberated in private on 1 June 2021,

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

# INTRODUCTION

1. The present case concerns the restriction of the applicant's parental rights in respect of her children and her being deprived of contact with them. The applicant alleged that her gender identity and the fact that she had undergone gender transition had played a crucial role in that restriction, even though there had been no evidence before the courts that her contact with the children would be harmful for their psychological health and development.

# THE FACTS

2. The applicant and her children are Russian nationals residing in Moscow. The President of the Section has decided, under Rule 47 § 4 of the Rules of Court, not to disclose their identities to the public.

3. The applicant was represented by Ms T. Glushkova and Mr D. Khaymovich, lawyers practising in Moscow.

4. The Government were represented initially by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr A. Fedorov.

5. The facts of the case, as submitted by the parties, may be summarised as follows.

6. The applicant, Ms A.M., was born in 1972. She is a post-operative transgender woman (male-to-female transgender person). She was born genetically and phenotypically male and her gender was registered as "male" in her birth records. She currently identifies herself as female.

7. The applicant brought the application on her own behalf and on behalf of her biological children. Mr M.M., who was born in 2009, and Ms K.M., born in 2012.

## I. EVENTS PRECEDING THE RESTRICTION OF THE APPLICANT'S PARENTAL RIGHTS

8. On 18 July 2008 the applicant, whose gender at that time had been officially recorded as "male", married Ms N.

9. In February 2015 the applicant formally donated an apartment, where the family resided at the time, to Ms N.

10. In June 2015 the marriage between the applicant and Ms N. was dissolved. Under the agreement between the former spouses, the children stayed with Ms N. and the applicant agreed to pay a monthly allowance to the children.

11. On 31 July 2015 the Lyublinskiy District Court of Moscow legally recognised the applicant's transition from the male to the female gender. On the basis of that judgment, the applicant was issued with new identification documents with her gender recorded as "female".

12. Until December 2016 the applicant regularly visited the children and spent time with them. During the visits she presented herself as male and wore men's clothes, since otherwise Ms N. would have objected to the visits.

13. From December 2016 onwards Ms N. started refusing visits from the applicant. In January 2017, following a complaint by the applicant, Ms N. was interviewed by the social services. The letter notifying the applicant of that interview stated the following:

> "... During the interview [with Ms N.] it was established that she categorically objects to your contact with underage children, since in her opinion it causes them psychological harm. She was advised [of the applicable legal provisions] which specify that parents have equal rights and equal duties in respect of underage children (parental rights); a parent residing separately has a right to visit them, take part in their upbringing and make [educational choices]. [Ms N. was informed of the available mediation procedures] ..."

## II. RESTRICTION OF THE APPLICANT'S PARENTAL RIGHTS

14. On 9 January 2017 Ms N. initiated judicial proceedings aimed at restricting the applicant's parental rights. She stated in her submissions that the applicant had been diagnosed with "transsexualism", a mental health disorder, and had then undergone a transition from the male to the female gender, and had rarely had contact with the children after that. In Ms N.'s opinion these developments (1) had caused irreparable harm to the mental health and morals of the children, (2) could distort their perception of family, (3) could lead to an inferiority complex and bullying at school, and (4) could expose them to information on "non-traditional sexual relations", such information being prohibited from distribution to minors.

15. In her submissions in reply the applicant argued that she had never refrained from exercising her parental obligations, that she paid allowances to the children and that she had maintained close contact with them until Ms N. had started obstructing it. She further maintained that under domestic law, a parent could be restricted in the exercise of parental rights only if that parent lived together with a child and put the child in danger. In the applicant's opinion, none of these conditions were satisfied in her case. She also lodged a counterclaim asking the courts to set rules on visiting rights and communication between the parents.

16. On 14 June 2017 the Lyublinskiy District Court of Moscow ordered a forensic psychiatric, sexological and psychological assessment of the first, second and third applicants. The District Court considered it appropriate for the assessments to be carried out by experts from the Serbskiy Institute, a leading psychiatric research and care facility in Russia, and compiled a list of detailed questions.

17. The experts of Serbskiy Institute examined in detail the applicant's and her children's medical and family histories and sociological profiles and conducted relevant tests and interviews.

18. In their reports dated 24 October 2017 the experts stated in respect of the children that the information about the applicant's gender transition would have a negative impact on them. The experts referred to the following relevant factors: the age of the children, the significance of gender identification and the role of parents in the development of such identification, societal pressure and the complexity of the family situation. They further noted that (1) currently there was a lack of research on the

upbringing of children in families where one of the parents had undergone gender transition, (2) the available studies concluding that there was no negative impact were methodologically inadequate, and (3) currently there were no reliable psychotherapeutic strategies for managing the impact of a parent's gender transition on children. The experts concluded that disclosure of the information on the father's gender transition would induce a pronounced long-term traumatic impact on the children's mental health.

19. In their report dated 18 and 20 December 2017 the experts confirmed the applicant's diagnosis and stated the following:

> "... Given the degree of manifestation of feminine characteristics in [the applicant] and her principled inability to preserve a male appearance; the insufficient consideration by her of the age-related specificities of the children's development; her expressed intention to communicate with the children as a 'transgender woman' and a 'parent' coupled with the provision to them of information on [the gender transition]; the low degree of critical assessment of the effects of [the transition] on the children's mental health; the developmental and individual characteristics of [her son] and the developmental characteristics of [her daughter]; and the social and psychological factors linked to gender transition ..., at the present moment contact between [the applicant] and [her children] and information on the gender transition would have a negative impact on their mental health and development. ... [T]his negative impact will be produced not by the individual and psychological profile of [the applicant] or her parenting style, but by the anticipated reaction of the children to their father's gender transition (given the available research data on age-related aspects of gender identity development in children and the findings of the present assessment) ..."

20. On 16 and 19 March 2018 the municipal social services issued formal opinions on the matter and concluded that the restriction of the applicant's parental rights was reasonable given the social and individual circumstances of gender transition and the findings of the experts.

21. On 19 March 2018 the Lyublinskiy District Court of Moscow held a hearing, examined the above expert findings and the social services' opinions, and heard the parties and character witnesses.

22. On the same day the District Court adopted a judgment, pursuant to Articles 65 and 73 of the Family Code (see paragraph 31 below), restricting the applicant's parental rights and dismissing her counterclaim. The relevant part of the judgment read as follows:

> "...
>
> The court, in taking the decision to restrict Ms A.M.'s parental rights ..., is guided solely by the interests of the children and their psychological and mental health and does not call into question the feelings of Ms A.M. as a loving parent. [The court] considers that by itself, [Ms A.M.'s] disorder – transsexualism – is not a ground for restricting her parental rights, but the resulting changes to Ms A.M.'s personality and the disclosure of information on [the father's gender transition] will create long-term psychotraumatic circumstances for the children and produce negative effects on their mental health and psychological development. [This position is confirmed by the expert findings.]
>
> ...

> The court, in taking the decision to restrict Ms A.M.'s parental rights and dismiss her counterclaim ..., is guided by the established facts demonstrating that communication between Ms A.M. and her children is impossible at the present moment. At the same time, the court notes the continuous nature of family relations. As the children grow older and the level of their mental development changes, the issue of contact between [Ms A.M.] and the children should be re-examined and visiting rights reconsidered in a manner ensuring the gradual adjustment of the children to the father's gender transition, while preserving their psychological and mental balance. At the present moment, given the age-related characteristics of the children, establishing such contact is unreasonable, since it would have a negative impact on mental health and psychological development ..."

23. The applicant sought an alternative expert assessment by a private psychiatrist, which was conducted between 25 April and 3 May 2018. The report, which was compiled after the hearing at first instance had taken place, concluded that transsexualism presented no danger to the children and could not be an obstacle to their upbringing. It stated that (1) the applicant had expressed a cautious and constructive approach in contact with the children; (2) she was not suffering from any mental disorder, and that "transsexualism" as a medical diagnosis was not included in the list of disorders precluding a person from bringing up children; and (3) there was no reliable research proving that a transgender parent raising children could have an impact on their sexual orientation or gender identity. The report asserted that the conclusions of the forensic medical assessment of 18 and 20 December 2017 were not reasoned or reliable, since the conclusions about the probable negative impact of transsexual parents on children's development were based solely on one study, which had been highly criticised by scholars, and ignored numerous studies proving otherwise. The report concluded:

> "Therefore, it has to be admitted that the experts' conclusions about the negative impact of information about gender transitioning on the psychological development or/and psychological health of the minors (Mr M. and Ms K.) are irrelevant and unscientific in nature and cannot serve as a basis for recognising the report on the expert examination of Ms A. as scientifically reasoned."

24. The applicant lodged an appeal with the Moscow City Court. During an appeal hearing, she sought the inclusion of the expert's report of 3 May 2018 in the case file, but her request was dismissed since, according to the domestic court "nothing [had] precluded the party from providing the evidence during the first-instance proceedings".

25. On 16 June 2018 the applicant's appeal was dismissed. The City Court agreed with the first-instance court's conclusions and noted that the negative impact of the applicant's contact with the children on their psychological health and development had been sufficiently proven, and that the applicant had not provided any evidence in support of the possibility and necessity of maintaining that contact.

26. The applicant's subsequent cassation appeals were dismissed on 1 February 2019 by the Moscow City Court and on 4 March 2019 by the Supreme Court of the Russian Federation.

### III. FURTHER DEVELOPMENTS

27. According to the applicant, on an unspecified date Ms N. changed her place of residence with the children and the applicant has no information about where the children now reside. At present, she is deprived of any opportunity to receive information about their lives and health.

28. On 24 September 2019 the applicant complained to the social services, asking them to provide information about the place of residence of her children. On 23 October 2019 she received a letter in which she was informed that the social services did not have the relevant credentials for locating the children.

29. The applicant submitted a request to the Department of Labour and Social Protection of the Population of Moscow, which also responded that it had no information regarding the children's current place of residence.

## RELEVANT DOMESTIC LAW

30. The relevant part of the Constitution of the Russian Federation states the following:

**Article 38**

"1. Maternity and childhood and the family shall be protected by the State.

2. The care and upbringing of children shall be both the right and the obligation of parents ..."

31. The Family Code of 1995 lays down comprehensive regulations on matters pertaining to the exercise of parental rights and in its relevant parts states the following:

**Article 65. Exercise of parental rights**

"1. The exercise of parental rights shall not be in contradiction with the children's interests. Providing for the children's interests shall be the primary purpose of the parents' care.

While exercising parental rights, parents shall not have the right to inflict harm on the physical and psychological well-being of children, or on their moral development. The methods of children's upbringing must exclude neglectful, cruel, rude or degrading treatment, insults or exploitation of the children.

Parents exercising parental rights to the detriment of the children's rights and interests shall be held responsible in accordance with the procedure prescribed by law ..."

**Article 73: Restriction of parental rights**

"1. A court may, taking into account the child's interests, decide to remove a child from the parents or one of the parents (restriction of parental rights) without depriving them of their parental rights.

2. Restriction of parental rights shall be allowed where leaving the child with the parents or one of the parents is dangerous for the child on account of circumstances outside the control of the parents or one of the parents, [such as] a psychiatric disorder or other chronic illness, a combination of difficult circumstances, or other reasons.

Restriction of parental rights is also possible in cases where leaving a child with the parents or one of the parents is dangerous for the child on account of their conduct, but sufficient grounds for depriving the parents or one of the parents of their parental rights have not been established. If the parents or one of the parents do not change their conduct within six months after the court decision restricting parental rights, the custody and guardianship authority shall be under an obligation to lodge an application with a court for the parents to be deprived of their parental rights. Acting in the interests of the child, the authority may lodge the application for the parents to be deprived of their parental rights before the expiry of the above-mentioned term.

3. An application for restriction of parental rights may be lodged by close relatives of the child, as well as by bodies and agencies entrusted under law with protection of minors' rights ... [as well as educational agencies or a prosecutor] ..."

**Article 74: Consequences of restriction of parental rights**

"1. Parents whose parental rights are restricted by a court shall lose the right to personally bring up the child, and also the right to privileges and State allowances granted to persons with children.

2. Restriction of parental rights shall not relieve parents of the duty to support the child financially.

3. A child whose parents or one of whose parents have had their parental rights restricted shall retain the right of ownership of any accommodation or the right of residence, and shall also retain property rights based on his or her affiliation with the parents and other relatives, including the right to inherit ..."

**Article 75: Contact with parents whose parental rights have been restricted by a court**

"Parents whose parental rights have been restricted by a court may maintain contact with the child, unless this has a negative impact on the child. Such contact shall be permitted with the consent of the custody and guardianship authority, or with the consent of the child's guardian (trustee), of the child's foster parents or of the administration of the facility where the child is placed."

**Article 76: Lifting a restriction of parental rights**

"1. If the grounds on which one or both parents' parental rights have been restricted cease to exist, the court may, at the request of one or both parents, return the child to one or both parents and lift the restrictions under Article 74 of the present Code.

2. The court, taking into account the child's opinion, may refuse the request if the child's return to one or both parents is contrary to his or her interests."

32. On 14 November 2017 the Plenum of the Supreme Court of the Russian Federation adopted Ruling no. 44 on the practice of application by

the courts of the legislation in disputes concerning the protection of rights and legal interests of a child at risk of immediate danger to life or health, as well as in cases concerning restriction or deprivation of parental rights. The relevant part of the Ruling states as follows:

> "11. When deciding on the restriction of parental rights, the court has to proceed from the nature and level of severity [of such a restriction], as well as the possible consequences for the child's life and health, [in order to decide whether the child may] remain with his parents or one of them, and also has to consider other [relevant] circumstances ..."

# RELEVANT INTERNATIONAL MATERIAL

## I. UNITED NATIONS DOCUMENTS

### A. The United Nations (UN) Convention on the Rights of the Child

33. Article 3 of the Convention on the Rights of the Child, adopted in 1989 by the UN General Assembly and ratified by Russia in 1990, provides as follows:

> "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.
>
> ..."

34. Article 9 provides, in so far as relevant, as follows:

> "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.
>
> ...
>
> 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."

### B. UN Committee on the Rights of the Child General Comment no. 14 (2013)

35. In its General Comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3,

paragraph 1), adopted on 29 May 2013 (CRC/C/GC/14), the UN Committee on the Rights of the Child stated, in particular:

> "1. Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 3, paragraph 1, as one of the four general principles of the Convention for interpreting and implementing all the rights of the child, and applies it [as] a dynamic concept that requires an assessment appropriate to the specific context ..."

### C. UN Human Rights Committee International Covenant on Civil and Political Rights General Comment No. 17 (1989)

36. In its General Comment no. 17 (1989) on Article 24 of the International Covenant on Civil and Political Rights, which concerns the rights of the child, adopted on 7 April 1989, the UN Human Rights Committee stated, in so far as relevant:

> "6. ... If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents ..."

## II. COUNCIL OF EUROPE DOCUMENTS

### A. Resolutions and recommendations by the Parliamentary Assembly

37. In its Resolution 2048(2015) on discrimination against transgender people in Europe, the Parliamentary Assembly raised the problem of discrimination that transgender people face in Europe, and stated in particular:

> "The Parliamentary Assembly regrets that transgender people face widespread discrimination in Europe. This takes a variety of forms, including difficulties in access to work, housing and health services, and transgender people are frequently targeted by hate speech, hate crime, bullying and physical and psychological violence. Transgender people are also at particular risk of multiple discrimination. The fact that the situation of transgender people is considered as a disease by international diagnosis manuals is disrespectful of their human dignity and an additional obstacle to social inclusion."

38. Resolution 2048(2015) also called on member States, concerning legal gender recognition, to "ensure that the best interests of the child are a primary consideration in all decisions concerning children".

39. In its Resolution 2239(2018) on private and family life: achieving equality regardless of sexual orientation, the Parliamentary Assembly called on Council of Europe member States to:

> "4.5. protect the rights of parents and children in rainbow families, without discrimination based on sexual orientation or gender identity, and accordingly:

> 4.5.1. in line with the case law of the European Court of Human Rights, ensure that all rights regarding parental authority, adoption by single parents and simple or second-parent adoption are granted without discrimination on the grounds of sexual orientation or gender identity ...”

### B. Recommendations by the Committee of Ministers

40. In its Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers, acknowledging that the child’s best interests should be the primary consideration in decisions regarding the parental responsibility for a child, recommended that member States “ensure that such decisions are taken without discrimination based on sexual orientation or gender identity”.

## THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant complained under Article 8 of the Convention that the restriction of her parental rights in respect of her children had not been necessary in a democratic society and, therefore, had violated their right to respect for family life. The relevant provision of the Convention reads as follows:

> “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### A. Admissibility

42. The present application was lodged by the applicant on her own behalf and on behalf of her children. The Government did not contest the applicant’s standing to bring the complaint on behalf of her children.

43. The Court observes that the instant case concerns a dispute about contact rights between the applicant and the children’s mother, the latter having full custody of the children. The Court reiterates that conflicts concerning parental rights other than custody do not oppose parents and the State on the question of deprivation of custody where the State as holder of custodial rights cannot be deemed to ensure the children’s Convention rights. In cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child’s interests.

In these situations, the position as natural parent cannot be regarded as a sufficient basis to bring an application on behalf of a child (see *Sahin v. Germany* (dec.), no. 30943/96, 10 December 2000; *Moog v. Germany*, nos. 23280/08 and 2334/10, §§ 39-42, 6 October 2016; and *K.B. and Others v. Croatia*, no. 36216/13, §§ 109-10, 14 March 2017). Having regard to its case-law on the matter and the specific circumstances of the present case, the Court concludes that the present complaint insofar as it has been lodged on behalf of the applicant's children must be rejected under Article 35 § 3 (a) and 4 of the Convention.

44. In so far as this complaint has been lodged by the applicant on her own behalf, it is neither manifestly ill-founded nor inadmissible on any grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## B. Merits

### *1. Submissions by the parties*

#### (a) The applicant

45. The applicant contested the Government's argument regarding the possible review of the domestic courts' decisions in the future, pointing out in particular that (1) the domestic courts had not provided any time frame or conditions under which the applicant could seek a review of the judgment restricting her rights, and (2) neither the domestic courts nor the experts in their reports had specified why the information about her gender transition would be less harmful for the children if they received it at an older age. The applicant also pointed out that they had continuously stated in the domestic proceedings that the above-mentioned expert report had lacked scientific evidence supporting its findings and had relied exclusively on a single academic paper, which had been highly criticised in the academic community, did not concern the raising of children by a transgender parent and thus was irrelevant to the applicant's situation. The applicant argued that the State had breached its positive obligation to maintain and restore, if necessary, the relationship between children and their biological parents, and that the interference with her family life had been neither proportionate nor necessary in a democratic society.

#### (b) The Government

46. The Government contested the applicant's arguments and reaffirmed that the domestic courts had duly placed the children's best interests at the heart of their decisions. The Government reiterated that according to the clinical assessment of 18 and 20 December 2017, information about the applicant's gender transition would have a prolonged harmful effect on the children's psychological health and development. They argued that those

considerations showed that the domestic courts, when deciding on the restriction of the applicant's parental rights, had been guided by the children's best interests, the protection of their rights and their healthy personal development. At the same time, the Government asserted that while contact with the applicant would currently be contrary to the children's interests, the decision on the restriction of the applicant's parental rights could be reconsidered in the future.

**(c) The third parties**

47. The third parties Transgender Europe and ILGA Europe jointly submitted, citing multiple studies, that scientific research had conclusively disproved concerns about children adopting the gender behaviour or gender identity of their transgender parents, and about the negative impact on their developmental milestones. Studies had proved that protective processes such as family continuity and communication could help children to avoid the feeling of "loss" after their parent's transitioning. At the same time, other variables, such as the age of the children (younger children being arguably more accepting), the relationship between the parents and social stigma, could make the adaptation process more difficult. The third parties suggested that decisions on child custody or the parental rights of a transgender parent should be based on an individualised analysis, rather than on negative perceptions and "myths" about transgender parents.

48. The third party Human Rights Watch, relying on the Court's case-law, the General Comments of the Committee on the Right of the Child and the Human Rights Committee (see paragraphs 33-36 above) and academic research, submitted that decisions on custody and contact should take into account the child's best interests and should afford considerable protection to children's rights to preserve their family relations, ensuring that their enjoyment of those rights was free from arbitrary interference.

49. A further third party, the Human Rights Centre of Ghent University, submitted that when assessing the "harm" to the child's development due to contact with the parents, any bias had to be identified and rejected. Such bias specifically occurred when a parent's gender transition or gender identity was in itself considered a source of likely "harm". On that account, the reasoning for determining the child's best interests should be subject to a scrutinised assessment "unpacking any bias that might have infiltrated that reasoning". The third party noted that in exceptional circumstances, contact with a parent might prove to be harmful to the child, but the States had a positive obligation to assess the least restrictive means available to reach a solution that protected the child and preserved parental contact. They suggested that it was necessary to assess the measures the State authorities had taken to assist the family in mitigating any risk of harm, considering the importance of such assistance in view of the challenges trans people faced in adjusting to their role following disclosure and social gender transition.

*2. The Court's assessment*

**(a) General principles**

50. The relevant general principles concerning interference with the right to respect for family life have recently been summarised by the Court in *Strand Lobben and Others v. Norway* (cited above, §§ 202-11) and in *Petrov and X v. Russia* (no. 23608/16, §§ 98-102, 23 October 2018).

**(b) Application of the above-mentioned principles to the present case**

51. The Court finds it unequivocally established that the decisions given by the domestic courts in the proceedings instituted by Ms N. on 9 January 2017 (see paragraph 14 above) constituted an interference with the applicant's right to respect for her family life under Article 8 § 1. It is also undisputed by the parties that those decisions were taken in accordance with the law, namely Articles 73-76 of the Family Code (see paragraph 31 above), and pursued legitimate aims, namely the "protection of health or morals" and of the "rights and freedoms" of the children. Therefore, it remains to be determined whether the interference was "necessary in a democratic society".

52. There is no disagreement between the parties that in the present case, the domestic courts restricted the applicant's parental rights and deprived her of contact with her children on account of her gender transitioning and the allegedly negative effect that communication with them and information on her gender transitioning might have on the children's psychological health and development.

53. It is not the Court's task to take the place of the domestic authorities in examining whether communication between the applicant and the children would be harmful for their psychological health and development, and whether she should be deprived of contact with them (see *Strand Lobben and Others*, cited above, § 210). However, the Court must satisfy itself that the domestic courts, when taking such a decision, conducted an in-depth examination of the entire family situation and a whole series of other relevant factors and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child (see, *mutatis mutandis*, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 139, ECHR 2010, and *Antonyuk v. Russia*, no. 47721/10, § 134, 1 August 2013).

54. The Court observes that the domestic courts in their decisions attached significant weight to the psychiatric expert assessments of the applicant and her children (see paragraphs 18-19 above). In the reports of 24 October 2017 the experts, taking into account the results of the children's psychological testing, their age, and the lack of psychotherapeutic practice in redressing the negative psychological consequences for children of transgender parents, reached the conclusion that information about the

applicant's transition would have a negative effect on the children's psychological health (see paragraph 18 above). At the same time the experts noted, with reference to an academic paper, that there had been no reliable research conducted on transgender parenthood, and that this question had not been sufficiently researched. The Court notes with concern that the experts reached their unfavourable conclusion after they themselves explicitly acknowledged that there was no reliable scientific evidence on this issue. The report of 18 and 20 December 2017 (see paragraph 19 above) similarly lacked references to scientific research supporting the experts' findings. The Court further notes that all expert reports lacked any indication of how the information about the applicant's gender transition represented a risk to her children's psychological health and development or any indication of how that risk could have been mitigated.

55. The Court takes note of the applicant's argument that the expert assessment reports referred only to a single academic paper that had been "highly criticised" in the academic community, and also notes the third parties' reference to the existence of multiple studies concluding that fears about the negative impact of a parent's gender transition on a child's development are groundless (see paragraph 47 above). However, it is not the Court's task to engage in the assessment of the reliability and relevance of the existing scientific research on transgender parenting. The point for examination here is whether the domestic courts, bearing in mind the best interests of the children, made a balanced and reasonable assessment of the respective interests of each person, relying on an in-depth examination of the entire family situation and of the relevant factors.

56. The available international material, cited in paragraphs 33-39 above, is unanimous that domestic courts deciding on the restriction of parental rights and contact should aim to (1) keep children together with their parents and, in the event of their separation, maintain direct contact between them on a regular basis, (2) take the child's best interests as a primary consideration, and (3) assess the entire family situation through close and individualised scrutiny. The third parties' submissions also support these principles (see paragraphs 47-49 above), highlighting in particular the need to avoid reliance on negative perceptions and prejudice about transgender parenthood.

57. Turning to the case at hand, it is apparent that the Russian courts' judgments (see paragraphs 22, 25, and 26 above) fell short of the above requirements. In taking the decision to restrict the applicant's parental rights and contact with her children, they considered certain evidence (see paragraph 21 above), but relied predominantly on the findings of the expert assessments without close scrutiny of those findings in the specific circumstances of the entire family situation (see paragraph 22 above). While there is no dispute that the findings of expert assessments will in any comparable situation be of relevance and significance to judicial

decision-making, it is equally beyond dispute that the courts should not forgo scrutiny of the reliability and quality of such findings. The self-acknowledged lack of scientific research supporting the experts' conclusions and the apparent lack of an explanation as to how the applicant's contact with her children could negatively affect their psychological health should have alerted the domestic courts in the present case and should have called for close scrutiny of the reliability and quality of the findings submitted to them (compare *X v. Latvia* [GC], no. 27853/09, §§ 102 and 106, ECHR 2013, and *P.V. v. Spain*, no. 35159/09, § 36, 30 November 2010). While recognising that the domestic courts had taken into account the opinion of the mother, her fears of the possible negative effect of the applicant's gender transition on the children, the conflicts between the parents, and the findings of social services, the Court cannot disregard the fact that the courts have placed the above findings of the experts in the heart of their decisions, in the absence of any demonstratable harm to the children. Thus, the domestic courts in making the decision had failed to conduct an in-depth examination of the entire family situation, and did not give enough weight to the rights of the applicant.

58. It is well established that measures totally depriving an applicant of his or her family life with the child are inconsistent with the aim of reuniting them and should "only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests" (see, for instance, *Johansen v. Norway*, 7 August 1996, § 78, *Reports of Judgments and Decisions* 1996-III, and *Aune v. Norway*, no. 52502/07, § 66, 28 October 2010).

59. The domestic courts in the present case, upon the request of the children's mother, applied the most restrictive measure possible and completely deprived the applicant of any contact with her children. Given that the passage of time can have irremediable consequences for relations between the child and the parent with whom that child does not live (see, among other authorities, *S.H. v. Italy*, no. 52557/14, § 42, 13 October 2015), they should have been exceptionally cautious in resorting to that measure.

60. The Court notes that the third parties in their submissions referred to the existence of measures and good practices which could be used to assist the children whose parents underwent gender transition (see paragraphs 47 and 49 above). However, the Court does not find it appropriate to contemplate on the existence of less restrictive means or to endorse any of them, since, as has been established above, the domestic courts failed to demonstrate that there was an appropriate basis for a restriction. In the absence of any demonstrably harmful effect of contact between the applicant with her children, it is not necessary to speculate as to whether a particular restriction might have been appropriate in the event that such potential or real harm had been established. Similarly, the Court does not

find it necessary to consider whether the possibility of reviewing the restriction, as mentioned by the domestic courts, provided an effective avenue for re-establishing contact between the applicant and her children or for ensuring the children's gradual adjustment to their changing family situation.

61. In the light of the foregoing, the Court considers that the domestic courts failed to make a balanced and reasonable assessment of the respective interests on the basis of an in-depth examination of the entire family situation and of other relevant factors. The Court thus concludes that the restriction of the applicant's parental rights and of her contact with her children was not "necessary in a democratic society".

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

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

63. The applicant further complained under Article 14 in conjunction with Article 8 of the Convention that the restriction of her parental rights had been discriminatory, since her gender transition had served as the sole ground for that restriction. The relevant provision of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

### A. Admissibility

64. The Court has consistently held that Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols thereto. Article 14 has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, among many other authorities, *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018, with further references).

65. The Court has found that the domestic decisions restricting the applicant's parental rights and depriving her of contact with her children amounted to an interference with her right to respect for her family life under the first paragraph of Article 8 (see paragraph 58 above). It follows that Article 14 of the Convention, taken in conjunction with Article 8, is applicable in the present case.

66. The Court further notes that this 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. Submissions by the parties*

#### (a) The applicant

67. The applicant maintained that she had been discriminated against on the basis of her gender identity and the fact that she had gone through gender transition. She further stated that, contrary to the Government's arguments, the restriction of her parental rights with reference to the allegedly harmful effect of her gender transition on her children had been based exclusively on the fact of the gender transition itself. Therefore, this constituted a difference in treatment based on the applicant's gender identity.

#### (b) The Government

68. The Government submitted that the applicant's gender transitioning in itself was not a reason for restricting her parental rights. They stated that the main reasons for restricting her contact with her children were (1) the changes in the applicant's personality and (2) the psychotraumatic situation that would be created for her children by the information on her transitioning, followed by the prolonged harmful effect on their personal development and psychological health.

#### (c) The third parties

69. The third parties Transgender Europe and ILGA Europe jointly submitted that there was widespread discrimination in child custody disputes. Manifest discrimination had recently developed into a nexus test that linked the child's best interests to fears and stereotypes about transgender parenthood. Thus, transgender parents' rights were systematically restricted with reference to harmful effects such as contagion of gender non-conformity, the parent's exercise of the supposedly volitional "choice" to transition, and the child's potential anxiety around transition and loss. However, transgender people should not have to face discriminatory consequences after choosing to live in accordance with their gender identity or because they had undergone gender-affirming medical treatment, and decisions on access rights for transgender parents should be based on an individualised analysis of the factors crucial to a child's well-being.

70. The third party Human Rights Watch, referring to the available research, stated that being a transgender person had no bearing on a person's parental qualities. Therefore, stigma and societal prejudice could

not justify the denial of transgender people's right to maintain contact with their children. In the third party's opinion it was improper to restrict a parent's contact with children simply because the parent was a transgender person.

71. The other third party, the Human Rights Centre of Ghent University, argued that a limitation of the rights of transgender parents to contact with their children on the ground of their gender transition discriminated against transgender persons in comparison with cisgender persons. It further noted that the use of negative stereotypes about gender dysphoria as a justification for limiting contact between parents and their children raised issues concerning the State's positive obligations under Article 14 of the Convention, as the State should take measures to counteract the social exclusion of transgender persons from their social environment, including their children.

### *2. The Court's assessment*

#### (a) General principles

72. The relevant general principles established under Article 14 of the Convention have been reiterated in *Hämäläinen v. Finland* ([GC], no. 37359/09, §§ 107-09, ECHR 2014) and in *Molla Sali* (cited above, §§ 133-37).

73. The Court has previously established that the prohibition of discrimination under Article 14 of the Convention duly covers questions related to gender identity (see *P.V. v. Spain,* cited above, § 30).

#### (b) Application of the above-mentioned principles to the present case

74. The Court notes that the applicant's gender identity and the fact that she had undergone gender transition featured prominently in the reasoning of all the domestic decisions concerning the restriction of her parental rights (see paragraphs 22, 25, and 26 above).

75. Despite the precautions taken by the domestic courts in stating that their decisions were not based on the applicant's transition, but on the potential harmful effect on her children, the inescapable conclusion is that her gender identity was consistently at the centre of the deliberations concerning her and was omnipresent at every stage of the judicial proceedings (compare *E.B. v. France* [GC], no. 43546/02, §§ 88-89, 22 January 2008, and *Cînța v. Romania*, no. 3891/19, §§ 68-69, 18 February 2020). The Court concludes that the influence of the applicant's gender identity on the assessment of her claim has been established and was a decisive factor leading to the decision to restrict her contact with her children.

76. The applicant has therefore been treated differently from other parents who also seek contact with their estranged children, but whose

gender identity matches their sex assigned at birth. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified (see *E.B. v. France*, cited above, § 90). In a different case the Court held that no reasonable relationship of proportionality existed between the means employed and the aim pursued when a difference of a parent's treatment was based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (compare *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 36, ECHR 1999-IX).

77. According to the established domestic practice reflected in the interpretative guidelines of the Supreme Court (see paragraph 32 above), the Russian courts deciding on the restriction of parental rights should, first of all, assess the possible danger to the child, the nature and severity of such a restriction, and the consequences it might have for the child's health and development. Moreover, the courts are under a duty to consider "other [relevant] circumstances", which arguably might include factors such as the parent's personal characteristics, his or her relationship with the child, the parent's prior conduct and behaviour towards the child, and the parent's living conditions and financial resources.

78. The Court observes that, contrary to the above-mentioned established practice, in the present case the domestic courts did not conduct their assessment with the required scrutiny. They did not engage in an examination of the possible danger to the applicant's children, the nature and severity of the restriction of parental rights, the consequences it might have for a child's health and development, or any other relevant circumstances. In the absence of such relevant considerations the domestic courts based their decisions on the alleged possible negative effect of the applicant's gender transition on her children. The reasons put forward by the authorities and the evidence presented in support of their position cannot be regarded as convincing and sufficient (see paragraph 57 above) to prove the existence of any possible harm to the children's development and to justify the restriction of the applicant's parental rights.

79. The Court concludes that in restricting the applicant's parental rights and contact with her children without doing a proper evaluation of the possible harm to the applicant's children, the domestic courts relied on her gender transition, singled her out on the ground of her status as transgender person and made a distinction which was not warranted in the light of the existing Convention standards.

80. The Court does not discern any reason to doubt that the domestic authorities pursued a legitimate aim of the protection of the rights of children in these proceedings. However, in absence of any demonstrably convincing and sufficient reasons for the difference in treatment, the Court finds it impossible to conclude that a reasonable relationship of proportionality existed between the means employed and the aim pursued.

Thus the impugned decision amounted to discrimination (see *E.B. v. France*, cited above, § 90, and *Salgueiro da Silva Mouta*, cited above, § 36).

81. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

83. In respect of non-pecuniary damage, the applicant submitted that in the event that the Court were to find a violation of their rights, it should award just satisfaction in accordance with its case-law.

84. The Government argued that no compensation should be awarded to the applicant under this head, since their rights had not been violated.

85. The Court considers that the applicant sustained non-pecuniary damage in connection with the violations it has found of her rights under Articles 8 and 14 of the Convention, and that such damage cannot be compensated for solely by the finding of a violation. Accordingly, it awards the applicant 9,800 euros (EUR) under this head.

### B. Costs and expenses

86. The applicant claimed 11,700 Russian roubles (RUB) (approximately EUR 130) for postal expenses and RUB 84,600 (EUR 940) for the costs of a forensic medical examination conducted in the domestic proceedings. The applicant further claimed EUR 6,600 for legal costs incurred in the domestic proceedings and the proceedings before the Court.

87. The Government submitted that the applicant's claims were neither justified nor reasonable and argued that this claim should be dismissed on account of their failure to submit a copy of an agreement with their lawyers.

88. It is well established that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017). The Court observes that the material in the case file does not include any contracts, receipts or other documents which legally bind the applicant to cover the amounts claimed by their representatives. The only documents provided are two billing invoices, indicating the

lawyers' professional fees, which are signed only by the respective lawyers. These documents do not bear the applicant's signature and there is nothing in the case file to prove that the applicant consented to pay the amounts requested, that she was legally bound to do so or, in fact, that she was made aware of the amounts of those claims (compare *V.K. v. Russia*, no. 9139/08, §§ 48-53, 4 April 2017). The Court also notes that under Russian law the invoices provided would not be enforceable without a proof of existence of a contract between the applicant and her lawyers. Accordingly, the Court rejects the claim for legal costs.

89. As regards the claim for postal expenses and the costs of a forensic medical examination conducted in the domestic proceedings, the Court notes that these claims are supported by the documents submitted and that the sums claimed were actually incurred. Therefore, the Court awards the applicant EUR 1,070 under this head.

### C. Default interest

90. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Articles 8 and 14 of the Convention admissible in so far as they have been lodged by the applicant on her own behalf and, by a majority, the remainder of the application inadmissible;

2. *Holds,* unanimously, that there has been a violation of Article 8 of the Convention;

3. *Holds*, unanimously, that there has been a violation of Article 14 of the Convention taken together with Article 8;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 9,800 (nine thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,070 (one thousand and seventy euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Ravarani and Elósegui;
(b) concurring opinion of Judge Elósegui.

P.L.
M.B.

# JOINT CONCURRING OPINION OF JUDGES RAVARANI AND ELÓSEGUI

### *1. A deficient factual background ...*

1. It is not without some difficulties that we found ourselves able to agree with the finding of a violation in the present case. Our doubts do not stem from the legal analysis itself but merely from the impression that the Court lacked some essential factual information enabling it to have a fully-fledged and balanced view of the underlying facts of the case. This, to our mind, originates in the general issue – previously raised by certain authors[1] and members of this Court[2] – of the adequate representation of the interests (and even rights) of persons concerned by the proceedings before the Court but not directly represented therein.

### *2. ... acknowledged by the judgment itself ...*

2. In the present case, the Court criticised the domestic courts for having "failed to conduct an in-depth examination of the entire family situation", and, as a consequence, for not having given "enough weight to the rights of the applicant" (see paragraph 57 of the judgment) – which resulted in the finding of a violation of Article 8 of the Convention and of Article 14 taken together with the latter.

3. Yet, as for the Court itself, while it agreed that "it is not [its] task to take the place of the domestic authorities" and that it must only "satisfy itself that the domestic courts ... made a balanced and reasonable assessment of the respective interests of each person" (see paragraph 53 of the judgment), can it be said to have had a *complete picture* of the various interests at stake – which could be seen as a precondition for a proper assessment of the domestic courts' examination of the case – since it did not hear either the explanations and arguments of the mother or those of the children?[3]

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[1] N. Bürli, *Third-party interventions before the European Court of Human Rights. Amicus Curiae, Member-State and Third-Party Interventions*, Cambridge, 2017.

[2] P. Pastor Vilanova, "Third Parties Involved in International Litigation Proceedings. What are the Challenges for the ECHR?", in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World:* Liber Amicorum *Vincent De Gaetano,* 2019; Judge Wojtyczek, Concurring opinions in *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, ECHR 2015, and *A. and B. v. Croatia*, no. 7144/15, 20 June 2019.

[3] Contrary to cases, for instance and under certain circumstances, where the applicant is opposed to the person appointed by the authorities to act as the child's guardian (see, for example, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 138, ECHR 2000-VIII, and *Siebert v. Germany* (dec.), no. 59008/00, 9 June 2005).

### *3. ... partly due to the absence of the mother and the children from the proceedings*

4. Admittedly, the issue of the representation of the children was addressed by the Court, through the prism of the applicant's capacity to act on behalf of her son. At the outset, it should be noted that this question was raised by the Court of its own motion, without the Government having raised any preliminary objection in this respect (see paragraph 42 of the judgment). The issue was dealt with in a traditional manner, relying on the Court's well-established case-law according to which "in cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests", and "the position as natural parent cannot be regarded as a sufficient basis to bring an application on behalf of a child" (see paragraph 43). Having referred to *Sahin v. Germany* (dec.) (no. 30943/96, 10 December 2000), *Moog v. Germany* (nos. 23280/08 and 2334/10, §§ 39-42, 6 October 2016), and *K.B. and Others v. Croatia* (no. 36216/13, §§ 109-10, 14 March 2017), the Court reached the conclusion that the applicant did not have *locus standi* to act on behalf of the children.

5. Although we agree with this solution as to the capacity of the applicant to represent her children, and the rationale underlying it, we regret that the Court did not reflect further on the appropriate way to take into account the interests of the children. The impossibility for the children to be represented by the applicant, who has a specific interest in the outcome of the case, should not amount to an *absence* of representation of their interests.

### *4. A general problem of legal representation*

6. While the Court increasingly deals with cases originating in disputes between civil parties, as in the case at hand (where the applicant, a transgender woman legally recognised as such, was initially opposed to her children's natural mother regarding the exercise of visiting rights), the vertical structure of proceedings before the Court, that is to say, where individuals are opposed to States, sometimes does not perfectly reflect the various interests at stake. This partial reflection can turn into a blind spot in cases, such as the present one, where the party who won the case at domestic level (in this case, the natural mother) and those who are concerned first and foremost by the outcome of the proceedings before the Court (that is, the children themselves and the applicant) had no opportunity to put forward their respective standpoints.

### *5. The "fourth instance" argument*

7. Some rely on the principle of subsidiarity and the idea that the Court is not a "fourth instance" body to justify the blind spot described above. However, it must be recognised that despite the fact that the Court does not in the first place re-examine the underlying facts but rather assesses the soundness of the domestic authorities' handling of the legal issues and their assessment of the established facts, it precisely turns into a fourth-instance body once it finds that the outcome of the domestic proceedings appears to be arbitrary or manifestly unreasonable. The Court delivers individual justice and it necessarily has to deal with the underlying facts of a case. It should not be forgotten that its judgments can lead to the final deprivation of rights previously acquired by third parties, or at least have serious consequences in practice – both for third parties and for the authority of the Court's judgments, since this issue relates to the potential difficulties that national authorities may encounter at the stage of execution of the Court's decisions. This concern has, for instance, been expressed in a straightforward manner by the German Federal Constitutional Court, which has stated that, in the context of re-examination or reopening of a case following a decision of the Court, account should be taken of the fact that "the individual application procedure before the Court ... may not fully reflect the legal positions and interests involved".[4]

### *6. An available remedy: third-party intervention*

8. It is for the above-mentioned reasons that there exists, under Article 36 § 2 of the Convention, a mechanism for third-party interventions for the benefit of the "person[s] concerned". The latter should be defined as persons who, albeit not parties to the proceedings before the Court, could be "affected in [their] human rights by individual measures taken by the respondent State in order to comply with the Court's judgments".[5] Contrary to Article 36 § 1 – which confers on States one of whose nationals is an applicant a *right* to intervene – Article 36 § 2 only offers a *possibility* for States, *amici curiae* or individuals to intervene. The decision to invite or grant leave to intervene to the "person[s] concerned" lies with the President of the Chamber, who has full discretion regarding both the possibility of intervening, the scope of the intervention and the conditions to which it is subject.

9. This degree of discretion should, in itself, be an indication of the need to reconsider the third-party intervention mechanism under Article 36 § 2 of the Convention, in order to make it more concrete and effective, for instance by implementing systematic notification of pending cases to all persons

[4] *Bundesverfassungsgericht*, 14 October 2004 (2 BvR 1481/04) NJW 2004, 3407, § 59.
[5] N. Bürli, *op. cit.*, p. 161.

defined as "concerned" in relation to those cases (that is to say, most of the time, the initial parties to the domestic proceedings), or at least by developing criteria more precise than the mere "interest of the proper administration of justice" currently provided for by Article 36 § 2 of the Convention and Rule 44 § 3 (a) of the Rules of Court, so that the President's discretionary power is framed. The case at hand clearly shows that what is at stake is not only the procedural legitimacy of the Court's decisions but also the well-informed nature of its decision-making process – in other words, the above-mentioned "complete picture" it enjoys when dealing with disputes arising from relationships between private parties.

### *7. The inadequacy of the existing third-party intervention mechanism in the present case*

10. In the present case, a major difficulty arose from the fact that the applicant herself had no information as to the location of her children (see paragraph 27 of the judgment) and that the social services had no credentials for locating the children (see paragraph 28). Therefore, in such cases, the question of the representation of third parties, and particularly of the children – whose best interests are, as we know, at stake – cannot be satisfactorily grasped by reasoning limited to the mechanism of third-party intervention and its possible adjustments.

### *8. The need to consider further representation options*

11. Consequently, the particular features of this case should be seen as an occasion to reflect on the possibility of reconciling the absence of a party with the need to take into account his or her interests, the compelling nature of which derives from his or her status as a child or, in a broader sense, an interested party in the domestic proceedings. This could be achieved, for example, as far as children are concerned, by establishing a mechanism whereby a representative *ad litem* would be appointed for children whose rights or interests are at stake in proceedings before the Court but who cannot be considered to be represented by the applicant or the respondent Government. In any case, where there is an arguable claim that the domestic courts did not struck a fair balance between all the legitimate interests at stake in a family dispute – and considering, as a consequence, that the interests of the family members other than the applicant cannot be deemed to be adequately represented by the respondent Government – it is of the utmost importance that clear safeguards should be established so that the present judgment of the Court is not, in turn, open to criticism due to a lack of consideration for such legitimate interests, especially when they are those of children.

# CONCURRING OPINION OF JUDGE ELÓSEGUI

1. Being in agreement with the judgment's finding of a violation of Article 8 and Article 14, I would like to qualify some facts and points set out in the judgment, taking into account the facts as examined by the domestic courts, as well as the information provided by the third parties before the Court. The present case concerns the restriction of the applicant's parental rights in respect of her children, and her being deprived of contact with them. The applicant alleged that her gender identity and the fact that she had undergone gender transition had played a crucial role in that restriction. According to the applicant, there had been no evidence before the domestic courts that her contact with the children would be harmful for their psychological health and development (see paragraph 1 of the judgment). Also according to the applicant, at the time of submitting her observations to the Court, she had not been able to communicate with her children or receive information about their lives for three and a half years (see second observations of the applicant, dated 9 July 2020, pp. 10-11, § 36).

2. In its examination of family-related questions arising in domestic civil proceedings where multiple parties have been involved, the Court encounters a number of difficulties in analysing questions of *locus standi* where one of the parents wants to act on behalf of a minor in cases involving an alleged violation of Article 8 of the Convention.

3. Whereas in civil domestic proceedings, all parties involved are heard, the problem that arises in proceedings before the Court is that only one of the parties brings a claim against the State. But we must not forget that under the "umbrella" of the State there are also other individuals who have been part of the proceedings at national level[1]. The interested parties in civil-law matters are private individuals acting against other private individuals. This is in stark contrast with other areas of law and represents a major difference between civil proceedings and other matters of public law. By way of example, in contentious administrative proceedings, the plaintiff is an individual acting against the State; in criminal law the State can act of its own motion against the accused. In some legal systems, the victim is not even a party to the proceedings. Hence, in conflicts relating to parental rights in domestic civil courts, there are two individuals in conflict. In this respect, the reflections of Judge Pere Pastor Vilanova on the advisability of

[1] See Judge Ravarani's forthcoming article "Third Parties - Poor Relations in Proceedings before the European Court of Human Rights", in the commemorative book for the retirement of Prof. D. Hauser, former President of the Polish Supreme Administrative Court. See also his concurring opinion in the present judgment.

the Court hearing those parties in proceedings before it and calling them of its own motion as interested parties are worth noting. Judge Wojtyczek also makes timely suggestions in his concurring opinion in *Bochan v. Ukraine (no. 2)* ([GC], no. 22251/08, ECHR 2015).

4. Having said that, two different questions should be distinguished. The first issue is the *locus standi* of the father/mother *vis-à-vis* the children in cases when he or she has parental rights, but not custody or guardianship. A second question is related to the consideration that should be given to other third parties that may be interested, involved and affected by the result of the proceedings before the Court, such as the father/mother in conflict or any other stakeholder, even if they were not a party to the domestic proceedings, such as adoptive or foster parents.

5. Starting with the first point, one constant discussion among judges of the Court has been to what extent a father or mother who is in conflict with the other parent can come to the Court representing their common children, when both parents are not in agreement about the best interests of those children.

One of the crucial points is the *locus standi* before the Court of a father or mother who comes to the Court in his or her own name and also wants to act on behalf of the children, even if the latter do not know that they are applicants to an international court. Does the father/mother have *locus standi* to act on behalf of his or her children when the conflict relates to custody rights, guardianship or visiting rights, especially when he or she is no longer in contact with his or her children? For instance, in a case considered by the Third Section relating to the deprivation of the parental rights of the applicant, the biological father, although he did not apply to the Court on behalf of his child, it was an important factor in the reasoning of the Court that the father had not seen his child since the child had been two years old, eight years previously. According to the Russian domestic courts, the child himself, and not only his mother, wanted to be adopted by his *de facto* father, the spouse of his mother (see *Ilya Lyapin v. Russia*, no. 70879/11, 30 June 2020). Adoption was not compatible with having another biological father with parental rights. As a consequence, the domestic Russian courts deprived the biological father of his parental rights in order to make the adoption of the child possible. The biological and former legal father came to the Court arguing that there had been a violation of Article 8. The Chamber decided by a majority of five judges against two dissenters that there had been no violation of Article 8 and that the domestic courts had struck an appropriate balance between the rights involved, prioritising the interest of the child in being adopted by the *de facto* father.

6. This point about the *locus standi* of one parent acting on behalf of the children (against the other father who also has parental rights) has been solved in different ways, depending on the specific and concrete circumstances of each case. As stated in paragraph 43 of the present judgment: "In cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests. In these situations, the position as natural parent cannot be regarded as a sufficient basis to bring an application on behalf of a child (see *Sahin v. Germany* [GC], no. 30943/96, ECHR 2003-VIII; *Moog v. Germany*, nos. 23280/08 and 2334/10, §§ 39-42, 6 October 2016; and *K.B. and Others v. Croatia*, no. 36216/13, §§ 109-10, 14 March 2017)."

7. The possibility of applicants acting on behalf of children who in some cases do not even know them or are not even aware or informed that they are applicants before the Court remains a controversial issue among the judges of the Court. In fact, this question was recently discussed in *Strand Lobben and Others v. Norway* ([GC], no. 37283/13, 10 September 2019). Although the majority agreed to accept that in this specific case, the applicant acted in the name and on behalf of her biological son, who had been given up for adoption when only one month old and who was 9 years old when the case was eventually brought before the Court, several judges formulated dissenting opinions about this particular point. As a matter of fact, Judges Koskelo and Nordén entitled their opinion: "On the question of the first applicant's right to represent the second applicant"[2]. These concerns can be further exemplified by reference to *Valdís Fjölnisdóttir and Others v. Iceland* (no. 71552/17, 18 May 2021, not yet final), where the interests of the child were represented by his current legal guardian, who is a State official.

8. Similarly, this problem is very much present in cases in which the parent (father or mother) who has abducted the minor is the one applying to the Court and intending to represent the child, without the Court having objective information as to the minor's wishes. In this connection, it is worth mentioning the dissenting opinions of Judge Lemmens (paragraph 2) and Judge Nußberger (paragraphs 6-7) in *Raw and Others v. France* (no. 10131/11, 7 March 2013), a complex case concerning the alleged abduction of two children by their father. The mother, who was living in England, applied to the Court and also acted on behalf of her children. However, the children (one of whom was already an adolescent) who were living in France with their father did not want to return to England. The

[2] *Strand Lobben and Others*, cited above, joint dissenting opinion of Judges Koskelo and Nordén on the question of the first applicant's right to represent the second applicant (paragraphs 1-17).

judgment concluded that there had been a violation of Article 8, but several of the judges expressed dissenting opinions.

9. The second question refers to the right of stakeholders to participate in proceedings before the Court, such as the father/mother involved in the civil proceedings at the domestic level, as well as interested persons who were not involved in such proceedings, but for whom the decision of the Court will have direct consequences, such as foster or adoptive parents. In relation to the partner in conflict, the President of the Chamber or the President of the Grand Chamber has sometimes invited that person to participate in the proceedings and to submit his or her own observations, despite Article 36 § 2 not securing a right to intervene to such interested persons. In this connection, Judge Pastor Vilanova reflects: "In accordance with Article 36 § 2, third States Parties and third parties to the proceedings may, in the interest of the proper administration of justice, be invited by the President of the Court 'to submit written comments and take part in hearings'. These States and persons take part in the proceedings but are not parties to them; hence it follows that they do not enjoy the same rights as the parties before the Court"[3]. The judgment given in *Y.S. and O.S. v. Russia* (no. 17665/17, 15 June 2021, not yet final), concerning the abduction of a child from Ukraine to Russia by the mother, might serve as an example of the foregoing. The father was invited to participate in the proceedings and submitted his observations as a third party. In this case the abducting mother was the applicant before the Court, and she also acted on behalf of the child, who was living with her in Russia, although she did not have custody over her. The domestic Russian courts decided that, under the Hague Convention, the daughter had to be returned to her father. However, the majority of the Chamber concluded, by four votes to three, that there would be a violation of Article 8 if the child were to be returned to Ukraine, owing to the unstable situation of the specific area of the country where the father was living. Three years before delivering the judgment, the Court had applied an interim measure under Rule 39 stopping the return. As a consequence, the child has been living in Russia until now since being abducted by her mother.

10. In two recent Grand Chamber cases (*Strand Lobben and Others*, cited above, and *Abdi Ibrahim v. Norway*, no. 15379/16, 17 December 2019, the latter still pending before the Grand Chamber, following a hearing held on 27 January 2021), brought by biological mothers whose children had been given up for adoption without their consent, the adoptive parents were

[3] Pere Pastor Vilanova, "Third Parties Involved in International Litigation Proceedings. What are the Challenges for the ECHR?", in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World.* Liber Amicorum *Vincent De Gaetano*, Springer, Cham, 2019, pp. 381-93.

informed about the proceedings before the Court and were given the opportunity, if they so desired, to intervene as third parties. In the Third Section, in *Omorefe v. Spain* (no. 69339/16, 23 June 2020), the President of the Chamber decided to inform the adoptive parents about the application to the Court.

11. After having presented all these various situations and coming back to the present case, I consider that the Court could have informed the ex-spouse and biological mother of the children about the present proceedings before it, even if she was not a party to them. In this hypothetical situation, the possibility of hearing her (even if only through written observations) could have been quite useful. As we have seen, there are many examples in the case-law of the Court where the partner who was not a party to the proceedings has been notified and invited to submit observations. Even if the case does not directly concern the deprivation of parental rights, custody rights or the determination of the children's place of residence, the main focus being the parent's right to visit and communicate with her children, both questions are deeply interrelated.

12. In fact and in practical terms, although the present judgment found a violation of the biological father's visiting rights, it will be very difficult to execute without the biological mother's cooperation. According to the information in the judgment: "On an unspecified date Ms N. changed her place of residence with the children and the applicant has no information about where the children now reside. At present, she is deprived of any opportunity to receive information about their lives and health" (see paragraph 27 of the judgment). Even the social services did not have the relevant credentials for locating the children (see paragraph 28).

13. In the present case, the existence of a conflict of interest between both parents was clear from the outset. On 18 July 2008 the first applicant, whose gender at that time was officially recorded as male, married Ms N. (see paragraph 8 of the judgment). Their two children were born in 2009 and in 2012. In June 2015 the marriage between the applicant and Ms. N. was dissolved. In fact, according to the information in the file, it was the mother who initiated judicial proceedings seeking a divorce from the applicant and she also litigated for the marriage to be annulled (see paragraph 13 and observations of the Government). Under the agreement between the former spouses, the children stayed with Ms. N. and the applicant agreed to pay a monthly allowance to the children (see paragraph 10 of the judgment). Simultaneously, the applicant started her transition from the male to the female gender and did not encounter any problems in having her new gender identity legally recognised: "On 31 July 2015 the Lyublinskiy District Court of Moscow legally recognised the

applicant's transition from the male to the female gender. On the basis of that judgment, the applicant was issued with new identification documents with her gender recorded as 'female'" (see paragraph 11). During the transition period, the mother did allow visits from the applicant to their children: "Until December 2016 the applicant regularly visited the children and spent time with them. During the visits she presented herself as male and wore men's clothes, since otherwise Ms. N. would have objected to the visits" (see paragraph 12).

14. In December 2016 the applicant wanted to inform the children – who were 4 and 7 years old at that time – about her new gender identity (see paragraph 19 of the judgment). As a consequence, the mother then started to oppose to the visits: "From December 2016 onwards Ms. N. started refusing visits from the applicant. In January 2017, following a complaint by the applicant, Ms N. was interviewed by the social services" (see paragraph 13). The social services advised the mother on the legal provisions applicable, according to which parents have equal rights and equal duties in respect of underage children (parental rights), and a parent residing separately has a right to visit the child, take part in the child's upbringing and make educational choices. Ms N. was also informed of the available mediation procedures (see paragraph 13), which means that the social services and the authorities duly fulfilled their task. However, it was the mother who rejected the assistance of a mediation procedure. As a Court we cannot ignore this point because it is not possible to put all the burden exclusively on in the domestic authorities. In fact, the judgment recognises that the domestic courts took into account the opinion of the mother, her fears of the potential negative effects of the applicant's gender transition on the children, the conflicts between the parents and the advice of the social services, which was eventually not followed by the mother. Having regard to all these facts, the judgment concludes that the domestic courts did not give enough weight to the rights of the applicant, who has a parental right to contact her children (see paragraph 57).

14. The domestic courts gathered several pieces of evidence, and interviewed the mother and the social services as well. Also, they relied on the expert assessments produced by the psychologists and psychiatrists who had interviewed the children, dated 24 October 2017 (see paragraphs 18 and 21 of the judgment). It must be taken into account that the children were 4 and 7 years old and could not be interviewed by the judge directly in court. It is obvious that in such circumstances the balancing exercise to be performed by the domestic courts was quite complex. The domestic courts were not developing theories, but examining two individual children. According to the forensic examination, the oldest child had a level of mental development corresponding to the standard for his age. At the time of the

assessment, he was 8 years old. According to the experts, the child "was found to be emotionally involved in a situation of family conflict ... He does not describe the personality of his father negatively, but he does not include him in the family, which is [the result of] the absence of the father ... in his life at the relevant moment and [of] the child's perception of the situation" (see observations of the Government, pp. 7-8, § 27). The girl was 5 years old. Some of the conclusions in respect of her were as follows: "Her vision of the family is still being formed and it meets the age standards. In her mind the boundaries of [the] 'family' concept are still flexible, she includes an extended range of valued relatives into the family community" (see observations of the Government, p. 9, § 28).

16. The Court takes into account the fact that according to some of the third parties, for instance the Human Rights Centre of Ghent University, contact with a parent might in exceptional circumstances prove to be harmful to the child, but the States have a positive obligation to assess the least restrictive means available to reach a solution that protects the child and preserves parental contact (see paragraph 49 of the judgment).

17. The domestic courts could have explored a less restrictive means of reconciling respect for and protection of the children's best interests with the right of the applicant to have contact with them. In any case, it cannot be forgotten that judicial solutions have to weigh up different interests, recognising the right of the children to adapt to the new situation without suffering harm and at the same time the parental rights of the applicant. As indicated by the third parties (see paragraphs 47-49 of the judgment), it is pivotal that in view of the sensitive nature of both a post-divorce period and the revelation of a gender transition, parents may need the help of a specialist. The applicant herself has suggested in her complaint before the Court that she would be willing to receive such advice. In her observations, the applicant "has repeatedly expressed her readiness and desire to resort to the services of a psychologist when informing the children about the fact of her gender reassignment" (see applicant's observations of 9 July 2020, § 60). It could have been possible to have some counselling with the children (and the mother) to assist the family in mitigating any potential risk of harm.

18. States have the positive obligation to assess the least restrictive means available to reach a solution that protects the child and that preserves the right of access. As the Court has already emphasised, expert opinions should not only focus on the existence of barriers in order to enable access but should also tackle the question as to how these barriers can be removed. The Court notes that therapeutic measures such as family therapy and mediation are especially relevant in complex custody situations.

19. The need for support from skilled professionals or trained specialists is underlined in the following observations submitted by the Human Rights Centre of Ghent University: "Given the sensitive nature of both a post-divorce and the revelation of a gender transition, safeguarding the relationship between a trans parent and their child highly depends upon trust, honesty and the expression of care (Hafford-Letchfield et al., 2019, p. 1119). To that end, it is pivotal that parents communicate their gender transition (probably with the help of a skilled professional) and smoothen the process of adjustment for all parties" (Observations of the third-party intervention by the Human Rights Centre of Ghent University, p. 4).

20. According to the third party Transgender Europe: "The majority of transgender parents questioned in multiple studies reported that relationship with their children were generally good or positive, including after 'coming out'. Several variables may play a role during difficult gender transitions, including the age of the children (younger children seem more accepting), the relationship between parents, even when they are separated, and the existence of social stigmatisation. Both children and parents often experienced a lack of trans or trans-friendly and knowledgeable therapists, a lack of support groups and having social service needs related to childcare and networking with other parents" (Observations of Transgender Europe, jointly with ILGA Europe, p. 3, § 6).

21. In relation to the aforementioned positive obligation of the State to assist trans families, the Human Rights Centre of Ghent University emphasised the following: "In the exceptional circumstances that contact with a parent could prove harmful to the child, State Parties should not restrict or bar contact rights too lightly. Instead, they are under the positive obligation to assess the less restrictive means available to reach a solution that protects the child and preserves contact rights (see, *mutatis mutandis*, *Y.I. v. Russia*, no. 68868/14, § 92, 25 February 2020) ... As the Court has already stressed, expert opinions should not only focus on the existence of barriers to facilitate contact but should also tackle the question as to how these barriers can be overcome. In this context, the Court is respectfully invited to further validate its reasoning in the recent case of *A.V. v. Slovenia*, no. 878/13, in which the relevance of therapeutic measures such as family therapy in complex custody cases was discussed at length" (Observations of the Human Rights Centre of Ghent University, p. 4).

22. Precisely in the case of *Y.I. v. Russia* (cited above, § 87), in which I was also a member of the Chamber, on an issue related to Article 8 it was found that the applicant, a drug addict undergoing treatment, had been disproportionately deprived of parental authority over her two youngest

children, who had been separated from their brother and placed in public care despite the grandmother's wish to provide care. The Court concluded that the domestic authorities had failed to consider less drastic measures in the children's best interests and had not taken into account the applicant's efforts to improve her situation after the children's removal.

23. In the same vein, Transgender Europe insisted in the advisability of providing mediation services: "Family ties may only be severed in very exceptional circumstances. Everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family. In that sense, States have a positive obligation to adopt specific measures designed to facilitate contact and 'reconcile the conflicting interests of the parties', including by providing mediation services, addressing communication barriers or helping persons in difficulty" (Observations of Transgender Europe, p. 9, § 20).

24. Summing up, family mediation could be a good practice in domestic proceedings and would be likely to be more efficient for the execution of the Court's judgments in cases where several persons of a family are involved. Judges and courts (including the Strasbourg Court) can deliver judgments relating to family conflicts, but they do not always have enough power to impose their judicial decisions in an absolute manner, when the will of private third parties who are reluctant to collaborate is involved. That is why family mediation might be a more efficient way of reaching agreements to protect the rights of both parents as well as the children. In the family structure, individual rights are not isolated. Quite the contrary: in order for such rights to be truly observed, courts need to coordinate the wishes of several individuals in trying to find harmonious solutions and friendly agreements[4].

CONCLUSIONS

(i) In family-law cases of this kind, and first and foremost in the case of children with parents in conflict, the Court should find a way of making sure that the children have been informed or have a representative. It is not very logical or indeed reasonable that someone can represent a minor before

[4] To give an example, in *P.V. v. Spain* (no. 35159/09, 30 November 2010), where the Spanish first-instance judge did not deprive the applicant of her parental rights or restrict communication, as the mother had requested, but established a new contact arrangement subject to periodic revision, the Court found no violation. Three years later, in 2013, the mother reached a friendly agreement in the civil court allowing flexible visits to the applicant with her son (at the time 16 years old). The applicant had been fighting in the domestic courts since 2004.

an international court when the minor or another representative has not been properly informed.

(ii) Next, regarding third parties who may be involved, such as the biological mother or father, the ex-husband or ex-wife, or the current adoptive parents, it seems to me that they should be informed of the proceedings before the Court and be invited to submit observations if they so desire. I would not extend this possibility to all types of civil proceedings, but only to cases addressing family conflicts.

(iii) Therapeutic measures such as family therapy and mediation in complex custody situations are highly relevant, especially in assisting families with a transgender parent (father or mother). Sometimes it is necessary to have a transitional period of accommodation or adaptation to the new situation, whereby children are informed according to their age and the social context, and attention is paid to their emotional response in facing problems that they may have to confront in their social environment or educational context, such as for instance at school, depending on the social acceptance or tolerance of these new forms of family and their own parent's transition to a new gender identity.

(iv) Summing up, family mediation and friendly agreements could be a good practice in domestic proceedings and an even more efficient means for the execution of the Court's judgments in cases of this kind where several family members are involved.