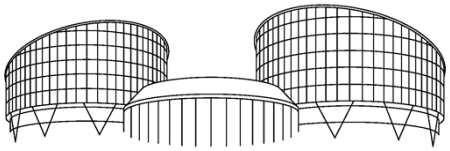

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF N.V. AND C.C. v. MALTA

(Application no. 4952/21)

JUDGMENT

Art 8 • Positive obligations • Family life • Disproportionate order by family court *de facto* preventing couple in stable relationship from living together to safeguard interests of child from mother's previous marriage • Flawed domestic decision-making process • Procedural failings • No balancing exercise of interests at stake • Failure to facilitate reunification of couple as soon as reasonably feasible when order no longer necessary

STRASBOURG

10 November 2022

FINAL

10/02/2023

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

In the case of N.V. and C.C. v. Malta,

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

Marko Bošnjak*, President*,
Péter Paczolay,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Davor Derenčinović*, judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 4952/21) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese national, Ms N.V. and a British national Mr C.C. ("the applicants"), on 12 January 2021;

the decision to give notice to the Maltese Government ("the Government") of the application;

the decision of the Government of the United Kingdom not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties' observations;

the decision not to have the applicants' identity disclosed (Rule 47 § 4 of the Rules of Court) and that documents deposited with the Registry in which the applicants' names appeared or which could otherwise easily lead to their identification should not be accessible to the public (Rule 33 § 1);

Having deliberated in private on 11 October 2022,

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

INTRODUCTION

1. The case concerns an order by the domestic court by which the first applicant was prohibited from seeing the second applicant (her partner, with whom she later had another child) in the presence of her child, from a previous marriage, who lived with them. It raises issues under Articles 6 and 8 of the Convention.

THE FACTS

2. The applicants were born in 1976 and 1968 respectively and live in Xewkija. The applicants were represented by Dr W. Cuschieri, a lawyer practising in Mosta.

3. The Government were represented by their Agents, Dr C. Soler, State Advocate, and Dr J. Vella, Advocate at the Office of the State Advocate.

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

THE CIRCUMSTANCES OF THE CASE

A. Background to the case

5. The first applicant married J. and a son, E., was born from their marriage in March 2006. They separated from each other in 2008. By deed of separation, they agreed *inter alia* that the first applicant would have E.'s care and custody and that E. would reside and live with the first applicant on the island of Gozo (one of the islands of the Maltese archipelago), where both parents lived at the time, and that J. would have access or visitation rights.

6. Subsequently, on 5 June 2009, the first applicant was given court authorisation to move to Malta with the child. By that time, she had begun a relationship with the second applicant and when she moved to Malta they started living together. In 2016 she became pregnant of him, giving birth to the child in November 2016.

7. J. also began a relationship with a third party (who already had a daughter of her own) from whom he had another child.

B. The civil proceedings

8. In 2012 J. instituted proceedings before the Civil Court (Family Section) (hereinafter the 'Family Court' for ease of reference). The subject of these proceedings was initially J.'s access rights, with a certain animosity arising between the parents. Eventually the issues raised included the presence of J.'s partner during the visits and the hindrance of the first applicant to the visits, as well as requests for prolonged visits over the holidays.

9. On 5 May 2015 C.S. was appointed as a psychologist to assist and follow E.

10. On 12 June 2015 the first applicant asked the court to allow her (and the second applicant) to travel with her son. J. objected claiming that the second applicant had been violent during an incident on 18 July 2015.

11. On an unspecified date in July 2015 the first applicant asked the court to revoke J.'s access in the light of the violent incident of 18 July 2015.

12. Subsequently, by means of an application filed by J. on 24 July 2015, J. asked the court to order that E. live with him and that E. be forcefully taken from his mother with the assistance of court marshals and the executive police. He brought to the court's attention that on 18 July 2015 the second applicant had gone to his house and threatened that he would kill E. He further alleged that the second applicant had psychological problems, that E. was scared of his mother and that he had been lying. He thus asked the court to

appoint a psychologist to examine the mother and to determine whether she was fit to have custody of the child.

13. On 3 August 2015 the first applicant objected to J.'s request. On the same day a Children's Advocate was appointed.

14. On 20 August 2015 (two days before the planned holiday) the court rejected the first applicant's request to travel with her son, upholding the objections raised by the father, and noting that the Children's Advocate's opinion had not yet been submitted. On the same day the first applicant submitted a note explaining the situation and noting that the second applicant had been the victim of violence not the other way around.

15. On 29 September 2015 the Children's Advocate submitted her report, but the parties were not informed.

16. By means of a decree delivered on 1 October 2015 the court ordered the first applicant not to expose the minor to her partner (the second applicant) and this with immediate effect. The court also admonished the first applicant for hindering J.'s access rights and warned her of serious consequences if she were to continue with such hindrance. It also appointed psychologist C.S. to assess the minor children (*sic.*) after communicating with the Children's Advocate and ordered the *Aġenzija Appoġġ* (AA) social workers to perform monitoring visits at the first applicant's home and report accordingly. It transpired from the decree that the report of the Children's Advocate, that was sealed by order of the court, and was not accessible to the parties to the proceedings, had been presented.

17. On 9 October 2015 the first applicant asked for the variation of the just-mentioned court order. Taking into consideration the fact that the Family Court had ruled without knowing, seeing or hearing the second applicant, she also asked the court to extend the role of the psychologist to evaluate the second applicant's character as well as his relationship with E. who could also be heard. She asked the court to hear the second applicant. J. objected, reiterating the arguments made in his application of 24 July 2015 (see paragraph 12 above).

18. On 28 October 2015, without holding a hearing, the court dismissed the request under all its heads "for some of the reasons mentioned in the objection pleadings", no specific reasons were mentioned.

19. The court-appointed psychologist (C.S.) submitted her report on 25 November 2015, after fourteen meetings with the parties. From the report it resulted that E. (at the time nine years old) cared for both parents and wanted to please them both but considered that his life was in Malta and that his moves to Gozo every other week were frustrating his life and commitments. It also transpired that E. was very fond of the second applicant who he missed and wished to see, and that there was nothing untoward and/or dangerous in the relationship established between them. C.S. suggested that visits take place after the child's Saturday commitments until Sunday, and that they be prolonged when he is on school holidays, so not to disrupt his

commitments. She also considered that both the life E. had with his mother and that with his father could be beneficial to him, had the parents been able to understand that and be more co-operative. She suggested that they be assisted by a parental coach or family therapist.

20. This notwithstanding, the Family Court did not revoke its decree of 1 October 2015 of its own motion. As a result, the first applicant who lived with her son and was expecting a child of the second applicant could no longer live with the latter in the same household, and the latter could not assist her in everyday needs.

C. Constitutional redress proceedings

1. The application

21. On 20 June 2016 the applicants instituted constitutional redress proceedings. They complained that the decree of 1 October 2015 and subsequent decrees rejecting any requests for it to be revoked, breached their rights under Article 8 of the Convention, as they were precluded from living together, travelling together or being together, if E. was present. The consequences were even more serious considering that the applicants were expecting a baby. They also complained that those decisions were in breach of Article 6 of the Convention:

- In that the second applicant was deprived of his right to access to court due to the fact that the Family Court made an order in his regard which affected him without him ever having been a party to those proceedings, without having been granted a hearing, without any form of investigation whatsoever, and notwithstanding a request that he be heard.

- In respect of both applicants in so far as the report of the Children's Advocate was sealed by order of the court and none of the parties to the proceedings had had access to it.

- In respect of the first applicant in so far as the decisions affecting her were made by the Family Court without granting her an oral hearing;

- In respect of the first applicant in so far as she had no effective remedy and no true and proper access to a court to impugn the court decrees ordering her not to expose the minor to her partner and all decrees intended to overturn, vary or revoke that decree. This was so because they all had to be challenged before the same court presided by the same judge who had taken those decisions;

- In respect of the first applicant in so far as the decrees were being delivered without any reasoning, in breach of Article 6 of the Convention.

22. They asked the court to annul those decrees and award damage with costs. J. was a party to these proceedings.

2. The arrangement

23. The birth of their child approaching, on 23 September 2016, the applicants asked the court to issue an interim measure so to be allowed to see each other in the presence of E., despite the Family Court's decree.

24. On 3 November 2016 the Civil Court (First Hall), in its constitutional competence, while abstaining from granting the interim measure, invited the parties to make a concession, without this being understood as being in contempt of the Family Court, and to allow E. to be close to the applicants in the time after the birth of their child. Such an arrangement had to be cautious, prudent and in the best interests of the child.

25. It appears from the testimony of the second applicant in the constitutional redress proceedings that, in practice, the situation changed following this order as on the birth of their child, the following day, they re-started living as a family.

3. First-instance

26. By a judgment of 30 May 2019, the Civil Court (First Hall), in its constitutional competence, found that there had been a breach of Articles 8 and 6 of Convention. It did not consider it necessary to award compensation, considering that, although their requests for the annulment of the decree and that for compensation, were not alternative, it was not, as such, compensation that the applicants sought, but rather the revocation of the decree. It thus annulled the decision of 1 October 2005 and ordered the applicants to pay one third of the costs of the proceedings.

27. In particular, rejecting the State's plea of non-exhaustion, it was satisfied, on the basis of the evidence presented, that the first applicant had attempted to reverse the situation, but each application (*rikors*) she had filed had been rejected by the Family Court. Moreover, the decree of 1 October 2015, under domestic law, was not amenable to a request for leave to appeal. Considering that there had been no adequate and effective remedy to challenge the decree – an *ad hoc* civil case as suggested by the State also not being adequate – it decided to take cognizance of the case, and accepted J.'s *locus standi* in these proceedings.

28. It found that the applicants and E. were a *de facto* family, which suffered interference with their family life in so far as they could not live together due to the decree of 1 October 2015.

29. On the merits of Article 8 it considered that the impugned decision had not been justified and had not been in the best interests of the child. Apart from the violent incident, there had been no other reason to justify such a measure. In relation to the violent incident, while the two men had different versions of the events, the only objective fact was that the second applicant was injured but not J. There had therefore been a breach of Article 8.

30. As to Article 6 it considered that the provision had been violated since:

- In a case as sensitive as the present one, which had an impact on vulnerable children and ultimately two families, the least the Family Court could have done was to appoint an oral hearing and hear the second applicant, as well as other persons, and evaluate the entire situation, particularly given that the evidence showed that E. had a good relationship with him;

- The report of the Children's Advocate, which could have been the only basis of the decision, had not been accessible to the parties;

- The first applicant had not had any oral hearings in relation to her challenge. The same was the case for her request to travel, and in relation to the variation of J.'s visitation rights (Article 37 of the Civil Code).

4. Appeal

31. On appeal by the State, by a judgment of 20 July 2020, the Constitutional Court varied the judgment in part. In particular it annulled that part of the judgment whereby the court had found a breach of Article 8 and instead declared that the complaint need not be entered into once the decree of 1 October 2015 had been annulled and the parties to the civil proceedings had been put in the "*status quo ante*". It considered that it could only hold that there was a breach of Article 8 of the Convention in the event that proof was adduced to the effect that the impugned decision had not been in the interests of the minor. This could only be known after a fair hearing was granted and such hearing had not yet been granted, and the procedure in 2015 had not been a fair one. The State's appeal on the finding of a breach of Article 8 was therefore no longer necessary.

32. It also annulled the part of the judgment whereby it had been held that there was a breach of Article 6 in respect of the second applicant and hence dismissed his claim holding that the provision did not apply to him since he was not a party to the civil proceedings between the first applicant and J. Moreover, he had not attempted to lodge an application with the court requesting it to hear him.

33. It confirmed the remaining violation of Article 6 under the different aspects upheld by the first-instance court, noting further that the first applicant had not been able to present any evidence to the Family Court which had been adamant in its unreasoned rejection decisions, as shown by its decree of 28 October 2015.

34. Half of the costs of the proceedings were to be borne by the applicants.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. NATIONAL LAW PROVISIONS

35. Article 37 of the Civil Code, Chapter 16 of the Laws of Malta, under title of Personal Separation, in so far as relevant, reads as follows:

"...(3) The court shall summarily hear the applicant and the respondent and shall then, by decree, decide on the demand:

Provided that the court may decide on the demand where the applicant or the respondent or both the applicant and the respondent fail to appear on the day of the hearing.

4) The decree referred to in sub-article (3) shall be an executive title deemed to be included amongst the decrees mentioned in article 253(a) of the Code of Organization and Civil Procedure and shall be enforceable in the same manner and under the same conditions in which such acts are executed...."

36. Article 47 of the Civil Code, under title of Personal Separation, concerning the care of children, reads as follows:

"During the pendency of the action the court shall give such directions concerning the custody of the children as it may deem appropriate, and in so doing the paramount consideration shall be the welfare of the children:

Provided that in cases where there is evidence of domestic violence, the Court may limit or deny access to the children if such access would put the children or the other parent at risk."

37. Article 56 of the Civil Code, under title of Personal Separation concerning custody, reads as follows:

"(1) On separation being pronounced the court shall also direct to which of the spouses custody of the children shall be entrusted, the paramount consideration being the welfare of the children.

(2) It shall be lawful for the court, if it considers such measures to be strictly necessary, having regard to all relevant circumstances, to direct that the children be placed in the custody of persons in *loco parentis*, of third parties, or in alternative forms of care.

(3) It shall be lawful for the court to give any such directions in the judgment of separation, although in the action relating thereto no demand has been made respecting the custody of the children.

(4) The court may, at any time, revoke or vary such directions respecting the children, where the interests of the children so require.

(5) The court may moreover where circumstances so require, determine that one or both of the parents shall be deprived wholly or in part of the rights of parental authority."

38. Article 149 of the Civil Code, under title of The Effects of Parental Authority in Regard to Minors, reads as follows:

"Notwithstanding any other provision of this Code, the court may, upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child."

II. NATIONAL CASE-LAW

39. In *Louis Cutajar v. Josette Farrugia gja' Cutajar*, Cit. 1438/1995/1, Civil Court (Family Section), decided on 29 April 2004, the court held:

> "That this means that the rights of the parents over their children are subject to the best interests of the same children, and this principle has been indicated as "the paramount interest of the child or children", since in the context of the rights of children, the rights of the parents are there, above all else, to protect the interests and welfare of the minors. This, in fact, is the concept of the family and the interests of minors is one of the pillars of the same, so much so that the court is obliged, at every stage of the proceedings before it, both during the cause (in light of what is provided in Article 47 of Chapter 16), and in its judgment, and even after judgment (see Article 56 of Chapter 16), and also during and after a contract of separation, as was emphasized on the basis of Article 61 of Chapter 16, to see that the supreme interest of the minors remains the primary consideration in every decree that it delivers about the care and custody of the children, and every decree must, even after an agreement between the parents, be aimed to benefit the minors."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicants complained about the decision of 1 October 2015 which had remained in place for nearly five years, and which they considered to be contrary to that provided in Article 8 of the Convention, which 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

41. The Government did not dispute the applicability of Article 8 in these proceedings, the applicants' situation, namely a couple who were living together and jointly took care of the first applicant's minor son, clearly amounting to family life (compare *X and Others v. Austria* [GC], no. 19010/07, § 96, ECHR 2013).

42. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

43. The applicants submitted that as a result of the decree of 1 October 2015 (hereinafter 'the decree') they could not live together, and with E. This had in particular placed a heavy burden on the first applicant, who could not avail herself of the assistance and support that the second applicant had previously provided to her in the care and upbringing of E., with whom he had had a good relationship.

44. The decree had remained in place until the Constitutional Court judgment of 20 July 2020 confirming the annulment of the decree by the first-instance constitutional jurisdiction of 30 May 2019, which had been appealed by the State. While the invite of the constitutional jurisdiction of 3 November 2016 was appreciated, no measures or arrangements had been put into place following such invite. It thus, had not brought to an end the effects of the decree.

45. The applicants submitted that the decree was an interference which had not been in accordance with law as there was no law, of sufficient quality (clear, foreseeable and accessible), prescribing such an action in local legislation. Nor was the measure necessary in a democratic society. Indeed, no assessment of the competing interests had been made, and no pressing social need transpired.

46. In reply to the Government's submissions, the applicants submitted that Article 47 of the Civil Code (see paragraph 35 above), was not applicable to the present circumstances which did not relate to the custody of the minor child, nor a case of domestic violence, and neither a limitation/denial of access.

47. Arguing that the measure was not necessary, the applicants noted that, contrary to the Government's assertion, while a police report had been filed by J., there had been no video evidence. Moreover, the police report, also exhibited before the Family Court, had made no reference to any physical violence, but only to verbal threats against "J.'s son". In this connection, even assuming they were true, the threats could have referred to J.'s other son, not E. Importantly, the first applicant's submissions to the Family Court, made in reply to J.'s allegations, had included documentary evidence, namely pictures, showing that rather than being the aggressor, the second applicant had suffered grievous injuries in his head and other parts of his body after being assaulted with clay pots thrown at him by J., who had suffered no physical injury (as noted by the Civil Court (First Hall) in its constitutional competence, see paragraph 29 above). Moreover, no criminal proceedings had been instituted against the second applicant, a person of clean conduct, contrary to J. who had been found guilty of physical abuse, the relevant

judgment having been brought to the attention of the Family Court too. Thus, on the basis of the information before the Family Court at the time, the latter had taken an erroneous decision, and in the least, if in doubt, it should have appointed a hearing and ordered that all the parties involved testify before it so to assess their credibility. The situation had therefore not changed with the benefit of hindsight, as alleged by the Government, and the psychologist report, submitted later on, only confirmed that which was already evident.

48. The mere fact that the measure was temporary did not mean that the applicants had not suffered during the relevant period. Moreover, it had not been revoked once it resulted from the report of the court-appointed psychologist that no danger whatsoever existed. Thus, the domestic authorities had not respected the positive duty under Article 8 of the Convention to take measures to facilitate the reunification of the applicants' family. They also noted that the first applicant had unsuccessfully asked for the revocation of the decree on numerous occasions, and although these requests were not exhibited during the constitutional proceedings, the State and J. had not contested their existence then. Given the above, a request due to the change of circumstances (the pregnancy) appeared futile.

(b) The Government

49. The Government submitted that the interference was in accordance with the law as the Family Court had been under a duty to respond, by means of a decree, to the application filed by J. on 24 July 2015 (see paragraph 12 above). They submitted that the law could not spell out an answer for every single type of demand that could be made by parties in ongoing proceedings, and the Convention did not require such level of legislative detail or certainty to make the decree lawful. The Family Court had given the first applicant the opportunity, of which she availed herself of, to reply to the application, before it decided to apply the measure in line with Article 47 of the Civil Code, which was both clear and foreseeable. The Government further relied on the domestic case of *Louis Cutajar* (cited above) (see paragraph 39 above).

50. The decree was aimed at safeguarding and protecting the rights and freedoms of others, given the serious allegations raised against the second applicant. Those allegations were, according to the Government, backed up by video evidence of the altercation and a police report. Thus, without the benefit of hindsight, the Family Court had been correct in taking action as there was a potential risk to the wellbeing of a minor. The reasons behind the measure where, therefore, relevant and sufficient.

51. Furthermore, the decree had been meant to be temporary, as it was an interlocutory decree that bound the parties before the court and was meant to regulate the ongoing proceedings and not to provide a final decision. In fact, the same decree had appointed a psychologist to give the necessary recommendations. The Government noted that on 9 October 2015 (see paragraph 17 above) the first applicant had not asked for the revocation of the

decree but only for its variation. In the Government's view, the latter request had been rejected (see paragraph 18 above) because the psychologist had already been appointed to carry out a holistic assessment of the minor child. There had, therefore, been no need to extend the scope of her role. So much so that the report of the psychologist included an assessment of E.'s relationship with the second applicant (see paragraph 19 above).

52. While it was true that the Family Court could have notified the psychologist report to the parties and asked them whether, in the light of its findings, it was still necessary to maintain the decree in force, there had been no obstacle for the first applicant to ask for the revocation of the decree. While she claimed to have done so numerous times, she had offered no documentary evidence of such action. Similarly, the first applicant had failed to ask for the revocation of the decree when there was a change of circumstances, namely her becoming pregnant of the second applicant. Thus, any failure could not be attributed to the authorities.

53. Lastly, the Government noted that the effects of the decree of 1 October 2015 were felt only until 3 November 2016, a day before the birth of the applicants' daughter, when the court [of constitutional competence] authorised them to start living together again as a family. They also questioned the severity of the consequences of the measure, since J. had testified before the domestic courts that, in spite of the decree, there were various occasions when he saw both applicants together in the presence of the minor child.

2. The Court's assessment

(a) General principles

54. The mutual enjoyment by members of a family of each other's company constitutes a fundamental element of family life (see *Nasr and Ghali v. Italy*, no. 44883/09, § 308, 23 February 2016). According to the Court's well-established case-law, domestic measures hindering such mutual enjoyment of each other's company amount to an interference with the right to respect for family life (see, *inter alia*, *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 202, 10 September 2019, and *Penchevi v. Bulgaria*, no. 77818/12, § 53, 10 February 2015).

55. Any such interference would constitute a violation of this Article unless it is, first of all, "in accordance with the law". The phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be clear, accessible and foreseeable. Furthermore, the interference must pursue aims that are legitimate under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. That in turn requires that "relevant" and "sufficient"

reasons be put forward by the authorities to justify the interference (ibid. § 54).

56. Regard must be had to the fair balance which has to be struck between the competing interests at stake, within the margin of appreciation afforded to States in such matters. The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit (see *Jansen v. Norway*, no. 2822/16, § 90, 6 September 2018).

57. It is not for the Court to substitute itself for the competent domestic authorities, it has to rather review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. In assessing those decisions, the Court must ascertain more specifically whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and whether they 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 *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 139, 6 July 2010).

58. Undoubtedly, consideration of what is in the best interest of the child is of crucial importance (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 70, ECHR 2001-V (extracts), and *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 176, 27 September 2011). Indeed, the Court has often reiterated that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see, for example, *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). Furthermore, the child's best interests may, depending on their nature and seriousness, override those of the parents (see *Neulinger and Shuruk*, cited above, § 134, and *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII). In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (ibid.).

59. The Court further recalls that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference

resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (see *T.P. and K.M. v. the United Kingdom*, cited above, § 72). In conducting its review in the context of Article 8 the Court may also have regard to the length of the local authority's decision-making process and of any related judicial proceedings (see *Diamante and Pelliccioni*, cited above, § 177, and *T.C. v. Italy*, no. 54032/18, § 57, 19 May 2022).

60. In various contexts the Court has also held that there is a positive duty to take measures to facilitate family reunification as soon as reasonably feasible (see, for example, *Strand Lobben and Others*, cited above, § 205, and *Abdi Ibrahim v. Norway* [GC], no. 15379/16, § 145, 10 December 2021 and the case-law cited therein).

(b) Application of the general principles to the present case

61. The Court notes that the majority of the above-cited principles have developed in situations concerning family life between children and parents, but they nonetheless remain relevant in the present case, which the Court considers can be limited to the applicants' sufferance as a result of the separation from each other (in so far as they could no longer live together or meet in E.'s presence), without it being necessary to enter into the analysis of the second applicant's separation from E. (or *vice versa* given that E. is not an applicant in the present case).

62. Regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8 (see *Abdi Ibrahim*, cited above, § 145). The Court considers that for the applicants, a couple in a stable relationship, the possibility of continuing to live together is a fundamental consideration falling under the concept of family, just as much as that of a parent with a child (compare *Penchevi*, cited above, § 59, in the latter scenario). Thus, an order with the effect of preventing the applicants from living together constitutes interference with one of the essential aspects of the applicants' family life (see, *mutatis mutandis*, *Taddeucci and McCall v. Italy*, no. 51362/09, § 59, 30 June 2016, and *Neulinger and Shuruk*, cited above, §§ 90-91).

63. The Court has no reason to doubt that the measure in the present case, which was given in the ambit of post-separation proceedings related to care custody and access, was in accordance with a law of sufficient quality, namely the relevant provisions of the Civil Code.

64. It can also be accepted that the measure pursued a legitimate aim in so far as it was intended to safeguard E. from any possible harm, and therefore was put in place for the protection of the rights and freedoms of others. Such an action is in line with the State's responsibility to protect individuals from violence by third parties.

65. However, the Court considers that the measure was not proportionate, for a plethora of reasons, including the inability to satisfy relevant procedural

requirements, some of which have already been identified by the domestic courts (see paragraphs 30 and 33 above). In this connection, the Court notes the entire lack of any meaningful involvement of the second applicant in the decision-making process, as well as the limited involvement of the first applicant in so far as all her requests had been rejected, without giving her the possibility of adducing any evidence, or challenging the Children's Advocate report, the content of which was never shown to her, as well as the lack of reasoning in the Family Court's decisions.

66. In the absence of any such reasoning, and bearing in mind the information available to the Family Court before it issued the decree (see paragraph 47 above), the Court cannot but consider that the Family Court failed to look into whether there had been any real and specific risk for the child and overlooked relevant information brought to its attention (compare *Penchevi*, cited above, § 69). In setting out the measure (more than two months after J.'s request), it had failed to conduct an in-depth examination of the entire family situation allowing for a balanced and reasonable assessment of the respective interests of each person. Even admitting that by issuing the decree (on 1 October 2015) the Family Court was erring on the side of caution and acting 'speedily' in order to protect E., whose interests were paramount, there seems to be no justification for the inaction during the subsequent years. The Court notes that when the Family Court realised (from the report of the expert psychologist submitted on 25 November 2015) that the order was no longer necessary, it failed to take any action, such as calling on the parties and inviting them to make submissions in order for it to undertake the relevant assessment including a balancing exercise of the interests at play, including the best interest of the child, at that stage. Nor did it take any such action at any later point in time. It thus left in place the order, contrary to the positive obligation of the State to facilitate reunification as soon as reasonably feasible, which the Court considers applied equally in the circumstances of the present case. While the Government insisted on arguing that the applicant could have requested a (or a further) revocation, the Court notes that both domestic courts have already dismissed these arguments (see paragraphs 27 and 33 above) and the Court finds no reason to alter those findings.

67. Lastly, the Court observes that *de jure* the decree remained valid for over four years, until the appeal judgment of the Constitutional Court confirming the prior decision to declare the decree null and void. It appears from the testimony of the second applicant in the constitutional redress proceedings that the situation continued in practice until the birth of their child on 4 November 2016 (see paragraph 23 above), and thus *de facto* it significantly affected the applicants for a little over a year. Nevertheless, the Court is of the view that the fact that, subsequent to that date, the applicants may have breached the order of the Family Court (with or without the agreement of J. and the constitutional jurisdiction's blessing) without consequences, does not mean that the applicants had not suffered of the

alleged violation of Article 8 for the entire period until the constitutional redress proceedings came to an end. In the absence of the revocation of the decree by the Family Court, or an interim decision by the constitutional jurisdictions, during such period the applicants could have been subject to any form of sanction or consequence and continued to suffer the anxiety as to whether they would ever be able to reunite legally.

68. In the light of all the foregoing considerations the Court finds that the decision-making process at domestic level was flawed, and the measure constituted a disproportionate interference with the right of each of the applicants to respect for their family life.

69. There has therefore been a violation of Article 8 in respect of both applicants.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

70. The second applicant also complained that the domestic courts had taken a decision affecting him, without him having had the opportunity to participate in those proceedings in breach of Article 6 § 1 of the Convention, which reads as follows:

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

71. The Government submitted that Article 6 was not applicable in respect of the second applicant, as the decree had only imposed an obligation on the first applicant, namely that she should not expose the minor to her partner, with immediate effect. In fact, the Family Court had no power or authority to bind the second applicant in any way because he was not a party to the proceedings before it. The Government relied on the findings of the Constitutional Court in this sense (see paragraph 32 above).

72. The second applicant submitted that the effects of the decree issued against the first applicant meant that he could not approach her when E. was with her as, otherwise, he would have exposed her to contempt of court proceedings amongst others. Thus, whether directly or indirectly, the effects of the said decree also concerned his own civil rights and obligations.

73. The Court has stressed that the question of the applicability of Article 6 cannot depend on the recognition of the formal status of "party" by national law (see *Arnoldi v. Italy*, no. 35637/04, § 28, 7 December 2017, and *S.W. v. the United Kingdom*, no. 87/18, § 78, 22 June 2021). However, the Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote

consequences not being sufficient to bring Article 6 § 1 into play (see, among many authorities, *Denisov*, cited above, § 44, and *Regner v. the Czech Republic* [GC], no. 35289/11, § 99, ECHR 2017).

74. In the present case, quite apart from the second applicant's status, the Court observes that, while it is clear that the applicants lived together at the time of the order, it is unknown whether they had entered into a cohabitation agreement in accordance with the Cohabitation Act as a result of which the relevant civil rights could come to play (Section 13).

75. In these circumstances, bearing in mind the findings under Article 8 of the Convention, whereby the Court found a violation of the provision, *inter alia*, because of the entire lack of any meaningful involvement of the second applicant in the decision-making process, the Court considers that it is not necessary to give a separate ruling on the admissibility and merits of the complaint under Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicants claimed 30,000 euros (EUR) in respect of non-pecuniary damage suffered.

78. The Government considered the claim excessive.

79. The Court awards the applicants EUR 12,000, jointly, in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

80. The applicants also claimed EUR 2,937.31 (excluding tax) for the costs and expenses incurred before the domestic courts as per taxed bill of costs submitted.

81. The Government submitted that proof of payment of these costs had not been shown, and in any event, they seemed to have been badly calculated given the partitioning decided by the domestic courts.

82. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, and noting that the sums due in the taxed bill of costs remain payable domestically (see *Borg v. Malta*, no. 37537/13,

§ 198, 12 January 2016), the Court considers it reasonable to award the sum of EUR 2,937 jointly, covering costs and expenses in the domestic proceedings, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 8 admissible and does not consider it necessary to examine the admissibility and merits of the remainder of the application;

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

3. *Holds*
   (a) that the respondent State is to pay the applicants, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,937 (two thousand, nine hundred and thirty-seven euros), plus any tax that may be chargeable to the applicants, 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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President