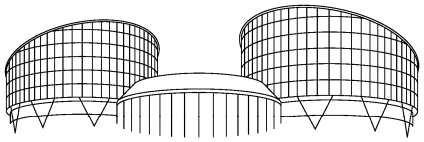

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MILOVANOVIĆ v. SERBIA

(Application no. 56065/10)

JUDGMENT

STRASBOURG

8 October 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Milovanović v. Serbia,

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

Vincent A. De Gaetano, *President,*
Georgios A. Serghides,
Paulo Pinto de Albuquerque,
Branko Lubarda,
Alena Poláčková,
María Elósegui,
Gilberto Felici, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 56065/10) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Ms Mirjana Milovanović ("the applicant"), on 14 September 2010.

2. The applicant was represented by Mr Z. Tošković, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their former Agent, Mr S. Carić, who was substituted by their Agent, Ms N. Plavšić.

3. The applicant alleged that the Serbian authorities had failed to take the necessary measures to enforce the courts' decisions in a child custody-related matter and to facilitate her reunion with her children since 2002.

4. The application was initially allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 6 September 2012 the application was communicated to the Government. On the same date, the President of the Chamber also gave priority to this application in accordance with Rule 41 of the Rules of Court.

6. On 1 February 2014 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1964 and lives in Belgrade.

8. In May 1996 she and her husband M.M. had twins, a boy D. and a girl K.

9. The applicant left the matrimonial home in March 2001 and initially moved with K. to her parents' house. It would appear that D. joined them in September 2001, when the children started attending preschool. In the meantime, both children were temporarily staying together with the applicant or the respondent.

10. In January 2002, when the applicant was taking the children to a medical check-up, M.M. intersected them on their way back home, took the children from the applicant and from then until 2010 systematically prevented her having any contact with them, on threat of violence. The respondent then moved with the children and their older stepbrother into a house that he had started building.

A. First set of custody proceedings, including adoption of an interim order

11. On an unspecified date in 2002 the applicant applied to the then Belgrade Second Municipal Court (*Drugi opštinski sud* – "the Municipal Court") for a divorce, sole custody of both children and child maintenance (*razvod, vršenje roditeljskog prava i izdržavanje*).

12. On 10 June 2002 the court pronounced the divorce and decided on custody of the children in the applicant's favour. The respondent's contact rights and child maintenance payments were also determined.

13. On 5 September 2002 the Belgrade District Court (*Okružni sud* – hereinafter "the District Court") upheld the divorce and quashed the remainder of the decision.

14. On 25 November 2002 the applicant sought interim custody of the children until the conclusion of the civil proceedings. The applicant referred to (a) her very good living conditions and the entirely inadequate living conditions in the respondent's house; (b) repeated physical violence by the respondent against her and the children; and (c) the children's absence from preschool from January 2002.

15. On 27 February 2003 the Municipal Court issued an interim custody order (*privremena mera o vršenju roditeljskog prava*) and, in so doing, specifically ordered the respondent to hand over the children to the applicant within twenty-four hours, pending the final outcome of the ongoing civil proceedings. It became enforceable on 14 June 2003 but remained unenforced.

16. On 6 October 2005 the Municipal Court (i) granted sole custody of the children to the applicant (*poverio decu na negu, staranje i vaspitavanje majci*); (ii) specified the respondent's contact rights; (iii) ordered the respondent to pay child maintenance; and (iv) prohibited contact between the respondent and the children for three months to enable the children to restore emotional ties with the applicant. The court specified, *inter alia*, that the respondent's very destructive behaviour and appalling living conditions, especially the lack of hygiene, windows and water in his house, required the children's immediate removal.

17. The judgment became final on 16 November 2006 and enforceable on 9 January 2007, as the court bailiffs had attempted unsuccessfully to serve it on the respondent beforehand.

B. Second set of custody proceedings (request for the revision of the judgment of 6 October 2005)

18. On 3 June 2008 the respondent filed a new civil claim (*tužba*), seeking sole custody.

19. On 23 June 2010 the Belgrade Court of First Instance (*Osnovni sud*) granted custody to him and ordered the applicant to pay child maintenance. On 8 December 2010 the Belgrade Appeals Court (*Apelacioni sud*) quashed that judgment and remitted the case to the lower court with numerous instructions on their earlier failures and how to examine the case properly and thoroughly.

20. In 2011 the Court of First Instance terminated the proceedings, considering the civil claim withdrawn given that the respondent had failed to appear at a scheduled hearing. The respondent did not appeal.

C. Enforcement of the interim custody order of 27 February 2003

21. Following a request by the applicant dated 18 June, on 26 June 2003 the Belgrade Fourth Municipal Court (hereinafter "the enforcement court") ordered the enforcement of the interim order of 27 February 2003 (see paragraph 15 above). On 30 July 2003 the order was served on the respondent, who was advised to comply with it.

22. The respondent failed to comply and on 7 October 2003 the enforcement court ordered him to pay a fine of 5,000 Serbian dinars (RSD – approximately 74 euros (EUR)) within three days for failing to hand over the children. On 20 October 2003 the court bailiff went to the respondent's house to enforce the fine, but found only the respondent's mother and children. The bailiff recounted that the family had been living in poverty and that the house itself had been in a poor and messy state without a single valuable asset.

23. The first attempt to reunite the applicant with the children took place on 2 December 2003. The respondent's mother maintained that he had moved out with the children to a new address she did not know. The bailiff noted that the children's clothes and school bags were still in the room.

24. On 4 December 2003 the enforcement court ordered the respondent to pay a new fine of RSD 20,000 (approximately EUR 287) and stated that another fine of RSD 25,000 would be imposed if he failed to comply with that order within an additional three days. In an attempt to enforce the fine, the court bailiff noted again that no valuable movable assets could be identified in the respondent's house.

25. On 17 June 2004 the enforcement court imposed the above-mentioned fine of RSD 25,000 (approximately EUR 355) on the respondent and stated that if he again failed to comply with the order within three days, the applicant's custody rights would be enforced forcibly.

26. On 2 and 30 November 2004, in two new reunion attempts, the respondent's house was found empty.

27. The transfer of child custody scheduled for 9 May 2005 had to be cancelled for failure to duly summon the parties, social services and police officers.

28. It appears that following a call from the Ministry of Justice the enforcement court scheduled another transfer of custody to be carried out on 3 June 2005 on the premises of the children's school. The court bailiff, the police, the applicant and the children were present. The Rakovica Social Care Centre (hereinafter "the RSCC") sent a lawyer rather than its expert team composed of a child psychologist, social pedagogue and social worker. The school psychologist stated that she had already tried to talk to the children, who had very little contact with the school staff. They had been terrified and rejected the idea of being reunited with the mother. The applicant suggested that to avoid any further fear and trauma the children, who were crying, should not be handed over forcibly because there were no psychologists or other competent experts present to provide adequate assistance to them.

29. On 18 July 2005 the applicant asked the RSCC to assist by providing its team of experts for the next transfer of custody in order to enable effective enforcement of the interim custody order.

30. On 24 August 2005 the enforcement court instructed the RSCC to submit an opinion on whether the applicant was suitable, ready and able to have custody of the children, if it were awarded to her, and whether it would be in the best interests of the children.

31. In a report supplied on 8 September 2005, the RSCC experts repeated their apparent earlier findings provided within the civil proceedings that the applicant had respectable parental capacity and was better suited to have custody. They also reiterated that they had asked for the court proceedings to be dealt with urgently, anticipating that the

respondent would obstruct any kind of contact between the applicant and their children. As regards the applicant's conduct, they considered that she had been primarily focused on defending herself from the respondent's violence rather than protecting her children from poor living conditions. That is to say, when the interim custody order had come into force, there had been no legal impediment to her taking the children. However, in the efforts to enforce her rights, when she could have been expected to protect the children by taking them to her house regardless of the risk to her from the respondent, she showed a lack of efficiency and emotional engagement, relying on "a unrealistic expectation that she would be protected from the respondent's violence if the State institution helped her in the execution of the custody transfer". As the children had been alienated from the applicant, and branded a bad mother by the respondent, the children had a perception about their father as the only parent interested in raising them. The RSCC considered that disrupting the children's current living arrangements with the respondent would not be in their best interests.

32. Referring to the above report and the children's objection to being reunited with the applicant on 3 June 2005, the enforcement court terminated (*obustavio*) the proceedings to enforce the interim custody decision on 16 September 2005.

33. The applicant received the decision of 16 September three months later and contested it on 21 December 2005 (*izjavila prigovor*), recalling the delivery of the first-instance judgment and complaining that it was not open to an administrative body to amend a judicial decision. In the meantime, on 9 November 2005 the applicant informed the court that the first-instance judgment of 6 October 2005 had been delivered in her favour (see paragraph 16 above).

34. On 28 February 2006 the RSCC decided of its own motion to initiate corrective supervision of the respondent's exercise of parental rights and requested that he attend meetings at the Mental Health Institute in Belgrade (*Institut za mentalno zdravlje* – hereinafter "the MHI"). The reasons for this measure were the respondent's continuous reluctance to enable contact between the applicant and their children, instilling negative attitudes towards their mother and preventing any emotional and caring links between them, unwillingness to comply with the interim custody order and disregard for the RSCC's warning about the detrimental effects of that behaviour on his children's development. It would appear that the respondent did not comply with his obligation to attend therapy sessions, and that the decision was not enforced.

35. On 10 April 2006 the second-instance court quashed the decision to end the proceedings to enforce the interim custody decision of 16 September 2005 (see paragraph 32) on several grounds, stating, *inter alia*, that the RSCC's report had been prepared outside the RSCC's

statutory competence to give such an opinion in the course of enforcement proceedings.

36. On 19 June 2006 the enforcement court, referring to the instructions given by the second-instance court, invited the RSCC to consult the court's case file in order to facilitate the protection of the best interests of the children.

37. The RSCC's lawyer and social worker consulted the court's case file a year later, on 28 June 2007 and in its report of 6 August 2007 stated that it would be in the best interests of the children to have the interim custody order enforced. The RSCC also informed the court that it had initiated civil proceedings against the respondent, requesting that he be deprived of his parental rights (see under G.2 below).

38. Owing to inactivity on the part of the enforcement court, the applicant's lawyer directly approached the court on 27 November 2007, supplying it with the phone numbers and a probable address of the respondent, and on 25 December 2007 when proposed that the transfer of the children be scheduled after the school holidays as the children would then be at school again.

39. On 7 February 2008 the enforcement court invited the RSCC's expert team and the school pedagogue and psychologist to provide assistance in facilitating the custody transfer scheduled for 20 February 2008. It also invited the police, warning them of the respondent's tendency towards aggressive behaviour.

40. On 19 February 2008 the applicant again informed the enforcement court that the judgment in her favour had become final and suggested that the court should allow enforcement of the custody order the following day for that reason. On the same date the court terminated the enforcement of the interim custody order of 2003, since it was no longer valid, and instructed the applicant to submit a new enforcement request within three days in view of the final judgment in her favour. The decision of the enforcement court became final on 31 March 2008.

D. Enforcement of the civil judgment of 6 October 2005

41. Following the applicant's request of 27 February 2008, on 13 March 2008 the same enforcement court issued an enforcement order in respect of the judgment of 6 October 2005.

42. The respondent appealed on 1 April 2008, but failed to sign his appeal. On 7 April 2008 the enforcement court instructed its bailiff to look for the respondent at his house to obtain his signature and verify that he had complied with the enforcement order. In the transcript of 9 May 2008 the bailiff reported that he had found the respondent, who had signed the appeal but had not yet complied with the order. The appeal was sent to the applicant on 5 June and she submitted her reply on 12 June 2008.

43. On 24 June 2008 the enforcement court transferred the case file to the Municipal Court, as the latter needed to consult it in respect of the criminal proceedings pending before it (see under G.1 below).

44. On 13 November 2008 and 27 January 2009 the enforcement court asked to have the case file back, which it forwarded to the District Court on 10 February 2009 to decide the respondent's appeal of 1 April 2008.

45. On 23 April 2009 the District Court rejected the respondent's appeal. The case file arrived at the enforcement court on 5 June 2009.

46. Between 7 July 2009 and 8 July 2010 the enforcement court scheduled eight hearings, of which five were held.

47. On 7 July 2009 the enforcement court heard the parties and decided to hear the children at the following hearing. The court could not hear the opinion of the RSCC's expert as planned. It had been informed by the expert that, despite the fact that she had officially requested to be exempted from the commitment because she was the applicant's bridesmaid, the RSCC had decided to send her to the hearing as their representative. According to her statement and the case file, she had not been engaged in other RSCC activities or reports in the case. The court postponed the hearing and requested the RSCC to submit an urgent opinion on the means of enforcement, that is to say, could it be expected that the respondent would comply with the judgment if fined or would forcible enforcement be required.

48. On 16 July 2009 the enforcement court complained to the Labour and Social Policy Ministry about the RSCC's conduct and requested the Ministry to inspect the RSCC's case file. The Ministry took the view that the steps taken by the RSCC had not been in breach of domestic law, but had not been taken in a professional manner.

49. On 20 October 2009 a newly formed RSCC expert team advised the court to order the respondent to commit himself to bringing the children to a specialist institution, which would organise counselling (*savetodavno-terapijski rad*) for the whole family aimed at preparing for the custody transfer.

50. On 22 October 2009 the applicant again requested forcible enforcement of the judgment in the presence of the RSCC's expert team, which could prepare the children in advance for the custody transfer.

51. At the hearing of 23 October 2009 the enforcement court heard the children, who expressed their wish to meet their mother, as well as their grandparents and uncle whom they had only heard about. They suggested to spend weekends at their mother's house. The court ordered counselling for the family at the MHI and that the children would spend the weekends at the mother's house. It instructed the parties to comply with the order and provide fortnightly reports about the course of contact and counselling, and the RSCC to supervise the whole process and inform it of the developments.

52. On 12 November 2009 the applicant informed the enforcement court that the respondent had been obstructing her contact rights.

53. On 16 November 2009 the children were examined by the MHI, whose experts found no psychiatric disorder or developmental disability requiring any psychiatric treatment. The MHI appears to have understood that they were to carry out an expert assessment of the parties' ability to have custody and, therefore requested payment in advance.

54. On 20 November 2009 the enforcement court clarified its request, describing the complex circumstances of the case and asking the MHI to specify how they could help the court to prepare the children for the reunion with their mother.

55. On 24 December 2009 the MHI explained that they had not been accredited for family mediation and advised the court to direct the family to the Marriage and Family Counselling Office of the Belgrade Social Care Centre. On 23 February 2010 the RSCC advised against this, given that further institutional work could make the children more resistant and put at risk the ongoing development of trust and cooperation between the RSCC and the children.

56. In the meantime, on 27 November and 16 December 2009 the RSCC informed the court that the children had slept once at their mother's house, while on the other days they had been impeded. It advised that the enforcement proceedings be stayed until the treatment at the MHI was completed. In addition, the hearings scheduled for 17 December 2009 and 3 February 2010 were adjourned because to the presiding judge and the RSCC had other commitments.

57. At the hearing of 3 March 2010[1] the applicant challenged the RSCC's advice and requested forcible enforcement. The applicant explained that there had been no particular developments and that the court's order of 23 October 2009 had not been complied with. She had been seeing the children after school and they had only been at her home three times for two or three hours. The RSCC stated that the children should not be put under pressure, but should see the applicant in accordance with their wishes and needs. It advised against forcible enforcement, but recommended further counselling for the family as it would be in the best interests of the children. The RSCC's social pedagogue could not give a precise proposal on the applicant's further contact with the children.

58. Following a written opinion provided by the RSCC on 12 March 2010 and the children's statements, on 8 April 2010 the enforcement court reversed the decision of 23 October 2009 by reducing the applicant's contact with the children to Tuesdays and Sundays, for four and eight hours respectively. It also ordered the RSCC to continue counselling,

1. Following the judicial reform, the Belgrade Court of First Instance became the competent court in this case.

supervise the contact and provide regular reports. The children expressed the wish to continue living with their father and visit the applicant.

59. The hearing scheduled for 29 June 2010 was adjourned because the presiding judge had other commitments.

60. On 8 July 2010 the children rejected the applicant's proposal to spend two weeks of their summer holidays together outside Belgrade, but agreed to spend some time with her in Belgrade when they wished. The applicant informed the court that contact with the children was not regular as ordered by that court. The court ordered the RSCC to provide reports once every two months about the regularity of contact between the applicant and her children and the children's behaviour throughout. It appears that the RSCC did so on 29 October 2010.

61. On 11 November 2010 the enforcement court transferred the case file to the trial chamber of the Belgrade Court of First Instance to be consulted in respect of the pending criminal proceedings for child abduction against the respondent (see paragraph 70 below). The case file stayed with the Belgrade Court of First Instance until 23 January 2012, when both the enforcement and criminal files were transferred to the Constitutional Court to decide the applicant's constitutional appeal of 26 February 2009. No records of the enforcement court's or the RSCC's work during this period, if any, were made available to the Court.

62. At the hearing of 15 March 2013 the RSCC's psychologist noted that the children had started seeing the applicant more often as of December 2012, but still did not want to live with her. The court instructed the RSCC to continue implementing the "Intervention Plan" and provide reports once every two months to the court.

63. The final custody judgment of October 2005 remained unenforced.

E. The applicant's contact with the children

64. In summary, between January 2002 and October 2009 the applicant saw the children during school breaks or shortly after school on weekdays. It would appear that as of October 2009 the applicant was able to see her children in the presence of the respondent and/or the RSCC's representatives for short periods of time only, and not as had been envisaged by the civil or enforcement courts. From July 2010 to the end of 2011 the children visited the applicant for several hours either on Saturdays or Sundays. According to the 2013 report (see paragraph 62 above), the children had started seeing the applicant more often. The Court has not received any factual update about the contact since then.

F. Constitutional appeal process

65. On 26 February 2009 the applicant filed a constitutional appeal with the Constitutional Court of Serbia (*Ustavni sud Republike Srbije*), seeking redress for the non-enforcement of the final custody judgment and the prior interim custody order. She also complained about the length of the pending criminal proceedings concerning child abduction. She relied on Article 32 of the Constitution, which corresponds to Article 6 of the Convention (see paragraph 83 below).

66. On 23 May 2012 the Constitutional Court found a violation of the right to a fair trial as regards the protracted length of the enforcement proceedings in respect of the final custody judgment of October 2005. It dismissed the remainder of the appeal. The decision was sent to the applicant on 5 July 2012.

As regards the violation found, the Constitutional Court stated, relying on several of the Court's judgments in child custody cases, that the enforcement court had been passive, protracting the proceedings unnecessarily and failing to take the necessary measures to enforce the judgment. It specifically noted that the first hearing had been held after a year and four months, that the respondent had stopped obstructing the enforcement at one point, and that the case file had been held by the criminal court twice for a long period of time. It ordered the enforcement court to take all the measures necessary to bring the impugned enforcement proceedings to a conclusion as soon as possible. The applicant did not seek any compensation in her constitutional appeal at the time, which is why no claim in that regard appears to have been considered.

The Constitutional Court dismissed (*odbacio*) the complaint about the non-enforcement of the interim custody order as out of time. The enforcement proceedings had been terminated in February 2008, while the applicant had filed her constitutional appeal in February 2009.

The Constitutional Court lastly found that the applicant could not complain about the length and outcome of the criminal proceedings in which she had participated only as an injured party without seeking damages by filing a civil-party claim (*predlog za ostvarivanje imovinsko-pravnog zahteva*).

67. On 2 August 2012 the applicant filed a claim for damages with the Commission for Damages in respect of the Constitutional Court's acknowledgment of the violation of her right to fair trial. She does not appear to have received any response.

G. Additional relevant facts

68. There are records in the case file of official complaints by the applicant of the respondent State's failure to enforce the said interim

custody order and the final civil judgment. These were addressed to: (i) the enforcement court on 10 and 23 March 2005, 11 April 2005, 1 June 2005, 19 July 2005, 9 November 2005, 10 March 2006, 30 October 2006, 19 January 2007, 10 September 2007, 22 October 2009, and 18 March 2010; (ii) the President of the District Court on 19 January 2007; and (iii) the Ministry of Justice on 25 April 2005. She also requested the support and engagement of the RSCC on numerous occasions and addressed the Public Prosecutor Office.

1. The respondent's criminal conviction and subsequent criminal charge

69. On 16 June 2006 the Municipal Court found the respondent guilty of failure to hand over the children to the person entitled to have custody (parental child abduction) between 16 June 2003 and 27 May 2005, the latter being the date of the respondent's indictment by the Public Prosecutor's Office. He was sentenced to four months in prison, suspended for two years. The applicant joined the proceedings as a civil party. It would appear that the judgment was served on the respondent on 11 October 2006 and became final on 19 October 2006.

70. On 14 Match 2007 the applicant informed the Public Prosecutor's Office that the respondent had refused to comply with the custody decisions and hand over the children. She asked the Prosecutor to indict the respondent or to request the suspended imprisonment. On 17 May 2007 the applicant filed a bill of indictment as a subsidiary prosecutor against the respondent for his continuing failure to hand over their children to her. The Public Prosecutor's Office took over the prosecution on 29 January 2008. On 27 December 2012 the court acquitted the respondent, finding his statement that he had not prevented enforcement of the orders concerning transfer of custody or contact with the children to be truthful. The criminal proceedings were still pending at second instance at the time the parties had exchanged their observations.

2. Proceedings for deprivation of parental rights

71. On an unspecified date in 2007 the RSCC instituted proceedings against the respondent, requesting that he be deprived of his parental rights (*roditeljsko pravo*) on the grounds of abusive behaviour and child abduction. The applicant joined the proceedings as an intervener (*umešač*). She explained that she had filed for divorce as the respondent had been physically aggressive towards her in front of the children.

72. On 8 September 2008 the competent court deprived the respondent of his parental rights, but it would appear that that decision was subsequently quashed and that the RSCC withdrew its initial request,

finding it unsuitable given that the respondent was the only carer that the children were used to living with.

3. Other relevant facts

73. At the beginning of April 2005 the respondent's neighbour filed a complaint (*podnela prijavu*) with the RSCC alleging various kinds of child abuse. The complaint was transferred to the police on 5 April 2005, who appear to have refused to investigate the allegations owing to alleged formal deficiencies in the complaint. It would also appear that a RSCC's psychologist lodged a criminal complaint against the respondent because of his alleged violence threats against her and her children.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Family law

74. Both relevant Family Acts, 1980 Marriage and Family Relations Act (*Zakon o braku i porodičnim odnosima*; published in the Official Gazette of the Socialist Republic of Serbia - OG SRS - nos. 22/80, 11/88 and in the Official Gazette of the Republic of Serbia - OG RS - nos. 22/93, 25/93, 35/94, 46/95 and 29/01) and 2005 Family Act (*Porodični zakon*; published in OG RS no. 18/05, entered into force on 1 July 2005 in respect of most articles) provided, *inter alia*, that all family-related disputes involving children, including enforcement proceedings, had to be dealt with by the courts urgently (see Articles 391 and 204 respectively).

75. A child who has reached the age of fifteen and who is able to reason has the right to decide which parent he or she is going to live with (Article 60(1) of the 2005 Act), while a child who is ten years old may freely and directly express an opinion within judicial and administrative proceedings whenever his or her rights are at stake (ibid., Article 65). A child has the right to maintain a personal relationship with the parent he or she does not live with, unless there are reasons to deprive that parent partially or fully of their parental rights or in cases of domestic violence (ibid., Article 61).

76. A complaint concerning the work of social services may be filed with the ministry competent for family protection by a guardian, a ward who is mentally capable or by any person who has a legal interest. The competent ministry must respond to the complaint within thirty days of receiving the complaint (ibid., Article 338).

B. Child custody-related enforcement rules applicable at the material time

77. Enforcement of the 2003 interim custody measure was to be pursued in accordance with the 2000 Act (*Zakon o izvršnom postupku*; published in OG FRY nos. 28/00, 73/00 and 71/01), whilst the enforcement of the 2005 final custody judgment was to be on the basis of the 2004 Act *(Zakon o izvršnom postupku;* published in OG RS no. 125/04) until 17 September 2011 and the 2011 Act (*Zakon o izvršenju i obezbeđenju*; published in OG RS nos. 31/11 and 99/11) thereafter.

78. All three Acts provided that all enforcement proceedings were to be conducted urgently (Article 4(1), Articles 5(1) and Article 6(1) respectively).

79. While placing special emphasis on the best interests of the child, the 2000 and 2004 Acts provided that there was an initial period of three days for voluntary compliance with a child custody order. Beyond that, however, fines were to be imposed and, ultimately, if necessary, the child had to be forcibly transferred, in cooperation with the social care center (Articles 209 and 224 respectively).

80. Ongoing enforcement proceedings must be terminated by the court of its own motion if the enforcement document in question has in the meantime been set aside by a final decision rendered within a separate set of proceedings (Article 68(1) of the 2004 Act).

81. Articles 224 to 235 of the 2011 Act provide more comprehensive rules for the enforcement of custody and contact orders than the previous legislation, as well as specific tasks for the enforcement court, psychologists and other specialist institutions. A hearing within the enforcement proceedings should be scheduled only exceptionally and specifically if the best interests of child whom it concerns so requires (Article 227(2)). The enforcement court must, after examining the particular circumstances of the case, choose the means of enforcement, whether that be to enforce the custody order forcibly, impose a fine or sentence to imprisonment a person who does not adhere to the custody decision outlined by the competent court (Article 228).

C. Constitutional appeal process

82. The Constitution of the Republic of Serbia (*Ustav Republike Srbije*; published in OG RS no. 98/06) entered into force on 8 November 2006. The Constitutional Court declines jurisdiction *ratione temporis* to decide on the constitutional appeals concerning the decisions and/or acts that occurred before that date (see Practice directions adopted by the Constitutional Court as regards the examination of and ruling on constitutional appeals, *Stavovi Ustavnog suda u postupku ispitivanja i odlučivanja po ustavnoj žalbi se*

odnose na postupak prethodnog ispitivanje ustavne žalbe, adopted on 30 October 2008 and 2 April 2009).

83. Article 32 § 1 provides, *inter alia*, for a right to a hearing within a reasonable time. The Constitution does not contain a provision on the right to respect for family life, which corresponds to Article 8 of the Convention. Article 65 guarantees that parents have a right and responsibility to support and provide an upbringing and education for their children, in which they are equal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE LENGTHY CONSTITUTIONAL PROCEEDINGS

84. The applicant complained that the length of the proceedings before the Constitutional Court had exceeded the "reasonable time" requirement of Article 6 of the Convention, which reads as follows:

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

85. The Government contested that argument, emphasising that a more rapid examination of the case, despite its sensitivity, had not been and would not be possible in this or similar cases in view of the Constitutional Court's excessive caseload of 6,000 pending cases. They also referred to the Court's finding in the case of *Janković v. Croatia* ((dec), no. 43440/98, ECHR 2000-X), that proceedings before the Croatian Constitutional Court, which had lasted three years, eleven months and six days, had not been excessively long.

86. The Court finds that the proceedings before the Serbian Constitutional Court come clearly within the scope of Article 6 of the Convention (see, generally, *Süßmann v. Germany*, 16 September 1996, §§ 39-42, *Reports of Judgments and Decisions* 1996-IV, and *Tričković v. Slovenia*, no. 39914/98, §§ 36-41, 12 June 2001).

87. The Court notes that the proceedings, which began on 26 February 2009, the date on which the applicant appealed to the Constitutional Court, and ended on 5 July 2012, the date on which its decision of 23 May 2012 was served on her, lasted nearly three years and five months.

88. The Court will assess the reasonableness of the length of the proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case, the conduct of the applicant and the competent

authorities, and the importance of what was at stake for the applicant in the litigation (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI). In this connection, the Court reiterates that exceptional diligence is required in dealing with child custody-related cases in view of the possible consequences which the excessive length of proceedings may have, notably, on enjoyment of the right to respect for family life (see, among other authorities, *Laino v. Italy* [GC], no. 33158/96, § 18, ECHR 1999-I, and *V.A.M. v. Serbia,* no. 39177/05, § 101, 13 March 2007).

89. The Court observes that neither the complexity of the case nor the applicant's conduct explains the length of the proceedings (contrast *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01 et seq., §§ 131-33, ECHR 2005-V); rather, the applicant's case was not terminated earlier owing to the excessive caseload of the Constitutional Court. In this connection, the Court has repeatedly held that Article 6 § 1 imposes on Contracting States a duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Although this obligation cannot be construed in the same way for a constitutional court with its role as guardian of the Constitution as for an ordinary court, this role also makes it particularly necessary for a Constitutional Court sometimes to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms (see *Süßmann,* cited above, §§ 55-57; *Gast and Popp v. Germany*, no. 29357/95, § 75, ECHR 2000-II and *Šikić v. Croatia*, no. 9143/08, § 37, 15 July 2010). The Court emphasises that, according to its established case-law, a chronic overload, like the one in the present case, cannot justify excessively long proceedings before the Constitutional Court (see, *mutatis mutandis*, *Pammel v. Germany* and *Probstmeier v. Germany*, 1 July 1997, § 69 and § 64 respectively, *Reports* 1997-IV; contrast, as regards the temporary backlog of court business and prompt remedial action, *Unión Alimentaria Sanders S.A. v. Spain*, 7 July 1989, § 40, Series A no. 157). Moreover, while what was at stake for the applicant in the proceedings before the Constitutional Court was of considerable importance, the Constitutional Court, according to the Government, was not in position to adopt and implement any priority policy in dealing with constitutional appeals and did not consider doing so, including in child custody-related cases (see paragraph 88 above). Hence, the Government have not submitted any factors which could justify the protracted length of the proceedings.

90. The Court considers that a lapse of time like that in the present case, even before the courts exercising constitutional jurisdiction, was excessive and failed to meet the "reasonable time" requirement of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no.

15766/03, §§ 108-9, ECHR 2010, where proceedings before the Constitutional Court regarding the education of Roma children lasted four years and one month; see also *Nikolac v. Croatia*, no. 17117/06, § 17, 10 July 2008, *Butković v. Croatia*, no. 32264/03, § 27, 24 May 2007, and *Šikić*, cited above, § 37, where the Court found violations of the reasonable time requirement contained in Article 6 § 1 of the Convention in urgent cases involving labour-related and housing issues; the constitutional proceedings therein had lasted for approximately three years and four months, three years and six months, and three years and nine months, respectively, and considered together with the prior civil proceedings had lasted globally for approximately seven years, six and a half years, and five years within the Court's competence *ratione temporis* respectively; contrast *Maltzan and Others*, cited above, § 135, *Tešić v. Serbia*, nos. 4678/07 and 50591/12, § 77, 11 February 2014, and *Janković*, cited and referred to above by the Government (see paragraph 85 above), the latter case concerning a dispute of pecuniary nature which did not require exceptional diligence, in which only one year and four months of the constitutional appeal proceedings fell within the Court's temporal jurisdiction). Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 6 AND 8 OF THE CONVENTION AS REGARDS THE NON-ENFORCEMENT OF THE APPLICANT'S CUSTODY RIGHTS

91. The applicant further complained under numerous Articles of the Convention about the non-enforcement of the child custody-related decisions rendered in her favour. She alleged that, owing to the failure of the State authorities to take adequate measures to enforce the decisions, she had been denied contact with her children and prevented from effectively exercising her custody and parental rights since 2002.

92. The Court considers that the main legal issue raised by the application concerns the applicant's inability to be reunited with her children and exercise her parental authority, meaning her right to respect for her family life. Regardless of the difference in the nature of the interests protected by Articles 6 and 8 (see *McMichael*, cited above), the Court considers that its examination should exclusively address the issue raised under Article 8 (see *Raban v. Romania*, no. 25437/08, § 23, 26 October 2010; and *Amanalachioai v. Romania*, no. 4023/04, § 63, 26 May 2009; see also, *mutatis mutandis*, in the context of the Hague Convention, *Oller Kamińska v. Poland*, no. 28481/12, § 69, 18 January 2018 and *Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, § 41, 22 April 2010). The relevant part of Article 8 reads as follows:

Article 8

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. As regards the non-enforcement of the child custody judgment of 2005: the applicant's loss of victim status

93. The Government argued that the applicant had lost her status as a "victim" within the meaning of Article 34 of the Convention of an alleged violation in respect of the non-enforcement of the custody judgment of 2005. They pointed out that the Constitutional Court had clearly acknowledged a violation of her rights in its decision of 23 May 2012 (see paragraph 66 above). The State could not be blamed for the fact that no compensation had been awarded to the applicant, as she had not sought any in her constitutional appeal.

94. The applicant maintained that she had pursued all the available legal remedies, including the constitutional avenue, to obtain enforcement of the judgment in her favour. Not only had the other remedies been ineffective, she had received the Constitutional Court's decision after an unacceptably long delay. Her children had in the meantime reached the age when they were entitled to decide with which parent they would live (see paragraph 75 above). The applicant stated that during all these years her former husband had used his position to turn the children against her and had paved the way to almost certain future suffering. Fundamentally, despite the Constitutional Court's decision in her favour, the custody judgment had not been enforced. Lastly, she stated that no monetary compensation could have repaired the suffering caused by the deprivation of irreplaceable contact with her children that the Constitutional Court had only prolonged.

95. The applicant lodged her application with the Court at the time when her constitutional appeal was still pending. While initially awaiting the outcome, the Court ultimately decided to communicate the application to the Government, taking into consideration the time the proceedings had been pending before the Constitutional Court. Soon after, the Court was informed of the Constitutional Court's decision in the applicant's favour. The question of whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, *inter alia*, *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII, and *Karahalios v. Greece*, no. 62503/00, § 21, 11 December 2003).

96. According to the Court's settled case-law, a decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and subsequently afforded appropriate and sufficient redress for the breach of the Convention (see, for the main principles, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-213, ECHR 2006-V, and *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 69-98, ECHR 2006-V; see also, among other authorities, *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003; and *Nardone v. Italy* (dec.), no. 34368/02, 25 November 2004). The Court has generally considered this to be dependent on all the circumstances of the case, with particular regard to the nature of the right alleged to have been breached (see *Gäfgen v. Germany* [GC], no. 22978/05, § 116, ECHR 2010), the reasons given for the decision (see *M.A. v. the United Kingdom* (dec.), no. 35242/04, ECHR 2005-VIII, and contrast *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X) and the persistence of the unfavourable consequences for the person concerned after that decision (see *Freimanis and Līdums v. Latvia*, nos. 73443/01 and 74860/01, § 68, 9 February 2006).

97. It is observed that the 2006 Serbian Constitution does not contain a provision on the right to respect for family life (see paragraph 83 above). In its decision of 23 May 2012 (dispatched on 5 July 2012), the Constitutional Court found, relying on several of the Court's decisions rendered under Article 8, that the applicant had suffered a breach of her "right to a fair trial" on account of the failure of the State to take all necessary measures to enforce the 2005 custody judgment. The Court considers that it is unnecessary to determine in the present case whether the acknowledgment of a violation by the national authorities adequately acknowledged a violation under Article 8, as the redress afforded was in any event not appropriate and sufficient for the reasons outlined below.

98. The Court notes that the proceedings which the applicant instituted in order to obtain redress for the situation about which she complained to the Court were pending before the Constitutional Court for three and a half years without any possibility of the case being dealt with as a priority policy, a lapse of time which cannot clearly be reconcilable with the general speediness requirement (see, in general context, *Scordino*, cited above, § 202; *McFarlane v. Ireland* [GC], no. 31333/06, § 123, 10 September 2010, with further references; *Vidas v. Croatia*, no. 40383/04, § 37, 3 July 2008; *Doran v. Ireland*, no. 50389/99, § 56-57 and 65, ECHR 2003-X (extracts); and *Wasserman v. Russia (no. 2)*, no. 21071/05, § 55, 10 April 2008; see, also, in respect of a preventive and compensatory nature of a remedy in context of Article 8, *Kuppinger v. Germany*, no. 62198/11, § 136-137, 15 January 2015; *Macready v. the Czech Republic*, cited above, § 48; *Bergmann v. the Czech Republic*, no. 8857/08, 27 October 2011,

§§ 45-46 with further references, and *Mansour v. Slovakia*, 60399/15, §§ 41-42, 21 November 2017). The court allowed the applicant's constitutional appeal in part and ordered the enforcement of the custody judgment as soon as possible. However, it gave no opinion on the feasibility of the enforcement in 2012 in the light of the time which had elapsed. The constitutional proceedings only added to existing delays and a continuing situation prejudicial to the applicant's right to respect for her family life. The enforcement proceedings continued even after the decision of the Constitutional Court.

99. In view of the above considerations, the Court considers that the Constitutional Court's decision was not appropriate and sufficient. Accordingly, the applicant can still claim to be a "victim" of a violation of Article 8 of the Convention within the meaning of Article 34. The Government's objection in this respect must therefore be dismissed.

2. As regards the non-enforcement of the interim measure of 27 February 2003: compliance with the exhaustion of domestic remedies in conjunction with the six-month rule

100. The Government maintained that the applicant had not properly exhausted the effective domestic remedies. Firstly, she had not complained to the Labour and Social Policy Ministry of the inefficiency of the RSCC either in general terms or concerning its failure to provide a psychologist during the handover in June 2005 or its report of February 2005 which led to a stay of enforcement. The Ministry had thirty days, or ninety days in complex cases, to draw up an analysis of the work of a social care center and give it guidelines on how to proceed. In the present case it had initiated such supervision at the request of the municipal court and issued instructions to the Centre (in accordance with Article 14(2) and 338 of the Family Act, see paragraph 76 above).

Secondly, the applicant had not properly exhausted the constitutional avenue, given that the Constitutional Court had dismissed her complaint concerning the non-enforcement of the interim measure as out of time (see paragraph 66 above).

101. The applicant maintained that she had complied with the exhaustion requirement. She also claimed that the Constitutional Court, in order to minimize the tardiness in the enforcement of her custody rights, had artificially split the enforcement of the interim custody measure and the custody judgment into two separate sets of proceedings, even though they had been of the same nature and had had the same objective, namely to put into effect the handover of the children between the same parties.

102. According to the Court's established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court (see *Kudła*, cited

above, § 152). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Vučković and Others v. Serbia* [GC], no. 17153/11 and 29 others, §§ 69-77, 25 March 2014, and *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009). The only remedies to be exhausted are those which are effective and were available in theory and in practice at the relevant time, that is to say they must have been accessible and capable of providing redress in respect of the complaint and must have offered reasonable prospects of success (see, *mutatis mutandis*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports* 1996-IV).

103. The application of this rule must make due allowance for the context. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The Court has recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69). It must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected in order to exhaust domestic remedies.

104. As regards the first objection, the Court notes that a complaint to the Ministry would be a hierarchical complaint or, in other words, no more than mere information submitted to the supervisory organ with full discretion to make use of its powers as it sees fit and without involving the applicant in the proceedings even if taken (see, *mutatis mutandis*, *V.A.M. v. Serbia*, cited above, § 85; *Horvat v. Croatia*, no. 51585/99, § 47, ECHR 2001-VIII; and *Hartman v. the Czech Republic*, no. 53341/99, § 66, ECHR 2003-VIII (extracts)). Moreover, the Court notes that the Ministry became involved in the enforcement of the custody judgment in 2009 and did not enable any significant expedition of those proceedings (see paragraph 48 above). This remedy cannot therefore be considered effective within the meaning of Article 35 § 1 of the Convention.

105. As regards the second objection, it is noted that the Constitutional Court divided the proceedings into two sets and dismissed the applicant's complaint about the non-enforcement of the interim custody order in respect of the right to a fair trial as out of time, stating that the relevant enforcement proceedings had been terminated on 19 February 2008 (although the Court notes that the interim order was not valid by operation of law as of 2005, see paragraphs 15-17 and 80 above), while the applicant had filed her

constitutional appeal in respect of non-enforcement of both custody-related decisions on 26 February 2009.

106. The aim of interim measures is to ensure that the main proceedings do not lose their purpose. Depending of the nature of an interim measure and of complaints before the Court, it may be appropriate in certain situations to distinguish between various sets of proceedings and examine them separately. The Court adopted such an approach in the *Leonov* case (see *Leonov v. Russia*, no. 77180/11, § 55, 10 April 2018), in which the applicant complained that the domestic authorities had not adduced relevant and sufficient reasons for granting a residence order in favour of his son's mother and, previously, for the interim order prohibiting him from contacting his son or picking him up from his nursery pending the residence order proceedings. In the present case, and unlike in the case of *Leonov*, the interim decision concerned precisely the same issue, that is care and custody of the children, and both decisions were in the applicant's favour. In the context of continuous non-enforcement of custody/contact-related rights under Article 8, an applicant cannot be expected to make a separate complaint to the Constitutional Court or this Court about the non-enforcement of each and every interim order, of which may be a large number, within the main proceedings. The Court will therefore adopt a global approach when considering the domestic proceedings and have regard to the overall facts which may be important for the context and merits of the main proceedings (see, *mutatis mutandis*, in the context of Article 6 and *ratione materiae* compatibility, *Micallef v. Malta* [GC], no. 17056/06, §§ 77, ECHR 2009 and, in the context of Article 10, *Editions Plon v. France*, no. 58148/00, § 22, ECHR 2004-IV; see, in the child custody context, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 45, 6 November 2007, and *Oller Kamińska v. Poland*, cited above, § 74, where the Court adopted a global approach to the examination of the entire civil proceedings, the interim orders included, although, if examined separately, the interim orders would have been rejected for non-compliance with the six-month rule).

107. Having regard to the above, the Court considers that the applicant cannot be criticised for not making a separate complaint to the Constitutional Court about the failure to enforce the interim custody order. Therefore, the Government's objection about non-exhaustion of domestic remedies must be dismissed. For the reasons stated above in the paragraph 106, the Court also considers that the present case does not raise any issue in respect of tardiness in lodging the application.

3. Conclusion

108. The Court considers that the applicant's complaint under Article 8 of itself is not manifestly ill-founded within the meaning of Article 35 § 3

(a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

As regards the non-enforcement of the interim custody order as well as of the final custody judgment, both considered under Article 8 of the Convention

(a) The parties' submissions

109. The applicant complained that owing to the continued non-enforcement of the final custody judgment of 6 October 2005, as well as the respondent State's prior failure to enforce the interim custody order of 27 February 2003, she had been denied contact with her children and prevented from exercising her parental rights in accordance with the relevant domestic legislation, the court's decisions and her right to family life.

110. She maintained that she had addressed various bodies in an attempt to accelerate the proceedings and take custody of the children. She asserted that while she had asked the RSCC on numerous occasions to prepare the children in good time for the transfer of custody, the authorities had not taken suitable preparatory measures and now blamed her for the failure of the inadequately organised forced transfer in a situation where the underage children had been without contact with her for two and a half years, being additionally and systematically manipulated by the respondent into refusing contact with her. The school psychologist had neither been authorised nor had she done so. The State had caused her additional suffering by accusing her of contributing herself to her own tragic situation by failing to go against the wishes of her unprepared crying children. Her tragic situation, which had lasted more than ten years, was however a paradigm of the Serbian system – a failure of the relevant bodies to act in good time and a lack of any responsibility or accountability for their laziness. The applicant blamed the domestic authorities for their failure to do anything about the respondent's aggressive attitude toward her, obstruction of contact and manipulation of the children. Her position had therefore been jeopardised by such inaction. By the authorities tolerating the respondent's destructive attitude, she had been put in an unequal position with someone who had usurped and violated the rights of others.

111. The Government denied that the State was to blame for the non-enforcement of the 2003 interim measure.

112. They further stated that the non-enforcement of the court's custody judgment of 2005 had clearly had an influence on the applicant's life, but added that the domestic authorities had done everything they could to enforce the custody judgment rendered in her favour whilst trying to protect

the best interests of the children. In 2008 the children had already been twelve, the age when their opinions had to be taken into account, and they had stated that they wanted to stay with their father. In such circumstances, any coercion would have been unacceptable, so the authorities had focused on overcoming the bad family relationships and suggested counselling for the parties. The competent court had apparently addressed a letter of 20 November 2009 to the MHI as "urgent", describing the complex circumstances of the case and indicating what was expected of the Institute. The MHI had declined its authority for mediation and advised the court to direct the family to the Marriage and Family Counselling Office of the Belgrade Social Care Centre. Unfortunately, no cooperation between the parents had been established, "which was not expected, either, bearing in mind [the respondent's] attitude during the entire proceedings as well as the circumstances – he had been assessed as a person of low intellectual and cultural potential in [his] initial contact with the Centre". The Government emphasised that the conflict between the applicant and the respondent had made it particularly difficult for the domestic authorities to act to enforce the applicant's custody rights.

113. Once the children had reached fifteen years of age in 2011, they could legally decide with which parent they wanted to live (see paragraph 75 above), so the State could not enforce the judgment without violating the children's rights. Its role was thus reduced to advisory activities with the applicant and her children and indirect supervision of the contact between them.

114. Lastly, the Government argued that the applicant had been insufficiently active during the children's early years, which was of essential importance to establishing good quality and meaningful relations between a parent and children. While acknowledging that "the State authorities were slightly passive", which had led to the Constitutional Court finding a violation of the applicant's right to a fair trial, the Government pointed out the same attitude on the side of the applicant throughout the relevant period, which, in turn, had led to the delay complained of, in particular: (a) in the early years she had departed with her daughter, leaving her son with his father in absolutely inadequate conditions; (b) she had sought the interim measure more than ten months after her husband had taken the children away; (c) she had shown no determination to forcibly take custody of her children as they had been crying even though the conditions had been fulfilled; (d) she had not shown any initiative to fix the hearing after that unsuccessful transfer of the children; and (e) she had failed in her duty to inform the court in good time that the interim measure had become null and to request enforcement of the custody judgment. As a consequence, the children had turned towards their father and expressed their wish to remain with him once they reached the age when their opinions had to be taken account.

(b) Relevant principles

115. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among many other authorities, *Monory v. Romania and Hungary*, no. 71099/01, 5 April 2005, § 70, and *Vojnity v. Hungary*, no. 29617/07, § 28, 12 February 2013).

116. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may however be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see, amongst other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Glacer v. the United Kingdom*, no. 32346/96, § 63, 19 September 2000). In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see, amongst other authorities, *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290, and *Siemianowski v. Poland*, no. 45972/99, § 97, 6 September 2005). In doing so, the Court will also take into consideration the general interest in ensuring respect for the rule of law (see *D. v. Poland* (dec.), no. 8215/02, 14 March 2006, and *Cristescu v. Romania*, no. 13589/07, § 61, 10 January 2012).

117. The Court has repeatedly held that in matters relating to child custody the interests of the child are of paramount importance. The child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX) and may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII). In particular, a parent cannot be entitled under Article 8 of the Convention to have measures taken which would harm the child's health and development (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 169, ECHR 2000-VIII, and *P., C. and S. v. the United Kingdom*, no. 56547/00, § 117, ECHR 2002-VI).

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

national authorities to take measures to facilitate a reunion is not absolute, since the reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures to be taken to this effect. The nature and extent of that preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child. Although coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live (see *Ignaccolo-Zenide*, cited above, § 106). In cases concerning the enforcement of decisions in the sphere of family law, the Court has repeatedly found that what is decisive is whether the national authorities have taken all necessary steps to facilitate the execution, in so far as can reasonably be demanded in the special circumstances of each case (see, among other authorities, *Hokkanen*, cited above, § 58; *Nuutinen*, cited above, §§ 127-28; *Glaser*, cited above, § 66; *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003; *Hansen v. Turkey*, no. 36141/97, §§ 97-99, 23 September 2003; *Kallo v. Hungary* (dec.), no. 70558/01, 14 October 2003; *Zawadka v. Poland*, no. 48542/99, § 56, 23 June 2005; and *Eremia v. the Republic of Moldova*, no. 3564/11, § 76, 28 May 2013; see also the cases against Serbia, *V.A.M. v. Serbia*, cited above, §§ 140-44; *Tomić*, cited above, §§ 100-02; *Felbab v. Serbia*, no. 14011/07, § 67, 14 April 2009; *Krivošej v. Serbia*, no. 42559/08, § 52, 13 April 2010; and *Damnjanović v. Serbia*, no. 5222/07, § 80-82, 18 November 2008).

119. In this connection, the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with them (see *Tomić*, § 101, and *Ignaccolo-Zenide*, § 102, both cited above). The essence of such an application is to protect the individual against any damage that may result merely from the lapse of time (see *Ignaccolo-Zenide*, cited above, § 106, and, also, albeit in the context of pre-adoption foster placement, *Haddad v. Spain*, no. 16572/17, §§ 54, 62-64 and 72-73, 18 June 2019). The likelihood of family reunification will be progressively diminished and eventually destroyed if the parent and the child are not allowed to see each other at all, or only so rarely that no natural bonding between them is likely to occur (see *Ribić*, cited above, § 99, and, *mutatis mutandis*, *Görgülü v. Germany*, no. 74969/01, § 46, 26 February 2004).

120. As regards the applicants, active parental participation in proceedings concerning children is required under Article 8 of the Convention in order to ensure the protection of their interests, and when an applicant applies for enforcement of a court order, his or her conduct as well as that of the courts is a relevant factor to be considered (see *Fuşcă v. Romania*, no. 34630/07, § 38, 13 July 2010, and *Cristescu*, cited above, § 59).

(c) The Court's assessment

121. The Court finds it undisputed that that the ties between the applicant and her children fell within the scope of "family life" within the meaning of Article 8 of the Convention.

122. The applicant's complaints concerned the State's failure to secure custody of her children as awarded by the domestic decisions from 2003 onwards. Following the first interim order of June 2002 which was quashed quickly thereafter, on 27 February 2003 the competent court ordered the respondent to hand over the children to the applicant within twenty-four hours, pending the final outcome of the ongoing custody proceedings (see paragraph 15 above). This interim custody order had been set aside by the custody judgment rendered in October 2005, which was served on the respondent in November 2006 (see paragraphs 16-17 above). By that final judgment, the court, referring to the respondent's negative behaviour, appalling living conditions and the need for the children's immediate removal, granted sole custody of the children to the applicant, determined the respondent's access rights and prohibited his contact with the children for three months to enable the children to restore emotional ties with the applicant. The new custody decision of June 2010 in the respondent's favour in the course of fresh custody proceedings was soon after quashed and the proceedings terminated following the respondent's ultimate withdrawal (see paragraphs 19-20 above). Both interim and final decisions remained unenforced (see paragraphs 40, 63 and 64 above). It appears that as of January 2002 the applicant was seeing her children only sporadically during the school breaks on weekdays and was unable to exercise the sole custody granted to her or even establish more regular and better quality contact with them until late 2009. The children turned eighteen in 2014. In the circumstances of the present case, the Court finds it appropriate to examine under Article 8 the overall length of and the conduct of the competent national authorities in both sets of enforcement proceedings which had had the same objective and had in any event been intertwined (see *Šobota-Gajić*, cited above, § 45, and, *mutatis mutandis*, *Glaser*, cited above, § 86; see also paragraph 106 above).

123. The enforcement court, having adopted the relevant enforcement order, was under an obligation, both under the Convention and the relevant domestic law, to proceed of its own motion and with exceptional

diligence. The task of the domestic courts was rendered more difficult by the respondent's destructive behaviour of obstructing contact between the applicant and the children. The Court is mindful of the fact that custody and contact-related disputes are by their very nature extremely sensitive for all the parties concerned, and it is not necessarily an easy task for the domestic authorities to ensure enforcement of a court order where one or both parents' behaviour is far from constructive (see *Krasicki v. Poland*, no. 17254/11, § 90, 15 April 2014). However, a lack of intention to co-operate by one parent rather imposes on the authorities an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the children to have contact with both parents and be in the custody of the parent who was determined as the custodial parent (see *Z. v. Poland*, no. 34694/06, § 75, 20 April 2010).

124. According to the domestic law, if the initial period of three days for voluntary compliance with a child custody order has passed, fines should be imposed and, ultimately, if necessary, the children be transferred forcibly by the judge (see paragraph 79 above). The enforcement court imposed fines to the respondent on two occasions in an attempt to make him comply with the order of June 2003 (October and December 2003) to no avail as the applicant's house did not contain any valuable assets to collect. The custody transfer fixed for 2 December 2003 also failed as the respondent had apparently hidden with the children. Those initial steps date back prior to 3 March 2004, the date of ratification of the Convention by Serbia, and are noted only for reasons of context whilst examining the situation complained of as a whole.

125. Six months later, on 17 June 2004, the enforcement court again resorted to imposing an earlier provisional fine on the respondent and announced that a forced custody transfer would take place if he failed to comply voluntarily with the order within three days (see paragraph 25 above). There is no information in the case file as to whether the court attempted to collect the imposed fine, which in any event had proved to be an ineffective measure earlier as it could not be enforced or provide any incentive for the respondent to alter his conduct. The custody transfer fixed by the court for 30 November 2004 failed, as no one could be found at the respondent's address (see paragraph 26 above). It took the court another five months to fix another reunion for 9 May 2005, which failed owing to the failure to duly summon the parties, social services and police officers (see paragraph 27 above). The Court observes that no procedural steps were taken in the meantime in the enforcement proceedings, nor was any attempt made to locate the respondent and make use of a more coercive measure in spite of his clearly uncooperative attitude, or to contact him or the children in order to offer counselling, mediation and prepare for the custody transfer in an adequate manner (compare and contrast *Cârstoiu v. Romania* (dec.), no. 20660/10, § 42, 7 May 2013). The Government have not provided an

explanation for any of these periods of inactivity. The Court notes, however, that the Public Prosecutor charged the respondent with child abduction on 27 May 2005 (see paragraph 69 above).

126. The Court observes that the Government considered that the applicant was responsible for her reluctance to physically assume custody of her children on 3 June 2005 on the school premises at a time when all the conditions for a custody transfer had been fulfilled as she preferred a less traumatic custody transfer for the children with the assistance of the Social Care Centre (see paragraph 28 above). While indeed such action by a parent may be held against him or her (see, for example, *Zdravković v. Serbia*, no. 28181/11, § 67, 20 September 2016, and *Damnjanović*, cited above, § 80), the Court considers that that the State authorities could not merely rely on the applicant's personal abilities and court orders which were not likely to produce the desired results smoothly in the context of a three-year long separation without any contact between the applicant and her two young children, as well as in view of the reported violence by the domestic authorities (see paragraphs 31 and 39 above), without any preparatory measure. No measures were taken or even considered by the authorities to provide expert assistance to the children over a number of motivation sessions and encourage them to meet the applicant, which could have prepared them for the re-establishment of contact and especially precautious swift of child custody in these circumstances.

127. A month and a half later the applicant again requested the RSCC's assistance in preparing for the custody transfer (see paragraph 29 above). However, soon after, the RSCC supplied the report requested by the enforcement court (see paragraphs 30-31 above). It reiterated its earlier assessment of the applicant's ability to have custody in comparison to that of the respondent, but noted that disrupting the children's living arrangements with the respondent would not at that time have been in their best interests. The applicant was also criticised for being primarily focused on defending herself from the respondent's violence rather than taking the children from him after the interim measure had been adopted and protecting them from poor living conditions regardless of the risk of violence for her, relying on "an unrealistic expectation that she would be protected from the respondent's violence if the State institution helped her in the execution of the custody transfer". The RSCC's decisions on the corrective supervision and initiation of the proceedings for deprivation of parental rights came late in the day (see *E.S. and Others v. Slovakia*, no. 8227/04, 15 September 2009), were focused on the respondent's negative attitude towards the custody transfer and were ultimately not enforced in any event (see paragraph 34 above).

128. Without taking any further measures, the enforcement court terminated the enforcement proceedings on 16 September 2005 and therefore altered the practical effect of the judicial interim decision on the

basis of the unauthorised RSCC's report (see paragraphs 32 and 35 above), without any analysis of the circumstances, communication with the civil court dealing with the merits of the case or ruling on the applicant's further contact with her children. Moreover, the final custody judgment was rendered two weeks later, in October 2005, ordering an immediate transfer of custody to the applicant. It took the bailiff more than twelve months to serve the judgment on the respondent in November 2006.

129. It took a further three months for the enforcement court to serve its decision on the termination of enforcement proceedings of 16 September on the applicant, four days for the latter to contest it and almost four months for the second-instance decision quashing the enforcement termination on several grounds on 10 April 2006 (see paragraphs 32, 33 and 35 above). Referring to the instructions given by the second-instance court, on 19 June 2006 the enforcement court invited the RSCC to consult the court's case file in order to facilitate the protection of the best interests of the children (see paragraph 36 above). The RSCC's lawyer and social worker consulted the court's case file a year later and reported on 6 August 2007 that it would be in the best interests of the children to have the interim custody order enforced (see paragraph 37 above). Despite all opinions and decisions, the enforcement court continued to display inaction itself in its own pending enforcement proceedings on the same matter between June 2006 and the scheduled custody transfer of February 2008.

130. On the one hand, the applicant bears partial responsibility for delay in 2007 in that she did not request the enforcement of the final judgment until February 2008 and misled the enforcement court from December 2007 until February 2008 (see paragraphs 38-41 above) by requesting enforcement of the interim access order, which was in fact no longer valid. However, notably, it appears that neither the RSCC nor the enforcement court was aware of the final decision on the case (despite the above information provided by the applicant), or if they were aware they failed to take adequate measures, such as terminating the enforcement of the interim order (see paragraph 80 above, Article 68(1)).

131. Following the adoption of the enforcement order of 13 March 2008 in respect of the custody judgment, the Court notes significant delays in serving of urgent court decisions and transferring case files between adjudicating courts of different levels (see paragraphs 17, 33, 43-44 and 61), as well as delays in seeking expert assistance to encourage the parties to cooperate, motivate children and create the necessary conditions for executing the decisions in question. The enforcement court took no steps between 24 June 2008 and 10 February 2009 as the original case file was with the court in charge of the pending criminal proceedings against the respondent for child abduction (see paragraphs 43-44 above). It then took two months for the appellate court to reject the respondent's appeal against the enforcement order and another month and a half to return the case file

back together with the decision to the enforcement court on 5 June 2009 (see paragraph 45 above).

132. Between 7 July 2009 and 8 July 2010 (see paragraphs 46-60 above) the newly engaged enforcement court scheduled eight hearings, of which three were adjourned because the presiding judge or the RSCC had other commitments (17 December 2009, 3 February and 29 June 2010). During this time, the enforcement court heard the parties (7 July 2009) and the children (23 October 2009). The latter expressed their wish to remain with their father, meet with their mother and their grandparents and uncle for the first time, as well as spend some weekends at their mother's house. Contact between the applicant and her children was finally established but reduced, in the children's best interests, to several hours twice a week. The court also eventually requested counselling for the whole family, expert supervision and reporting on the contact and parties' behaviour in that respect, as well as on the fortnightly supervision of the children's weekend visits to the applicant. At the same time, it would also appear that there were no clear guidelines as to the competences of various institutions for the family's treatment, or that the two bodies in charge of the enforcement of the custody decisions did not know which institution was entrusted with which tasks (see paragraphs 51-56 above).

133. However, after this period, in November 2010 the original case file was again transferred to the criminal court until January 2012, and forwarded together with the criminal case file to the Constitutional Court to decide the case on appeal in 2014 (see paragraph 61 above). No explanation has been provided as to why the original case file, rather than a copy, had to be sent to another court for consultation. No record of the work of the enforcement court or the RSCC on the case at hand during these four years has been submitted to the Court.

134. In the meantime, following the respondent's new claim in 2008, the 2005 judgments was temporarily reversed by the judgment of 23 June 2010 in the respondent's favour, but that judgment was quashed six months later and the fresh proceedings terminated as the respondent withdraw his claim soon after. The 2005 judgment remained unenforced and the Court does not have detailed information on the applicant's contact with her children since then.

135. Having regard to the above observations, the Court finds numerous failures on the part of the respondent State to make the adequate and effective efforts, such as to take coercive measures if necessary, or the inability to enforce those which had already been imposed to respond adequately to the respondent's defiance of the court orders and decisions of social services. The respondent was in effect allowed to use the judicial system and the above-mentioned delays to his advantage until the factual situation was sufficiently altered by the passage of time so as to allow for a reversal of the applicant's custody rights through a separate set of judicial

proceedings or for the manipulated children to decide for themselves (see *Tomić*, cited above, § 104, and also, *mutatis mutandis*, *Pini and Others v. Romania*, cited above, § 188).

136. Having regard to the facts of the case, including the passage of time, the best interests of the child, the criteria laid down in its own case-law and the parties' submissions, the Court considers, in conclusion, that, notwithstanding the respondent State's margin of appreciation, the non-enforcement of the applicant's custody rights, as awarded by the interim order and final judgment, amounted to a breach of her right to respect for her family life as guaranteed by Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

137. 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

138. The applicant claimed 200,000 euros (EUR) in respect of non-pecuniary damage. She argued that she had endured pain and suffering as a result of not seeing her children, including feelings of anxiety and helplessness. She stated she would use money to rebuild her relationship with the children and on joint activities. The applicant's lawyer requested the Court to pay 90% of the amount awarded to the applicant's bank account and 10% to his own.

139. The Government maintained that the amount was excessive, inviting the Court to make an award in accordance with its case-law. The lawyer's request to be paid 10% on account of the applicant's mental anguish was immoral. They asked the Court that, should it find a violation of the Convention, any financial compensation awarded should be consistent with the Court's own case-law in other similar cases.

140. Under Article 41 of the Convention the purpose of awarding sums by way of just satisfaction is to provide reparation for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.

141. In the case at hand, the applicant's children turned eighteen in 2014, which makes them eligible to choose with whom they will live, if anyone. The Court further considers that the applicant has suffered non-pecuniary harm as a result of being without any quality contact with both children for seven years and thereafter enjoying some irregular contact with them, despite the two decisions granting her custody rights. Such damage

has had irremediable consequences on relations between the children and the applicant. The impugned conduct of the respondent State's authorities in the present case must have been a source of distress for the applicant. Having regard to the above, and the amounts awarded in comparable cases and the basis of equity as required by Article 41, the Court awards directly to the applicant EUR 10,000 under this head, there being no legal or contractual obligations to make any payment to the applicant's lawyer.

B. Costs and expenses

142. The applicant also claimed RSD 1,189,000 (EUR 10,654) for the costs and expenses incurred before the domestic courts and RSD 315,000 (approximately EUR 2,823) for those incurred before the Court. In this connection, her lawyer provided a detailed and itemised calculation.

143. The Government maintained that the amount was excessive both under the Court's standards and the "Lawyer's Remuneration Tariff" ("*Tarifa o nagradama i naknadama troškova za rad advokata*"; published in OG RS no 121/2012).

144. 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 have been actually and necessarily incurred and are reasonable as to quantum. In the present case, concerning the costs and expenses incurred domestically, the Court considers that the amounts claimed by the applicant are excessive. Regard being had to all of the information in its possession and the above criteria, however, the Court considers it reasonable to award the applicant the sum of EUR 5,300 for the costs and expenses incurred domestically, as well as those incurred before this Court.

C. Default interest

145. 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 of the Convention as regards the protracted length of proceedings before the Constitutional Court;

3. *Holds* that there has been a violation of Article 8 of the Convention as regards the non-enforcement of the custody interim order and the judgment;

4. *Holds*

(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 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 5,300 (five thousand three hundred 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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President