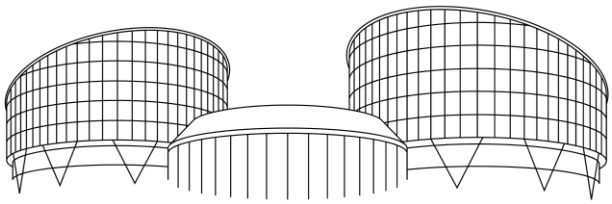

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MIJUŠKOVIĆ v. MONTENEGRO

(Application no. 49337/07)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/12/2010

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

In the case of Mijušković v. Montenegro,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 31 August 2010,

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

PROCEDURE

1. The case originated in an application (no. 49337/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Ms Svetlana Mijušković ("the applicant"), on 2 November 2007.

2. The applicant was represented by Mr D. Kovačević, a lawyer practising in Nikšić. The Montenegrin Government ("the Government") were represented by their Agent, Mr. Z. Pažin.

3. The applicant primarily complained, under Article 8 of the Convention, of the belated enforcement of a final custody judgment, as well as the respondent State's prior failure to enforce an interim custody order.

4. On 2 September 2009 the President of the Fourth Section decided to give notice of the application to the Government. Under Article 29 § 3 of the Convention, it was also decided to examine the merits of the application at the same time as its admissibility and to give priority to the application in accordance with Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. The applicant was born in 1971 and currently lives in Budva.

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

7. On 26 April 1998 the applicant and V.K. married and on 12 October 1998 their twins, A and B, were born.

8. On 5 June 2003, due to marital problems, the applicant moved back to her parents' house in Nikšić, together with the children.

9. On 22 July 2004 the Social Care Centre in Nikšić ("the NSCC") issued a decision regulating V.K.'s access to A and B.

10. It would appear that during this period V.K. had been seeing the children in accordance with this decision.

11. On 5 January 2005 V.K. took the children for the winter holiday and subsequently refused to return them to the applicant.

12. On 8 March 2005 the NSCC ordered that the children be returned to the applicant and entrusted the enforcement of that order to the Social Care Centre in Budva ("the BSCC").

13. On 14 March 2005 the BSCC, with police assistance, attempted to enforce the order in question, but it appears that V.K.'s parents physically prevented that from happening.

14. Between April and June 2005, at the applicant's requests, the NSCC issued three additional decisions, urging V.K. to surrender the children. They provided that should V.K. fail to comply with the applicant's custody rights he would be fined, and that, ultimately, forcible enforcement might be called for.

15. On one occasion thereafter V.K. brought the children to the BSCC but refused to surrender them to the applicant, claiming that the children did not want to live with her.

16. There is no evidence in the case file indicating that V.K. had been fined or, indeed, that a forcible transfer of custody had been attempted again.

B. The first set of civil proceedings

17. On 23 June 2003 V.K. lodged a claim with the Court of First Instance in Kotor, seeking the dissolution of his marriage to the applicant as well as custody of the children.

18. On 1 September 2003 the applicant lodged a counter-claim to the same effect.

19. On 9 March 2004 the presiding judge joined the two claims into a single set of proceedings.

20. On 5 January 2006 the Court of First Instance: (i) dissolved the marriage, (ii) granted custody of the children to the applicant, and (iii) ordered V.K. to pay monthly child maintenance.

21. On 5 May 2006 the High Court upheld that judgment and it thereby became final.

22. On 12 September 2006 the Supreme Court dismissed V.K.'s appeal on points of law (*revizija*).

C. The enforcement proceedings

23. On 12 June 2006 the applicant submitted a request for the enforcement of the final judgment.

24. On 22 June 2006 the Court of First Instance in Kotor issued an enforcement order whereby V.K. was given three days to surrender the children to the applicant. He was also warned that if he failed to comply he could be fined or even subjected to a forcible transfer of custody.

25. On 21 July 2006 the High Court upheld this order.

26. On 26 February 2009 the applicant submitted a request for a review (*kontrolni zahtjev*; see paragraph 46 below) with the Court of First Instance, seeking execution of the enforcement order.

27. On 5 March 2009 the execution judge (*izvršni sudija*) informed the President of the court that as it was "impossible to reach an agreement [...] by which the children would be surrendered" to the applicant, the bailiff was ordered to enforce "without delay" the fine of EUR 500 in respect of V.K. He finished his report by stating "that it [was] impossible to say when and how the enforcement proceedings at issue shall be concluded".

28. On 7 March 2009 the bailiff made an attempt to enforce the fine, but it was to no avail due to the verbal and physical resistance of V.K.'s parents. Subsequently, the bailiff requested the President of the court to release her of the duty to enforce the fine.

29. On 9 March 2009 V.K. was informed that the forcible payment of the fine would be executed on 13 March 2009. On 12 March 2009 V.K.'s father paid the fine imposed.

30. On 17 March 2009 the Court of First Instance issued another enforcement order requesting that the children be surrendered to the applicant within three days, failing which V.K. would be fined EUR 1,000.

31. On 10 September 2009, after the application had already been communicated to the respondent Government, the Court of First Instance issued a decision specifying that the order would be enforced on 8 October 2009, if need be, by means of a forcible transfer of custody.

32. On 8 October 2009 V.K. refused to surrender the children, who, apparently, also resisted the transfer. The BSCC representative proposed that a forcible transfer of custody be postponed and the judge accepted to do so.

33. On 23 October 2009, when the enforcement was to be attempted again, V.K. proposed that it be adjourned until the court had decided on his request for custody (see paragraphs 36-38 below), or that an interim period be allowed, with the participation of a family psychologist, to help the children to adapt to the new situation. The BSCC representative also suggested that a transitional period be allowed before the enforcement. The applicant insisted on the enforcement. The house was searched, but the children were not found. The applicant was invited to submit a proposal as to how the judgment could be further enforced as well as to inform the court on her possibility to provide the necessary labour force for the enforcement ("*eventualnog obezbjeđenja potrebne radne snage*"). At the same time, the police were invited to establish the whereabouts of the children.

34. On 30 November 2009, during another attempt at enforcement, the children refused to go with the applicant, claiming that she had not treated them properly. After V.K.'s parents, who had resisted the enforcement, were removed, the judgment was enforced and the children were finally surrendered to the applicant.

35. The applicant maintained that as of 5 January 2005 until 30 November 2009 she had only had sporadic and brief contact with her children, mostly in-between school classes and, even then, in the presence of V.K. or his father.

D. The second set of civil proceedings

36. On an unspecified date V.K. instituted a new civil complaint, seeking sole custody of the children.

37. On 1 June 2009 the Court of First Instance ruled in his favour and ordered the applicant to pay monthly child maintenance. In so deciding, the court took account of an informal conversation that an expert psychiatrist had had with the children. The psychiatrist's conclusion was that A and B wanted to live with their father, that it would be stressful for them to be taken away from their present home, but that their mother needed to be allowed regular access. When specifically asked whether the children had

been negatively directed towards their mother by their father, the expert responded by saying that "it [was] obvious that the children had been negatively directed towards their mother by an adult person". The court noted that the children had been living with their father, contrary to the final judgment rendered in 2006, but that they had adapted to it and liked it. Finally, the court concluded that "the factual situation [had] lasted for far too long" and that it was in the children's interest to verify the situation.

38. On 15 September 2009 the High Court in Podgorica quashed this judgment and remitted the case to the Court of First Instance.

E. Criminal proceedings against V.K.

39. On 16 February 2007 V.K. was found guilty of domestic violence, the victim being the applicant, and was sentenced to three months in prison, suspended for a period of two years. On 28 June 2007 the High Court in Podgorica overturned that judgment and dismissed the charges as the criminal prosecution had become time-barred.

40. On 7 December 2007 the Court of First Instance in Kotor acquitted V.K. of charges of child abduction (*oduzimanje maloljetnog lica*) concluding that "[...] although the said acts of the accused contained all the elements of the criminal offence he had been charged with, the said offence represented an act of minor significance". On 28 May 2008 the High Court in Podgorica upheld that judgment and it thereby became final.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

41. The relevant provisions of the Constitution read as follows:

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [filed in respect of an alleged] ... violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted ..."

42. This Constitution entered into force on 22 October 2007.

B. Constitutional Court Act of Montenegro (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

43. The relevant provision of the Constitutional Court Act read as follows:

Article 48

"Constitutional appeal can be filed against an individual decision of a state body [...] for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted."

44. Articles 49-59 provide additional details as regards the processing of constitutional appeals.

45. This Act entered into force on 4 November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

46. Relevant provisions of this Act read as follows:

Article 2 § 1

"The party and the intervener in civil matters [...] shall have the right to judicial protection in the event of violation of the right to trial within a reasonable time [...]."

Article 3

"Legal remedies for the protection of right to trial within a reasonable time shall be:

(1) Request to accelerate the proceedings (hereinafter referred to as the request for review);

(2) Action for fair redress."

Article 17

"If the judge notifies the president of the court that certain procedural measures will be undertaken ... no later than four months after the receipt of the request for review, the president of the court shall notify the party thereof and thus finalise the procedure upon the request for review."

Article 23 § 1

"If the president of the court acted pursuant to Article 17 [...], the party cannot file another request for review in the same case before the expiry of the period specified in the notification [...]."

Article 24 § 1

"If the president of the court [...] does not deliver [...] notification on the request for review to the party [...] pursuant to Article 17 the party may lodge an appeal [...]."

Article 31

"Fair redress for the violation of the right to trial within a reasonable time may be realised by:

(1) payment of monetary compensation for the damage caused by the violation of the right to trial within a reasonable time, and/or

(2) by publishing the judgment that the right of the party to a trial within a reasonable time has been violated."

Article 33 § 3

"The action [for fair redress] ... shall be filed with the Supreme Court no later than six months after the date of receipt of the final and legally binding decision on the request for review within the procedure of enforcement of the decision."

Article 40

"The Supreme Court shall be obliged to make a decision on the action no later than four months after the date of receipt of the action."

Article 44

"This Act shall apply also to judicial proceedings instituted before the entry into force of this Act but after 3 March 2004.

In cases referred to in paragraph 1 above, in the determination of a legal remedy for violations of the right to trial within a reasonable time, the violations of the right which occurred after 3 March 2004 shall be established.

When establishing the violation of the right referred to in paragraph 2 above, the Court shall also take into consideration the length of the judicial proceedings prior to 3 March 2004."

47. This Act entered into force on 21 December 2007, but contained no reference to the applications involving procedural delay already lodged with the Court.

D. The relevant domestic court's case-law

48. Between 1 January 2008 and 30 September 2009 the courts in Montenegro considered one hundred and two requests for review. Two requests were withdrawn and eight were being examined. In the same period, twenty-two actions for fair redress were submitted, out of which

sixteen actions were dealt with and six were still being examined. In one case the courts awarded the plaintiff non-pecuniary damages for the length of civil proceedings.

49. Four of the requests for review, among the copies provided by the Government, concerned the length of enforcement proceedings. In two cases the plaintiffs were informed that the proceedings would be terminated within the next four months. There is no information in the provided documents as to whether these time-limits were complied with. In one case it is unclear whether the enforcement was not undertaken due to some prior obligations of the parties, and in another case the judge notified the plaintiff that the enforcement had since taken place.

50. In no case have the plaintiffs attempted to file an appeal following notifications rendered in accordance with Article 17 of the Act.

51. With regard to the case-law, following the action for fair redress, there were two such actions, among the provided copies, in which the plaintiffs had sought redress due to the length of enforcement proceedings. One was declared inadmissible because the plaintiff had not previously made use of a request for review, and the other was rejected as premature as the plaintiff had filed his action before the expiration of the time-limit set in the notification.

E. Family Law Act 1989 (Porodični zakon; published in the Official Gazette of the Socialist Federal Republic of Montenegro no. 07/89)

52. Article 68 of this Act provides that, after obtaining the opinion of the SCC, the court shall decide who will be granted custody of the children, if there is no agreement between the parents in that respect. Exceptionally, the court can also decide on the child's contact with a parent who has not been granted custody if the other parent prevents him/her from seeing the child. The court shall change these decisions if the circumstances so require.

53. Article 333 provides that in proceedings relating to the custody of children, the court shall *ex officio* decide on interim measures for the protection and living arrangements of the children.

54. Article 343 provides for urgency in forcible enforcements and the need to protect children as much as possible. If the enforcement cannot be achieved through fines, children shall be taken and given to the parent who was granted custody.

F. Family Law Act 2007 (Porodični zakon; published in OGM no. 01/07)

55. This Act entered into force on 1 September 2007, thereby repealing the Family Law Act 1989. Article 375, however, provides for an identical provision with regard to forcible enforcement, as per the previous Act.

G. Enforcement Procedure Act 2004 (*Zakon o izvršnom postupku*; published in the Official Gazette of the Republic of Montenegro – OG RM - no. 23/04)

56. Article 4 § 1 provides that the enforcement court is obliged to proceed urgently.

57. Under Article 47, if needed, the bailiff may request police assistance; should the police fail to provide such assistance, the enforcement court shall inform the Minister of Internal Affairs, the Government, or the competent parliamentary body.

58. Articles 224-227 contain, *inter alia*, provisions relating to the enforcement of final child custody judgments.

59. Article 225, while placing special emphasis on the best interests of the child, provides, in particular, that there shall be an initial period of three days for voluntary compliance with a child custody order. Beyond that, however, fines should be imposed and, ultimately, if necessary, the child should be taken forcibly by the court, in co-operation with the Social Care Centre.

H. Police Act (Zakon o policiji; published in OG RM no. 28/05)

60. Pursuant to Article 7 § 1 the police are obliged to assist other State bodies in the enforcement of their decisions if there is physical resistance or such resistance may reasonably be expected.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained under Article 8 of the Convention that due to the belated enforcement of the final custody judgment of 5 May 2006, as well as the respondent State's prior failure to enforce the NSCC's order of 8 March 2005, she had been prevented from exercising her parental rights in

accordance with the relevant domestic legislation. Article 8 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

1. Compatibility ratione temporis

62. The Government submitted that the Committee of Ministers of the Council of Europe had decided that Montenegro was a party to the Convention as of 6 June 2006.

63. The applicant made belated comments, which, on that account, were not admitted to the file.

64. The Court has already held that the Convention should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004 (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009). It sees no reason to depart from this finding in the present case. The Government's objection must, therefore, be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

65. The Government submitted that the applicant had not exhausted all effective domestic remedies available to her. In particular, she had failed to lodge an appeal, following the request for review, and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act (see paragraph 46 above). Lastly, she had not made use of the constitutional appeal (see paragraph 43 above).

66. The applicant did not file comments within the time-limit set (see paragraph 63 above).

(b) Relevant principles

67. The Court recalls that, according to its 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 alleged violations before they are submitted to the Court.

68. However, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

69. Finally, the Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not there is a possibility for the applicant to be provided with direct and speedy redress, rather than an indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli v. Germany* [GC], cited above, § 99).

(c) Court's assessment

(i) As regards the appeal following the request for review

70. The Court notes that, pursuant to Article 17 of the Right to a Trial within a Reasonable Time Act, notification is provided as one of the means of dealing with a request for review (see paragraph 46 above). The Court further notes that in the present case the domestic court apparently did resort to such a notification, informing the applicant that V.K. would be fined "without delay" but that it was "impossible to say when and how the enforcement proceedings at issue shall be concluded" (see paragraph 27 above). In accordance with Article 17, with this notification the applicant's request for review was considered to be dealt with.

71. Article 24, however, provides for the right of appeal, *inter alia*, in cases where the court fails to deliver the notification to the applicant within the specified time. Since the notification was duly delivered to the applicant,

she had no statutory right to lodge an appeal. The domestic courts' case-law in this regard, submitted by the Government itself, confirms this (see paragraph 50 above). Therefore, the said appeal cannot be considered an available remedy in the applicant's case and the Government's objection in this regard must be dismissed.

(ii) As regards the action for fair redress

72. Article 31 of the Right to a Trial within a Reasonable Time Act (see paragraph 46 above) provides for redress in the form of monetary compensation and/or publishing the judgment that the right to a trial within reasonable time has been violated. Even assuming that the applicant could have obtained compensation for the past delay and/or have had the judgment on the violation of her right to trial within reasonable time published, the said action was clearly not capable of expediting the enforcement at issue while it was still pending, which was clearly the applicant's main concern (see, *mutatis mutandis, V.A.M. v. Serbia*, no. 39177/05, § 86, 13 March 2007). Therefore, the applicant had had no obligation to make use of this avenue of redress. In any event, it would appear that the ultimate enforcement of the judgment in question was primarily, if not exclusively, the consequence of the present case having been communicated to the Government rather than the result of any domestic remedy.

(iii) As regards the constitutional appeal

73. Pursuant to Article 48 of the Constitutional Court Act of Montenegro, a constitutional appeal can be filed against an individual decision concerning one's human rights and freedoms (see paragraph 43 above). As the Court understands the said provision, the applicant is supposed to have a final decision, which by its contents and substance violates his/her human rights. The applicant is allowed to file a constitutional appeal against such a decision.

74**.** The Court notes that in this case the applicant complains about the respondent State's continued failure to enforce the final court's decision. Taking into account that the Government have presented no case-law to the contrary, the Court considers that the constitutional appeal cannot be considered an available remedy in cases of non-enforcement due to there being no "individual decision" against which such an appeal could be filed.

(iv) Conclusion

75. The Court also considers that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare them inadmissible. They must therefore be declared admissible.

B. Merits

1. Arguments of the parties

76. The Government submitted that, pursuant to Article 68 of the Family Act in force at the time, ruling on the custody of children was exclusively in the courts' competence (see paragraph 52 above) from the moment when the action for divorce was brought. In that context, the Government submitted that, if the applicant had wanted an interim decision with regard to the custody of children before the judgment was rendered, she should have submitted a request to the court to that effect. The Social Care Centre, according to the Government, had no competence in that respect, except to provide its opinion on the matter.

77. The Government further noted that the Court of First Instance in Kotor primarily had the interests of the children in mind, who, "from the beginning of the dispute" had refused to live with the applicant, and for whom the forcible transfer would have been an irremediable trauma, as stated by the BSCC expert. Such conditions, as submitted by the Government, had required sensitivity on the part of all involved so that the necessary conditions could be created with a view to reducing the trauma for the children as much as possible.

78. The applicant's belated submissions were not admitted to the file (see paragraph 63 above).

2. Relevant principles

79. The Court notes that 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 other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

80. Even though the primary object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). In this context, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action (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 *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 58, 24 April 2003).

81. However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take

place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned are always an important element (see *Ignaccolo-Zenide*, cited above, § 94).

82. The Court, therefore, has to ascertain whether the national authorities took all such necessary steps to facilitate reunion as could reasonably be demanded in the special circumstances of the case (see *Ignaccolo-Zenide*, cited above, § 96, *Nuutinen v. Finland*, cited above, § 128, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A, and *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 53, 6 November 2007).

83. In this connection, the Court states that, in a case such as the present one, 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 children and the parent who does not live with them (see *Ignaccolo-Zenide*, cited above, § 102).

3. The Court's assessment

84. The Court considers that, while the applicant could have theoretically requested the domestic court to render an interim measure on custody during the proceedings, she was not required to do so pursuant to Article 333 of the Family Act in force at the time, which provided for the court to decide on such measures *ex officio* (see paragraph 53 above). In addition, had the NSCC considered that it lacked competence to decide on the matter it would have declared so and rejected the applicant's requests. Therefore, the first decision aimed at reuniting the applicant with her children was rendered by the NSCC on 8 March 2005.

85. Between April and June 2005, at the applicant's requests, the NSCC issued three additional decisions to the same effect. The Court notes, however, that there has been only one unsuccessful attempt to enforce the first NSCC decision, which was on 14 March 2005.

86. The NSCC decisions became irrelevant on 5 May 2006, when the court's judgment, granting the custody of A and B to the applicant, became final. On 12 June 2006 the applicant sought the enforcement of the judgment. In this context, the Court notes that the first attempt to fine V.K. for failing to surrender the children took place only on 9 March 2009, and the first attempt to actually enforce the judgment by forcible transfer took place on 8 October 2009, which is after the application had been communicated. On 30 November 2009, on the third attempt, the applicant was reunited with her children.

87. Therefore, the impugned situation lasted nearly four years and nine months after the NSCC's decision was rendered, that is three years and seven months after the court judgment to the same effect became final. During this time the competent national authorities had: (a) attempted only

once to enforce the NSCC decision, (b) fined V.K. only once, two years and nine months after the applicant had sought the enforcement of the judgment, (c) attempted the forcible transfer only after the case had been communicated to the respondent Government, and (d) enforced the judgment within less than three months from the communication of the case.

88. Whilst the Government maintained that the children had refused "from the beginning of the dispute" to be transferred to the applicant, the information provided by the Government showed that there had been no attempt aimed at such a transfer for two years and nine months. The Government provided no explanation in this regard. At the same time, there is no indication that this delay can be attributed to the applicant.

89. As noted above, the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and without the necessary preparation, particularly in the circumstances of A and B's case. However, there is no evidence that any such preparatory work explained the above-mentioned delays by the authorities.

90. Having regard to the facts of the case, including the passage of time, the best interests of A and B, the criteria laid down in its own case-law and the Government's submissions, notwithstanding the State's margin of appreciation as well as the fact that A and B were eventually surrendered to the applicant, the Court concludes that the Montenegrin authorities have failed to make adequate and effective efforts to execute the NSCC decision and the final court judgment in a timely manner.

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

II. OTHER COMPLAINTS

92. To the extent that the applicant implicitly complained of the non-enforcement of the judgment, in that V.K. had not paid the child-maintenance as specified, the Court notes that the beneficiaries of such maintenance are, by default, the children. As the children, although contrary to the judgment, lived with V.K. as of 5 January 2005 until 30 November 2009, the applicant cannot claim child maintenance for that period having had no expenses herself in that respect. Therefore, even assuming that the applicant's complaint is compatible *ratione personae*, it must be declared inadmissible as manifestly ill-founded. As for the period after 30 November 2009, due to the short time which elapsed after the children had been surrendered, the applicant's complaint is manifestly ill-founded and must be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention. It is also open to the applicant to obtain a further order from the domestic courts requiring her former spouse to comply with his maintenance obligations.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. 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

94. The applicant claimed damages of EUR 50,000 after the expiry of the time-limit for submitting Article 41 claims.

95. However, the Government, with reference to the same amount claimed in the application form filed by the applicant, nevertheless stated in their observations on the admissibility and merits that the claim was excessive and contrary to the case-law of the Court.

96. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of Article 8. However, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis and having regard to the particular circumstances of the case, the Court awards the applicant EUR 10,000 under this head.

B. Costs and expenses

97. The Court notes that the applicant's claim for costs was submitted after the expiry of the original deadline and, unlike the claim for damages, was never the subject of submissions by the Government. The applicant has therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, and her claim must therefore be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the respondent State's belated enforcement of the final custody judgment and its prior failure to enforce the interim custody order admissible and the remainder of the application inadmissible;

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 applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President