

# THE ECtHR ON PARENTAL AUTHORITY AND CONTACT AFTER SEPARATION

## Towards a More Child-Centred Perspective?

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## ABSTRACT

Even though the European Convention on Human Rights (ECHR) does not specifically mention children's rights, children benefit from the rights it provides based on Article 1 ECHR and are able to lodge an application with the European Court of Human Rights (ECtHR). Throughout the years, the ECtHR has increasingly promoted children's rights in its case law. Even when complaints reach the Court that are situated in the sphere of parental separation, in which the child was not a direct party to the dispute at the domestic level, the Court refers to the child's best interests concept, the child's right to maintain contact with both parents and the child's right to be heard in its case law under Article 8 ECHR. This contribution will comprehensively examine the Court's interpretation of the relevant children's rights that arise during legal discussions regarding parental authority and contact when parents separate. As will be shown below, the Court evidently offers some clear and definite guidelines to the interpretation of children's rights in cases of parental authority and contact. The overview given is useful for practitioners when they are confronted with complex and sensitive situations which might lead to a neglect of the rights of the children involved. It could also guide policymakers and legal researchers in their normative quest to enhance children's rights.

However, despite the efforts the Court has made to acknowledge children's rights in these disputes, several barriers exist that hinder a meaningful inclusion of the child's perspective in the cases that reach the Court. Children's autonomous access to the Court is limited, and this lack of access is worsened as in most countries this is also the case on the domestic level. Secondly, the Court's subsidiary role and the resulting doctrine of the margin of appreciation has contributed to the award of significant discretion to the state in deciding on these issues, while interpreting and implementing the children's rights relevant to the case. The lack of child applicants and the subsidiarity principle reveal the limits of the competence of the Court to safeguard children's rights, as the case law of the Court remains thoroughly parent-applicant-centred. Nevertheless, in 2019 judges of the Court increasingly acknowledged these problems and have tentatively started the debate to seek the most appropriate solution to adopt a more child-centred perspective.

## 1. INTRODUCTION

Though children are granted legal personality in many countries worldwide, children are rarely able to invoke their rights independently in a courtroom.<sup>1</sup> The Child Rights International Network (CRIN) established in its global report that ‘the countries of the world overwhelmingly enshrine a general rule that children lack the legal standing to approach courts by themselves and require children to do so through a representative.’<sup>2</sup> Embracing a child-centred perspective is therefore challenging for courts dealing with parental separation cases. In these cases, only the parents are party to the proceedings, although decisions are being made that impact children’s daily lives to a great extent and frequently they find themselves at the centre of the parental dispute. Therefore, a conflict of interests can occur between the interests of the parents and those of the children they represent and whose rights they are expected to safeguard. Consequently, a clear interpretation of children’s rights and organising the procedure in a child-friendly manner is crucial to enhancing children’s well-being.

In this regard, the question arises of the extent to which the European Court of Human Rights (ECtHR, the Court) acknowledges children’s rights when deciding on human rights questions related to parental authority and contact decisions which require a thorough case-by-case examination. The Court has stressed that the European Convention on Human Rights (ECHR) has to be interpreted in light of the rules of interpretation set out in the Vienna Convention of 1969, which requires taking into account any relevant rules of international law applicable in the relations between the parties.<sup>3</sup> In this context, when discussing the relevant international law materials, the Court frequently mentions the Convention on the Rights of the Child (CRC),<sup>4</sup> the General Comments<sup>5</sup>

<sup>1</sup> CRIN, ‘Rights, Remedies and Representation: A Global Report on Access to Justice for Children’, 08.02.2016, 7, available at <https://archive.crin.org/en/library/publications/rights-remedies-and-representation-global-report-access-justice-children.html>, last accessed 26.05.2020.

<sup>2</sup> CRIN (2016), ‘Rights, Remedies and Representation’, *supra* note 1, 17.

<sup>3</sup> ECtHR, *Loizidou v Turkey*, no 15318/89, 18.12.1996, para. 43.

<sup>4</sup> U. KILKELLY, ‘Chapter 12: The CRC in Litigation under the ECHR’, in T. LIEFAARD and J.E. DOEK (eds.), *Litigating the Rights of the Child*, Springer, Dordrecht 2015, pp. 193–194; U. KILKELLY, ‘Protecting Children’s Rights under the ECHR: the Role of Positive Obligations’, (2010) 61(3), *Northern Ireland Legal Quarterly*, pp. 245–261; E. E. SUTHERLAND and L. BARNES MACFARLANE, ‘Introduction’, in E. E. SUTHERLAND and L. BARNES MACFARLANE (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Cambridge University Press, Cambridge 2016, pp. 1–17, 8.

<sup>5</sup> See amongst others: ECtHR, *M. and M. v Croatia*, no 10161/13, 3.09.2015, paras. 96–97; ECtHR, *Vujica v Croatia*, no 56163/12, 8.10.2015, para. 56; ECtHR, *A. V. v Slovenia*, no 878/13, 9.04.2019, para. 49.

and, albeit more rarely, the Concluding Observations<sup>6</sup> of the United Nations Committee on the Rights of the Child (UN CRC Committee). The Guidelines of the Council of Europe on Child-friendly Justice are also regularly referred to.<sup>7</sup> Moreover, the Court generally refers to the best interests principle during the assessment of the applicants' right to family life under Article 8 ECHR and discusses the child's right to maintain contact with both parents and the child's right to be heard.<sup>8</sup>

First, a general overview of the relevant case law of the ECtHR relating to the Court's interpretation of children's rights and child-friendly justice in these situations will be presented. The focus will be on Article 8 ECHR, as the relevant body of litigation relates to compliance with this Article in regard to parental authority and contact rights in divorce proceedings.<sup>9</sup> One hundred and two judgments of the last decade and some important key cases are analysed. The selection of the relevant cases was conducted through the use of the Theseus<sup>10</sup> and HUDOC database, by selecting Article 8 ECHR and using the keywords<sup>11</sup> 'parental authority', 'parental separation' and 'contact rights'. The key cases were selected by searching for Grand Chamber judgments and by looking at the judgments to which the Court frequently referred in the previously selected cases. This literature study will discuss which children's rights seem to play an important role in the reasoning of the Court and how those rights were interpreted.

Secondly, this contribution will discuss the limits that the Court encounters that render the solid incorporation of the child's perspective in its judgments difficult by highlighting on the one hand the Court's adherence to the principle of subsidiarity and, on the other hand, the lack of children applying to the Court in matters regarding the award of parental authority, contact or visitation rights

<sup>6</sup> E.g. ECtHR, *G.B. v Lithuania*, no 36137/13, 19.01.2016.

<sup>7</sup> See amongst others: ECtHR, *Z.J. v Lithuania*, no 60092/12, 29.04.2014, para. 73; ECtHR, *M. and M. v Croatia*, *supra* note 5, para. 102; ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 50.

<sup>8</sup> A. GRGIC, 'Jurisprudence of the European Court of Human Rights on the Best Interests of the Child in Family Affairs', in COUNCIL OF EUROPE (ed.), *The Best Interests of the Child – A Dialogue Between Theory and Practice*, Council of Europe Publishing, Strasbourg 2016, pp. 105–106; F. TULKENS, 'The European Convention on Human Rights', in *International Justice for Children*, Council of Europe Publishing, 2008, p. 27.

<sup>9</sup> F. TULKENS (2008), 'The European Convention on Human Rights', *supra* note 8, p. 27; Art. 6 ECHR was not included in the analysis, as it is rarely invoked in these type of family law disputes by the applicant, and even when this is the case, the Court will often tackle the issues that arise under it as comprising the procedural obligations embedded within Art. 8 ECHR (e.g. ECtHR, *Vujica v Croatia*, *supra* note 5, para. 109; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 113; ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 52).

<sup>10</sup> This database is, regrettably, no longer accessible.

<sup>11</sup> These criteria were also translated into French, to uncover the judgments delivered only in French, as well.

or the enforcement of these decisions. Thirdly, to discover recent developments in the case law of the Court, either subtle or drastic, the judgments that were delivered in 2019 regarding parental authority and contact in the context of parental separation were selected, using the same keywords in the HUDOC database, and subsequently analysed. These searches revealed 12 judgments that were relevant to this contribution. Two cases were still included even though the facts of the cases did not revolve around parental separation. In the case of *V.D. and others v Russia*, the application was filed by a former foster parent. However, some interesting arguments were raised in the context of children's representation which could also be applied to the context of parental separation. *Zelikha Magomadova v Russia* revolved around a mother's battle to retrieve her children from her late husband's family, although the Court in this case emphasises certain elements which could also permeate the Court's reasoning in cases where parents separate.

To ensure that the goal is manageable, certain limitations are set. Firstly, this contribution will exclude cases with an element of international child abduction, as this could risk distorting the analysis given that the Hague Convention is also applicable and as it creates another legal framework with Article 13 of the Hague Convention, which does not apply to cases that do not feature cross-border elements. Secondly, the selection of cases only focuses on the context of parental separation, precisely because this type of cases poses specific challenges to respect the child's best interests. In this context, the interests of the child's legal representatives, who are presumed to safeguard the child's best interests, frequently clash, resulting in the child's best interests being overlooked or even used to the representative's advantage. Therefore, situations of adoption, foster care, child protection and paternity actions are excluded.

## 2. CHILDREN'S RIGHTS IN THE CASE LAW OF THE ECtHR ON PARENTAL AUTHORITY AND CONTACT AFTER SEPARATION

The following section will provide a general overview of the relevant principles and criteria used by the Court to resolve issues regarding parental authority and contact in the context of parental separation and will highlight the interpretation of children's rights in the Court's case law. Preliminarily, the theory of negative and positive obligations is discussed to highlight the concrete obligations of Member States under Article 8 ECHR. Next, the section will focus on the substantive reasoning of the Court in the light of the relevant children's rights. Subsequently, the Court's interpretation of the child's best interests principle, the child's right to maintain contact with both parents and the child's right to be heard will be discussed. Given that safeguarding all rights provided in the CRC

are deemed to be in the child's best interests,<sup>12</sup> clear distinctions between the separate rights are frequently difficult to draw, resulting in a considerable overlap between those rights in disputes regarding parental authority and contact.

## 2.1. PRELIMINARY REMARK: THE ROLE OF POSITIVE OBLIGATIONS

Decisions regarding parental authority and contact can constitute an interference in the right to respect for family life of the parties involved. Such an interference can be justified if it occurs in accordance with the law, pursues a legitimate aim and is necessary in a democratic society.<sup>13</sup> Steady case law of the ECtHR reveals that the implementation of Article 8 ECHR can sometimes necessitate adhering to positive obligations.<sup>14</sup> In this context, the Court stresses that 'children and other vulnerable individuals, in particular, are entitled to effective protection'.<sup>15</sup> The boundaries between positive and negative obligations under this provision do not lend themselves to precise definition,<sup>16</sup> and the Courts accepts that the applicable principles are similar because they both require striking a fair balance between competing interests.<sup>17</sup> In any case, State Parties are required to adopt certain measures through the establishment of an effective regulatory framework of adjudicatory and enforcement machinery that can guarantee individuals' private rights.<sup>18</sup> Therefore, when the Court evaluates the implementation of children's rights in a given case, considerable attention will be attached to the measures that were taken by the domestic authorities. According to Kilkelly, the combination of adoption of procedural rights under Article 8 ECHR and the practice of including positive obligations has strengthened the potential of the ECHR to safeguard children's rights.<sup>19</sup>

<sup>12</sup> UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 29.05.2013, nr. 4.

<sup>13</sup> ECtHR, *Diamante and Pelliccioni v San Marino*, no 32250/08, 27.09.2011, para. 146; ECtHR, *Vujica v Croatia*, *supra* note 5, para. 87; A. GRGIC (2016), 'Jurisprudence of the European Court of Human Rights', *supra* note 8, p. 106.

<sup>14</sup> ECtHR, *Mitovi v the former Yugoslav Republic of Macedonia*, no 53565/13, 16.04.2015, para. 54.

<sup>15</sup> ECtHR, *M. and M. v Croatia*, *supra* note 5, para. 176.

<sup>16</sup> ECtHR, *Cengiz Kiliç v Turkey*, no 16192/06, 06.12.2011, para. 122.

<sup>17</sup> ECtHR, *D. v Poland*, no 8215/02 [dec.], 14.03.2006, p. 11; ECtHR, *Krasicki v Poland*, no 17254/11, 15.04.2014, para. 82.

<sup>18</sup> See amongst other authorities: ECtHR, *Zawadka v Poland*, no 48542/99, 23.07.2005, para. 53; ECtHR, *Mitovi v the former Yugoslav Republic of Macedonia*, *supra* note 14, para. 54; ECtHR, *Stasik v Poland*, no 21823/12, 06.10.2015, para. 80; ECtHR, *Kacper Nowakowski v Poland*, no 32407/13, 10.01.2017, para. 71.

<sup>19</sup> U. KILKELLY (2015), 'Chapter 12: The CRC in Litigation under the ECHR', *supra* note 4, p. 195.

## 2.2. ARTICLE 3 CRC: THE CHILD'S BEST INTERESTS CONCEPT IN THE COURT'S CASE LAW

### 2.2.1. Prevalence: Omnipresent as a General Principle

The principle of the best interests of the child is undeniably omnipresent in the Court's case law under Article 8 ECHR in the context of parental authority and contact. In only 11 of the cases analysed, the Court omits referring to this principle completely.<sup>20</sup> In all other relevant cases, the Court refers explicitly to the concept in its reasoning. This finding should not come as a surprise, as the Court draws inspiration from Article 3 CRC and has in several judgments deliberately referred to it during the exploration of the relevant international law material.<sup>21</sup> In three judgments, the Court even provided a summary of the relevant paragraphs of the General Recommendation of the UN CRC Committee.<sup>22</sup>

Relying on the Court's interpretation of the child's best interests principle can be appropriate, as the Court requires domestic authorities to always evaluate the child's best interests in cases concerning parental authority and contact<sup>23</sup> and to perform this assessment individually when siblings are involved.<sup>24</sup> According to the Court:

... the common point of departure in the majority of State Parties appears to be that decisions regarding the attribution of parental authority are to be based on the child's best interests and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts.<sup>25</sup>

<sup>20</sup> ECtHR, *Salgueiro Da Silva Mouta v Portugal*, no 33290/96, 21.12.1999; ECtHR, *Sanchez Cardenas v Norway*, no 12148/03, 04.10.2007; ECtHR, *Kaleta v Poland*, no 11375/02, 16.12.2008; ECtHR, *Felbab v Serbia*, no 14011/07, 14.04.2009; ECtHR, *Dabrowska v Poland*, no 34568/08, 02.02.2010; ECtHR, *Krivosej v Serbia*, no 42559/08, 13.04.2010; ECtHR, *Bordeianu v Moldova*, no 49868/08, 11.01.2011; ECtHR, *Cengiz Kiliç v Turkey*, *supra* note 16; ECtHR, *Mitovi v the former Yugoslav Republic of Macedonia*, *supra* note 14; ECtHR, *Zdravkovic v Serbia*, no 28181/11, 20.09.2016; ECtHR, *Cristian Catalin Ungureanu v Romania*, no 6221/14, 04.09.2018.

<sup>21</sup> ECtHR, *Sahin v Germany*, no 30943/96 [GC], 08.07.2003, para. 41; ECtHR, *Sommerfeld v Germany*, no 31871/96 [GC], 08.07.2003, para. 39; ECtHR, *Gineitiene v Lithuania*, no 20739/05, 27.06.2010, para. 29; ECtHR, *Raw and others v France*, no 10131/11, 07.03.2013, para. 46; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 71; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 64; ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 50; ECtHR, *M.S. v Ukraine*, no 2091/13, 11.07.2017, para. 49.

<sup>22</sup> ECtHR, *Vujica v Croatia*, *supra* note 5, paras. 55–56; ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 48.

<sup>23</sup> ECtHR, *Zaunegger v Germany*, no 22028/04, 03.12.2009; ECtHR, *Anayo v Germany*, no 20578/07, 21.12.2010, para. 71; A. GRGIC (2016), 'Jurisprudence of the European Court of Human Rights', *supra* note 8, p. 108.

<sup>24</sup> ECtHR, *Vujica v Croatia*, *supra* note 5, para. 100.

<sup>25</sup> ECtHR, *Zaunegger v Germany*, *supra* note 23, para. 60.

For instance, the mere assumption that joint custody would be detrimental to the child's best interests – because one parent opposes it and this could give rise to conflict – does not justify the absence of a best interests assessment.<sup>26</sup>

### 2.2.2. *Assessing and Safeguarding the Child's Best Interests*

The child's interests consist primarily of two factors according to the Court: to have its ties with its family maintained and to have its development in a sound environment ensured.<sup>27</sup> The reunion of parent and child should thus only be pursued 'insofar as the interests of the child dictate that everything must be done to preserve personal relations'<sup>28</sup> and insofar as the measures do not harm the child's health and development.<sup>29</sup>

Fortunately, the Court reveals some criteria which the domestic authorities should examine in order to assess the child's best interests. These are the child's age and maturity, the presence or absence of its parents and its environment and experiences.<sup>30</sup> Other relevant factors are the emotional bond of the child with its respective parents and the importance of stability for the child.<sup>31</sup> Still, due to the subsidiarity principle, which is further discussed in section 3.1, the Court generally abstains from evaluating the child's best interests assessment performed by the domestic authorities.

Closely linked to this is the more general requirement formulated by the Court that the domestic authorities must 'conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature'.<sup>32</sup> In this context, the conclusions of domestic authorities should be well reasoned and have a sufficient evidentiary basis. Statements by witnesses, reports by competent authorities, medical notes and psychological and other relevant expert assessments need to be examined,<sup>33</sup> bearing in mind that the final decision should not be based on

<sup>26</sup> ECtHR, *Zaunegger v Germany*, *supra* note 23, paras. 57–59.

<sup>27</sup> ECtHR, *M.R. and L.R. v Estonia*, no 13420/12 [dec], 15.05.2012, para. 37.

<sup>28</sup> ECtHR, *Stasik v Poland*, *supra* note 18, 82.

<sup>29</sup> ECtHR, *Elsholz v Germany*, no 25735/94 [GC], 13.07.2000, para. 43; ECtHR [GC], *Sahin v Germany*, *supra* note 21, para. 66; ECtHR, *Sommerfeld v Germany*, *supra* note 21, para. 64; ECtHR, *Krasicki v Poland*, *supra* note 17, para. 83; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 98; ECtHR, *Plaza v Poland*, no 18830/07, 25.01.2011, para. 71.

<sup>30</sup> ECtHR, *Neulinger and Shuruk v Switzerland*, no 41615/07, 06.07.2010, para. 138; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27, para. 37.

<sup>31</sup> ECtHR, *Solomon v Romania*, no 42799/05 [dec], 27.09. 2011, para. 54.

<sup>32</sup> ECtHR, *Neulinger and Shuruk v Switzerland*, *supra* note 30, para. 139; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27, para. 37; ECtHR, *Leonov v Russia*, no 77180/11, 10.04.2018, para. 64.

<sup>33</sup> ECtHR, *Kosmopolou v Greece*, no 60457/00, 05.02.2004, para. 48; ECtHR, *Süss v Germany*, no 40324/98, 10.11.2005, para. 95; ECtHR, *Mustafa and Armagan Akin v Turkey*, no 4694/03, 06.04.2010, paras. 22–23; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27, para. 44; U. KILKELLY (2015), 'Chapter 12: The CRC in Litigation under the ECHR', *supra* note 4, p. 200.

an outdated report.<sup>34</sup> Even though this requirement is not specifically linked to the context of the best interests assessment, it is evident that fulfilling this requirement is necessary to reveal the child's best interests.

Importantly, the Court stresses that active parental participation is required in order to ensure the protection of the children's interests.<sup>35</sup> Governments have to ensure that their legal system encourages this participation. The Court, for instance, stresses the importance of parents reaching agreements for the (future) welfare of their children through mediation<sup>36</sup> or similar procedures<sup>37</sup> and twice referred to the guideline of the Committee of Ministers of the Council of Europe.<sup>38</sup> The Court heavily underlines that the only solution in these cases can be measures that are peaceful, adequate and respect the psychological state of the child. Therefore, governments should consider offering parents and their children the opportunity of civil mediation, because it could encourage their participation.<sup>39</sup> When mandatory mediation is provided in the domestic legislation, courts have to adhere to this principle.<sup>40</sup>

### 2.2.3. *The Impact of the Child's Best Interests During the Balancing Exercise*

The omnipresence of the child's best interests principle did not result in a uniform description by the Court regarding the import that should be afforded to the principle during the balancing exercise of different competing interests. Strikingly, the phrasing of the Court differs considerably depending on the judgment. In *Mustafa and Armagan Akin v Turkey*, the Court does not seem to attach much weight to the best interests of the child, compared to the interests of the other parties, as the Court merely emphasises the authorities' obligation to have regard to the best interests of the child.<sup>41</sup> In two other cases, the Court stays true to the wording of the CRC and stresses that the child's best interest should be a primary consideration.<sup>42</sup> In the majority of the cases, however, the Court makes use of other phrasing, such as the claim that the best interests of the child

<sup>34</sup> ECtHR, *Improta v Italy*, no 66396/14, 04.05.2017, para. 56.

<sup>35</sup> ECtHR, *Prizzia v Hungary*, no 20255/12, 11.06.2013, para. 38; ECtHR, *Onodi v Hungary*, no 38647/09, 30.05.2017, para. 33.

<sup>36</sup> ECtHR, *Mincheva v Bulgaria*, no 21558/03, 02.09.2010, para. 95; ECtHR, *Zoltan Németh v Hungary*, no 29436/05, 14.06.2011, para. 51; ECtHR, *Cârstoiu v Romania*, no 20660/10 [dec.], 07.05.2013, para. 42; ECtHR, *Fernández Cabanillas v Spain*, no 22731/11, 18.02.2014, para. 55.

<sup>37</sup> ECtHR, *Süss v Germany*, *supra* note 33, para. 102.

<sup>38</sup> ECtHR, *Cengiz Kiliç v Turkey*, *supra* note 16, para. 133; ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 51; COUNCIL OF EUROPE, *Recommendation No R (98) 1 of the Committee of Ministers to Member States on Family mediation*, 21.01.1998, p. 3.

<sup>39</sup> ECtHR, *Cengiz Kiliç v Turkey*, *supra* note 16, para. 132.

<sup>40</sup> ECtHR, *Vujica v Croatia*, *supra* note 5, paras. 90–93.

<sup>41</sup> ECtHR, *Mustafa and Armagan Akin v Turkey*, *supra* note 33, para. 22.

<sup>42</sup> E.g. ECtHR, *M. and M. v Croatia*, *supra* note 5, para. 172; ECtHR, *K.B. and others v Croatia*, no 36216/13, 14.03.2017, para. 144.

are ‘of crucial importance’<sup>43</sup> or are ‘paramount’<sup>44</sup> and ‘may override those of the parents.’<sup>45</sup> The Court is also known to reason that during the balancing exercise, a constant concern should be given for determining the best solution for the child<sup>46</sup> and that particular importance should be attached to the best interests of the child.<sup>47</sup> In 12 of the judgments analysed, the Court’s formulation of the primacy condition arguably even goes beyond the scope of Article 3 CRC,<sup>48</sup> as the Court claims that State Parties should bear in mind that the interests of the child should be the primary consideration.<sup>49</sup>

The lack of consistency in the reasoning of the Court with regard to the weight that should be attached to the best interests principle in judgments with a similar factual background can be puzzling and therefore provides little guidance to domestic authorities to balance the competing interests at stake during a dispute concerning parental authority or contact.

### 2.3. ARTICLE 9 CRC: THE COURT’S FOCUS ON PRESERVING FAMILY TIES

#### 2.3.1. *Evaluation of Contact in Light of the Child’s Best Interests*

The child’s right to maintain contact with both parents is frequently evaluated by the Court in light of the child’s right to have his or her best interests taken

<sup>43</sup> E.g. ECtHR, *Elsholz v Germany*, *supra* note 29, para. 48; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 96; ECtHR, *Vujica v Croatia*, *supra* note 5, para. 89; *M.S. v Ukraine*, *supra* note 21, para. 75; ECtHR, *Elita Magomadova v Russia*, no 77546/14, 10.04.2018, para. 54; ECtHR, *Petrov and X. v Russia*, no 23608/16, 23.10.2018, para. 98.

<sup>44</sup> E.g. ECtHR, *Zawadka v Poland*, *supra* note 18, para. 67; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 98; ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, paras. 75 and 89; *M.S. v Ukraine*, *supra* note 21, para. 75.

<sup>45</sup> E.g. ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 98; ECtHR, *Elsholz v Germany*, *supra* note 29, para. 50.

<sup>46</sup> E.g. ECtHR, *Leonov v Russia*, *supra* note 32, para. 64; ECtHR, *Petrov and X. v Russia*, *supra* note 43, para. 98.

<sup>47</sup> E.g. ECtHR, *Elsholz v Germany*, *supra* note 29, para. 50; ECtHR, *Zawadka v Poland*, *supra* note 18, para. 67; ECtHR, *Aneva and others v Bulgaria*, nos 66997/13, 77760/14 and 50240/15, 06.04.2017, para. 101; ECtHR, *R.I. and others v Romania*, no 57077/16 [Fourth Section Committee], 04.12.2018, para. 55; ECtHR, *Petrov and X. v Russia*, *supra* note 43, para. 100.

<sup>48</sup> U. KILKELLY (2015), ‘Chapter 12: The CRC in Litigation under the ECHR’, *supra* note 4, p. 197.

<sup>49</sup> ECtHR, *Neulinger and Shuruk v Switzerland* *supra* note 30, para. 134; ECtHR, *Plaza v Poland*, *supra* note 29, para. 71; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27, para. 37; ECtHR, *Gobec v Slovenia*, no 7233/04, 03.10.2013, para. 133; ECtHR, *Krasicki v Poland*, *supra* note 17, para. 83; ECtHR, *Stasik v Poland*, *supra* note 18, para. 81; ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, no 42534/09, 11.02.2016, para. 78; ECtHR, *Malec v Poland*, no 28623/12, 28.06.2016, para. 67; ECtHR, *Wdowiak v Poland*, no 28768/12, 07.02.2017, para. 63; ECtHR, *Endrizzi v Italy*, no 71660/14, 23.03.2017, para. 47; ECtHR, *Onodi v Hungary*, *supra* note 35, para. 30; ECtHR, *Grujic v Serbia*, no 203/07, 28.08.2018, para. 65; ECtHR, *Vyshnyakov v Ukraine*, no 25612/12, 24.07.2018, para. 35; ECtHR, *Milovanovic v Serbia*, no 56065/10, 08.10.2019, para. 117.

into account. This overlap is, of course, unsurprising, as Article 3 CRC was identified by the UN CRC Committee as being one of the four general principles of the Convention, resulting in the fact that the exercise of other children's rights needs to be in conformity with the best interests principle.<sup>50</sup> Furthermore, the Court was definitely inspired by Article 9 CRC as it has repeatedly referred to it in its judgments under the relevant international law material.<sup>51</sup> In *Kacper Nowakowski v Poland*, the Court even referred to the CRC in its reasoning, when it established that it is, in principle, in the child's best interests to maintain contact with both parents, save for lawful limitations justified by considerations regarding the child's best interests. The same rationale underpins Article 9 (3) of the CRC.<sup>52</sup>

The ECtHR has established that the mutual enjoyment by parent and child of each other's company is a fundamental element of family life, even when the relationship between the parents has broken down.<sup>53</sup> The Court also establishes that maintaining family ties should,<sup>54</sup> in so far as practicable, transpire on equal footing.<sup>55</sup>

Moreover, the Court emphasises the legitimate, long-term interest of a child to develop and sustain a bond with his or her parent<sup>56</sup> and that 'severing such ties means cutting a child off from its roots'.<sup>57</sup> Therefore, if no exceptional circumstances are at hand, state authorities must do everything to preserve personal relations and, if appropriate, to rebuild the family.<sup>58</sup>

A serious limitation of parental rights should only be ordered for reasons relating to the parenting skills of a parent and should always serve the child's best interests.<sup>59</sup> Suspending contact rights cannot, as a rule, be permanent.

<sup>50</sup> UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 29.05.2013, nr. 4.

<sup>51</sup> ECtHR, *Sahin v Germany*, *supra* note 21, para. 41; ECtHR, *Sommerfeld v Germany*, *supra* note 21, para. 39; ECtHR, *Neulinger and Shuruk v Switzerland*, *supra* note 30, para. 48; ECtHR, *Z.J. v Lithuania* *supra* note 7, para. 71; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 64; ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 50; ECtHR, *M.S. v Ukraine*, *supra* note 21, para. 49.

<sup>52</sup> ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 81.

<sup>53</sup> Amongst others: ECtHR, *Keegan v Ireland*, no 16969/90, 26.05.1994, para. 50; ECtHR, *Elsholz v Germany*, *supra* note 29, para. 43; ECtHR, *Kosmopoulou v Greece*, *supra* note 33, para. 47; ECtHR, *Mustafa and Armagan Akin v Turkey*, *supra* note 33, para. 19; ECtHR, *Mitovi v the former Yugoslav Republic of Macedonia*, *supra* note 14, para. 57; ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 82; ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 70.

<sup>54</sup> ECtHR, *Gnathoré v France*, no 40031/98, 19.09.2000, para. 59; ECtHR, *Nistor v Romania*, no 14565/05, 02.11.2010, para. 70.

<sup>55</sup> ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 81.

<sup>56</sup> ECtHR, *Felbab v Serbia*, *supra* note 20, para. 69; ECtHR, *Krivosej v Serbia*, *supra* note 20, para. 54.

<sup>57</sup> ECtHR, *Vojnity v Hungary*, no 29617/07, 12.02.2013, para. 40.

<sup>58</sup> ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 75.

<sup>59</sup> ECtHR, *Zawadka v Poland*, *supra* note 18, paras. 60–61.

The Court holds that these decisions should generally be re-assessed at regular intervals of at least once a year. However, the Court does find that this rule cannot be upheld when the child in question suffers from the procedures and if his or her well-being is threatened by the mere prospect of further examination. In these cases, the decision of suspending contact rights can be upheld for a longer period in order to allow the child to stabilise further.<sup>60</sup> A total severance of contact can only be justified in exceptional circumstances, and domestic authorities should always review whether less restrictive means could achieve the aim of protecting the child.<sup>61</sup>

### 2.3.2. *Adopting Decisions and Measures*

Decisions and measures taken by domestic authorities to maintain contact between parent and child should be adapted to the specific circumstances of the case and the specifics of the parties' situations. The positive obligation of the state is not absolute,<sup>62</sup> but solely an obligation of means.<sup>63</sup> The behaviour of individuals and the understanding and cooperation of the parents and children involved remain a crucial prerogative.<sup>64</sup> The Court acknowledges that contact and residence disputes are by their very nature extremely sensitive<sup>65</sup> and State Parties do not have a positive obligation to ensure that two persons adopt a positive attitude towards each other.<sup>66</sup> The enforcement of custody decisions can be a difficult task if State Parties are confronted with the destructive behaviour of one of the parties.<sup>67</sup> On the other hand, lack of cooperation is not a determining factor to exempt the State Party from its positive obligations.<sup>68</sup> Authorities are obliged to reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child.<sup>69</sup> In some judgments, the Court also incorporates the general interest in ensuring respect for the rule of law in this

<sup>60</sup> ECtHR, *Heidemann v Germany*, no 9732/10 [dec.], 17.05.2011.

<sup>61</sup> ECtHR, *Vojnity v Hungary*, *supra* note 57, paras. 41–42; ECtHR, *Cincimino v Italy*, no 68884/13, 28.04.2016, para. 66.

<sup>62</sup> See amongst other authorities: ECtHR, *Mitovi v the former Yugoslav Republic of Macedonia*, *supra* note 14, para. 56.

<sup>63</sup> E.g. ECtHR, *Prizzia v Hungary*, *supra* note 35, para. 35; ECtHR, *Cârstoiu v Romania*, *supra* note 36, para. 69; ECtHR, *Stasik v Poland*, *supra* note 18, para. 82; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 107; ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 74.

<sup>64</sup> ECtHR, *Fernández Cabanillas v Spain*, *supra* note 36, para. 47; ECtHR, *Bostina v Romania*, no 612/13, 22.03.2016, para. 57.

<sup>65</sup> ECtHR, *Krasicki v Poland*, *supra* note 17, para. 90.

<sup>66</sup> ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 97.

<sup>67</sup> ECtHR, *Bondavalli v Italy*, no 35532/12, 17.11.2015, para. 82; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 97; ECtHR, *Kaleta v Poland*, *supra* note 20, para. 58.

<sup>68</sup> ECtHR, *Ribic v Croatia*, no 27148/12, 02.04.2015, para. 94.

<sup>69</sup> ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 98.

balancing exercise.<sup>70</sup> Even though the positive obligation is one of means, and not result, a recent judgment of the ECtHR seems to interpret this in a very strict manner. In *Aneva and others v Bulgaria*, the Court still found a violation of Article 8 ECHR because the imposition of fines and the presence of the bailiff had not led to the return of the children to their mothers, nor to the re-establishment of any kind of meaningful contact between them.<sup>71</sup>

The Court accepts that the nature and extent of sanctions and measures taken by the authorities depend on the circumstances.<sup>72</sup> However, the Court stresses that they need to be implemented rapidly to avoid irreparable damage,<sup>73</sup> as procedural delays can result in the *de facto* determination of the issue before the court.<sup>74</sup> Swiftness is all the more pressing in cases where the passage of time may also have an impact on a pending custody dispute.<sup>75</sup> If custody proceedings face delays, domestic authorities need to prioritise the ordering and enforcement of provisional contact measures in order to prevent a *de facto* determination of the case.<sup>76</sup> However, a violation is unlikely to be found if the reason for delay is primarily due to the applicant's behaviour<sup>77</sup> or when objective reasons for the delay exist.<sup>78</sup>

### 2.3.3. Behaviour and Identity of Parents

The behaviour of parents can be an important factor in the decision-making process. Parents need to show interest in the development of their children

<sup>70</sup> E.g. ECtHR, *Kosmopoulou v Greece*, *supra* note 33, para. 47; ECtHR, *Koudelka v the Czech Republic*, no 1633/05, 20.07.2006, para. 61; ECtHR, *Krasicki v Poland*, *supra* note 17, para. 82; ECtHR, *Kaleta v Poland*, *supra* note 20, para. 53; ECtHR, *Prizzia v Hungary*, *supra* note 35, para. 34.

<sup>71</sup> ECtHR, *Aneva and others v Bulgaria*, *supra* note 47, para. 116.

<sup>72</sup> ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 77.

<sup>73</sup> E.g. ECtHR, *Neulinger and Shuruk v Switzerland*, *supra* note 30, para. 140; ECtHR, *Mitovi v the former Yugoslav Republic of Macedonia*, *supra* note 14, para. 56; ECtHR, *Bondavalli v Italy*, *supra* note 67, para. 73; ECtHR, *Yusupova v Russia*, no 66157/14, 20.12.2016, para. 54; ECtHR, *Bostina v Romania*, *supra* note 64, para. 56.

<sup>74</sup> ECtHR, *Prizzia v Hungary*, *supra* note 35, para. 44; ECtHR, *Stasik v Poland*, *supra* note 18, para. 83; ECtHR, *Ribic v Croatia*, *supra* note 68, para. 92.

<sup>75</sup> ECtHR, *Hokkanen v Finland*, no 19823/92, 23.09.1994, para. 58; ECtHR, *Eberhard and M. v Slovenia*, nos 8673/05 and 9733/05, 1.12.2009, paras. 138–142; ECtHR, *Dabrowska v Poland*, *supra* note 20, para. 47; ECtHR, *Stasik v Poland*, *supra* note 18, para.92; ECtHR, *Improta v Italy*, *supra* note 34, paras. 43–56.

<sup>76</sup> ECtHR, *Bevacqua and S. v Bulgaria*, no 71127/01, 12.06.2008, para. 68; ECtHR, *Ribic v Croatia*, *supra* note 68, paras. 99–101; ECtHR, *Cristian Catalin Ungureanu v Romania*, *supra* note 20, paras. 32–33.

<sup>77</sup> ECtHR, *Gobec v Slovenia*, *supra* note 49, para. 144; ECtHR, *Kuppinger v Germany*, no 62198/11, 15.01.2015, para. 121.

<sup>78</sup> ECtHR, *Süss v Germany*, *supra* note 33, para. 101; ECtHR, *Gobec v Slovenia*, *supra* note 49, para. 144; ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, para. 189.

and be supportive towards their health and special needs.<sup>79</sup> In *Z.J. v Lithuania*, a father had temporarily lost his right to have his children reside with him. However, the domestic courts argued that he had stalled in his quest to have his rights restored and even though he had all means to communicate with his children, he had only done so sporadically. Secondly, the father had failed to inquire about the children's development and health, and his behaviour proved that he was not ready to take concrete steps to take care of them.<sup>80</sup> The Court held that the domestic authorities had acted in the best interests of the children and explicitly mentions the failure of the father to be sufficiently supportive towards his children's health and special needs.<sup>81</sup>

The needs of the child also includes maintaining contact with the other parent. When parents face an obstruction of contact, they need to proactively seek the enforcement thereof, by addressing various authorities and asking them to resort to coercive measures.<sup>82</sup> However, the Court accepts that parents refuse to visit the home of the obstructing parent, if such an undertaking would not achieve the desired results and it could result in criminal prosecution.<sup>83</sup> Parents who refuse to demand custodial sentences are not reprimanded either, as the Court acknowledges that this could offer more ammunition for the obstructing parent to influence their children.<sup>84</sup> However, the Court is less lenient with parents who are responsible for the lack of contact themselves<sup>85</sup> or fail to attend crucial hearings.<sup>86</sup>

Furthermore, parents have to provide a safe and stable environment.<sup>87</sup> Domestic courts should thoroughly scrutinise allegations of dangers that one parent poses to a child. The sole finding that a parent suffered from depression and could risk relapsing cannot be a sufficient motivation to prove the danger of that person and award custody to the other parent.<sup>88</sup> Supervised contact in this context can be arranged, though the Court tends to examine this measure carefully if the parent does not pose a concrete risk to the safety and well-being of the child.<sup>89</sup> In this context, the Court accepts the decision of domestic courts to suspend the custody and contact rights of the alleged perpetrator of child

<sup>79</sup> ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 103.

<sup>80</sup> ECtHR, *Z.J. v Lithuania*, *supra* note 7, paras. 37–38.

<sup>81</sup> ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 103.

<sup>82</sup> ECtHR, *Bordeianu v Moldova*, *supra* note 20, para. 70; ECtHR, *Malec v Poland*, *supra* note 49, para. 73; *a contrario*: ECtHR, *Giorgioni v Italy*, no 43299/12, 15.09.2016.

<sup>83</sup> ECtHR, *Koudelka v the Czech Republic*, *supra* note 70, para. 66.

<sup>84</sup> ECtHR, *Fourkiotis v Greece*, no 74758/11, 16.06.2016, para. 69.

<sup>85</sup> ECtHR, *Kaleta v Poland*, *supra* note 20, paras. 56–58; ECtHR, *Aneva and others v Bulgaria*, *supra* note 47, para. 120–121; ECtHR, *Grujic v Serbia*, *supra* note 49, para. 72.

<sup>86</sup> ECtHR, *Grujic v Serbia*, *supra* note 49, para. 73.

<sup>87</sup> ECtHR, *M.S. v Ukraine*, *supra* note 21, paras. 79–84; ECtHR, *Improta v Italy*, *supra* note 34, paras. 48–53.

<sup>88</sup> ECtHR, *Antonyuk v Russia*, no 47721/10, 01.08.2013, paras. 141–142.

<sup>89</sup> ECtHR, *Improta v Italy*, *supra* note 34, para. 51.

abuse or domestic violence.<sup>90</sup> However, when the suspension measures are no longer necessary, it is also in the best interests of the child to let the family bond between parent and child develop again.<sup>91</sup> This is all the more necessary as the Court recognises that manipulation of children and false accusations of child abuse occur frequently in highly conflictual relationships between separated parents.<sup>92</sup>

The religious conviction, sexual orientation or gender identity of a parent can sometimes justify the restriction of contact. However, the Court holds that such difference in treatment will be discriminatory in the absence of an objective and reasonable justification.<sup>93</sup> For instance, a total removal of access rights that is decisively based on the father's religious beliefs will only be justified if very weighty reasons exist.<sup>94</sup> Parents have the right to communicate and promote their religious beliefs, unless this exposes their children to dangerous practices or to physical or psychological harm. The risk of harm needs to exceed the mere unease, discomfort or embarrassment, and convincing evidence to the contrary should be presented.<sup>95</sup> On the other hand, in *P.V. v Spain*, the Court held that the restriction of contact rights of a male-to-female transgender individual was justified as the domestic courts took measures that would allow the child to become gradually accustomed to his parent's gender reassignment. The Court agrees that the domestic authorities were primarily concerned about the child's best interests, as the report of a psychologist stated that the parent suffered from mental instability, which could affect the child's emotional well-being.<sup>96</sup>

The duty of State Parties to prevent and remedy the obstruction of custody and contact decisions<sup>97</sup> can also be dependent on the conduct of both parents and the courts.<sup>98</sup> Firstly, if the non-resident parent is not entirely deprived of contact, the Court will adopt a more lenient attitude towards the measures adopted.<sup>99</sup> This tolerance stretches even further if the case concerns a very young child whose mother allows contact inside her house, but not outside it.

<sup>90</sup> This was the case in, for example: ECtHR, *Cengiz Kiliç v Turkey*, *supra* note 16; ECtHR, *Sanchez Cardenas v Norway* *supra* note 20; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27; ECtHR, *M. and M. v Croatia*, *supra* note 5; ECtHR, *Strumia v Italy*, no 53377/13, 23.06.2016.

<sup>91</sup> ECtHR, *D'Alconzo v Italy*, no 64297/12, 23.02.2017, paras. 62–63.

<sup>92</sup> ECtHR, *M. and M. v Croatia*, *supra* note 5, paras. 134–136, 140.

<sup>93</sup> ECtHR, *Hoffmann v Austria*, no 12875/87, 23.06.1993, para. 36; ECtHR, *Salgueiro Da Silva Mouta v Portugal*, *supra* note 20, paras. 35–36; ECtHR, *P.V. v Spain*, no 35159/09, 30.11.2010, para. 29; ECtHR, *Vojnity v Hungary*, *supra* note 57, paras. 31–32.

<sup>94</sup> ECtHR, *Vojnity v Hungary*, *supra* note 57, paras. 33, 36–37.

<sup>95</sup> ECtHR, *Vojnity v Hungary*, *supra* note 57, paras. 37–38.

<sup>96</sup> ECtHR, *P.V. v Spain*, 2010, *supra* note 93, paras. 32, 34–36.

<sup>97</sup> ECtHR, *A.B.V. v Russia*, no 56987/15, 02.10.2018, para. 80.

<sup>98</sup> ECtHR, *Prizzia v Hungary*, *supra* note 35, para. 38.

<sup>99</sup> ECtHR, *Bostina v Romania*, *supra* note 64, para. 71; *A contrario*: ECtHR, *Costreie v Romania*, no 31703/05, 13.10.2009, para. 79; ECtHR, *Tocarenco v Moldova*, no 769/13, 04.10.2014, 2014.

Secondly, occasional contact refusals of the resident parent which – according to the domestic authorities – are based on objective reasons such as the illness or the fear of the child instilled by the obstructed parent<sup>100</sup> are endorsed as necessary.<sup>101</sup> Thirdly, domestic authorities are granted more leeway if they refuse to enforce a contact order because the place of residence of the parent requesting the return is uncertain. The ECtHR considers that a stable place of residence is in the best interests of the child.<sup>102</sup>

#### 2.3.4. *The Evaluation of Measures by the Court*

When contact breaches arise, several social institutions and state authorities can provide assistance, such as the school, an Ombudsperson, psychologists, childcare services, guardians and the police.<sup>103</sup> In this context, the Court held that ‘the primary role of the child protection authority is that of facilitating contact and negotiating solutions between the parties concerned, with a view to promoting the child’s best interests.’<sup>104</sup> The Court is highly appreciative of social welfare centres that proactively guide families through these proceedings and provide psychological assistance for divorcing parents, and the Court reprimands State Parties who do not provide this guidance.<sup>105</sup> These centres can play a crucial role in evaluating the situation and the child’s living conditions, contacting the involved parties and proposing solutions to problems.<sup>106</sup> All these institutions can warn parents that their interests should not triumph over those of the children<sup>107</sup> and are ideally placed to urge parents to seek psychological help.<sup>108</sup>

Sometimes children have to be prepared for the renewal of contact with a parent, especially in cases where they are strangers to each other.<sup>109</sup> This can require preparatory or phased measures.<sup>110</sup> Importantly, expert opinions should

<sup>100</sup> ECtHR, *Bostina v Romania*, *supra* note 64, para. 39.

<sup>101</sup> ECtHR, *Bostina v Romania*, *supra* note 64, para. 67.

<sup>102</sup> ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 104.

<sup>103</sup> ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 99; ECtHR, *Krasicki v Poland*, *supra* note 17, paras. 92–100.

<sup>104</sup> EComHR, *Nita v Romania*, no 30305/16, 03.07.2018, para. 42.

<sup>105</sup> ECtHR, *Sophie Gudrun Hansen v Turkey*, no 36141/97, 22.09.2003, para. 103; ECtHR, *Bostina v Romania*, *supra* note 64, para. 70; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 98; ECtHR, *Grujic v Serbia*, *supra* note 49, para. 70.

<sup>106</sup> ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 99; ECtHR, *Bostina v Romania*, *supra* note 64, para. 66.

<sup>107</sup> ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 99.

<sup>108</sup> ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 102.

<sup>109</sup> ECtHR, *A.B.V. v Russia*, *supra* note 97; paras. 70–77.

<sup>110</sup> ECtHR, *Hokkanen v Finland*, *supra* note 75, para. 58; ECtHR, *D. v Poland*, *supra* note 17, para. 11; ECtHR, *Costreie v Romania*, *supra* note 99, para. 84; ECtHR, *Gluhakovic v Croatia*, no 21188/09, 12.04.2011, para. 57; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 99; ECtHR, *Bondavalli v Italy*, *supra* note 67, para. 72; ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 74.

not only focus on the existence of barriers to achieve contact between parent and child, but should also tackle how to overcome them.<sup>111</sup> Court-appointed guardians can also supervise the observance of contact arrangements. The guardian needs to exercise this supervision actively by frequently submitting reports on the family situation and by accompanying the non-resident parent in his efforts to enforce a contact order.<sup>112</sup> The Court also values domestic courts urging parties to undergo family and parental therapy<sup>113</sup> and (in-school) counselling<sup>114</sup> and enabling children to visit an estranged parent in the presence of a psychologist.<sup>115</sup>

Coercive measures often will not be desirable, and any obligation to apply coercion must be limited.<sup>116</sup> The Court primarily obliges State Parties to offer guidance and support to children and their families<sup>117</sup> and considers that a soft and sensitive approach might be more feasible than ordinary civil enforcement proceedings.<sup>118</sup> However, ‘the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives.’<sup>119</sup> When these measures become necessary, the Court seems to propose a hierarchical plan of action. The first and most obvious step that authorities need to take entails delivering a contact order, issued by a competent body with the best interests of the child at heart.<sup>120</sup> Secondly, if the first step remains unsuccessful, fines can be imposed, which should be implemented and recovered swiftly<sup>121</sup> and should be sufficiently high in order to achieve a change of attitude in the obstructing parent,<sup>122</sup> while taking into account the circumstances of the case,

<sup>111</sup> ECtHR, *Kacper Nowakowski v Poland*, *supra* note 18, para. 94.

<sup>112</sup> ECtHR, *Krasicki v Poland*, *supra* note 17, paras. 91–92.

<sup>113</sup> ECtHR, *Plaza v Poland*, *supra* note 29, para. 81; ECtHR, *Zdravkovic v Serbia*, *supra* note 20, para. 67.

<sup>114</sup> ECtHR, *Gobec v Slovenia*, *supra* note 49, para. 137; ECtHR, *Zdravkovic v Serbia*, *supra* note 20, para. 67.

<sup>115</sup> ECtHR, ECtHR, *Fuşca v Romania*, no 34630/07, 13.07.2010, para. 44; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 102; ECtHR, *Zdravkovic v Serbia*, *supra* note 20, para. 67.

<sup>116</sup> ECtHR, *Hokkanen v Finland*, *supra* note 75, para. 58; ECtHR, *Volesky v the Czech Republic*, no 63627/00, 29.06.2004, para. 118; ECtHR, *Zelenevy v Russia*, no 59913/11, 03.10.2013, para. 61; ECtHR, *Fernández Cabanillas v Spain*, *supra* note 36, para. 47; ECtHR, *Tocarenco v The Republic of Moldova*, *supra* note 99, para. 55; ECtHR, *Muruzheva v Russia*, no 62526/15, para. 50.

<sup>117</sup> ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 105.

<sup>118</sup> ECtHR, *Fuşca v Romania*, *supra* note 115, para. 43.

<sup>119</sup> ECtHR, *Neulinger and Shuruk v Switzerland*, *supra* note 30, para. 140; ECtHR, *Tocarenco v The Republic of Moldova*, *supra* note 99, para. 56; ECtHR, *Ribic v Croatia*, *supra* note 68, para. 95; ECtHR, *Kuppinger v Germany*, *supra* note 77, para. 103; ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 77; ECtHR, *Vyshnyakov v Ukraine*, *supra* note 49, para. 43; ECtHR, *Muruzheva v Russia*, *supra* note 116, para. 50.

<sup>120</sup> ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 91.

<sup>121</sup> ECtHR, *Malec v Poland*, *supra* note 49, para. 74; ECtHR, *Muruzheva v Russia*, *supra* note 116, para. 55.

<sup>122</sup> ECtHR, *Bordeianu v Moldova*, *supra* note 20, para. 78.

the relentlessness of the obstructing behaviour<sup>123</sup> and the financial situation of the obstructing parent.<sup>124</sup> Importantly, the Court accepts that the imposition of a series of fines can be contrary to the best interests of the child if he or she has to suffer the consequences of the deterioration of the financial situation of the residential parent.<sup>125</sup> Thirdly, if the attitude of the obstructing parent is particularly challenging, the Court acknowledges that more direct and specific measures should be explored by the domestic authorities.<sup>126</sup> Obstructed parents can call for the aid of a bailiff to ensure the execution of judicial decisions.<sup>127</sup> Fourthly, custody arrangements or decisions can be reversed or changed,<sup>128</sup> as the Court sometimes accepts that the obstructing parent loses sole custody or residence.<sup>129</sup> Finally, and most drastic, custodial sentences can be imposed on the obstructing parent, even though these sentences are often ill-suited to benefit a children's rights perspective. This is acknowledged by the Court, as it states that criminal prosecution of a parent can be detrimental to the well-being of the child and can obliterate any possibility of future cooperation between both parents. Therefore, custodial sentences should only be ordered in exceptional circumstances and as a last resort.<sup>130</sup> This entails that the imposed sentence should be relatively short and that the parent ought to have been sufficiently warned.<sup>131</sup>

## 2.4. ARTICLE 12 CRC: THE CHILD'S RIGHT TO BE HEARD

### 2.4.1. *The Court's Interpretation of Article 12 CRC*

The Court acknowledges that the children involved should, in general, be heard<sup>132</sup> (in)directly, having due regard to the age and maturity of the children concerned.<sup>133</sup> The Court has referred to Article 12 CRC in its discussion of the

<sup>123</sup> ECtHR, *Koudelka v the Czech Republic*, *supra* note 70, para. 64.

<sup>124</sup> ECtHR, *Kuppinger v Germany*, *supra* note 77, para. 105.

<sup>125</sup> ECtHR, *Mincheva v Bulgaria*, *supra* note 36, para. 89; ECtHR, *Fuşca v Romania*, *supra* note 115, para. 48.

<sup>126</sup> ECtHR, *Tocarenco v Moldova*, *supra* note 99, paras. 60–62.

<sup>127</sup> For example: ECtHR, *Cârstoiu v Romania*, *supra* note 36, para. 44.

<sup>128</sup> ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, paras. 179–185; ECtHR, *Krasicki v Poland*, *supra* note 17, para. 94; ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 99.

<sup>129</sup> ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, paras. 183–184.

<sup>130</sup> ECtHR, *Fourkiotis v Greece*, *supra* note 84, paras. 68–69.

<sup>131</sup> ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 91.

<sup>132</sup> ECtHR, *Mustafa and Armagan Akin v Turkey*, *supra* note 33, para. 22; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 104; ECtHR, *M. and M. v Croatia*, *supra* note 5; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 105.

<sup>133</sup> ECtHR, *Sahin v Germany*, *supra* note 21, para. 73; U. KILKELLY (2015), 'Chapter 12: The CRC in Litigation under the ECHR', *supra* note 4, p. 200.

relevant international law material,<sup>134</sup> albeit less frequently than it has referred to Articles 3 and 9 CRC. Subsequently, the child's right to be heard, in contrast with the child's best interests principle and the child's right to maintain contact with both parents, does not surface in the majority of judgments of the ECtHR concerning parental authority and contact. Still, in *M. and M. v Croatia*, the Court included the General Comment of the UN CRC Committee on the child's right to be heard at length.<sup>135</sup>

The Court specifies in its reasoning that domestic courts should give due weight to the views and feelings, as well as to the right to respect for private life, of children who are maturing and are able to formulate their own opinion on contact with a parent.<sup>136</sup> Regrettably, the Court has not yet established what constitutes sufficient maturity.<sup>137</sup> According to Mol's analysis, in the majority of cases the Court refers to the age of the children involved to resolve this conundrum, in which refusing participation of children from the age of 11 and onwards is criticised, while the lack of participation of children below the age of six is seen as reasonable.<sup>138</sup> Only two other factors have been referred to, namely, the intellectual capacities of the child and the consistency of the views expressed.<sup>139</sup> Still, providing a guideline as a general principle as to what criteria should be assessed by the domestic authorities could prove helpful for domestic authorities. In this regard, the UN CRC Committee refers to the ability to understand and assess the implications of a particular matter<sup>140</sup> and that the child should be able to express his or her views in a reasonable and independent manner.<sup>141</sup>

Grunderbeeck argued in 2003 that the child's right to be heard – as it was portrayed in the judgments of *Sahin v Germany* and *Sommerfeld v Germany* – was constructed to serve the interests of the parent who asks for contact.<sup>142</sup> However, since *M. and M. v Croatia*, the Court has explicitly reasoned that the

<sup>134</sup> ECtHR, *Gineitiene. Lithuania*, *supra* note 21, para. 29; ECtHR, *Raw and others v France*, *supra* note 21, para. 46; ECtHR, *M. and M. v Croatia*, *supra* note 5, para. 94.

<sup>135</sup> ECtHR, *M. and M. v Croatia*, *supra* note 5, para. 97.

<sup>136</sup> ECtHR, *Plaza v Poland*, *supra* note 29, para. 71.

<sup>137</sup> N. NIKOLINA, *Divided Parents, Shared Children – Legal Aspects of (Residential) Co-parenting in England, the Netherlands and Belgium*, Intersentia, Antwerp 2015, p. 22.

<sup>138</sup> C. MOL, 'Maturity and the Child's Right to be Heard in Family Law Proceedings. Article 12 UNCRC and Case Law of the ECtHR Compared', in K. BOELE-WOELKI and D. MARTINY (eds.), *Plurality and Diversity of Family Relations in Europe*, Cambridge, Intersentia 2019, pp. 245–246.

<sup>139</sup> C. MOL (2019), 'Maturity and the Child's Right to be Heard', *supra* note 138, p. 245.

<sup>140</sup> UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No 12 (2009) on the right to be heard*, CRC/C/GC/12, 20.07.2009, 11, nrs. 29–30.

<sup>141</sup> UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No 12 (2009) on the right to be heard*, CRC/C/GC/12, 20.07.2009, 11, nr. 30.

<sup>142</sup> D. VAN GRUNDERBEECK, *Beginselen van Personen- en Familierecht: een Mensenrechtelijke Benadering*, Intersentia, Antwerp 2003, p. 602.

right of the child to be heard primarily served the child's interests, as the Court stresses that when two parents are equally (un)fit to raise their child, the child's preference should be respected.<sup>143</sup> Another consideration in this regard is the fact that the Court acknowledges that the conduct of the alienated parent can provide objective reasons for children to start refusing contact.<sup>144</sup> Moreover, the Court acknowledges that in certain cases, contact-seeking parents are more concerned with proving the other parent's negative influence than with actually listening to their children's concerns and wishes. In *Sbarnea v Romania*, the Court expressed understanding of the child's efforts to explain her views on her relationship with her father and what she did not like and wanted to change, all of which fell on deaf ears in conversations with her father.<sup>145</sup>

#### 2.4.2. *The Realisation of the Child's Right to be Heard*

Importantly, the realisation of this right depends on the specific circumstances of the case. Domestic courts are not always required to hear a child in court – for instance when the very process of questioning the child entails a risk for his or her well-being that cannot be avoided by special arrangements in court.<sup>146</sup> When very young children are involved, the Court deems that it is essentially for the domestic courts to make an objective assessment regarding the award of custody and whether contact with a parent is desired.<sup>147</sup> Still, experts ought to be appointed to meet the child and both parents to analyse the child's attitude to both parents and to determine whether the child could be heard in court, if need be with the assistance of a specialist in child psychology.<sup>148</sup> If children are considered too young to be heard, the relationship of the children with each of the parents should be assessed by childcare authorities who have been following the family for some time and have repeatedly talked to the children and to both parents.<sup>149</sup> In this regard, the Court interprets Article 12 CRC correctly, as it stipulates that children should be heard 'either directly, or through a representative or an appropriate body'. Article 12 CRC is also a right of the child, not a duty. On the other hand, even if the child had refused to be heard in the past, the Court maintains that domestic authorities should ensure that this attitude has not changed in the future.<sup>150</sup>

<sup>143</sup> ECtHR, *M. and M. v Croatia*, *supra* note 5, paras. 185–186.

<sup>144</sup> ECtHR, *Onodi v Hungary*, *supra* note 35, para. 33.

<sup>145</sup> ECtHR, *Sbarnea v Romania*, no 2040/06, 21.06.2011, para. 137.

<sup>146</sup> ECtHR, *Sahin v Germany*, *supra* note 21, paras. 73–74; A. GRGIC (2016), 'Jurisprudence of the European Court of Human Rights', *supra* note 8, p. 107.

<sup>147</sup> ECtHR, *Plaza v Poland*, *supra* note 29, para. 71.

<sup>148</sup> ECtHR, *Sahin v Germany*, *supra* note 21, paras. 72–75; ECtHR, *Petrov and X. v Russia*, *supra* note 43, para. 108.

<sup>149</sup> ECtHR, *Malinin v Russia*, no 70135/14, 12.12.2017, para. 75.

<sup>150</sup> ECtHR, *Moog v Germany*, nos 23280/08 and 2334/10, 06.10.2016, para. 81.

### 2.4.3. *The Child Refusing Contact: Room for Autonomy During the Best Interests Assessment?*

The ECtHR seriously takes into account the risk of children starting to refuse contact themselves and expressing this through their right to be heard.<sup>151</sup> In this regard, the Court no longer finds that the risk that a child would develop a loyalty conflict because of the obstructing behaviour of one parent can justify not enforcing contact.<sup>152</sup> The Court, however, does recognise that the passage of time may change the circumstances and can call for a re-assessment of the child's ties, justifying the non-execution of custody and contact judgments.<sup>153</sup> Still, the Court examines whether this change of circumstances is primarily attributable to the domestic authorities themselves and stresses that State Parties should prevent the situation in which children begin to refuse visiting a parent due to the domestic authorities' actions.<sup>154</sup> Above all, the Court underlines that the passivity of the state, which led to the total rupture of relations between a parent and his or her child, can never be in the best interests of the child.<sup>155</sup> Domestic authorities should ensure that the relationship between parent and child can develop in a calm environment where the children can freely express their feelings, to prevent children being manipulated into refusing contact with a parent.<sup>156</sup> If domestic authorities were unable to take adequate measures to prevent a child's refusal, they are obliged to adopt a complex approach with the assistance of experts in the field and adopt pedagogic or therapeutic measures to alleviate the consequences of the prolonged separation.<sup>157</sup> As stated above, in these scenarios it is even more important to adopt proper preparatory measures.<sup>158</sup>

If the efforts of the State Party remain fruitless, a tension arises between two aspects embedded in the best interests principle – namely, the child's interest to have his or her family ties preserved and the child's interest to have his or her

<sup>151</sup> ECtHR, *Zavrel v the Czech Republic*, 2007, no 14044/05, 18.01.2007, para. 52; ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, para. 185; ECtHR, *Bordeianu v Moldova*, *supra* note 20, para. 82.

<sup>152</sup> For instance, in the case of ECtHR, *Hoffmann v Germany*, *supra* note 93, para. 53, even though it consisted of similar facts, the Court did not re-apply the European Commission's motivation in EComHR, *Hendriks v the Netherlands*, no 8427/78, 08.03.1982.

<sup>153</sup> ECtHR, *Bordeianu v Moldova*, *supra* note 20, para. 68; ECtHR, *Prizzia v Hungary*, *supra* note 35, para. 49.

<sup>154</sup> ECtHR, *Koudelka v the Czech Republic*, *supra* note 70, para. 65; ECtHR, *Piazzi v Italy*, no 36168/09, 02.11.2010, paras. 55–61; ECtHR, *Bordeianu v Moldova*, *supra* note 20, para. 68; ECtHR, *Zelenevy v Russia*, *supra* note 116, para. 72; ECtHR, *Prizzia v Hungary*, *supra* note 35, para. 49; ECtHR, *Cincimino v Italy*, *supra* note 61; ECtHR, *K.B. and others v Croatia*, *supra* note 42.

<sup>155</sup> ECtHR, *Leschiutta and Fraccaro v Belgium*, nos 58081/00 and 58411/00, 17.06.2008, para. 34.

<sup>156</sup> ECtHR, *Sophie Gudrun Hansen v Turkey*, *supra* note 105, para. 104.

<sup>157</sup> ECtHR, *Bordeianu v Moldova*, *supra* note 20, paras. 82–83.

<sup>158</sup> ECtHR, *R.I. and others v Romania*, *supra* note 47, para. 67.

opinion given due weight.<sup>159</sup> This tension is not easily resolved. The Court adds that the child's views definitely cannot be followed automatically without any other factors being considered and an examination being carried out to determine their best interests.<sup>160</sup> The Court's choice of wording seems to oppose the child's best interests against the child's right to be heard, instead of viewing the child's views as an aspect to assess the child's best interests. Such an interpretation can provide risks for future judgments, as no clear guidance is offered to authorities to resolve this purported dichotomy. However, it does accurately question the capacity of certain children to express their views freely when they are suffering from a loyalty conflict. In this regard, the Court states that:

... if a court would base a decision on the views of children who are palpably unable to form and articulate an opinion as to their wishes – for example, because of a loyalty conflict and/or their exposure to the alienating behaviour of one parent – such a decision could run contrary to Article 8 of the Convention.<sup>161</sup>

Nonetheless, the Court only sporadically evaluates the consequences of loyalty conflicts and parental estrangement on the children's rights and well-being.<sup>162</sup> Regrettably, the Court does not specify in depth the extent to which parental estrangement violates the rights of the children involved and does not answer the question of whether the refusal of states to adequately protect children from developing loyalty conflicts in the first place is in their best interests.<sup>163</sup> The Court primarily views the estrangement following from such loyalty conflicts as negatively affecting the rights of the parent, while the existence of a loyalty conflict definitely affects the rights and well-being of the children themselves, as well.

Choudry and Herring argue that the Court adopts a very parent-centred perspective in these cases, as the refusal of the child is seen as a justification for the State Party not to enforce a custody order, instead of an exercise of the children's

<sup>159</sup> S. CHOUDRY and J. HERRING, *European Human Rights and Family Law*, Hart Publishing, Oxford 2010, pp. 127–138, 221.

<sup>160</sup> ECtHR, *K.B. and others v Croatia*, *supra* note 42, para. 143; ECtHR, *R.I. and others v Romania*, *supra* note 47, para. 58.

<sup>161</sup> ECtHR, *K.B. and others v Croatia*, *supra* note 42, para. 143.

<sup>162</sup> ECtHR, *Piazzini v Italy*, *supra* note 154, paras. 59–63. However, in ECtHR, *Strumia v Italy*, *supra* note 90, paras. 119–123, the Court did mention the psychologist report that stated that the child suffered from emotional abuse, due to the manipulation of her mother and the hostile environment. The report concluded, and the Court concurred, that the only possible solution that was still open to the domestic authorities was the placement of the child in an institute. This finding prompted the Court to consider Art. 8 ECHR violated by the State Party. In ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, para. 137 and EComHR, *Luzi v Italy*, no 48322/17, 05.12.2019, para. 79, the Court does refer to the best interests of the child, but in a short and slightly tokenistic manner.

<sup>163</sup> ECtHR, *Buchleither v Germany*, no 20106/13, 28.04.2016, para. 46; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 95.

right to determine with which parent they should live.<sup>164</sup> When children actively oppose contact with a parent, the Court accepts that bailiffs refuse to resort to physical force and consider that another method of enforcement is necessary to preserve the child's best interests.<sup>165</sup> In this regard, the Court judges that 'on a practical basis, there may also come a stage where it becomes pointless, if not counterproductive and harmful, to attempt to force a child to conform to a situation which, for whatever reasons, he or she resists'.<sup>166</sup> Moreover, the Court less readily finds a violation of Article 8 if states fail to enforce contact decisions effectively.<sup>167</sup> On the other hand, the Court refuses to grant children an unconditional veto power, and even when they have clear views, there needs to be a careful and full consideration of all the evidence and a weighing up of the competing rights.<sup>168</sup> Nevertheless, the use of the wording 'for whatever reasons' can allegedly contribute to a parent-centred approach, in which the reasons behind the child's refusal are overlooked when decisions are made regarding enforcement of contact decisions. This oversight results in the view that the refusal of children to contact their parent is primarily an infringement of the rights of the estranged parent, when the refusal could also negatively affect the child's rights due to the circumstances that are the cause of the refusal. A better viewpoint, which would correspond to the child's best interests principle, would be to start with the reasons behind the child's refusal and to view these reasons as the cornerstone when the enforcement of contact has to be decided upon. Overlooking the reasons behind the refusal and merely focusing on the difficulty that the refusal itself poses to enforce contact render it impossible to evaluate whether this refusal could be attributed to the undue influence the other parent has on the child, which, if this is the case, is undoubtedly infringing the child's rights, as well. Furthermore, discounting the reasons behind the refusal of the children involved can be detrimental to establishing the most appropriate course of action to rebuild contact between parent and child, as the child might have legitimate reasons to refuse contact. When this is the case, addressing these reasons could improve the bond between parent and child, which would undoubtedly be in the best interests of both parties concerned.<sup>169</sup> However, in

<sup>164</sup> S. CHOUDRY and J. HERRING (2010), *European Human Rights and Family Law*, *supra* note 159, p. 223.

<sup>165</sup> ECtHR, *Sbarnea v Romania*, *supra* note 145, para. 134.

<sup>166</sup> ECtHR, *C. v Finland*, no 18249/02, 09.05.2006, para. 57.

<sup>167</sup> ECtHR, *Mincheva v Bulgaria*, *supra* note 36, para. 94; ECtHR, *Zoltan Németh v Hungary*, *supra* note 36, para. 48; In contrast see: ECtHR, *Fuşca v Romania*, *supra* note 116, para. 42; ECtHR, *Fernández Cabanillas v Spain*, *supra* note 36, para. 51; ECtHR, *Zdravkovic v Serbia*, *supra* note 20; ECtHR, *Wdowiak v Poland*, *supra* note 49.

<sup>168</sup> ECtHR, *C. v Finland*, *supra* note 166, paras. 57–58; ECtHR, *R.I. and others v Romania*, *supra* note 47, para. 58; S. CHOUDRY and J. HERRING (2010), *European Human Rights and Family Law*, *supra* note 159, p. 244.

<sup>169</sup> C. DRAGHICI, *Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?*, Hart Publishing, Oxford 2017, p. 277.

a more recent judgment, the Court seems to depart from this line of reasoning and instead holds that ‘Article 8 of the Convention requires States to try to identify the causes of such resistance and address them accordingly’.<sup>170</sup>

### 3. THE LIMITS THE COURT FACES TO MEANINGFULLY INCORPORATE THE CHILD’S PERSPECTIVE

Even though the ECtHR incorporates children’s rights in its case law, this does not necessarily result in a meaningful inclusion of the child’s perspective in all judgments. Two elements that particularly frame the procedure before the ECtHR reveal the limits the Court faces in this regard: namely, the principle of subsidiarity which the Court adheres to and the difficulties children encounter when seeking to effectively invoke their rights before the ECtHR.

#### 3.1. THE PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity primarily entails that the task of assessing the relevant facts of a case is attributed to the national authorities.<sup>171</sup> The Court accepts that domestic authorities are generally better placed to regulate custody and contact disputes as they have the benefit of direct contact with the persons concerned<sup>172</sup> and will only find a violation of Article 8 when the inefficiency of the measures applied is manifest.<sup>173</sup> Therefore, the Court will solely examine whether the State Party adopted all necessary, relevant and sufficient measures<sup>174</sup> that can be reasonably expected to facilitate contact between parent and child<sup>175</sup> and whether a fair balance has been struck between competing interests within a state’s margin of appreciation.<sup>176</sup> In this context, the Court awards a wide margin

<sup>170</sup> ECtHR, *K.B. and others v Croatia*, *supra* note 42, para. 144.

<sup>171</sup> A. GRGIC (2016), ‘Jurisprudence of the European Court of Human Rights’, *supra* note 8, p. 106.

<sup>172</sup> ECtHR, *Elsholz v Germany*, *supra* note 29, para. 48; ECtHR, *Sahin v Germany*, *supra* note 21, para. 64; ECtHR, *Sommerfeld v Germany*, *supra* note 21, para. 62; ECtHR, *Z.J. v Lithuania*, *supra* note 7, para. 96; ECtHR, *Bondavalli v Italy*, *supra* note 67, para. 79; ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49, para. 79; ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 69.

<sup>173</sup> ECtHR, *Zoltan Németh v Hungary*, *supra* note 36, para. 51.

<sup>174</sup> ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 74; ECtHR, *G.B. v Lithuania*, *supra* note 6, para. 94.

<sup>175</sup> ECtHR, *Bostina v Romania*, *supra* note 64, para. 57.

<sup>176</sup> ECtHR, *Sommerfeld v Germany*, *supra* note 21, para. 62; ECtHR, *Neulinger and Shuruk v Switzerland*, *supra* note 30, para. 138; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27, para. 37.

of appreciation to State Parties when they decide upon parental authority and residence arrangements.<sup>177</sup> A stricter margin of appreciation is foreseen when further limitations are being placed on custody, such as restrictions placed on access rights.<sup>178</sup>

The principle of subsidiarity and the award of a margin of appreciation in the context of parental authority and contact results in the Court being very hesitant to evaluate the domestic authorities' assessment of children's rights in a given case. For instance, the child's best interests concept is referred to under the general principles of Article 8 ECHR, but is rarely evaluated in the application of those principles to the facts of the case. The Court stresses that domestic courts are in principle better placed than an international judge to evaluate the evidence before them and that the Court should not take their place in establishing and assessing the facts and deciding what is in the best interests of the child,<sup>179</sup> nor to judge which necessary measures have to be taken in that respect.<sup>180</sup> Even though the Court understandably refuses to do so and it would be unreasonable to argue another approach, an evaluation of the authorities' assessment of the best interests of the child involved is crucial to meaningfully incorporate the child's perspective in the Court's judgments. Due to the vagueness of the concept, the domestic authorities' assessment of the child's best interests can be susceptible to bias and negligence. Moreover, in the domestic procedure, children are not a party to the conflict, nor are they always heard. Therefore, even though a decision might seemingly be justified in the best interests of the child, it could still have a negative impact on the child due to the specific circumstances of the case. Furthermore, as argued above in the context of the discussion regarding the feasibility of coercive measures and the implementation of the child's right to be heard, it becomes evident that the Court generally views these conundrums through the perspective of the applicant parent and refrains from evaluating the situation from the perspective of the child, who is nonetheless the central subject of the dispute. Contact breaches are primarily seen as impacting the parent's rights, while the Court does not elaborate on the negative impact it can have on the child, nor does the Court always evaluate whether the child involved should have been heard by the domestic authorities. Combined with the fact that the child is also hardly ever an effective party to the proceedings before the Court, the question can be asked to what extent the perspective of the child involved is meaningfully assessed.

<sup>177</sup> E.g. ECtHR, *Sahin v Germany*, *supra* note 21, para. 64; ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, paras. 174–175; ECtHR, *Cincimino v Italy*, *supra* note 61, para. 65.

<sup>178</sup> E.g. ECtHR, *Elsholz v Germany*, *supra* note 29, para. 49; ECtHR, *C. v Finland*, *supra* note 166, para. 60; ECtHR, *A. V. v Slovenia*, *supra* note 5, para. 70.

<sup>179</sup> ECtHR, *Leonov v Russia*, *supra* note 32, para. 72.

<sup>180</sup> ECtHR, *Cârstoiu v Romania*, *supra* note 36, para. 39.

### 3.2. THE CHILD'S DIFFICULTIES IN ACCESSING THE ECtHR

In the context of parental separation and divorce, the ECtHR infrequently deals with cases brought on behalf of children and even less with cases brought by them.<sup>181</sup> In the total of 115 judgments analysed,<sup>182</sup> only 22 parents also applied on behalf of his or her child, and in only one case was the child the only applicant.<sup>183</sup>

A meaningful inclusion of the child's perspective in judgments of the ECtHR requires all aspects of relevance to the child's specific situation to be brought to the Court's attention. To achieve this, ideally the child is party to the Court's procedure. However, the child's path to access the Court is apparently riddled with obstacles, as not many children apply to the Court independently. Secondly, even though the child might be represented by a parent in the proceedings, that parent might not fully disclose the child's perspective to the Court, and the child might not even be aware of the proceedings. The Court merely requires a form of consent to be signed and sent by the child in the cases where he or she reached majority during the proceedings before it.<sup>184</sup> In matters of family law, parents are usually claimants, additionally defending what they consider to be in the best interests of their children next to defending their own interests.<sup>185</sup> Undeniably, that parent will not disclose those aspects of the child's best interests that conflict with his or her own. Thirdly, some parents do not represent, or are not entitled to represent, their child, resulting in the Court being completely dependent on the argumentation of the Member State to form a view of the child's best interests in the case.

Even if a parent applies simultaneously on behalf of his or her child, the following analysis shows why the Court does not always accept this request. In this context, the Court reviews 'the relationship between the child and his or her representatives, the subject matter and the purpose of the application and also the possibility of a conflict of interests.'<sup>186</sup> This leads to a fairly complicated reasoning in family law proceedings. The Court accedes that in a conflict

<sup>181</sup> S. CHOUDRY and J. HERRING (2010), *European Human Rights and Family Law*, *supra* note 159, pp. 221–222; COUNCIL OF EUROPE, 'Explanatory Memorandum to the Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice', Council of Europe Publishing, 2010, p. 46; M. DE BOER-BUQUICCHIO, 'Preface', in *International Justice for Children*, Council of Europe Publishing, 2008, p. 10; U. KILKELLY (2015), 'Chapter 12: The CRC in Litigation under the ECHR', *supra* note 4, p. 199; F. TULKENS (2008), 'The European Convention on Human Rights', *supra* note 8, pp. 17–33.

<sup>182</sup> The judgments of 2019 were included for this analysis.

<sup>183</sup> ECtHR, *M.M.B. v Slovakia*, no 6318/17, 26.11.2019.

<sup>184</sup> ECtHR, *Raw and others v France*, *supra* note 21, para. 53.

<sup>185</sup> I. BERRO-LEFÈVRE, 'Improving children's access to the European Court of Human Rights', in *International Justice for Children*, Council of Europe Publishing, 2008, p. 70.

<sup>186</sup> ECtHR, *Moretti and Benedetti v Italy*, no 16318/07, 27.04.2010, para. 32.

between a natural parent<sup>187</sup> and the parent entitled to represent the child under domestic law, some of the interests of the child will not be brought to the Court's attention if the natural parent is not granted standing to represent that child.<sup>188</sup> In this regard, the Court accepts that the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*.<sup>189</sup> In the situation where the parent is in conflict with the domestic authorities, the Court accepts that he or she may be able to represent the child in the proceedings before it – for instance, when that parent criticises the decisions and conduct of the domestic authorities as being inconsistent with the rights guaranteed by the ECHR.<sup>190</sup> However, this finding alone is insufficient to grant that parent legal standing. The answer to this question depends on three factors: firstly, whether the parent who does exercise parental authority can be deemed to effectively protect the child's Convention rights;<sup>191</sup> secondly, parental rights of the applicant; and thirdly, whether the domestic decision involves a decision regarding parental authority or access rights, on the one hand, or the inobservance of contact arrangements, on the other.

Parents who are not deprived of parental authority and who challenge a custody or contact decision will encounter no difficulties in representing their children.<sup>192</sup> On the other hand, parents deprived of parental authority who challenge, for instance, the obstruction of their contact rights will not be granted standing to represent their children.<sup>193</sup> The Court argues in these scenarios that it is not the state's responsibility to safeguard the child's Convention rights, but the responsibility of the parent who was granted parental authority. The Court holds that 'in cases arising out of disputes between parents, it is the parent

<sup>187</sup> The Court seems to use this term as a synonym for the biological parent, without or deprived of parental rights.

<sup>188</sup> E.g. ECtHR, *Scozzari and Giunta v Italy*, nos 39221/98 and 41963/98, 13.07.2000, para. 138; ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, para. 87.

<sup>189</sup> ECtHR, *Scozzari and Giunta v Italy*, *supra* note 188, para. 138; ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, para. 85; ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, para. 146; ECtHR, *Raw and others v France*, *supra* note 21, para. 51.

<sup>190</sup> T. WUYTS (2013), *Ouderlijk Gezag*, Intersentia, Antwerp 2013, p. 464 referring to: ECtHR, *Petersen v Germany*, no 31178/96 [dec.], 6.12.2001.

<sup>191</sup> ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, para. 86.

<sup>192</sup> See, for instance: ECtHR, *Bevacqua and S. v Bulgaria*, *supra* note 76; ECtHR, *Mustafa and Armagan Akin v Turkey*, *supra* note 33; ECtHR, *Neulinger and Shuruk v Switzerland*, *supra* note 30; ECtHR, *Diamante and Pelliccioni v San Marino*, *supra* note 13, para. 146; ECtHR, *M.R. and L.R. v Estonia*, *supra* note 27; ECtHR, *Zelenevy v Russia*, *supra* note 116; ECtHR, *M. and M. v Croatia*, *supra* note 5; ECtHR, *Mitrova and Savik v the former Yugoslav Republic of Macedonia*, *supra* note 49; ECtHR, *M.S. v Ukraine*, *supra* note 21, paras. 52–53; ECtHR, *Petrov and X. v Russia*, *supra* note 43, para. 83.

<sup>193</sup> E.g. ECtHR, *Sahin v Germany*, no 30943/96 [dec.], 12.12.2000; ECtHR, *Petersen v Germany*, *supra* note 190; ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, paras. 88–89; ECtHR, *Moog v Germany*, *supra* note 150, paras. 41–42; ECtHR, *K.B. and others v Croatia*, *supra* note 42, para. 109.

entitled to custody who is entrusted with safeguarding the child's interests'. Therefore, the Court holds that conflicts regarding access rights in this situation do not oppose the parent and the state.<sup>194</sup> Building further on this reasoning of the Court, contact-obstructed parents with parental authority challenging the non-observance of their right to custody or access are entitled to represent their child,<sup>195</sup> as are parents who are deprived of parental authority who challenge a custody or contact decision.<sup>196</sup>

However, the approach of the Court in which it denies standing to the parent without parental rights, who challenges the non-observance of a custody or contact decision, is regrettable, as the child's right to maintain contact with both parents is impacted to a great degree in these cases. It can be argued that in these cases, it is not only the responsibility of the parent holding parental authority to safeguard the children's rights, but also that of the domestic authorities, who should ensure that its decisions – which were delivered in the best interests of the child – are being complied with.

To conclude, the lack of children applying to the Court and the fact that some children are not even able to be represented due to the specifics of the case and the parental rights of the applicant<sup>197</sup> is a second cause of the Court's struggles to meaningfully incorporate a child's perspective in their judgments.

#### 4. 2019: PAVING THE WAY TOWARDS A MORE CHILD-CENTRED PERSPECTIVE?

This section aims to discover whether shifts can be detected in 2019 in the reasoning of the Court regarding the children's rights perspective in judgments concerning parental authority and contact, as the Court uses a dynamic and evolutive interpretation method to ensure that the protection provided by the ECHR remains contemporary and effective.<sup>198</sup>

In the majority of cases, a violation was found, with the exception of *Stankunaite v Lithuania* and *A. and B. v Croatia*. In all cases, the facts of the case presented signs that the children might have been manipulated by the other

<sup>194</sup> ECtHR, *Sahin v Germany*, *supra* note 21; ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, para. 88.

<sup>195</sup> Which was the case in ECtHR, *Siebert v Germany*, no 59008/00 [dec], 09.06.2005; ECtHR, *Raw and others v France*, *supra* note 21, paras. 51–53; ECtHR, *Aneva and others v Bulgaria*, *supra* note 47, para. 92; ECtHR, *R.I. and others v Romania*, *supra* note 47, paras. 38–39.

<sup>196</sup> ECtHR, *Scozzari and Giunta v Italy*, *supra* note 188.

<sup>197</sup> E.g. ECtHR, *Sahin v Germany*, *supra* note 21; ECtHR, *Petersen v Germany*, *supra* note 190; ECtHR, *Eberhard and M. v Slovenia*, *supra* note 75, paras. 88–89; ECtHR, *Moog v Germany*, *supra* note 150, paras. 41–42; ECtHR, *K.B. and others v Croatia*, *supra* note 42, para. 109.

<sup>198</sup> K. DZEHTSIAROU, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', (2011) 12(10), *German Law Journal*, pp. 1730–1745.

parent or were suffering from an apparent loyalty conflict. Additionally, in the majority of cases, the children were heard by experts. In three cases, the children involved were also heard by the domestic courts.<sup>199</sup> This section will first discuss the biggest revelation, namely, the discussion that arose between the Court judges regarding children's representation. Secondly, although the majority of judgments that were delivered in 2019 seem to adhere to the principles that were discussed above, slight refinements in reasoning are discussed that seem to act as a prelude to providing more recognition for the perspective of the child.

#### 4.1. TRIGGERING THE DEBATE REGARDING CHILDREN'S REPRESENTATION

##### 4.1.1. *Conflict of Loyalty Necessitating Separate Representation in Front of the Court*

*A. and B. v Croatia* succeeded in sparking the debate regarding the position of children in proceedings before the ECtHR in complex family (criminal) law cases. The case involved a situation of alleged child sexual abuse by a father, in which the mother wished to represent the child. The ECtHR found, for the first time in these circumstances, that the relationship between the child and her father, and the potential conflict of interest between both parents, necessitated the child's separate representation.<sup>200</sup> This approach has been the subject of a lively discussion in the separate opinions to the judgment. Adding salt to the wound, Judge Wojtyczek argues that even though the Court's proceedings succeed in comprehensively bundling the proceedings at the domestic level, fragmentation still exists, as other private legal subjects, such as the other parent or the child involved – with their own fundamental rights and legitimate interests which might conflict or diverge – are excluded. He claims that this absence is not compensated for by the Government given that the interests of these private parties and the Government are not identical.<sup>201</sup> As the Court is no fact-finding judicial body and relies on the arguments presented by the parties, this problem is even more acute, as legally protected goods and interests not invoked by the parties are often completely absent from the 'balancing' exercise conducted by the Court.<sup>202</sup> Still, the rights of the individuals who are not party to the proceedings can be affected by a judgment of the Court.<sup>203</sup> Building further

<sup>199</sup> Namely: ECtHR, *Begovic v Croatia*, no 35810/14, 13.06.2019; ECtHR, *Milovanovic v Serbia*, *supra* note 49 and ECtHR, *Zelikha Magomadova v Russia*, no 58724/14, 08.10.2019.

<sup>200</sup> ECtHR, *A. and B. v Croatia*, no 7144/15, 20.06.2019, para. 3.

<sup>201</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judge Wojtyczek, para. 3.

<sup>202</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judge Wojtyczek, para. 3.

<sup>203</sup> These possible consequences are further elaborated upon: ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judge Wojtyczek, para. 4.

on the reasoning of the Judge, it could be argued that children, whose rights are already frequently omitted at the domestic level due to the fact that they are not a party during the decision-making process surrounding parental authority, residence and contact rights, are subsequently at even greater risk of having their rights overlooked at the level of the Court.

Judge Wojtyczek additionally claims that conflict between two parents involves a strong risk that the rights of the child will be invoked in an instrumental way, rendering them unable to identify and pursue the best interests of the child. He suggests to the domestic authorities to appoint a curator *ad litem* for the child during the proceedings in front of the ECtHR in very exceptional circumstances and where there is an acute conflict between the parents. Additionally, he proposes to have the Rules of Court address the more general situation of every conflict of interests between a person representing a party and that specific party. He acknowledges that the submissions of the curator would still require particularly thorough and critical scrutiny.<sup>204</sup> Interestingly, however, he proposes that the child's curator ought to also evaluate whether legal remedies and an application to this Court would serve the child's best interests. In arguing this, he acknowledges the adverse effects that parental conflict and litigation have on children and the importance of swift proceedings to de-escalate the conflict.<sup>205</sup>

The Concurring Opinion of Judges Koskelo, Eicke and Ilievski stresses the particularly stark example of the problem with which the Court is frequently confronted, namely, ascertaining the child's best interests and ensuring, on a procedural level, that the child's best interest was and remains a primary consideration throughout both domestic proceedings and the proceedings before the Court.<sup>206</sup> Furthermore, the judges shed more light onto the decision-making process which led to the appointment of the separate representative of the child in front of the ECtHR. Given that various expert opinions stressed the negative influence the mother had on the child, her manipulative behaviour and the possibility of emotional abuse, the Court found it suitable to appoint a separate representative.<sup>207</sup> In the case, the representative of the child alleged that the child was a victim of emotional abuse of the applicant parent.<sup>208</sup> The fact that this argument was not disclosed by either the mother or the domestic authorities clearly reveals the blind spots that can seep into the Court's analysis of cases in which the child is at the centre of the dispute, though not

<sup>204</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judge Wojtyczek, para. 5.

<sup>205</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judge Wojtyczek, para. 7.

<sup>206</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judges Koskelo, Eicke and Ilievski, para. 2.

<sup>207</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judges Koskelo, Eicke and Ilievski, paras. 12–15.

<sup>208</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judges Koskelo, Eicke and Ilievski, para. 16.

party to it. Nevertheless, the judges clarify in their Concurring Opinion that they choose not to assess these allegations, as it would involve acting *ultra* or even *extra petita*.<sup>209</sup> The judges stress that the absence of separate representation of the child in front of the Court ‘makes it extremely difficult if not impossible for this Court to ascertain in any meaningful way what the best interests of the child, in fact, are or were’. Furthermore, they acknowledge that it is certainly not right for the Court to assume that parents are always best placed to assess the child’s best interests in highly stressful situations, such as a family break-up.<sup>210</sup> However, they also argue that in the vast majority of cases, the Court requesting the appointment of a representative for the child would come far too late and therefore be ineffective to protect the best interests of the child.<sup>211</sup>

Dissenting Judges Sicilianos, Turković and Pejchal rightly argue that it must be avoided that the very same authority implicated as responsible for an alleged violation of the Convention might be requested to appoint a special guardian for the child.<sup>212</sup> They further call for a debate regarding the question whether the adaptation of the ‘six-month rule’, the rule on exhaustion of domestic remedies and the ‘*ultra petita* rule’ are necessary to accommodate the protection of children’s best interests in these cases, as this has been the main argument to refrain from assessing the representative’s claim that the child had been insufficiently protected from emotional abuse.<sup>213</sup>

The strong criminal law component of this case probably also moved the Court towards the installation of a separate representative for the child during the proceedings before it, in contrast to cases concerning parental authority and contact in which such allegations did not originate. However, doubts can rise regarding this distinction, as similar concerns also exist in custody proceedings when parents are in conflict with each other, and this difference in treatment by the Court might not be fully justifiable. The question, therefore, remains as to whether the Court in the future will find solutions for those children, as well. Strangely enough, the judgment in a very similar case in which sexual abuse allegations were also made,<sup>214</sup> namely, *M.M.B. v Slovakia*, did not follow this same approach. Even though the overview of facts also revealed a risk of the

<sup>209</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judges Koskelo, Eicke and Ilievski, para. 16.

<sup>210</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judges Koskelo, Eicke and Ilievski, para. 18.

<sup>211</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Concurring Opinion Judges Koskelo, Eicke and Ilievski, paras. 20–21.

<sup>212</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Dissenting Opinion Judges Sicilianos, Turković and Pejchal, para. 28.

<sup>213</sup> ECtHR, *A. and B. v Croatia*, *supra* note 200, Dissenting Opinion Judges Sicilianos, Turković and Pejchal, paras. 29–30.

<sup>214</sup> The similarity of both cases was also remarked upon by dissenting Judge Lemmens: ECtHR, *M.M.B. v Slovakia*, *supra* note 183, Dissenting Opinion Judge Lemmens, para. 10.

child having been manipulated by the mother,<sup>215</sup> the Court still allowed the mother to represent her child.<sup>216</sup>

#### 4.1.2. *Giving Children a Say Regarding their Representation?*

In *V.D. and others v Russia*, the Court rejected the request of a foster parent to represent her former foster child. Importantly, the Court states that in view of the child's serious medical conditions, 'he is clearly not in a position to express himself on this issue' and holds this as a consideration to reject the application.<sup>217</sup> It is certainly rather unclear which message the Court tried to convey with this sentence and which consequences could be deduced from it, if any. The least far-reaching conclusion could be that children who cannot express themselves should not be represented by persons without parental authority. However, it could also beg the question of whether the ECtHR will, in the future, request the opinion of children to guide them in reaching a decision on who will represent them. Given the lively debate that is ongoing in the Court at the moment, as discussed above, this might be a welcome solution to involve children in the proceedings before the ECtHR.

## 4.2. SMALL SHIFTS AND CLARIFICATIONS IN THE COURT'S REASONING

### 4.2.1. *The Child's Right to Contact: Stressing Attachment and Discussing Effective Measures*

In the context of the child's right to contact with both parents, *Zelikha Magomadova v Russia* pointedly stresses the importance of attachment to both parents for the child to establish the child's best interests, when in the past the Court merely seemed to stress the children's emotional bond with each parent, which can be interpreted as comprising only a part of the child's attachment to a parent. Even more importantly, the Court specifically anticipates the adverse effects on the child that could result from an attachment disorder. In this context, the Court assigned particular importance to the fact that no expert opinion was sought on such important questions as the degree of the children's attachment to their mother and the effect which the severance of all bonds with her might have on them.<sup>218</sup> The Court stresses that the absence of contact between the mother and her children for over two years must have had consequences on the children's

<sup>215</sup> ECtHR, *M.M.B. v Slovakia*, *supra* note 183, paras. 21 and 37.

<sup>216</sup> ECtHR, *M.M.B. v Slovakia*, *supra* note 183, para. 2.

<sup>217</sup> ECtHR, *V.D. and others v Russia*, no 72931/10, 09.09.2019, para. 75.

<sup>218</sup> ECtHR, *Zelikha Magomadova v Russia*, *supra* note 199, para. 113.

physical and psychological well-being.<sup>219</sup> The importance of evaluating the level of attachment between the child and her father was also stressed in *Sirvinskas v Lithuania*.<sup>220</sup> However, the reasoning of the Court in this decision seems to still be very parent-centred, as the question regarding attachment is regrettably solely evaluated to support the alleged violation of the right to family life of the parent and does not elaborate on the adverse impact this breach of contact might have had on the child. Due to the fact that in neither of the cases were the children parties to the procedure, this cannot be justified as an explanation for the absence of the child's perspective regarding the attachment to her father in the latter judgment.

Several judgments also discuss in length the measures taken by the domestic authorities to rebuild contact and further elaborate on the existing case law of the Court. In *A.V. v Slovenia*, the feasibility of ordering family therapy as an effective measure is discussed at length. In its assessment, the Court explicitly refers to the Recommendation on Children's Rights and Social Services Friendly to Children and Families.<sup>221</sup> In this case, the children actively refused to contact their father, and the Court then draws attention to the fact that the mother categorically opposed the counselling process and any form of family therapy.<sup>222</sup> In the case, the authorities had recognised the adverse effect of the proceedings on the children and that family therapy for the parents was the only viable option for the successful establishment of contact between the applicant and the children. However, no measures were taken in response to the mother's opposition to the counselling process.<sup>223</sup> The Court further stresses that the social welfare centre failed to provide professional, targeted support to the children to get them used to the idea of seeing their father again. Nor did the centre provide support to the parents to help them recognise what was in the children's best interests.<sup>224</sup> Finally, the Court highlights the expert's psychiatrist's opinion in this case that establishing contact was only possible within the context of family therapy. The domestic courts, however, never ordered such therapy, and the State Party argued that the mother could not be legally forced to participate in family therapy, to which the Court replies that: 'it is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention'.<sup>225</sup> Given the fact that a violation was still found in this case, it can be argued that the Court subtly nudges states to foresee some possibility to order family therapy in their national

<sup>219</sup> ECtHR, *Zelikha Magomadova v Russia*, *supra* note 199, para. 108.

<sup>220</sup> ECtHR, *Sirvinskas v Lithuania*, no 21243/17, 23.07.2019, para. 113.

<sup>221</sup> ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 84.

<sup>222</sup> ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 83.

<sup>223</sup> ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 83.

<sup>224</sup> ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 84.

<sup>225</sup> ECtHR, *A.V. v Slovenia*, *supra* note 5, para. 87.

legislation, regardless of the parties' opposition. In this context, the Court in *Olindraru v Romania* reproaches the authorities because, even though they had mandatory counselling measures at their disposal, this measure was ordered with a significant delay, which rendered the counselling more difficult.<sup>226</sup> The same was held in *Pisica v the Republic of Moldova*, where the Court stated that the alienation of children requires complex preparations.<sup>227</sup> In sum, the Court increasingly departs from the case law in which it ruled that it is difficult to force children to contact a parent when they refuse to do so. This reasoning seems to be replaced by concrete guidelines as to how supporting therapeutic facilities should facilitate contact in order to preserve the child's best interest by rebuilding contact between parent and child and that these measures might even be imposed on parents. Still, it must be specified that in *Bondar v Ukraine*, the Court recognises that even though voluntary compliance with a contact judgment is preferable and should be monitored with support from childcare and family services, and that the feasibility to employ family mediation should be evaluated, 'the entrenched positions often taken by the parents in such cases can render such compliance difficult, making it necessary, in certain cases, to have recourse to proportionate coercive measures.'<sup>228</sup> Given the fact that the Court in this judgment also neglects to assess the interests of the child involved, this judgment seems to illustrate a slight backtrack in the Court's careful advance of the child's perspective in this context.

Furthermore, in *Stankunaite v Lithuania*, a prime example of a well executed enforcement procedure is illustrated. The forced execution of the residence order that had the aim of transferring a child back to her mother was rendered extremely difficult, given the fact that a large number of people were present at the premises to hinder the enforcement. This necessitated the presence of 100 police officers while the bailiff, a childcare specialist and a psychologist ensured the transfer of the child to the parent.<sup>229</sup> The Court acknowledges that this coercive procedure was undertaken by the bailiff with the most sophisticated measures, as it involved a coordinated plan, executed with the cooperation of all the necessary authorities and followed with psychological support for the child and the applicant.<sup>230</sup> This judgment can guide domestic authorities when they order contact measures in the child's best interests in a similarly difficult situation.

In the *Olindraru v Romania* judgment, the Court called upon the government to bear in mind that the finding of a violation by no means suggests that the child should be reunited with the applicant without proper preparatory measures

<sup>226</sup> EComHR, *Olindraru v Romania*, no 1490/17, 19.03.2019, paras. 48 and 54.

<sup>227</sup> ECtHR, *Pisica v the Republic of Moldova*, no 23641/17, 29.10.2019, para. 79.

<sup>228</sup> ECtHR, *Bondar v Ukraine*, no 7097/18, 17.12.2019, para. 34.

<sup>229</sup> ECtHR, *Stankunaite v Lithuania*, no 67068/11, 29.10.2019, paras. 64–67.

<sup>230</sup> ECtHR, *Stankunaite v Lithuania*, *supra* note 229, para. 123.

being taken. By concluding this, the Court acknowledges the fact that the child had lived with her father from the time that she was two, without interruption for almost five years.<sup>231</sup> In none of the other cases that were analysed above did the Court warn the domestic authorities against taking specific measures after the deliverance of the judgment that could jeopardise the child's best interests. This therefore seems to be a fresh endeavour to include the child's perspective in the proceedings before the Court.

#### 4.2.2. *The Difficult Balance between Expressing Views Freely and Respecting Autonomy Remains*

Regarding the child's right to be heard, the Court held in *Olindraru v Romania* – in which a child refused to have contact with her mother – that authorities should have questioned the child's capacity to make informed choices regarding contact with her mother and that they should have determined the extent of the influence the father exercised on the child. This is seen to be particularly important, given the child's young age and the long period of time she had spent exclusively in his company.<sup>232</sup> Similarly, the Court accepted in *Milovanovic v Serbia* that in the context of a three-year separation, 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 [...] without any preparatory measure'.<sup>233</sup> In this case, the Court judged the inadequate proceedings very harshly and concluded that the parent:

... 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.<sup>234</sup>

Finally, in *Begovic v Croatia*, the domestic authorities went to great lengths to discover the reasons behind the refusal of the son to contact his father and whether this was due to the mother's obstructing behaviour. They established that the son very obviously suffered under the ongoing proceedings and complained of the lack of flexibility of his father and the fact that he did not seem to understand him.<sup>235</sup> The child's perspective in this case seems to be lacking, as even though the child seems to have had acceptable reasons for his reservations regarding contact with his father, the Court maintained that the facts of the case revealed

<sup>231</sup> EComHR, *Olindraru v Romania*, *supra* note 226, para. 57.

<sup>232</sup> EComHR, *Olindraru v Romania*, *supra* note 226, para. 49.

<sup>233</sup> ECtHR, *Milovanovic v Serbia*, *supra* note 49, para. 126.

<sup>234</sup> ECtHR, *Milovanovic v Serbia*, *supra* note 49, para. 135.

<sup>235</sup> ECtHR, *Begovic v Croatia*, *supra* note 199, para. 19.

that the child had been in an obvious conflict of loyalties. The Court reiterates the difficulty of achieving family reunification if parent and child are not allowed to see each other. Therefore, a violation of Article 8 ECHR was found due to the failure of the respondent state to enforce contact between parent and child.<sup>236</sup>

## 5. CONCLUSION

To conclude, the case law analysis in the first section revealed that the Court exerts noticeable efforts to incorporate a children's rights perspective in cases regarding parental authority and contact rights in the context of parental separation. The Court incorporates Articles 3, 9 and 12 of the CRC in its case law and interprets these provisions to a great extent. Furthermore, the Court offers guidance to State Parties as to how they should proceed to safeguard children's rights and even seems to promote child-friendly justice next to children's rights, as considerable attention is paid to parental participation, parental support and avoiding coercion in these sensitive cases.

However, the Court itself stumbles on procedural obstacles particular to its litigation which hinder the meaningful incorporation of the child's perspective in its reasoning. Apart from the lack of child applicants and estranged parents not always being entitled to represent their children, another difficulty is to be found in the subsidiarity principle to which the Court adheres. Therefore, the Court refrains from reconsidering the facts presented by the domestic authorities and therefore does not review whether the child's best interests were safeguarded, even in those cases in which the child was not heard by the domestic authorities. Both difficulties might explain why the majority of judgments of the ECtHR take on a very parent-centred perspective under Article 8 ECHR. This is understandable, given the complexity of the matters at hand. Still, given the vulnerability of children to have their voices heard at the domestic level, showing resignation in the face of this complex reality without at least striving to mitigate some of the consequences easily turns children into collateral damage when they face the acrimonious separation of their parents.

Some small steps have been taken to remedy this, for instance, the Court's view of the right to be heard as portrayed in *M. and M. v Croatia* and the obligation of State Parties to uncover the reasons children have for refusing contact with a parent. In 2019, further steps were taken to incorporate the child's perspective in a more meaningful way in the reasoning of the Court. Firstly, a lively debate was started on the necessity of child representation in these complex family law cases, as the absence of the child and other parent can render the balancing exercise conducted by the Court imprecise or even erroneous. Secondly, the

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<sup>236</sup> ECtHR, *Begovic v Croatia*, *supra* note 199, para. 70.

Court elaborates on the negative effects that the child's separation from his or her parents can have on the child's well-being and the importance of attachment assessment, when in the past this has been solely evaluated in light of the parent's complaint. Thirdly, the feasibility of ordering family therapy is discussed at length, with what can be regarded as subtle advice to incorporate mandatory counselling programmes where needed. However, these shifts are not found in all judgments, and some even backtrack on them. Therefore, it remains to be seen how the child's perspective will be included in the Court's judgments in the future.

