



Courts should not have ordered return of three children to their father against their will

In today's **Chamber judgment**¹ in the case of **N.Ts. v. Georgia** (application no. 71776/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned proceedings for the return of three young boys – who had been living with their maternal family since their mother's death – to their father.

The Court found that the boys had not been adequately represented before the domestic courts, in particular as the functions and powers of the domestic authority designated to represent them had not been clearly defined and the courts had not considered hearing the oldest of the boys in person. Moreover, the courts had made an inadequate assessment of the boys' best interests, which did not take their emotional state of mind into consideration.

Principal facts

The applicants are four Georgian nationals who live in Tbilisi: N.Ts., who was born in 1976, and her three nephews, who are minors.

Following their mother's – Ms Ts.'s sister's – death in November 2009, the boys started living with their aunts and their maternal grandparents. At that time, their father, G.B., was undergoing treatment for drug addiction; he had previously been convicted of drug abuse.

In early 2010 G.B. brought court proceedings for the return of his sons to him. The Tbilisi City Court requested the Social Service Agency to appoint a representative to protect the boys' interests. In May 2010 the court ordered the boys' return to their father. Taking into account G.B.'s latest medical record, which found that his addiction had gone into remission and that he was not suffering from any psychiatric pathology, the court concluded that he was fit to resume his parental responsibilities. At the same time, the competent judge dismissed a report on the children's mental state as unreliable, which – having found that they suffered from separation anxiety disorder and showed a negative attitude towards their father – had recommended that no change be made in their living environment.

The representatives of the Social Service Agency were not involved in the proceedings leading to the May 2010 decision. In the subsequent appeal proceedings brought by the maternal family, the Agency's representatives participated as an "interested party".

The appeal court quashed the decision in February 2011 and ordered that the children stay with their maternal family, but the Supreme Court, in October 2011, remitted the case for re-examination. In February 2012 the appeal court reversed its decision and concluded that the children should live with their father. An appeal against that decision by the aunts and maternal

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

grandparents was rejected by the Supreme Court in May 2012. However, the decision has remained unenforced, as the boys have refused to move in with their father and two attempts to hand them over to him have been unsuccessful.

Complaints, procedure and composition of the Court

Ms Ts. complained of a violation of Article 8 (right to respect for private and family life) in respect of her nephews, maintaining in particular that the national authorities had failed to thoroughly assess the best interests of the boys and that the proceedings had been procedurally flawed.

The application was lodged with the European Court of Human Rights on 2 November 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

András **Sajó** (Hungary), *President*,
Boštjan M. **Zupančič** (Slovenia),
Nona **Tsotsoria** (Georgia),
Krzysztof **Wojtyczek** (Poland),
Egidijus **Kūris** (Lithuania),
Iulia Antoanella **Motoc** (Romania),
Gabriele **Kucsko-Stadlmayer** (Austria),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

Article 8 – admissibility

As regards the admissibility of the complaint, the Court had to address an objection by the Georgian Government to the effect that Ms Ts. did not have the necessary standing to act on behalf of her nephews. The Government argued, in particular: that the boys' father had never been deprived of his parental rights and was their sole legal guardian after their mother's death; and that the boys had never been placed under the guardianship of their aunt.

The Court considered that the three boys were in a vulnerable position, having lost their mother and having a complicated, if not hostile, relationship with their father. There was no doubt that their aunt, Ms Ts., had a sufficiently close link with them to complain on their behalf, having regard to the fact that she had cared for and provided a home to the boys, who had lived with their maternal family for more than two years at the time the application was lodged with the Court. Moreover, in view of their alienation from their father, there was no closer next of kin who could complain on their behalf. As for potential institutional alternatives to represent the boys, the Social Service Agency was itself the subject of criticism in the present case. It would therefore not have been realistic to expect them to facilitate the complaint before the Court on behalf of the boys. Furthermore, the Court could not see how there could be a conflict of interest between Ms Ts. and the children as regards the object of the complaint. Finally, the application concerned important interests of the boys which merited consideration under the Convention. The Court therefore concluded that Ms Ts. had standing to lodge the case on behalf of her nephews. It accordingly dismissed the Government's objection.

Article 8 – merits

As regards the question of whether the children had been duly involved in the proceedings, the Government argued that the children had been heard via the representative assigned to them by the Social Service Agency. The Court noted, however, that that Agency had become formally involved in the proceedings only from the appeal stage onwards. In the appeal proceedings, it had participated

as an “interested party”, a status for which the Georgian Code of Civil Procedure did not make any provision defining its procedural rights. It therefore was unclear how the Agency could have effectively represented the children’s interests without having a formal procedural role. While the Agency was designated to represent the children’s interests under the Civil Code, it remained ambiguous what that representation exactly implied, as the relevant legislation did not spell out the functions and powers of the representative. In practice, during the period of more than two years that the proceedings in the applicants’ case had lasted, representatives of the Agency had met the boys only a few times with the purpose of drafting reports on their living conditions and their emotional state of mind, but no regular contact had been maintained in order to monitor the boys and establish a trustful relationship with them.

In that context, the Court referred to the recommendations by several international bodies, including the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, which sought to ensure that in cases where there were conflicting interests between parents and children an independent representative was appointed to represent the views of the child and keep the child informed about the content of the proceedings. The Court did not see how the Social Service Agency’s role could be considered adequate representation by those standards. Moreover, contrary to the relevant international standards, the national courts had failed to consider the possibility of directly involving in the proceedings the oldest boy-

The domestic courts’ decision had mainly been based on two reasons: they had found that it was in the boys’ best interest to be reunited with their father and that the maternal family had a negative influence on the boys. While the Court accepted that motivation, it noted that the domestic courts had failed to give adequate consideration to the important fact that the boys did not want to return to their father. Whatever the manipulative role of the maternal family towards G.B. – which, according to some reports, had been a factor in shaping the boys’ relationship with their father – the evidence before the domestic courts concerning the boys’ hostile attitude towards him had been unambiguous. Moreover, there had been several reports by psychologists who had warned of the potential risks to the boys’ psychological health if they were forcefully returned to their father. In those circumstances, ordering such a radical measure without considering an adequate transition appeared to be contrary to their best interests.

The Court concluded that, as a result of the flawed decision-making process in the proceedings, exacerbated by an inadequate and one-sided consideration of the boys’ best interest, there had been a violation of Article 8.

Just satisfaction (Article 41)

The Court held that Georgia was to pay the applicants 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 900 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.