



## KEY THEME<sup>1</sup>

### Article 8

# Right of the child to be heard in domestic proceedings on family matters

(Last updated: 10/01/2022)

## Introduction

Whilst Article 8 contains no explicit procedural requirements, the child must be sufficiently involved in the decision-making related to his/her family and private life. The general principles set out originally in *Sahin v. Germany* [GC], §§ 72-74 and *Sommerfeld v. Germany* [GC], §§ 70 and 72, have been developed to provide the child with the right to be consulted and heard in order to protect his/her best interests. Depending on the age and maturity of the child concerned, interviews by experts and subsequent reports for the judges referred to in the judicial decisions could be considered sufficient. For children of a certain age, the Court favours the national judge hearing them in person in any proceedings affecting their rights under Article 8. The case-law has therefore incorporated the international and European standards to the effect that children must no longer be considered as parents' property.

## Principles drawn from the current case-law

- In any judicial or administrative proceedings affecting children's rights under Article 8 it cannot be said that the children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views (*M. and M. v. Croatia*, § 181, *C. v. Croatia*, 2020, § 78, and for the relevant international instruments, *M.K. v. Greece*, 2018, §§ 91-92 and *C. v. Croatia*, 2020, § 76).
- Children are entitled to be consulted and heard on matters affecting them. In particular, as children mature and become, with the passage of time, able to formulate their own opinion on their contact with the parents, the courts should give due weight also to their views and feelings as well as to their right to respect for their private life (*N.Ts. and Others v. Georgia*, § 72 with reference to the relevant international instruments). The situation is different with very young children who are still unable to form or express their wishes (*Petrov and X v. Russia*, § 108; *Neves Caratão Pinto v. Portugal*, 2021, § 138).
- In respect of very young children it is essential that the courts rely on an expert assessment to make an objective evaluation (*Neves Caratão Pinto v. Portugal*, 2021, § 138), in the light of all the evidence available to them, whether contact with the parent should be encouraged/maintained or not (*Petrov and X v. Russia*, § 108, which is to be distinguished from opinions of other actors, see §§ 109-110). Courts ought to seek expert opinions on whether it is possible, given the younger children's age and maturity, to interview them in court, if needs be with the assistance of a specialist in child psychology (*Zelikhha Magomadova v. Russia*, § 116; see also *Cînta v. Romania*, no. 3891/19, §§ 53-54, 18 February 2020). The views of children are not necessarily immutable, and their

<sup>1</sup> Prepared by the Registry. It does not bind the Court.

objections which must be given due weight, are not necessarily sufficient to override the parents' interests, especially in having regular contact with their child. No unconditional veto power should be given to children without any other factors being considered and an examination being carried out to determine their best interests (*Zelikha Magomadova v. Russia*, § 115); such interests normally dictate that the child's ties with its family must be maintained, except in cases where this would harm the child's health and development (*Suur v. Estonia*, 2020, § 79). Should a court 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 (*K.B. and Others v. Croatia*, § 143 and case-law references therein).

- In cases where there are conflicting interests between parents and children, for instance when the applicant is the child of divorced parents in a custody battle, the issue of the appointment of a special guardian *ad litem* in respect of the applicant to protect his/her interests may arise (*C. v. Croatia*, 2020, §§ 76-77, § 80).
- Taking into account the margin of appreciation enjoyed by the domestic authorities, who are better placed than the Court, the domestic courts could reasonably consider that it was not appropriate, given the expert advice, for them to hear the child in person (*R.M. v. Latvia*, 2021, § 117).
- Under the Hague Convention system, the opinion of the child subject to international abduction by one of his/her parents, is expressly regulated (*Gajtani v. Switzerland*, §§ 106-114). The case-law also refers to the Convention on the Rights of the Child and other international instruments (*M.K. v. Greece*, 2018, §§ 90-93). The opinion of the child might be overridden (*S.N. and M.B.N. v. Switzerland*, 2021, §§ 112-115 and case-law references therein).

### Noteworthy examples

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- *Sahin v. Germany* [GC], §§ 73-77: father access to child born out of wedlock;
- *C. v. Finland*, §§ 57-59: domestic courts gave decisive weight to the expressed wishes of the children on custody;
- *Płaza v. Poland*: right of contact of the parent with the child;
- *A.L. v. Poland*, § 74: action to disavow paternity;
- *Gajtani v. Switzerland*, §§ 110-111: opinion of an eleven years old child not taken into account in return proceedings under Hague Convention;
- *M. and M. v. Croatia*, §§ 168-172 and 181-187: custody proceedings;
- *Mandet v. France*: change in recognised paternity;
- *N.Ts. and Others v. Georgia*, §§ 72 and 74-84: children's return to their biological father against their will;
- *K.B. and Others v. Croatia*: the children's strong and continuous resistance to contact with their mother;
- *M.K. v. Greece*, § 74: international abduction of a child by a parent (see also *Raw and Others v. France*, § 94; *Maumousseau and Washington v. France*, §§ 79-80; *Van den Berg and Noa Sarri v. the Netherlands* (dec.);
- *Petrov and X v. Russia*, §§ 108-112: divorce and child residence issue (compare *Sahin*);
- *Zelikha Magomadova v. Russia*, §§ 115-117: widow denied access to her children by relatives-in-law despite court orders and later arbitrarily deprived of parental authority;

- *Cînța v. Romania*, §§ 53-54: child interviewed by the judge *in camera*, without the presence of an expert psychologist from the child-protection authority and it was not clear from the court decisions to what extent the child's allegations of negative behaviour on the part of her father had been taken into account;
- *C. v. Croatia*, 2020, §§ 78-81: failure of the authorities to appoint special guardian *ad litem* and to hear the applicant (a minor) when deciding on his custody.
- *Suur v. Estonia*, 2020, §§ 87-89, § 97: proceedings concerning ending of applicant's joint custody of child and restrictions on contact where the minor was heard, guardian *ad litem* appointed, and domestic courts' decision was based on relevant and sufficient reasons.
- *R.B. v. Estonia*, 2021: Rules of criminal procedure on a child's testimony and the distinction between child and adult witnesses in the context of sexual abuse; reference to international instruments: §§ 87-103.
- *Neves Caratão Pinto v. Portugal*, 2021: young children not heard, in line with Article 12 § 1 of the UN Convention on the Rights of the Child, but absence of expert assessment: § 138 (compare *R.M. v. Latvia*, 2021, § 117 as concerns a traumatised child).
- *S.N. and M.B.N. v. Switzerland*, 2021: the opinion of the child heard but not fully considered in return proceedings under the Hague Convention (§ 106, §§ 112-115).

### Recap of general principles and of relevant international / European material

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- *C. v. Finland*, §§ 52-54 and § 60;
- *N.Ts. and Others v. Georgia*, §§ 43-44 and §§ 72-80;
- *M.K. v. Greece*, §§ 46-50 and §§ 74-92;
- *Petrov and X v. Russia*, § 108;
- *Zelikha Magomadova v. Russia*, 2019, § 115;
- *C. v. Croatia*, 2020, §§ 72-73.

### Related issues

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- Mediation at domestic level: *Cengiz Kılıç v. Turkey*, § 133.

### Further references

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#### **Press factsheets:**

- Protection of minors
- Children's rights
- International child abductions

#### **Online databases:**

- Theseus: children's rights case-law database
- Child participation, Council of Europe

#### **Other:**

- Council of Europe Convention on the Exercise of Children's Rights (Article 10) (1996)
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Article 31.1.c.) (2007)

- Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (2010)
- Recommendation CM/Rec(2012)2 of the Committee of Ministers to member States on the participation of children and young people under the age of 18 (2012)
- UN Convention on the Rights of the Child (Article 12) (1989) – see also §§ 135-136 in *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019 and *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016, §§ 40-42
- Charter of Fundamental Rights of the European Union (Article 24) (2000)

## KEY CASE-LAW REFERENCES

- *C. v. Finland*, no. 18249/02, 9 May 2006 (violation of Article 8 as regards refusing the applicant custody of his children; no violation of Article 8 as regards the alleged failure to provide sufficient access visits to the children);
- *Maumousseau and Washington v. France*, no. 39388/05, 6 December 2007 (no violation of Article 8);
- *Van den Berg and Noa Sarri v. the Netherlands* (dec.), no. 7239/08, 2 November 2010 (inadmissible);
- *Płaza v. Poland*, no. 18830/07, 25 January 2011 (no violation of Article 8);
- *Raw and Others v. France*, no. 10131/11, 7 March 2013 (violation of Article 8);
- *A.L. v. Poland*, no. 28609/08, 18 February 2014 (action to disavow paternity: see § 74; no violation of Article 8);
- *Gajtani v. Switzerland*, no. 43730/07, 9 September 2014 (no violation of Article 8);
- *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts) (violation of Article 3 (procedural) as regards the first applicant; no violation of Article 3 (substantive) as regards the first applicant; no violation of Article 8 as regards the second applicant; violation of Article 8 as regards the first applicant; violation of Article 8 as regards the second applicant (protracted character of the custody proceedings);
- *Mandet v. France*, no. 30955/12, 14 January 2016 (no violation of Article 8);
- *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016 (violation of Article 8 in respect of N.B, S.B, and L.B.);
- *K.B. and Others v. Croatia*, no. 36216/13, 14 March 2017 (violation of Article 8);
- *M.K. v. Greece*, no. 51312/16, 1 February 2018 (no violation of Article 8);
- *Petrov and X v. Russia*, no. 23608/16, 23 October 2018 (violation of Article 8);
- *Zelikhha Magomadova v. Russia*, no. 58724/14, 8 October 2019 (violation of Article 8);
- *Cînța v. Romania*, no. 3891/19, § 53-54, 18 February 2020 (violation of Article 8);
- *C. v. Croatia*, no. 80117/17, 8 October 2020 (violation of Article 8);
- *Suur v. Estonia*, no. 41736/18, 20 October 2020 (no violation of Article 8);
- *R.B. v. Estonia*, no. 22597, 22 June 2021 (violation of Articles 3 and 8);
- *Neves Caratão Pinto v. Portugal*, no. 28443/19, 13 July 2021 (violation of Article 8);
- *S.N. and M.B.N. v. Switzerland*, no. 12937/20, 23 November 2021 (no violation of Article 8);
- *R.M. v. Latvia*, no. 53487/13, 9 December 2021 (no violation of Article 8).