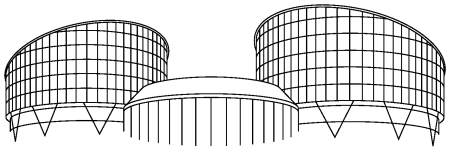

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.S. v. UKRAINE

(Application no. 2091/13)

JUDGMENT

STRASBOURG

11 July 2017

FINAL

11/10/2017

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

In the case of M.S. v. Ukraine,

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

Vincent A. De Gaetano, *President,*
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Carlo Ranzoni, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 6 June 2017,

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

PROCEDURE

1. The case originated in an application (no. 2091/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr M.S. ("the applicant"), on 18 December 2012. The Court decided that the applicant's identity should not be disclosed (Rule 47 § 4 of the Rules of Court).

2. The Ukrainian Government ("the Government") were represented by their Agent, most recently, Mr I. Lishchyna.

3. The applicant alleged, in particular, that the domestic authorities had failed to carry out an effective investigation into allegations regarding the alleged sexual abuse of his child. He further complained that the domestic courts had failed to properly determine the child's place of residence.

4. On 24 August 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1986 and lives in Sumy.

6. The applicant had relations with V., a female student born in 1989. On 24 March 2008 V. gave birth to their daughter. On 29 August 2008 the applicant and V. registered their marriage.

7. From the time of the birth of the child the couple and their daughter lived in the applicant's flat in Sumy. The applicant's parents lived in the same flat and assisted the parents in bringing up the child.

8. In 2009 the applicant and V. were absent from home for six months, as they were working abroad. During their absence the applicant's parents took care of the child.

9. In October 2010 the child was admitted to a child-minding centre in Sumy.

10. Between 2010 and 2011 V. worked abroad for six months. During that time the child was taken care of by the applicant and his parents. While working abroad, V. transferred funds to the applicant to support the family.

11. Relations between the applicant and V. grew worse and on 20 September 2011, after a quarrel with the applicant, V. took the child and moved from the flat without the agreement or knowledge of the applicant. The applicant was not informed of the place to where V. and the child moved to live.

12. On 28 September 2011 the applicant asked the police to establish the whereabouts of the child. He and his parents also conducted their own enquiries.

13. As was further established in the course of the domestic proceedings, V. moved to the village of Bezdryk, near Sumy, where she apparently cohabited with her uncle, F. (born in 1967). The applicant's child was admitted to the child-minding centre located in the same village.

14. On 1 December 2011 the applicant found the child at the Bezdryk child-minding centre. According to the applicant, the child's body bore bruises. He took the child back to his flat in Sumy and the following day submitted her for medical examination.

15. On 2 December 2011 a forensic medical expert examined the child and reported a red spot on the chin, measuring 1.5 cm by 0.8 , which – in the expert's opinion – was "a sign of an earlier abrasion". The expert also documented two abrasions on the nose, measuring 0.4 cm by 0.3 cm and 0.3 cm by 0.2 cm; a bruise on the back, measuring 2 cm by 1 cm; two bruises on the right shin, measuring 1.8 cm by 1 cm and 1.5 cm by 1 cm; and a red, itchy spot in the abdominal area. The expert stated that the injuries could have been caused by blunt objects three or four days before the examination.

16. The applicant asked the police to carry out a criminal investigation in connection with the injuries sustained by his daughter, who had allegedly explained that the injuries had been inflicted by V.

17. After her return to Sumy, the child continued to live with the applicant and his parents. V. was given access to the child only in the presence of the applicant or other persons that he trusted.

18. On 9 December 2011 the Zarichnyy district police of Sumy refused to open a criminal investigation in respect of the alleged abduction of the

child, stating that the facts of the case did not indicate that the crime of child abduction had been committed. It was noted that the couple had not divorced and it had yet to be determined by the court with whom the child should reside.

19. On 13 December 2011 the Trostyanetskyy district police of the Sumy Region refused to open a criminal investigation in connection with the child's injuries, as determined on 1 December 2011, for lack of *corpus delicti*. According to the police decision, the seriousness of the injuries had not been established; however, if the injuries had been minor, the applicant was free to institute a private prosecution against the person concerned.

A. Criminal investigations on allegations of child sexual abuse

20. On 28 March and 9 April 2012 the applicant's mother requested the law-enforcement authorities to institute criminal proceedings against V. and F. under Article 156 § 2 of the Criminal Code. She considered that the child could have been a victim of sexual abuse in the period during which the latter had been living together with V. and F. in the village of Bezdryk. The applicant's mother submitted that the child had told her personal stories which suggested that V. and F. might have engaged in sexual activities in view of the child and that F. had shown his genitals to the child.

21. On 9 April 2012, in the course of a pre-investigation inquiry, the applicant's daughter was interviewed in the presence of the applicant's mother. The child explained that during her stay with the mother in the village of Bezdryk she had regularly observed V. and F. naked, embracing and kissing each other and engaging in some "backwards and forwards movements" which she had not been able to understand; F. had taught the child how to kiss in an adult fashion, uncovered his genitals in front of her and asked her to touch his genitals.

22. On 14 April, 16 May and 31 October 2012 the Sumy district police, having conducted the pre-investigation inquiries, refused to open criminal proceedings for lack of *corpus delicti*. Those decisions were quashed as unsubstantiated by the supervising prosecutors, who ordered further measures, such as establishing the whereabouts of F. (who had not been interviewed), identifying and interviewing possible witnesses, inspecting the premises and the yard where the alleged crime could have been committed, and undertaking medical and psychological examinations of the child.

23. On 8 November 2012 the Sumy district police once again refused to open criminal proceedings against V. and F. on the grounds that there had been no *corpus delicti*. In their decision the police referred to the interviews with the applicant's child, V., and other people. V. denied the allegations. F. could not be interviewed as he had moved abroad. In sum, the Sumy district police concluded that the available material had been insufficient to suggest that any crime had been committed.

24. On 8 May 2013 the applicant, relying on the new Code of Criminal Procedure of 2012, requested that an investigation be opened against V. and F. in respect of the alleged child sexual abuse. On the same day the Sumy district police opened a criminal investigation under Article 156 § 2 of the Criminal Code. The applicant was admitted to the proceedings as the representative of his daughter.

25. The investigator ordered that measures be undertaken to establish the whereabouts of F. During the investigation V. denied the allegations and submitted that she had been a victim of domestic violence, that she had been threatened and beaten by the applicant, and that this had prompted her to run away with the child on 20 September 2011; she also submitted that she had moved to the village of Bezdryk, where her grandfather lived, and that she had had no sexual relations with F., her uncle. When questioned, the applicant and his mother insisted on the truth of their previous statements. They underwent polygraph examinations which suggested that they had told the truth in their submissions.

26. On 3 October 2013 the applicant's daughter was questioned in the presence of a psychologist and her grandmother (the applicant's mother). The applicant's daughter submitted in particular that F. had taken her hand and placed it on his genitals; that F. had taught her to kiss in an adult fashion; and that F. and V. had engaged in certain activities which she had not been able to understand and which she had earlier described to the applicant and the grandmother.

27. On 21 November 2013 a panel of experts carried out a forensic psychiatric examination of the applicant's daughter. In the course of the examination, the child stated that F. had been touching her genitals and she, in compliance with his commands, had had to touch F.'s genitals. F. taught her to kiss in an adult fashion. The child stated that she had seen V. and F. naked and kissing each other; she then described the movements that she had observed V. and F. engaging in while in bed.

28. The experts found that the child had not been suffering from any mental illness at the time of the events or at the time of the examination; that she had not shown any tendency to fantasise; and that she was able to remember the circumstances of the events at issue and to give truthful statements in that regard. However, she could not understand the meaning of the actions that she had observed or in which she had participated. The experts concluded that the child could take part in the investigative measures.

29. On 9 April 2014 the deputy head of the investigation division of the Sumy regional police department ordered the investigator in charge of the case to immediately speed up the investigation, which, in his opinion, was being conducted too slowly. He requested the investigator to undertake a number of investigative measures.

30. On 28 April and 29 September 2014 the Sumy district police closed the criminal proceedings for lack of *corpus delicti* in the actions of V. and F. Having assessed the available material, the investigator found that there had been insufficient evidence submitted to enable the bringing of charges of sexual abuse. In the last decision the investigator also referred to the statements by F. who was questioned on 20 September 2014 and who denied all the allegations, arguing that they were totally false.

31. These two decisions were reversed as unsubstantiated by the supervising prosecutors, who ordered further investigation.

32. On 27 December 2014 the Sumy district police decided once again to close the criminal proceedings. In examining the statements of the applicant's daughter, the investigator considered that these statements could not convincingly prove the alleged events since the child had made those statements belatedly; furthermore, the child had only been three years old at the time of the events in question. The investigator furthermore noted that these statements did not suggest anything in respect of *mens rea*, in particular whether there was any sexual intent in V.'s and F.'s alleged actions in relation to the child, or whether they had been aware of the fact that the child had been observing them during the alleged instances of sexual intercourse.

33. The investigator then referred to the statements of the applicant and his mother, as well as of the mothers of two girls with whom the child had used to play. The latter two women stated in particular that the applicant's daughter had told them stories which had suggested that she had been subjected to sexual abuse while she had been living with V. and F. The investigator noted that those individuals had not directly observed the alleged instances of sexual abuse and that they had simply repeated statements made by the child. The investigator then stated that V. and F. denied the allegations of child sexual abuse. Other people, such as the child's teacher at the child-minding centre and village inhabitants, had not provided any more precise information. Overall, the investigator concluded that the available material had been insufficient for him to conclude that V. and F. had committed the alleged crime.

34. On 6 March 2015 the Sumy district prosecutor's office reversed the decision of 27 December 2014 as unsubstantiated. The supervising prosecutor found that the previous instructions given by the prosecutor's office had not been followed and that it was necessary to take further investigative measures.

35. As of 20 January 2016, the investigation was ongoing.

B. Civil dispute regarding the child's place of residence

1. Decision of the first-instance court

36. On 20 June 2012 the Zarichnyy District Court of Sumy dissolved the marriage between the applicant and V. and ruled that the child should live with V. The court ordered the applicant to hand over the child to V. and to pay her a monthly amount for the support of their daughter.

37. In determining the place of the child's residence, the court first established that until 20 September 2011 the child had lived with both parents and her paternal grandparents in the applicant's flat and that all of them had participated in the upbringing of the child; the paternal grandparents had taken care of the child when both parents had been abroad for six months in 2009; when V. had been abroad for six months over 2010 and 2011 she had transferred money earned by her to the applicant to cover the needs of the family. On 25 October 2010 the child had been admitted to the child-minding centre in Sumy; the child had been accompanied to and from the centre by the applicant.

38. The court also established that on 20 September 2011 V. had taken the child and moved from the flat because of conflict between her and the applicant. On 25 October 2011 the child had been admitted to the child-minding centre in the village of Bezdryk. The child had been accompanied to and from the centre by her mother. On 1 December 2011 the child had been taken from the centre by her father. Since that time the child had been living again in the applicant's flat in Sumy.

39. In comparing the applicant's flat and the flat where V. was then living, the court found that both flats were located in Sumy and offered appropriate conditions for the residence of the child. In that regard the court referred to the report of the local guardianship office, which stated that both parents provided adequate residential conditions for the child. As to the income of the parents, the father was employed and received a salary; the mother was a student but worked unofficially and had been abroad to earn money. Both parents had positive reference letters and the child had an equal attitude towards both of them.

40. The court dismissed as unsubstantiated the applicant's allegation that the mother was negligent with the child and that she might have exercised physical violence against the child: in contrast to the results of the medical examination of 2 December 2011 documenting the injuries on the child's body (see paragraph 15 above), the staff of the Bezdryk child-minding centre had signed a certificate stating that on 1 December 2011 the child had had no injuries; furthermore, the police had refused to institute criminal investigation in respect of the child's injuries (see paragraph 19 above). The court concluded that there was no link between V.'s attitude towards the child and the latter's injuries.

41. Relying on the United Nations Declaration of the Rights of the Child of 1959 the United Nations Convention on the Rights of the Child and Article 161 of the Family Code, the court found that the facts did not disclose any exceptional circumstances which could justify the separation of the child from her mother. Consequently, it determined that the child should reside with her mother.

2. Review proceedings

42. The applicant appealed against that decision, arguing that the first-instance court had breached substantive and procedural provisions of domestic legislation and international law. He submitted that in determining the place of the child's residence the court should have been guided by the principle of the best interests of the child. The applicant insisted that on 20 September 2011 V. had secretly moved with the child from the flat and destroyed the stability of the child's everyday life. The court had failed to properly examine the allegations that V. had behaved violently towards the child and the possibility that the child had been the target of sexual abuse during the period when she had lived apart from her father with her mother. The applicant emphasised that on 1 December 2011 he had lawfully taken the child back to his flat since the child had previously been permanently living in his flat and he had never given any consent for V. to change the child's place of residence. In his opinion, the court had paid no attention to the fact that the child had been attached to the paternal grandparents and that her separation from them would be detrimental to her interests. Furthermore, the respective financial capacity of the applicant and V., as well as the residential conditions, had not been properly assessed. Important pieces of evidence had not been included in the case file and part of the evidence had been assessed wrongly – namely, the certificate issued by the Bezdryk child-minding centre regarding the child's good state of health was a fabricated document that had been discredited by the forensic medical expert report of 2 December 2011.

43. On 9 August 2012 the Sumy Regional Court of Appeal dismissed the applicant's appeal and upheld the decision of the first-instance court. The Court of Appeal found that the allegations of child abduction, sexual abuse and physical violence had been groundless. As to the child's attachment to the paternal grandparents, the Court of Appeal considered that the parents played a more important role in the upbringing of the child. Overall, the findings of the first-instance court had been lawful and reasonable.

44. On 14 September 2012 the Higher Specialised Court for Civil and Criminal Matters dismissed a cassation appeal lodged by the applicant as unfounded.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of 5 April 2001

45. Article 156 of the Criminal Code provides as follows:

"1. Debauching (depraving) actions committed in respect of a person under sixteen years of age shall be punishable ....

2. The same actions committed in respect of a [person under fourteen years of age] or by a parent ... shall be punishable by imprisonment for a period of between five and eight years ..."

B. Family Code of 10 January 2002

46. The Code provides that the place of residence of a child under ten years of age shall be determined jointly by the parents (Article 160 § 1). If parents who live separately cannot agree on the place of residence of a child under the age of fourteen years, the dispute may be determined by a guardianship authority or by a court. When deciding on such a dispute, the guardianship authority or the court should take into account the parents' respective attitude to their parental duties, the personal disposition of the child to each parent, the age of the child, the child's state of health, and other relevant circumstances (Article 161 § 1). The guardianship authority or the court cannot order that the place of a child's residence be with a parent who does not have an independent income, abuses alcohol or drugs, or by dishonourable conduct may cause damage to the development of the child (Article 161 § 2).

47. The Code also provides that if the place of residence of a child under fourteen years of age is changed by a parent or by any other individual without authorisation or the consent of the other parent or an individual with whom the child resides by virtue of law or a court decision, a court may order the return of the child to the person with whom the child was living before (Article 162 § 1).

III. INTERNATIONAL MATERIAL

A. The United Nations Declaration of the Rights of the Child of 20 November 1959

48. The relevant extracts of the Declaration read as follows:

"Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of

freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. ...

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable. ..."

B. The United Nations Convention on the Rights of the Child of 20 November 1989

49. The relevant extracts of the Convention, which came into force with respect to Ukraine on 27 September 1991, read as follows:

"Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. ...

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. ..."

C. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

50. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse that entered into force on 1 July 2010 (ratified by Ukraine) provides in its Chapter VII concerning investigation, prosecution and procedural law as follows:

Article 30 – Principles

"1. Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.

2. Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by

the child and that the criminal justice response is followed by assistance, where appropriate.

3. Each Party shall ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay. ..."

Article 35 – Interviews with the child

"1. Each Party shall take the necessary legislative or other measures to ensure that:

a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c. interviews with the child are carried out by professionals trained for this purpose;

d. the same persons, if possible and where appropriate, conduct all interviews with the child;

e. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;

f. the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person. ..."

THE LAW

I. THE APPLICANT'S STANDING

51. The applicant submitted the application in his own name, complaining not only of the alleged violation of his right but also of the alleged violation of the right of his daughter. The Court has to determine first whether the applicant has standing in relation to the part of application which concerns the alleged violation of the right of his daughter.

52. In this regard the Court reiterates that the position of children under Article 34 calls for careful consideration, since they generally have to rely on others to present their claims and represent their interests, and may not be of an age or capacity to authorise steps to be taken on their behalf in any real sense. A restrictive or technical approach in this area is therefore to be avoided and the key consideration in such cases is that any serious issues concerning respect for a child's rights should be examined (see *N.Ts. and Others v. Georgia*, no. 71776/12, § 54, 2 February 2016).

53. The Court observes that the applicant's daughter was a minor at the time of the lodging of the application. Having regard to the above principles, the Court finds that the applicant was entitled to apply to the Court to protect his daughter's interests. Moreover, it was the applicant who

acted as the child's representative in the domestic criminal proceedings at issue (see, for example, *Tonchev v. Bulgaria*, no. 18527/02, §§ 32 and 33, 19 November 2009). Accordingly, the Court will examine the complaints submitted by the applicant in his personal capacity and in the capacity of his daughter's representative.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE INVESTIGATION INTO THE CHILD SEXUAL ABUSE ALLEGATION

54. Without referring to any provision of the Convention, the applicant complained that the authorities had failed to carry out an effective investigation into the alleged sexual abuse of his minor daughter.

55. The Court finds it appropriate to examine the complaint under Article 8 of the Convention (see, for similar approach, *A, B and C v. Latvia*, no. 30808/11, § 116, 31 March 2016). The relevant parts of that Article read as follows:

> "1. Everyone has the right to respect for his private ... life ... .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

56. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

57. The applicant did not comment on the merits of the complaint.

58. The Government submitted that they had complied with their positive obligations to ensure the effective protection of children from sexual abuse: there were domestic criminal-law provisions which prohibited the relevant offences and those provisions were effectively implemented in practice. The Government emphasised that the domestic authorities had had to deal with a complex case, the victim of the alleged offence had been only three years old at the time of the events, and there had been a lack of direct evidence. Nevertheless, the authorities had taken all possible measures to conduct the investigation effectively. The present complaint therefore did not give rise to a violation of the Convention.

59. The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013). The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is in issue. Where a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed (ibid., § 79, with further references).

60. The Court notes that the present complaint concerns the alleged sexual abuse of the applicant's daughter. There was no allegation of rape, the girl was allegedly a victim of other forms of sexual abuse. The Court considers that the allegation contained sufficient elements to trigger positive obligations under Article 8 of the Convention. The Court has held that in this area the scope of positive obligations under Article 8 of the Convention differs, depending on the seriousness of the alleged behaviour (see *A, B and C v. Latvia*, cited above, §§ 154 et seq.).

61. In the instant case the domestic authorities faced the following allegation: over the course of about two months a child aged three years had regularly observed her mother and another man naked, embracing and kissing each other, and engaging in backwards and forwards movements which she had not been able to understand, and there had been occasions when the man had taught the child to kiss in an adult fashion, shown her his genitals and asked her to touch his genitals.

62. The alleged actions were covered by the relevant provision of the Criminal Code (see paragraph 45 above) and, given their seriousness, an effective criminal investigation was necessary. The scope of the positive obligation in the present case has not been disputed by the parties.

63. Even though the authorities had a difficult investigative task in the present case, it has to be reiterated that the measures applied by the State to protect children against the acts falling within the scope of Article 8 should be effective (see, *mutatis mutandis*, *Söderman v. Sweden*, cited above, § 81) and the obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures

available to them to secure evidence concerning the incident at issue (see, in the context of Article 2, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 173, 14 April 2015).

64. The Court notes that during the initial period of seven months the domestic authorities examined the issue by way of undertaking a pre-investigation inquiry without a full-scale investigation being opened. However, the Court has held in other contexts that that investigative procedure did not comply with the principles of an effective remedy because the inquiring officer could only take a limited number of steps and the victim had no formal status, meaning her effective participation in the procedure was excluded (see, for example, *Savitskyy v. Ukraine*, no. 38773/05, § 105, 26 July 2012). In the present case the inquiry proved to be ineffective indeed because it was insufficiently thorough, which is confirmed by the repeated remittals for further inquiries after the decisions closing the previous inquiries had been quashed as unsubstantiated (see paragraph 22 above).

65. Moreover, a full-scale investigation was belatedly initiated; at an even later date (about two years after the commission of the alleged crime) the authorities questioned the applicant's child within the framework of the criminal proceedings and conducted a forensic psychiatric expert examination (see paragraphs 26 and 27 above). During the course of those investigative measures the child confirmed the statements that she had made previously in person to the authorities as early as April 2012 – in other words about half a year after the alleged events (see paragraph 21 above); furthermore, the experts concluded that she was able to make truthful statements regarding the alleged facts (while acknowledging that the young age of the girl did not allow her to understand the meaning of the actions at issue). There is no justification for such a delay in securing this important evidence. It is relevant to mention here that Article 35 § 1 (a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse specifies that in cases of this type interviews with the child should take place without unjustified delay (see paragraph 50 above). Therefore, it is doubtful whether the investigator had provided sufficient reasons for discarding the child's statements considering that she had made them after the expiry of a long period of time and that her young age undermined the veracity of the statements (see paragraph 32 above).

66. As regards the investigator's further conclusion in the same decision that the child's statements lacked information in respect of *mens rea* and whether there was any sexual intent in F.'s alleged actions, it was rather for the authorities to arrange the questioning of the child in such a way that those issues were duly raised and clarified; furthermore, the investigator's conclusion regarding the absence of *mens rea* apparently did not cover the assessment of the actions of F. when he – according to the statements of the child – taught her to kiss in an adult fashion and demanded that she touch

his genitals. It is therefore not surprising that that decision was reversed as unsubstantiated and the case was remitted for further investigation. It cannot be overlooked, however, that this was the third unfounded decision discontinuing the investigation of the case. Apart from the investigator's repeated failure to carry out a thorough investigation, the authorities noted that the proceedings had been excessively lengthy and instructed the investigator to speed up the proceedings immediately (see paragraph 29 above). According to the information provided to the Court by the parties, the domestic authorities had been dealing with the case for more than three years and three months and the investigation was still ongoing. In that regard, the Court notes again that the above-mentioned Council of Europe Convention emphasises the importance of conducting such criminal proceedings without any unjustified delay (see Article 30 of the Convention cited in paragraph 50 above).

67. Having regard to the significant shortcomings and improper manner in which the authorities investigated the case, as well as the overall length of the proceedings, the Court finds that the authorities failed to comply with their positive obligation to carry out an effective criminal investigation of the case and ensure the adequate protection of the private life of the applicant's child.

68. There has therefore been a violation of Article 8 of the Convention on account of the lack of an effective investigation into the alleged sexual abuse of the applicant's child.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE DETERMINATION OF THE CHILD'S PLACE OF RESIDENCE

69. The applicant complained under Article 6 of the Convention that the courts had failed to properly determine his child's place of residence.

70. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case. While Article 6 affords a procedural safeguard, namely the "right to court" in the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring respect for, *inter alia*, family life. In this light, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests at issue. Accordingly, the Court finds it appropriate to examine the complaint under Article 8 of the Convention (see, for similar approach, *Kurochkin v. Ukraine*, no. 42276/08, §§ 31 and 32, 20 May 2010, and *Anghel v. Italy*, no. 5968/09, §§ 68 and 69, 25 June 2013, with further references).

A. Admissibility

71. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

72. The applicant insisted that the domestic courts failed to properly assess the evidence and examine all the relevant circumstances when determining the child's place of residence.

73. The Government maintained that the domestic courts had satisfactorily taken the necessary steps and taken reasonable decisions on the merits of the case.

74. In the present case it is a common ground that the court decision determining the child's place of residence constituted an interference with the applicant's family life. Likewise, there is no doubt that the impugned measure had a basis in domestic law and that it pursued the legitimate aim of protecting "the rights and freedoms of the others", namely those of the child. The question arises as to whether the interference was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

75. In determining whether the interference was "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what serves best the interest of the child is of crucial importance in every case of this kind (see *Elsholz v. Germany* [GC], no. 25735/94, § 48, ECHR 2000-VIII). There is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010).

76. In identifying the child's best interests in a particular case, two considerations must be taken into account: first, it is in the child's best interests that his or her ties with the family be maintained, except in cases where the family has proved particularly unfit or is clearly dysfunctional; and second, it is in the child's best interests to ensure his or her development in a safe, secure and stable environment and in an environment which is not dysfunctional (see *Mamchur v. Ukraine*, no. 10383/09, § 100, 16 July 2015).

77. Lastly, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. The Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in

the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see *Sahin v. Germany* [GC], no. 30943/96, § 64, ECHR 2003-VIII). The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. The Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody (see *Sommerfeld v. Germany* [GC], no. 31871/96, § 63, ECHR 2003-VIII (extracts)).

78. Relying on the above principles, the Court will examine whether in the present case the domestic courts took all measures to identify the child's best interests and determined her place of residence in accordance with the requirements of Article 8 of the Convention.

1. Safety and security of the child

79. In the first place it is important to examine how the domestic courts addressed the issue of the safety and security of the child.

80. The issue of the possible sexual abuse of the child during the period of her stay with the mother was examined by the civil courts in a limited way. At the relevant time the criminal inquiry into that matter was still in progress and it does not appear that the applicant made any such allegation before the first-instance court; as to the higher-instance courts, he raised that matter quite briefly and nothing suggests that he provided any supporting material to substantiate that allegation. Accordingly, the civil courts briefly addressed that issue and they did so fairly to the extent that the issue was raised in the civil proceedings.

81. On the other hand, the applicant made an arguable allegation about the child being at risk of being exposed to physical violence if she had to stay with the mother. In examining that issue the civil courts pointed out that there had been no proof submitted to show that the injuries to the child, as documented in the forensic medical report of 2 December 2011, had been inflicted by the mother. Nevertheless, according to the above forensic medical report, the child sustained the injuries precisely in the period when she was living with her mother, who had a duty to care for and ensure the safety and security of the child. The courts did not analyse that issue in their decisions. Moreover, it is not clear why the courts placed on an equal footing the above-mentioned medical expert report and the certificate issued by the child-minding centre stating that the child had had no injuries on 1 December 2011. It remains unclear whether any medical practitioners participated in the examination of the child at the child-minding centre, what the scope of the medical examination of the child was, and why the child-minding centre decided to carry out a medical examination of a particular child on that date. Those issues were likewise not addressed, even though the two documents were contradictory and the applicant insisted that the centre's certificate was false.

82. Overall, the applicant's allegation about the risk of physical violence was serious and merited more scrutiny to find out whether or not the child had been subjected to higher security and safety risks when living with the mother.

2. Stability of the child's environment

83. Until the conflict between the parents, the child always lived in the applicant's flat, where she had a stable environment. Apparently, the child's absence from the flat for the period between 20 September and 1 December 2011 upset the stability of the child's everyday life: she had to live in a new home in a different residential area, and she had to attend a new child-minding centre and communicate with and adapt to the new people surrounding her. By the time of the civil dispute, the mother had moved to Sumy, where she lived in a different flat (see paragraph 39 above); this was once again a new environment that the child had to accept. The courts' decisions do not suggest that any of those issues were given due consideration.

84. Furthermore, in previous cases the Court has admitted that the length of time spent by a child with a grandparent could be an important factor in securing that child's best interests (see *Hokkanen v. Finland*, 23 September 1994, § 64, Series A no. 299; A; *Mamchur*, cited above, § 110; and *Krapivin v. Russia*, no. 45142/14, § 73, 12 July 2016). In the present case the courts found that, until the conflict between the parents, the child had continually lived not only with both parents but also with the paternal grandparents. The courts also established that the grandparents had taken care of the child when the parents had been outside the country for a considerable period of time. It was never disputed that the child had developed close ties with the paternal grandparents. However, the fact that the grandparents constituted an important part of the child's family life was not examined by the first-instance court; the Court of Appeal only noted that the role of parents was more important than that of grandparents in the upbringing of a child. While the Court agrees with this observation, it considers that in the specific circumstances of the case it was insufficient as it remained unclear how such a general observation fitted the individual situation of the applicant's child and whether the separation of the child from the grandparents would be detrimental to the child's interests.

3. Conclusion

85. Having regard to the above considerations (see paragraphs 79-84 above), the Court finds that the analysis conducted by the domestic courts before reaching the decision that the applicant's daughter was to live with her mother, was not sufficiently thorough. Therefore, notwithstanding the wide margin of appreciation left to the national authorities in the field of

child custody, the reasons they adduced for their decision cannot be regarded as "relevant and sufficient" (see paragraph 75 above).

86. Accordingly, there has been a violation of Article 8 of the Convention in respect of the determination of the applicant's child's place of residence.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides as follows:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

88. The applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

89. The Government submitted that the claim was unfounded and excessive.

90. The Court considers that the applicant and his daughter must have suffered anguish and distress on account of the facts giving rise to the finding of a violation in the present case. Ruling on an equitable basis, the Court awards the applicant EUR 7,000 in respect of non-pecuniary damage.

B. Costs and expenses

91. The applicant also claimed 32,625 Ukrainian hryvnias (UAH) in respect of legal fees and UAH 503.92 for postal expenses and UAH 240 for translation services.

92. The Government contended that the claim for compensation for legal fees was unfounded. As to the other claims, the Government left these to the Court's discretion.

93. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for the reimbursement of legal fees. It further considers it reasonable to award the sum of EUR 27 in respect of postal expenses and translation services.

C. Default interest

94. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention on account of the lack of an effective investigation into the alleged sexual abuse of the applicant's child;

3. *Holds* that there has been a violation of Article 8 of the Convention in respect of the determination of the applicant's child's place of residence;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 27 (twenty seven euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 July 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Ranzoni is annexed to this judgment.

V.D.G.
M.T.

CONCURRING OPINION OF JUDGE RANZONI

1. I have voted with my colleagues in finding a violation of Article 8 of the Convention (point 3 of the operative provisions), although national authorities are accorded a wide margin of appreciation when deciding on custody rights (see paragraph 77 of the judgment). However, one important element is lacking in the Court's reasoning, which would have strengthened the judgment and would have addressed the root cause of the shortcomings in the domestic courts' proceedings.

2. The facts of the case can be summarised as follows: From the time of the child's birth in March 2008 the parents, that is, the applicant and the child's mother, lived with their daughter and the applicant's parents (hereinafter "the grandparents") in the same flat. In 2009 the parents were absent from home for six months, and during this period the grandparents took care of the child. Between 2010 and 2011 the mother again worked abroad, and during this period the father and the grandparents took care of the child. On 20 September 2011 the mother left the apartment with the child, without the father being informed of their whereabouts. On 1 December 2011 the father found his daughter in a child-minding centre and brought her back to his flat. On 20 June 2012 the District Court ruled that the child should live with her mother. This decision became final on 14 September 2012 (see paragraphs 5-14, 36 and 44 of the judgment). It is not known whether, subsequent to the District Court's decision, the applicant actually handed over the child to the mother or whether the girl continued to live with her father and the grandparents.

3. In ruling that the child should live with her mother, the District Court relied on the United Nations Declaration on the Rights of the Child of 1959 (hereinafter "the U.N. Declaration") and found "that the facts did not disclose any exceptional circumstances which could justify the separation of the child from her mother" (see paragraph 41 of the Court's judgment). This Declaration, in principle 6, provides that a child of tender years should not, "save in exceptional circumstances", be separated from the mother.

4. In the present case, the domestic courts seem to have developed a methodology, based on the said principle, entailing a presumption in favour of the mother in childcare cases, that is, that a child should live with the mother, which could be rebutted only where "exceptional circumstances" existed. Applying this presumption, the domestic courts limited the scope of their fact-finding exercise, essentially seeking to establish whether or not there were "exceptional circumstances". Consequently, in the absence of "exceptional circumstances" the courts dispensed with further assessment of all the other non-exceptional circumstances that might still have been relevant for the decision.

5. A presumption in favour of the mother in childcare cases is neither supported by the developments at United Nations-level subsequent to the U.N. Declaration nor by our Court's case-law, and it does not correspond to the position of the Council of Europe and of most member States. In the 21st century, a methodology with such a presumption, rebuttable only in "exceptional circumstances" is, to my mind, no longer sustainable with regard to the rights guaranteed under the Convention. The crucial point is that this presumption *prima facie* considers the child's residence with the father as not being in the child's best interests (see, *mutatis mutandis*, *Zaunegger v. Germany*, no. 22028/04, § 46, 3 December 2009).

6. The U.N. Declaration is not a legally binding document. It was the basis for developing the United Nations Convention on the Rights of the Child of 1989 which is, in contrast, a legally binding international treaty. However, the *travaux préparatoires* to that Convention clearly show that the provision concerning "separation of the child from the mother only in exceptional circumstances" existed only at the very initial stage of the drafting process. It was subsequently criticised, as it promoted a stereotypical view of mothers which hinged on discrimination, and it was therefore removed. The principle of the child's best interests, which stems from the same Declaration, was given full support, however. as the first and paramount consideration (see, for example, Sharon Detrick, *The United Nations Convention on the Rights of the Child, A Guide to the "*Travaux Préparatoires*",* 1992, and Thoko Kaime, "The Foundations of Rights in the African Charter on the Rights and Welfare of the child", *African Journal of Legal Studies*, November 2009).

7. The European Court of Human Rights has reiterated on many occasions that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount (see *Neulinger and Shuruk* [GC], no. 41615/07, § 135, 6 July 2010, and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). The child's best interests may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003‑VIII).

8. The Court has also emphasised that parents, in principle, should have equal rights in custody disputes, and has not accepted any presumptions based on the sex of one parent. For example, in *Sommerfeld v. Germany* [GC] (no. 31871/96, § 86, ECHR 2003-VIII) it reiterated that its task was to examine whether the application of domestic legislation led to an unjustified difference in the treatment of an applicant. In the above-mentioned case of *Zaunegger v. Germany* (§ 48; see also *Sporer v. Austria*, no. 35637/03, 3 February 2011) the Court required sufficient reasons for a difference in treatment as regards the attribution of custody to the father of a child born out of wedlock, particularly compared with the mother. It has also accepted that there may exist valid reasons to deny an unmarried father participation

in parental authority, as might be the case if arguments or lack of communication between the parents risked jeopardising the child's welfare. However, nothing indicated that this attitude was a general feature of the relationship between unmarried fathers and their children (ibid., § 56). Finally, the Court has not accepted the assumption that joint custody against the will of the mother was *prima facie* not in the child's interest (ibid., § 59). In *Diamante and Pelliccioni v. San Marino* (no. 32250/08, § 177, 27 September 2011) it held that the local authority's decision-making process had to be based on relevant considerations and ought not to be one-sided, and hence neither be, nor appear to be, arbitrary. In *Mamchur v. Ukraine* (no. 10383/09, § 102, 16 July 2015) the Court summarised that it had to ascertain "whether the domestic courts conducted 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 – and made a balanced and reasonable assessment of the respective interests of each person, being constantly mindful of what would be the best solution for the child".

9. As stated in *Zaunegger v. Germany* (cited above, § 60), the common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child's best interest. The House of Lords, for example, in a judgment of 4 July 1996 expressly denied that there was a presumption or principle of "maternal preference" in custody awards. Further, it underlined that the advantage to a very young child of being with his or her mother was only one of various competing circumstances, and that it was not overriding (see *M.L. v. the United Kingdom*, no. 35705/97, 20 March 2001).

10. Finally, the Council of Europe has, on several occasions, condemned unequal treatment of fathers and emphasised that the role of fathers with regard to their children needed to be better recognised and properly valued. For example, in its Resolution 2079 (2015) on "Equality and shared parental responsibility: the role of fathers", the Parliamentary Assembly stressed the importance "to transcend gender stereotypes about the roles supposedly assigned to women and men within the family" as a "reflection of the sociological changes that have taken place over the past fifty years in terms of how the private and family sphere is organised".

11. The principle set out in the U.N. Declaration concerning the exceptionality of a mother-child separation may not be regarded as problematic in itself, provided that it does not impair the decision-making process of identifying the child's best interests. However, that was exactly what happened in the present case. Because of the presumption in favour of the mother, the domestic courts reduced the scope of their assessment, limited themselves to establishing the lack of "exceptional circumstances" and dispensed with examining further "non-exceptional" circumstances which would have been decisive in order to secure the child's best interests.

12. The application of a presumption based on a non-binding U.N. Declaration from 1959 was the real cause of the failure to conduct a sufficiently thorough analysis at domestic level, and in particular to scrutinise the risks to the child's safety when living with the mother and the stability of her environment (see paragraphs 79-85 of the judgment). That presumption undermined, from the outset, a balanced assessment of both parents' situations and, more importantly, of the child's best interests.

13. Today's judgment, regrettably, omits to address this central problem in the present case, and prefers to leave uncommented the domestic courts' application of the presumption in favour of mothers in childcare cases. This could give the impression that the Court accepts it. In my opinion, however, such a presumption has to be qualified as unacceptable in the light of the foregoing observations.