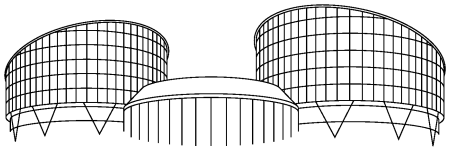

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF N.TS. AND OTHERS v. GEORGIA

*(Application no. 71776/12)*

JUDGMENT

STRASBOURG

2 February 2016

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of N.Ts. and Others v. Georgia,**

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

András Sajó, *President,*
Boštjan M. Zupančič,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 12 January 2016,

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

# PROCEDURE

1. The case originated in an application (no. 71776/12) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms N.Ts., acting initially on her own behalf and on that of her nephews, N.B., S.B. and L.B. ("the applicants"), on 2 November 2012. The Chamber decided of its own motion to grant the applicants anonymity pursuant to Rule 47 § 4 of the Rules of Court.

2. The applicants were represented by Ms N. Jomarjidze, Ms T. Abazadze, Ms K. Shubashvili and Ms T. Dekanosidze, lawyers of the Georgian Young Lawyers Association (GYLA). The Georgian Government ("the Government") were represented by their Agent, Mr L. Meskhoradze, of the Ministry of Justice.

3. The applicants alleged that their right to respect for private and family life under Article 8 of the Convention had been breached on account of the domestic courts' decision ordering the return of the children to their father.

4. On 26 March 2014 the application was communicated to the Government. On 2 June 2015, the parties were invited to submit additional observations.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. Ms N.Ts., is a Georgian national who was born in 1976 and lives in Tbilisi. Her three nephews – N.B., and twin boys, S.B. and L.B. – were born in 2002 and 2006 respectively. The facts of the case, as submitted by the applicants, may be summarised as follows.

### A. Background information

6. Ms N.Ts.'s sister started a relationship with G.B. in 2000 and the couple moved in together. They had three children, N.B., S.B. and L.B.

7. In 2006 G.B. was convicted of drug abuse and given a five-year suspended sentence. In 2008 he was diagnosed with psychiatric and behavioural disorders. The same year he started methadone substitution treatment (as part of a specialised drug treatment programme). In 2009 G.B. was fined under the Code of Administrative offences for two additional incidents of drug abuse.

8. On 26 November 2009, the mother of the boys died in unrelated circumstances. The boys started living with their aunts and their maternal grandparents. At the end of December 2009 G.B. requested the return of the boys but the maternal family refused his request.

9. According to his medical file, in February 2010 G.B.'s addiction went into remission; no signs of disintegration of personality were observed and he was considered to be reacting appropriately *vis-à-vis* his surroundings. On 10 February 2010 he was diagnosed with an early remission stage. According to the medical report, he did not pose any threat either to himself or to the people surrounding him and was motivated to start a healthy life. According to another medical certificate dated 26 February 2010, G.B.'s central nervous system was not damaged and he was not suffering from any psychiatric pathology.

### B. Return proceedings

10. On 5 January 2010 G.B. asked the Tbilisi City Court under Article 1204 of the Civil Code to order the return of his sons. On 12 January 2010 the first instance court judge decided to involve the Social Service Agency ("the SSA") in the proceedings. The court ordered that the case file be forwarded to the SSA, that the latter appoint a representative to protect the boys' interests, and that the SSA conduct an assessment of the social environment and living conditions of the father and the maternal family.

11. The assessment was conducted by the Vake-Saburtalo regional branch of the SSA. Their representative visited the places of residence of G.B. and the maternal family and conducted conversations with G.B., the paternal grandparents, several of their neighbours, the maternal family and also a former babysitter of the boys. The social worker concerned concluded that the living conditions were satisfactory at both locations. As for the boys themselves, she noted the following:

> "As regards the children's interests, they are in need of a caring and safe environment ... Both families should consider the needs of the children and how they can help them with a concerted mutual effort to most easily overcome the psychological trauma they have suffered because of the loss of their mother ..."

12. In parallel, the SSA's Vake-Saburtalo regional branch arranged for a psychological examination of the boys. The psychologist involved managed to see only the twins in the presence of their father and a family friend. She concluded that they both had a twofold attitude towards their father, with warm feelings and love on the one hand and fear on the other hand. She further observed that certain emotional and behavioural problems of the boys were predetermined by their subconscious protest against the lack of a healthy relationship with both families and the incomprehensible situation in which they were living. In conclusion, the psychologist noted that the boys' stressful situation was being further aggravated through having a negative image of their father imposed on them, which could in itself pose a threat to their psychological health and life ("the psychological report of 3 March 2010").

13. In the interim, the Tbilisi City Court issued an interlocutory order allowing G.B. to see his children in the presence of two family friends. It is apparent from the case file that after just a few meetings, the third persons refused to participate in further meetings.

14. On 23 April 2010 the boys were taken to a paediatric hospital where, following psychological examination, all three were diagnosed with separation anxiety disorder. It was noted that all three children had a negative attitude towards their father and a range of fears with respect to him. According to the medical report, they also displayed severe anxiety as a result of the death of their mother. It was recommended that no change be made to their living environment in order to avoid causing further stress to them.

15. In addition, on 26 April 2010 specialists from an Institute of Psychology concluded, on the basis of the material in the case file, that – in view of the emotional stress the boys had suffered as a result of the death of their mother and the fact that their habitual place of residence was that of their maternal grandparents and aunts – it was not advisable for them to return to their father. The questions put to the specialists had been prepared by the lawyer acting on behalf of the maternal family. The specialists also examined the older boy in person and observed the following:

> "... [N. B.] feels frustrated because of the situation he is in and gets easily irritated ... the child is sensitive and seeks relief in a safe environment and in a fantasy world ... he escapes everything that is undesirable for him in order to avoid additional trauma ...
>
> We consider that at this stage a drastic change in [N.B.'s] situation is not advisable, in order to avoid additional irritation and traumatisation of the boy and to allow him rehabilitation in a calm environment. Obviously, it would be useful if he could develop a close relationship with his father and could perceive him as a guardian and protector, but in order to achieve that, in our view, some more time will be needed. The father should gain his confidence and the child should gradually feel the need to communicate with his father again ...
>
> For the psychological wellbeing of the children ... we consider it necessary to facilitate an appropriate process of readjustment between the father and his children, i.e. for a certain period of time (a minimum of one year) the father should communicate with the children within a stable regime and a formally accepted format, to regain their trust."

16. On 30 April 2010 the SSA scheduled another psychological examination of the boys. But it turned out to be impossible to conduct as the father had only agreed to their check-up on condition that it would be conducted in his presence and in a neutral place. However, according to the maternal family, the boys refused to see him.

17. On 18 May 2010 the Tbilisi City Court ordered that the three boys be returned to their father. Taking into account G.B.'s latest medical record, the court concluded that he was fit to resume his parental responsibilities. At the same time, the competent judge dismissed the medical report on the children's mental state as unreliable; she concluded that the experts' conclusions contradicted the factual circumstances and were based on facts which had not been derived from the case file. She further observed that from a psychological point of view the twin boys were ready to be reunited with their father; they were traumatised as a result of the death of their mother and were in need of a relationship with their father. As for the older boy, the judge observed − referring to the psychologists' reports – that he had had pre-prepared answers.

18. In conclusion the court noted:

> "In view of all the above and having regard to the fact that the children's mother has passed away, the separation of the children from their father and their family environment breaches their right to be raised in a family and runs contrary to their interests ...
>
> In the current case it has been established that the respondents do not have any legal right to keep the children with them. The applicant [G.B.]'s parental rights have not been restricted ...
>
> It has been established that the return of the children to their father would not be against their interests but, on the contrary, would be beneficial and is necessary. ... With the children's best interests in mind, [G.B.'s] request is hereby granted, since bringing the children up in a family environment will have a positive effect on their physical and intellectual development".

19. According to the case file, representatives from the SSA were not involved in the above proceedings.

20. The maternal family filed an appeal. They claimed *inter alia* that the court of first instance had assessed the available psychological evidence in a one-sided manner; in particular, it had relied on the SSA's conclusion – which was unreliable – while rejecting the other medical reports in an unsubstantiated manner. They also criticised the fact that the court had put the father's rights at the centre of its decision instead of being guided by the best interests of the children.

21. On 24 February 2011 the Tbilisi Court of Appeal quashed the first-instance court's decision and ruled that the children should stay with their maternal family. The appeal court referred to the psychological reports, according to which the boys were in need of a stable and safe environment and any forceful change in this respect could aggravate their already stressful situation. The panel of three judges concluded as follows:

> "... At this stage, the return of the children to G.B. before some more time has passed and his recovery is officially confirmed by specialists, ... thereby putting the children at risk, is considered inappropriate by the chamber [from the point of view of the children's] own safety. The chamber considers that not only should G.B. demonstrate that he has recovered but should, at the same time, prepare the children psychologically for a change in [their] situation, in order to facilitate their subsequent adjustment."

22. The panel further noted that they shared the views of the specialists, according to which the process of the boys' adjustment to their father should happen naturally. Given that for various objective and subjective reasons the boys remained stressed in their relationship with their biological father, their removal from their habitual environment could, in the view of the judges, have adverse effects on them.

23. According to the court record, the representatives of the SSA and their district branch were involved in the appeal proceedings with the status of an "interested party".

24. On 11 October 2011 the Supreme Court of Georgia remitted the case to the appeal court for re-examination. The court noted the following gaps in the decision of the Tbilisi Court of Appeal:

> "In view of the specific circumstances of the case, and having regard to the interests of the children, who are minors, the court of cassation has examined in detail the material on the case file concerning the determination of the children's place of residence and concludes that the decision in question fails to establish beyond any doubt the necessity of separating the parent and the children ...
>
> It is indisputable that drug addiction has a negative influence on the state of mind of a person. However, bearing in mind that G.B. is being treated, and that according to the evidential material his treatment has brought positive results, [his drug addiction] does not provide a basis for drawing the unambiguous conclusion that living with their father would be insecure and dangerous for the children. At the same time, the cassation court observes that in such circumstances, when there is a

> suspicion of creating an unhealthy environment for minors, a court may – according to the civil procedural law – at its own initiative involve custody and guardianship authorities in order to monitor the children's upbringing ...
>
> The cassation court would like to emphasise that although the opinion of a child concerning the determination of his or her place of residence is very important, it may be disregarded if it does not correspond to his or her interests ...
>
> The cassation court particularly notes that whenever there is a doubt – requiring urgent reaction – as to whether a parental right is being properly exercised, or whether questions concerning a child's upbringing have been properly decided, all the bodies concerned, and above all the court – which has inquisitorial power to establish and examine factual circumstances – is obliged to take all measures provided for by law to protect the children's rights and to actively involve the competent authorities to redress the situation. When considering the current case, reference must be made to Article $1198^{1}$ of the Civil Code, which obliges the custody and guardianship body to engage actively in protecting the rights of minors, including their right to education, rather than simply limiting itself to making general observations and assessing their living conditions.
>
> The cassation court observes from the material on the case file that there is a clear violation of the children's rights from the perspective of their physical, mental, emotional, and social development and upbringing, since their legal representative – their father – is not able to take the requisite steps as regards the children's education ..."

25. Lastly, the court noted – along the same line of reasoning as the appeal court – the importance of the psychological preparation of the children for a change in their situation. It observed, however, that despite the interlocutory measure ordered by the first-instance court, no meetings between the children and their father were being organised, since the family friends had refused to take part in those meetings. In such circumstances, it was unclear how a natural adjustment process with the father could be expected.

26. In November 2011 the proceedings recommenced at the Tbilisi Court of Appeal. The maternal family members alleged that G.B. was not interested in seeing his boys and re-establishing contact and a relationship with them. They claimed that the last time he had seen the boys had been in April 2010. They also criticised the fact that G.B. had spoken openly about the contentious situation concerning the boys on a TV show, following which the children had allegedly been further traumatised. The older one was ashamed of going to school because everyone knew his family situation and, according to the maternal family, would ask him questions about his "drug-addicted" father. The maternal family members also claimed that the SSA had shown absolutely no interest in the children, not checking on them for more than a year. The father, for his part, stated that he would not want his children to go with him unless they changed their mind.

On 24 November 2011, acting at the request of G.B., the court issued an interlocutory measure under which the latter was allowed to see his children

in the presence of a representative of the SSA. The appeal court also asked the SSA to report on the progress of those meetings.

27. On 11 and 18 December 2012 three social workers went to see the boys at their maternal family's apartment. According to the report drawn up thereafter ("the report of 4 January 2012"), during both of the visits the members of the maternal family reacted negatively. The boys refused to stay and talk to the social workers alone on 11 December 2012, and at the second meeting only the older boy spoke with the social workers. The social workers concluded that the psycho-emotional condition of the children had deteriorated. Furthermore, according to the report, N. explicitly expressed a negative attitude towards his father and the social workers. In this regard the social workers observed:

> "The child was clearly nervous, the situation in which he found himself influenced him significantly and he was hysterically repeating that he did not want to live with his father, that "his father had killed his mother and he was a monster", that "the appearance of the father had brought him trouble and that he was ashamed of his father in the eyes of his friends". In view of the emotional state of mind of the child we were forced to stop the conversation."

28. The report concluded the following:

> "... the psycho-emotional condition of the children – nine-year-old N. and six-year-old L. and S. – is very serious. The children do not have a mother and are being raised in the absence of the only parent in an environment hostile towards their father ... We consider that the biological father of the children, G.B. has the human and material resources to take care of his children and create for them appropriate conditions for their development. We also consider that a relationship between the children and their father is necessary for the children's future, so that they develop into fully-fledged members of society".

29. In January 2012 the older boy was taken for psychological examination to a paediatric hospital, where he was diagnosed with anxiety phobia disorders. It was recommended that he undergo a psychotherapy course and live in a stable, calm and safe environment.

30. By a decision of 2 February 2012 the Tbilisi Court of Appeal reversed its decision of 24 February 2011, concluding that the children should live with their father. The court referred to the report of 4 January 2012 concluding that the children had been negatively influenced by their maternal family and that their attitude towards their father had been shaped accordingly. In particular, the court stated:

> "The chamber notes that since 2009 the attitude of the children towards their father has worsened and that this has happened despite the fact that the father has not in fact been given an opportunity to communicate with his children. Accordingly, the father could not have negatively influenced his children.
>
> The chamber considers that the children's negative attitude towards [their father] is a result of powerful, unhealthy psychological influence and inappropriate educational methods [used] by the persons providing for their upbringing".

31. And,

> "... [T]he return of the children to their father would be beneficial and is necessary for them. In view of the factual circumstances established in the case, the court considers that for the children to stay with the respondents would breach the father's parental rights as well as the children's interests, since in such a case the children will be separated from their father and the family environment. This in itself is a violation of the fundamental principle enshrined in the Convention on the Rights of a Child – that for the purposes of a comprehensive and harmonious development children should live in a family environment, in an atmosphere of happiness, love and mutual understanding. This is particularly relevant in view of the fact that the attitude of the children towards their father, under the influence of those with whom they are living, is becoming more negative than positive, a fact which, in the opinion of the chamber, runs contrary to their interests. The children are being raised with a hostile attitude towards their father, which is totally unacceptable ..."

32. Relying on Article 3 of the Convention on the Rights of the Chid, and Articles 1197-1199 and Article 1204 of the Civil Code, the Tbilisi Court of Appeal concluded that there was no legal basis for the boys to stay with their maternal grandparents and aunts, and that it was in their best interests to be reunited with their father.

33. The aunts and the maternal grandparents filed an appeal on points of law, which was rejected by the Supreme Court of Georgia on 3 May 2012.

### C. Enforcement proceedings

34. On 4 June 2012 the Tbilisi City Court issued an execution order for enforcement of the decision concerning the return of the boys to the father. The handover which was due to take place on 25 June 2012 in the presence of a social worker failed, however, since the boys refused to go with their father. A psychologist who was there at the invitation of the maternal family noted in the subsequent report that the boys had been afraid of being taken by force by their father; they had cried as they had not want to go with him. She concluded that G.B. should look for other ways of regaining their trust and re-establishing a relationship with his children. On 14 September 2012 a further attempt to enforce the court decision was likewise unsuccessful. According to the report drawn up thereafter, the children had refused to move in with their father.

35. According to the case file, the domestic courts' decision has not been enforced to date. Neither the SSA nor the father has taken any additional measures for that purpose. The boys are currently living with their maternal grandparents and aunts.

# II. RELEVANT DOMESTIC LAW

## A. The Civil Code of Georgia

36. The Civil Code of Georgia contains a special chapter regulating the relationship between parents and children. Article 1199 states that the rights of parents shall not be exercised in such a way that would harm the interests of their children. The relevant Articles of the Civil Code further state:

**Article 1200 – Upbringing of children with the mutual agreement of parents**

"... 2. If parents fail to agree, the disputed issue shall be decided by a court with their participation. In such a case, the right of a parent to represent his or her child in connection with the court dispute shall be suspended. The custody and guardianship body shall appoint a representative who will represent the interests of a child in the court proceedings."

**Article 1204 – Right to request the return of a child who is a minor**

"1. Parents have the right to request a court order for the return of a child from a person who has taken the child into his or her care without any legal grounds or corresponding court decision.

2. The court may refuse such a request if it is not in the child's interests."

## B. The Civil Code of Procedure of Georgia

37. The relevant provisions of the Civil Code of Procedure of Georgia read as follows:

**Article 81 – Civil procedural legal personality**

"3. The rights of minors between seven and eighteen years of age ... and their legal interests shall be protected in court by their parents, foster parents or guardians. At the same time, the court is under an obligation to involve those minors in the relevant proceedings."

**Article 162 – Court order for a forensic examination**

"If, during the examination of a case, an issue arises that requires specialist knowledge, the court may, at the request of the parties or on its own initiative, order a forensic examination."

38. Article 354 of the above Code provides that when examining family disputes the courts may, on their own initiative, request additional evidence.

## C. The Rules of the Social Service Agency

39. The Social Service Agency ("the SSA") is a public law entity which was created by and functions under the Ministry of Health, Labour and Social Affairs. The SSA is responsible, *inter alia*, for overseeing and implementing state programs concerning social rehabilitation and the

protection of children. Article 2 § 2 (f1) of its Rules states that the Agency shall provide and coordinate the adoption, custody and care of orphans and children left without parental care.

## III. RELEVANT INTERNATIONAL LAW

### A. The International Convention on the Rights of the Child

40. The relevant provisions of the United Nations Convention on the Rights of the Child ("the CRC"), which entered into force for Georgia in 1994, 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 ...

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known."

**Article 12**

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

41. In General Comment no. 14 on the right of the child to have his or her best interests taken as a primary consideration, published on 29 May 2013 (CRC/C/GC/14), the Committee on the Rights of the Child stated, *inter alia*, the following:

**The child's best interests and the right to be heard (art. 12)**

43. Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee's general comment No.

12 which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives.

44. The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake ... [A]s the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.

45. The Committee recalls that article 12, paragraph 2, of the Convention provides for the right of the child to be heard, either directly or through a representative, in any judicial or administrative proceeding affecting him or her ...

**Elements to be taken into account when assessing the child's best interests**

...

**(a) The child's views**

53. Article 12 of the Convention provides for the right of children to express their views in every decision that affects them. Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.

42. The relevant parts of General Comment no. 12 on the right of the child to be heard, published on 20 July 2009 (CRC/C/GC/12) by the Committee on the Rights of the Child read as follows:

**I. Introduction**

2. The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights ...

**A. Legal analysis**

**(a) Paragraph 1 of article 12**

**(i) "Shall assure"**

19. Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully

implement this right for all children. This obligation contains two elements in order to ensure that mechanisms are in place to solicit the views of the child in all matters affecting her or him and to give due weight to those views.

**ii) "Capable of forming his or her own views"**

20. States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him ...

**(iii) "The right to express those views freely"**

22. The child has the right "to express those views freely". "Freely" means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard. "Freely" also means that the child must not be manipulated or subjected to undue influence or pressure. "Freely" is further intrinsically related to the child's "own" perspective: the child has the right to express her or his own views and not the views of others.

**(iv) "In all matters affecting the child"**

26. States parties must assure that the child is able to express her or his views "in all matters affecting" her or him. This represents a second qualification of this right: the child must be heard if the matter under discussion affects the child. This basic condition has to be respected and understood broadly.

**(v) "Being given due weight in accordance with the age and maturity of the child"**

28. The views of the child must be "given due weight in accordance with the age and maturity of the child". This clause refers to the capacity of the child, which has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process. Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views.

**(b) Paragraph 2 of article 12**

**(i) The right "to be heard in any judicial and administrative proceedings affecting the child"**

32. Article 12, paragraph 2, specifies that opportunities to be heard have to be provided in particular "in any judicial and administrative proceedings affecting the child". The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, ...

33. The right to be heard applies both to proceedings which are initiated by the child, such as complaints against ill-treatment and appeals against school exclusion, as well as to those initiated by others which affect the child, such as parental separation or adoption ...

**ii) "Either directly, or through a representative or an appropriate body"**

35. After the child has decided to be heard, he or she will have to decide how to be heard: "either directly, or through a representative or appropriate body". The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.

36. The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). However, it must be stressed that in many cases (civil, penal or administrative), there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative. The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation. Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.

37. The representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society). Codes of conduct should be developed for representatives who are appointed to represent the child's views.

**3. Obligations of States parties**

**1. Articles 12 and 3**

70. The purpose of article 3 is to ensure that in all actions undertaken concerning children, by a public or private welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child are a primary consideration. It means that every action taken on behalf of the child has to respect the best interests of the child. The best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration. The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.

71. The best interests of the child, established in consultation with the child, is not the only factor to be considered in the actions of institutions, authorities and administration. It is, however, of crucial importance, as are the views of the child.

...

74. There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

## B. Other international instruments

43. The relevant parts of the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, provide:

> **I. Scope and purpose**
>
> 1. The guidelines deal with the issue of the place and role, as well as the views, rights and needs of the child in judicial proceedings as well as in alternatives to such proceedings.
>
> 2. The guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil or administrative law.
>
> 3. The guidelines aim to ensure that, in any such proceedings, all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child's level of maturity and understanding as well as to the circumstances of the case. Respecting children's rights should not jeopardise the rights of other parties involved.
>
> ...
>
> **A. Participation**
>
> 1. The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.
>
> ...
>
> **2. Legal counsel and representation**
>
> 37. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties ...
>
> 43. Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.
>
> **3. Right to be heard and to express views**
>
> 44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.
>
> 45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.
>
> 46. The right to be heard is a right of the child, not a duty on the child ...

49. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.

44. On 25 January 1996 the Council of Europe adopted the Convention on the Exercise of Children's Rights, which entered into force on 1 July 2000. To date, the Convention has been signed by twenty-eight Council of Europe Member States and ratified by twenty. Georgia is not a party to the Convention. The relevant parts of the Convention read as follows:

**Article 3 – Right to be informed and to express his or her views in proceedings**

"A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

a. to receive all relevant information;

b. to be consulted and express his or her views;

c. to be informed of the possible consequences of compliance with these views and the possible consequences of any decision."

**Article 6 – Decision-making process**

"In proceedings affecting a child, the judicial authority, before taking a decision, shall:

a. consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;

b. in a case where the child is considered by internal law as having sufficient understanding:

– ensure that the child has received all relevant information;

– consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;

– allow the child to express his or her views;

c. give due weight to the views expressed by the child."

**Article 9 – Appointment of a representative**

"1. In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings ..."

**C. Role of representatives**

**Article 10**

"1. In the case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interests of the child:

a. provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;

b. provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;

c. determine the views of the child and present these views to the judicial authority ..."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

45. Ms N.Ts. complained of a violation of the right to respect for private and family life in respect of herself and her nephews. She relied on Article 8 of the Convention, which reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

### A. The scope of the application

46. In her written observations filed with the Court Ms N.Ts. made it clear that she was complaining solely in the name and on behalf of her nephews and was not pursuing any possible complaints on her own behalf. In their comments on the above submission, the Government claimed that the aunt did not have *locus standi* to complain on behalf of her nephews.

47. The Court notes the applicants' clarified submissions and the Government's reply thereto. Accordingly, it will not examine Ms. N.Ts.'s complaints under Article 8 of the Convention and will limit its consideration of the current case to the following two questions: whether Ms N.Ts. has *locus standi* to complain on behalf of her nephews and, if so, whether the boys' right to respect for their private and family life has been violated on account of the domestic courts' decision to return them to their father.

## B. Admissibility

### *1. The parties' submissions*

#### (a) The Government

48. The Government submitted that the aunt did not have the necessary standing to act on behalf of her nephews. Their argument in this respect was threefold: firstly, the father of the boys has never been deprived of his parental rights and was the sole legal guardian of the boys after the death of their mother (see *Kruškić and Others v. Croatia*, (dec.), no. 10140/13, 25 November 2014). Secondly, the boys have never been placed under the guardianship of their aunt and she hence had no legal basis for representing their interests. Even in the context of the domestic proceedings, the interests of the boys had been – according to the Government – represented by a representative of the SSA and not by her. In any event, Ms N.Ts.'s status as an aunt did not amount to family life with the boys meriting protection under Article 8 of the Convention.

49. The Government further submitted that in any case the application was premature since the decision of the domestic courts ordering the return of the boys to their father had not yet been enforced and the boys were continuing to live with their maternal family.

#### (b) The applicants

50. The applicants, referring to the Court's judgment in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, § 103, ECHR 2014), submitted that at the moment of lodging the application the boys were ten (the older boy) and six (the twins) years of age; they were in a vulnerable situation and deprived of any practical means of lodging a complaint with the Court on their own. In view of the death of their mother and their hostile attitude towards their father, they had no one except their maternal aunt who could complain on their behalf. The children's vulnerable position, in the applicant's view, justified the application of a less restrictive approach with respect to the *locus standi* in the current case. They also observed that such an approach has already been applied by the Court in several cases (see *İlhan v. Turkey* [GC], no. 22277/93, §§ 49-55, ECHR 2000-VII, and *Y.F. v. Turkey*, no. 24209/94, § 31, ECHR 2003-IX), including cases where the interests of children were at stake (see *Becker v. Denmark* no. 7011/75, 3 October 1975; *Siebert v. Germany* (dec.), no. 59008/00 9 June 2005; and *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, §§ 138-139, ECHR 2000-VIII).

51. In support of the aunt's *locus standi* the applicants further relied on Article 37 of the Convention and claimed that respect for human rights as defined in the Convention required the Court to continue with the examination of the current case. They recalled in this connection the case-

law of the Court where, in the interests of protecting human rights, next of kin had been allowed to continue with applications on behalf of deceased applicants (see *Karner v. Austria*, no. 40016/98, §§ 24-28, ECHR 2003-IX, and *Micallef v. Malta*, no. 17056/06, §§ 44-51, 15 January 2008).

*2. The Court's assessment*

**(a) Recapitulation of the principles**

52. In the recent cases of *Centre for Legal Resources on behalf of Valentin Câmpeanu* (cited above) and *Lambert and Others v. France* ([GC], no. 46043/14, ECHR 2015 (extracts)), the Court has reiterated that where the application is not lodged by the victims themselves, Rule 45 § 3 of the Rules of Court requires the production of a signed written authority to act. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim on whose behalf they purport to act before the Court. However, special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 of the Convention at the hands of the national authorities. Applications lodged by individuals or associations on behalf of the victim or victims have thus been declared admissible even though no valid form of authority has been presented (see *İlhan v. Turkey* [GC], no. 22277/93, §§ 53-55, ECHR 2000-VII; *Y.F. v. Turkey*, no. 24209/94, § 29, ECHR 2003-IX; *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 103; see also *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*, no. 2959/11, §§ 42-46, 24 March 2015).

53. According to the Court's case-law, particular consideration has been shown with regard to victims' vulnerability on account of their age, sex or disability in cases where these factors have rendered them unable to lodge a complaint on the matter with the Court, due regard also being paid to the connections between the person lodging the application and the victim (see, *Ilhan,* cited above, §§ 53-55).

54. Specifically with respect to children, the Court has previously held 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 (see *S.D., D.P. and A.T. v. the United Kingdom*, no. 23715/94, Commission decision of 20 May 1996; *P.,C. and S. v. the United Kingdom* (dec.), 56547/00, 11 December 2001; *C. and D. v. the United Kingdom* (dec.), no. 34407/02, 31 August 2004; *Giusto, Bornacin and V. v. Italy,* no.38972/06, 15 May 2007; *Moretti and Benedetti v. Italy*, no. 16318/07, § 32, 27 April 2010; *Šneersone and Kampanella v. Italy*, no. 14737/09, § 61, 12 July 2011; *M.D. and Others v.*

*Malta*, no. 64791/10, § 37, 17 July 2012; and *A.K. and L. v. Croatia*, no. 37956/11, § 47, 8 January 2013). The key consideration in such cases is that any serious issues concerning respect for a child's rights should be examined (see *C. and D.*, *P., C. and S.*, and *M.D. and Others*, both cited above; see also *Scozzari and Giunta*, cited above, § 138; *Tonchev v. Bulgaria*, no. 18527/02, § 31, 19 November 2009; and *Hromadka and Hromadkova v. Russia*, no. 22909/10, § 118, 11 December 2014).

**(b) Application to the present case**

55. The Court considers that the three boys in the current case were clearly in a vulnerable position. They were minors who had lost their mother and had a complicated, if not hostile, relationship with their father. Their aunt submitted the current application in their name. It is undisputed that she has actively participated in the upbringing of the boys, cared for them and, at least as far as the post-December 2009 period is concerned, provided a home for them. At the moment of lodging the application with the Court, the boys had been permanently residing with their maternal family for more than two years. In present circumstances, there is no doubt that the aunt had a sufficiently close link with her nephews – the direct alleged victims of a violation under Article 8 of the Convention – to complain on their behalf. It hence remains to determine whether the current case satisfies two additional criteria from the perspective of the Court's relevant case-law: first, the risk that without the aunt's complaint, the boys will be deprived of effective protection of their rights; and that there is no conflict of interests between them and their aunt (see *Lambert*, cited above, § 102).

56. As to the first criterion, the Court observes that in view of the boys' family situation, namely the death of their mother and their obvious alienation from their father, there seems to be no closer next of kin who could complain on their behalf. No family members other than the father and the maternal grandparents and aunts expressed any interest in the relevant domestic proceedings (see paragraphs 10 and 20 above). The father, given the outcome of the domestic proceedings, is clearly showing no interest at all (see also paragraphs 34-35 above). As for potential institutional alternatives to handle their representation, the Court observes that the SSA was itself the subject of criticism in the current application. It would therefore not have been realistic to expect them to facilitate, on behalf of the children, the bringing of a complaint which is in part a criticism of the system they represented. There was therefore no alternative source of representation in the present case which would render their aunt's assumption of the role inappropriate or unnecessary.

57. As to the second criterion, the Court observes that the core of the complaint in the current case is the alleged failure of the domestic authorities to comply procedurally with the requirements of the Convention

and to act in the best interests of the children. In view of the object and scope of the application (see paragraphs 46-47 above and paragraph 73 below), the Court does not see how there could be a conflict of interests between the aunt and her nephews on this very point (see *S.D., D.P. and A.T.* (dec.), cited above). The fact that Ms N.Ts. is not complaining in her own name further supports the above understanding of the Court (see, *a contrario, Kruškić and Others* (cited above), § 97).

58. The Government in their observations relied largely on the Court's decision in the case of *Kruškić and Others* (see paragraph 48 above). The Court observes that in the course of the domestic proceedings conducted in the current case, unlike in the above-cited one, the children were never represented by a guardian *ad litem*, a lawyer who could have procedurally acted on their behalf (compare with *Kruškić and Others*, cited above, §§ 76, 85, and 87). The SSA, which the Government claim was responsible for representing the boys' interests, in fact held the status of a mere "interested party", without intrinsic procedural rights (see paragraphs 74-77 below).

Furthermore, while the focus in the *Kruškić* case was the interruption of a grandparent-grandchildren relationship, the main issue at stake in the instant case is the alleged disregard by the domestic authorities of the best interests of the children and the procedural flaws of the proceedings in question. In this connection, and having regard to the scope of the current application (see paragraphs 46-47 above) the Government's argument concerning the non-existence of family life between the aunt and her nephews for the purposes of Article 8 of the Convention is irrelevant.

59. In view of all the above mentioned, and having regard to the fact that the present application in the Court's opinion concerns important interests of the boys, which merit consideration under the Convention, it considers that the aunt has standing to lodge an application on behalf of her nephews. It follows that the Government's objection in this regard must be dismissed.

60. As to the Government's argument that the application is premature, the Court notes that the decision to return the boys to their father is final and enforceable. An execution order was issued on 4 June 2012 and there have been two attempts, albeit unsuccessful, to remove the boys from their maternal family. Although issued more than three years ago, the decision continues to have full legal effect. It is not possible to challenge its enforcement and the Government have not pleaded before the Court that the father has abandoned the idea of seeking the return of his children. In those circumstances, the Court considers that the children may claim to be victims within the meaning of Article 34 of the Convention (see, *mutatis mutandis, Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 358, ECHR 2005-III, and *Abdulazhon Isakov v. Russia*, no. 14049/08, § 100, 8 July 2010). The Government's objection concerning the children's lack of victim status is accordingly dismissed.

61. The Court notes that the application 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.

## C. Merits

### *1. The parties' submissions*

#### (a) The Government

62. The Government submitted that the domestic courts had conducted an in-depth examination of a whole series of factors regarding the children before ordering their return to their father. They argued that the participation of the SSA and of psychologists in the proceedings was a guarantee that the children's voice had been heard. In relation to the particular factual circumstances of the case, the Government emphasised that G.B. had never been deprived of his parental rights; he was no longer dependent on drugs and, according to expert conclusions, was ready to resume his parental responsibilities. He also had adequate financial resources and appropriate living conditions in which to take care of his own children.

63. As to the children's attitudes, the Government maintained that the children were living under the negative influence of their maternal family, and that their stay in such an unhealthy psychological environment conflicted with their best interests.

64. The Government further emphasised that in line with the requirements of Article 81 of the Civil Code of Procedure, the older boy had been involved in the domestic proceedings via the representatives of the SSA. They argued in this connection that the above provision should not be interpreted as obliging domestic courts to involve minors directly in the relevant proceedings.

65. In conclusion, the Government pointed out that the margin of appreciation accorded to States in the field of family life was rather wide and that, by adopting a reasoned decision in the best interests of the children, the domestic authorities had not exceeded their remit.

#### (b) The applicants

66. The aunt submitted that her nephews' rights, as guaranteed under Article 8 of the Convention, had been violated because the domestic courts had failed to thoroughly assess their situation and to take their best interests into consideration. She claimed that several important factors had been overlooked by the domestic authorities in their examination of the case. First and foremost, the courts had disregarded the boys' negative attitude towards their father. In this connection the aunt emphasised particularly – with reference to the Court's decision in the case of *Hokkanen v. Finland*

(23 September 1994, §§ 61-62, Series A no. 299-A) – that the older boy, who was nine at the material time, was categorically opposed to the idea moving to his father's home. Hence, rather than assessing the living conditions, the domestic authorities should have focused on the boys' emotional state of mind and possible solutions. In the aunt's view, even assuming that the children's negative attitude towards their father was in part preconditioned by the influence of the maternal family, it was anyway contrary to their best interests to order their immediate return without any rehabilitation plan and preparatory period in mind.

67. The aunt further argued that the father lacked interest in his children. Despite the adoption of the two interim orders, he had never really attempted to see them. And most importantly, although more than three years had passed since the two unsuccessful attempts to enforce the final court ruling concerning the return of the children to G.B., the latter had made no effort to establish contact with the boys. Nor had he ever complained before the courts about the non-enforcement of the final binding decision or approached the SSA seeking their help.

68. In connection with Article 81 of the Civil Code of Procedure, the applicants referred to a well-established principle under the CRC according to which a child who is capable of forming his/her own views should be personally involved in proceedings concerning his or her rights. They disagreed with the interpretation of the above provision proposed by the Government, and claimed that the phrase "at the same time" implied that, as well as having a legal representative appointed, a minor between seven and eighteen years of age should have been directly involved in the proceedings.

69. Lastly, the applicants contended that a superficial assessment of the situation concerning the boys, in combination with the disregard for their own opinions, had led the domestic courts to adopt a decision that was contrary to their best interests.

*2. The Court's assessment*

**(a) General principles**

70. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Article 8 of the Convention (see, among other authorities, *Olsson v. Sweden* (no. 1), 24 March 1988, § 59, Series A no. 130, and *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005). In this context, the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective "respect" for family life. Hence, the Court has repeatedly held that Article 8 includes the right for parents to have measures taken that will permit them to be reunited with their children and an obligation on part of the national authorities to take

such action (see, amongst many others, *Eriksson v. Sweden*, judgment of 22 June 1989, Series A no. 156, pp. 26-27, § 71; *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A no. 226-A, p. 30, § 91; *Olsson v. Sweden* (no. 2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90; *Nuutinen v. Finland*, judgment of 27 June 2000, *Reports of Judgments and Decisions* 2000-VIII, p. 83, § 127; *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 58, 24 April 2003). This also applies to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (see *Fuşcă v. Romania*, no. 34630/07, § 34, 13 July 2010; *Hromadka and Hromadkova v. Russia*, no. 22909/10, § 150, 11 December 2014; and *Manic v. Lithuania*, no. 46600/11, § 101, 13 January 2015).

71. The obligation of national authorities to take measures to facilitate reunion is not, however, absolute (see *Hokkanen*, cited above, § 58; *Vamosi v. Hungary* (dec.), no. 71657/01, 23 March 2004). The reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contact with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see *Hokkanen*, cited above, § 58). The child's best interests must be the primary consideration and may, depending on their nature and seriousness, override those of the parents (see among many others, *Olsson* (No. 2), § 90, *Ignaccolo-Zenide*, § 94, both cited above; *Płaza v. Poland*, no. 18830/07, § 71, 25 January 2011; and *Manic*, cited above, § 102, with further references thereto).

72. The Court further notes that, whilst Article 8 contains no explicit procedural requirements, the applicant must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his interests, as safeguarded by that Article (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 147, ECHR 2014 (extracts); *Z.J. v. Lithuania*, no. 60092/12, § 100, 29 April 2014; *Elsholz v. Germany* [GC], no. 25735/94, § 52, ECHR 2000-VIII; and *W. v. the United Kingdom*, 8 July 1987, §64, Series A no. 121). In the case of children, the above principle is exercised through their right to be consulted and heard (see *M. and M. v. Croatia*, no. 10161/13, §§ 180-181, 3 September 2015).

The Court has already held that as children mature and, with the passage of time, become able to formulate their own opinions on their contact with their parents, for instance, the courts should give due weight to their views and feelings as well as to their right to respect for their private life (see *Plaza*, cited above, § 71). The same principles are enshrined in Article 12 of the CRC and in other relevant international instruments (see paragraphs 40-44 above).

**(b) Application of these principles to the present case**

73. The Court observes that the essence of this case lies in the applicants' complaint that the procedures followed by the domestic authorities in the current case were not in compliance with the requirements of Article 8 of the Convention and disregarded the best interests of the children. There are therefore two fundamental aspects to examine – whether the boys were duly involved in the proceedings, and whether the decisions taken by the domestic courts were dictated by their best interests.

*i. The right to be represented and to be heard*

74. The Government claimed that the children had been both involved and heard in the domestic proceedings via the representative assigned to them by the SSA (see paragraph 62 above). The Court notes that on 12 January 2010 the Tbilisi City Court did indeed request the appointment under Article 1200 of the Civil Code of Georgia of a representative for the boys. However, it has certain reservations as to the specific role this representative played in the course of the domestic proceedings. Thus, it appears from the case file that the SSA became formally involved in the proceedings only from the appeal stage onwards (see paragraph 19 above), skipping – for unknown reasons – the full examination of the case at first instance. After its involvement in the appeal proceedings, the SSA and its relevant regional branch enjoyed the status of an "interested party" (see paragraph 23 above). The Code of Civil Procedure, however, does not make any provision for the status of an "interested party" and/or its ensuing procedural rights. Hence, it remains unclear how the SSA could have effectively represented the children's interests while lacking a formal procedural role in the case. This leads the Court to its second area of concern.

75. The SSA and its relevant regional branch were designated to represent the children's interests under Article 1200 § 2 of the Civil Code. But it remains ambiguous what this type of representation exactly implies. Neither the Civil Code of Procedure nor the SSA-related legislation spells out the functions and powers of the representative appointed under the above scheme. In practice, throughout a period of rather more that the two years that the proceedings lasted, the various representatives of the SSA met the boys only a few times, with the sole purpose of drafting several reports

on the boys' living conditions and their emotional state of mind. No regular or frequent contact was maintained in order to monitor the boys and to establish trustworthy relationship with them.

76. In this context, reference should be made to the European Convention on the Exercise of Children's Rights, which has not been ratified by Georgia, but is a useful tool for the interpretation of relevant principles. Article 10 of the above-mentioned Convention provides that the duty of a representative is to act in an appropriate manner on behalf of the child, by providing information and explanations to the child, determining the views of the child and presenting them to the judicial authority (see paragraph 44 above). Likewise, the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice seek to ensure that in cases where there are conflicting interests between parents and children, either a guardian *ad litem* or another independent representative is appointed to represent the views and interests of the child and keep the child informed about the content of the proceedings (see paragraph 43 above).

77. The Court does not see how the SSA's drafting of several reports and attending court hearings without the requisite status could be classified as constituting adequate and meaningful representation, as outlined *inter alia* in the above-mentioned international standards.

78. It is now necessary to examine whether the children were otherwise heard by the judicial authorities. In this connection the Court points out, having regard to Article 12 of the CRC (see paragraph 40-42 above, and in particular point 32 of General Comment no. 12 of the Committee on the Rights of the Child), that in any judicial or administrative proceedings affecting children's rights under Article 8 of the Convention, children capable of forming their own views should be sufficiently involved in the decision-making process and be given the opportunity to be heard and thus to express their views (see also *M. and M.*, cited above, § 181). The same principle is enshrined in the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, which provide for the right of children to be heard and to express their views in all matters that affect them (see paragraph 43 above).

79. In the current case, none of the three boys was heard in person by either of the judicial instances. The applicants claimed on the basis of Article 81 of the CCP that, at least as far as the older boy was concerned, his right to be heard by judges had been violated. The Government for its part maintained that Article 81 of the CCP did not intend to imply the obligatory direct involvement of children over the age of seven in proceedings affecting them (see paragraph 64 above).

80. While a literal reading of the relevant provision (see paragraph 37 above) might suggest that it does in fact provide for a right of minors between seven and eighteen years of age to be directly involved in proceedings affecting their rights, neither of the parties submitted any

relevant domestic case-law examples. In any event, taking into account the relevant international standards, the Court does not understand why the domestic courts failed both to give any consideration to the possibility of directly involving the older boy in the proceedings and to give reasons for not hearing him (see *M. and M.*, cited above, §§ 184-185). The potential need for his direct involvement was particularly apparent given the flaws in the quality of the boys' representation, as noted above.

*ii. The assessment of the best interests*

81. Turning now to the second aspect of the proceedings, namely whether the domestic courts took adequate account of the best interests of the children, the two main reasons behind the decision of the domestic courts to return the boys to their father were the following: first, it was within their best interests to be reunited with their father, and second, the maternal family was having a negative influence on the boys. The Court accepts the above motivation of the domestic courts. Indeed, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and it is within the best interests of the children to be allowed to develop in a sound and harmonious environment. However, while making its own assessment of the best interests, the domestic courts failed to give adequate consideration to one important fact: the boys did not want to be reunited with their father.

82. On this point the Court refers to several reports which concluded that the negative attitude of the maternal family towards G.B. was a factor in shaping the boys' relationship with their father. But, whatever the manipulative role played by the maternal family, the evidence before the domestic courts concerning the hostile attitude of the children towards their father was unambiguous. The latest conclusion of the social workers dated 4 January 2012, noted the particularly severe alienation of the children from their father (see paragraphs 27-28 above).

83. Further, the Court attaches particular weight to the reports of various psychologists who throughout the proceedings referred to the potential danger to the boys' psychological health in the event of their forced return to G.B. (see paragraphs 14-15, and 29 above). In such circumstances, ordering such a radical measure without considering a proper transition and preparatory measures aimed at assisting the boys and their estranged father in rebuilding their relationship appears to be contrary to their best interests (see, *Z.J.*, cited above, §§ 99 and 103; compare also with *Plaza*, § 86, *Hokkanen*, § 61, and *M. and M.*, § 186, all cited above).

*iii. Conclusion*

84. In the view of the Court, the combination of flawed representation, and as a consequence the failure to duly present and hear the views of the boys, undermined the procedural fairness of the decision-making process in

the instant case. This was exacerbated by inadequate and one-sided consideration of the boys' best interests, in which their emotional state of mind was simply ignored. This leads the Court to conclude that there was a violation of the boys' right to respect for their family and private life, as guaranteed by Article 8 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

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

### A. Damage

86. The applicants claimed 5,000 euros (EUR) each in respect of non-pecuniary damage on account of the anxiety and uncertainty they had had to, and continued to, endure.

87. The Government submitted that the amount claimed in the name of the three boys was unreasonable.

88. The Court considers that the boys must have suffered distress and anxiety resulting at least partly from the domestic authorities' handling of their case. It hence awards them EUR 10,000 jointly in respect of non-pecuniary damage. The sum is to be paid to Ms N.Ts., to be held by her for the children.

### B. Costs and expenses

89. The applicants also claimed EUR 1,200 for the costs and expenses incurred before the domestic courts.

90. The Government did not comment.

91. 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 considers it reasonable to award the sum of EUR 900 for costs and expenses in the domestic proceedings.

### C. Default interest

92. 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 in respect of N.B, S.B, and L.B.;

3. *Holds*
   (a) that the respondent State is to pay the applicants, 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 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be held by Ms N.Ts.;
      (ii) EUR 900 (nine hundred euros), plus any tax that may be chargeable to the applicants, 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 ;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 February 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Fatoş Aracı | András Sajó |
| Deputy Registrar | President |