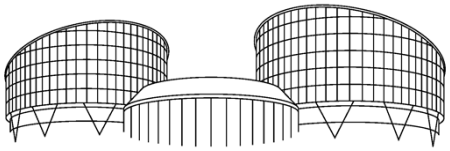

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ILYA LYAPIN v. RUSSIA

(Application no. 70879/11)

JUDGMENT

Art 8 • Respect for family life • Natural father divested of parental rights due to voluntary and prolonged separation from child who was well integrated into mother's new family from an early age • Convention protecting family ties between spouses and children they actually care for • Lack of convincing justification for applicant's inaction leading to severance of ties • Removal of parental authority only cancelling legal link and incapable of adversely affecting non-existent personal relations • Child's deep attachment to step-father who later adopted him • Fair and adversarial decision-making process with carefully balanced assessment of entire family situation and best interest of the child

STRASBOURG

30 June 2020

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 Ilya Lyapin v. Russia,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Lorraine Schembri Orland, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 70879/11) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Ilya Viktorovich Lyapin ("the applicant"), on 7 November 2011;

the decision to give notice of the complaint concerning the removal of the applicant's parental authority over his son to the Russian Government ("the Government") and to declare inadmissible the remainder of the application;

the decision to grant priority to the above application under Rule 41 of the Rules of Court;

the parties' observations;

Having deliberated in private on 3 June 2020,

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

INTRODUCTION

1. The case concerns deprivation of the applicant's parental authority.

THE FACTS

2. The applicant was born in 1980 and lives in Arkhangelsk. He was represented by Mr S. Drobotov, a lawyer practising in St Petersburg.

3. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by Mr M. Galperin, his successor in that office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. In April 2000 the applicant married Ms A.K., who gave birth to their son, V., on 3 January 2001. The couple divorced on 15 April 2003 upon mutual consent.

6. In 2004 Ms A.K. entered into a relationship with Mr M.K. They married in 2005. Ms A.K. and Mr M.K. have a common son, Ye.

7. On 23 March 2011 Ms A.K. instituted civil proceedings against the applicant, seeking to have him divested of his parental authority over V. In her court claim, Ms A.K. argued that since V.'s birth the applicant had neither participated in his upbringing, nor supported him financially; in fact, he had lived separately from her and the child. She went on to state that after the divorce, neither she nor V. had seen the applicant even once. According to Ms A.K., the applicant had never expressed any interest in V.'s life, or any wish or intention to see his son; nor had he offered any assistance or financial support for V., with the result that V. could hardly remember him. She further pointed out that since 2004 she and V. had been living as a family with Mr M.K., whom V. regarded as his father, even though he knew that it was the applicant who was his biological father. V. was very attached to Mr M.K. and his half-brother, Ye. He regarded himself as a member of that family and was distressed by the fact that his family name and patronymic were different from those of Ye. Ms A.K. also pointed out in her claim that Mr M.K. intended to adopt V.

8. On 8 April 2011 the applicant lodged a counter-claim. He objected to Ms A.K.'s claim, stating that he loved his son and wished to participate in his upbringing. The applicant stated that he had accepted the fact that after his divorce from Ms A.K., the boy would remain with her, as he had been persuaded that such arrangement had been in V.'s best interests. He further alleged that after Ms A.K. had remarried, he had orally agreed with her that he "would not intervene in V.'s upbringing and would not disturb [Ms A.K.] with his presence" in order not to traumatise V. and to give him time to adapt to his new family. The applicant further alleged that his relations with Ms A.K. were complicated and it had been impossible for him to resolve the question of his access to V. He therefore requested that the court grant him access to his son and establish his right to see him once a fortnight, on Saturday or Sunday from 11 a.m. until 7 p. m., and to spend his annual leave with him.

9. In an interlocutory decision of 19 April 2011 the Oktyabrskiy District Court of Arkhangelsk ("the District Court") ordered an expert assessment of the child-parent relationship. In the light of the degree of V.'s attachment to each of his parents, with due regard to his age, and the nature of his relationship with each of his parents, the experts were to establish whether, in view of his personal characteristics and those of each of his parents, the applicant could be granted access to V., and, in particular, allowed to spend his annual leave with him, without any damage to the latter's psychological well-being. The court ordered that the applicant, Ms A.K. and V. appear before a competent body of child psychologists for the assessment.

10. On 3 May 2011 the applicant requested that the assessment be postponed "until further notice" because he was ill. His request appears to have been refused, and the assessment was carried out in his absence.

11. In an interview with the psychologists, V. stated that he lived with his "mum" (Ms A.K.), his "dad" (Mr M.K.), and his "brother Ye." He also stated that he knew of the existence of his "other dad", the applicant, but he did not remember him and did not want to have contact with him. V. also explained that he had met the applicant once, in April 2011, and that he had had a negative impression of that meeting, as he had feared that the applicant might kidnap him.

12. On 6 May 2011, at a hearing, the District Court heard the parties, who stated that they wished to pursue their claims. It also examined a number of witnesses, including on behalf of the applicant.

13. One witness, Ms B., who had been V.'s kindergarten teacher, stated that it had always been Ms A.K. and Mr M.K., who had brought V. to the kindergarten. The boy had been attached to Mr M.K., whom he had considered as his father. Ms B. stated that she did not know the applicant, as she had never seen him at the kindergarten.

14. Another witness, Ms P., who was the school teacher in charge of V.'s class, stated that she had never seen the applicant at school. He had never come there or expressed any interest in V.'s school life, whereas Ms A.K. and Mr M.K. actively participated in V.'s life and development, followed his progress in school, and took him to various after-school activities. She also stated that, if asked about his family, V. talked about his mother, brother and Mr M.K. as his father, and that he wanted to change his surname to K. (Mr M.K.'s surname).

15. Another witness, Ms D., who was a paediatrician at a hospital in the vicinity of V.'s home, stated that the applicant had never brought V. to the hospital for check-ups, and had not expressed any interest in V.'s health. She also stated that on several occasions she had visited V. at home and had seen the applicant there only once.

16. Ms Sh., an acquaintance of the applicant, stated that in April 2011 she and the applicant had gone to a supermarket, where they had seen V. The applicant had told her that that was his son. Ms Sh. had gone up to V. and started talking to him. V. had communicated openly and eagerly. The applicant had then gone up and told V. that he was his father; the boy had stopped smiling and said that he needed to go home. Ms Sh. stated that V. had not recognised his father before the applicant had told him who he was.

17. On the same date, the District Court gave its judgment. It noted that by virtue of Article 69 of the Russian Family Code and paragraph 11 of Ruling no. 10 of the Supreme Court of Russia of 27 May 1998, parents could be deprived of their parental authority if they deliberately avoided their parental obligations. The court added that deprivation of parents' parental authority was a measure of last resort applicable only in a situation

where it was impossible to protect a child's rights and interests in another way.

18. The District Court further observed that the applicant had not been living together with his son V. since April 2003, when he had divorced. It noted that, as could be established from the evidence in the case, after the divorce the applicant had transferred to Ms A.K. for V.'s support 1,000 roubles (RUB) (approximately 25 euros (EUR)) in 2005, and RUB 1,500 (approximately EUR 37) in 2011. He had once sent gifts to V. through a delivery service and had once wished him a happy birthday. Also, in 2011 the applicant had opened a bank account in V.'s name, where he had transferred RUB 1,000 (approximately EUR 25).

19. The court rejected the applicant's arguments that he had financially supported V. by informally giving money to Ms A.K. on many occasions. The court noted that the applicant had provided no evidence to corroborate his allegations. It also noted that the photographs adduced by the applicant only confirmed the fact that he had seen his son before 2004. The court also observed that Ms A.K. had not, in fact, prevented V. from seeing his father; she had never hidden V. from the applicant, and he could thus have agreed with her on the question of his access to the child.

20. Moreover, in so far as the applicant alleged that Ms A.K. had obstructed his contact with V., the court observed that he had never raised that argument before she had brought the proceedings for removal of his parental authority; nor had he ever sought assistance from the competent authorities on that matter. The court thus rejected the applicant's argument that Ms A.K. had prevented V. from having contact with his father.

21. The District Court therefore found it established that, in the absence of any objective obstacles, the applicant had not participated in his son's upbringing since 2004, that he had never expressed any interest in V.'s life, and that he had only occasionally provided the boy with financial support. The court held that, in fact, the applicant had waived his right to participate in V.'s upbringing.

22. The District Court referred to the report on the assessment of the child-parent relationship and stated that the family ties between the applicant and V. had been lost, and that the boy perceived a third person, Mr M.K., as his father. Those facts, in the District Court's view, showed that the applicant had wilfully neglected his parental duties with respect to his son. It thus considered that in such circumstances, it was in V.'s best interests to deprive the applicant of his parental authority over his son and leave the boy under the full custody of his mother, Ms A.K. Such a measure, according to the court, was necessary for the protection of V.'s interests, restoration of his right to protection of his health and personality, as well as his right to education and proper physical and mental development. It thus granted Ms A.K.'s claim against the applicant in full, and rejected the applicant's counter-claim. It also ordered the applicant to

pay a monthly amount in child support, starting from the date of the judgment until his son reached the age of majority. According to the applicant, he made payments as ordered by the District Court until he found out about V.'s adoption by Mr M.K. (see paragraph 26 below).

23. The applicant appealed against the judgment of 6 May 2011. He argued that deprivation of parental authority was a measure of last resort and should be applied only if relevant and sufficient reasons existed. The District Court, in the applicant's view, had not found any such reason. He disputed the findings of the first-instance court and insisted that he wished to maintain his ties with his son and to take part in his upbringing.

24. On 27 June 2011 the Arkhangelsk Regional Court upheld the judgment of 6 May 2011 on appeal, endorsing the District Court's reasoning.

25. The applicant's attempts to have the court decisions of 6 May and 27 June 2011 reviewed in a supervisory review procedure were unsuccessful.

26. By a court decision of 24 January 2012 Mr M.K. was granted full adoption of V.; as a result of that decision, the applicant's obligation to pay the child maintenance was terminated.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. FAMILY CODE

27. Article 69 of the Russian Family Code ("the Code") provides that a parent may be deprived of parental authority if he or she avoids parental obligations, such as an obligation to pay child maintenance; refuses to collect the child from the maternity hospital or from any other medical, educational, social or similar institution; abuses his or her parental authority; mistreats the child by resorting to physical or psychological violence or sexual abuse; suffers from chronic alcohol or drug abuse; or has committed a premeditated criminal offence against the life or health of his or her child or spouse.

28. By virtue of Article 71 of the Code, parents who have been deprived of their parental authority lose all rights based on their kinship with the child in respect of whom their parental authority has been withdrawn, as well as the right to receive child welfare benefits and allowances paid by the State. Deprivation of parental authority does not absolve parents from their obligation to pay the child maintenance.

29. Article 129 of the Code provides that the consent of the child's parents is required for his or her adoption. Such consent must be expressed in a written statement certified by a public notary, or by the head of an entity where the child who has been left without parental care is being looked after, or by a custody and guardianship agency at the place of

adoption or at the parents' place of residence. Alternatively, consent can be expressed directly in the court proceedings for adoption. The parents are entitled to revoke their consent to adoption at any time before a court decision on the adoption is taken.

30. By virtue of Article 137 of the Code, adopted children lose personal non-pecuniary and pecuniary rights and are relieved of their obligations *vis-à-vis* their parents (their relatives).

II. RULING OF THE SUPREME COURT

31. In its ruling no. 10 on courts' application of legislation when resolving disputes concerning the upbringing of children dated 27 May 1998, as amended on 6 February 2007, the Plenary of the Supreme Court of Russia stated, in particular:

> "...
>
> 11. Only in the event of their guilty conduct may parents be deprived of their parental authority by a court on the grounds established in Article 69 of the [Russian Family Code].
>
> ...
>
> 12. ... Persons who do not fulfil their parental obligations as a result of a combination of adverse circumstances or on other grounds beyond their control (for instance, [where the person has] a psychiatric or other chronic disease ...) cannot be deprived of their parental authority.
>
> ...
>
> 13. Courts should keep in mind that deprivation of parental authority is a measure of last resort. Exceptionally, where a parent's guilty conduct has been proved, a court, with due regard to [that parent's] conduct, personality and other specific circumstances, may reject an action for [him or her] to be deprived of his or her parental authority and urge [him or her] to alter [his or her] attitude towards bringing up [his or her] children, entrusting [a competent] custody and guardianship agency with monitoring whether [that parent] duly performs [his or her] parental duties."

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

32. The applicant complained that his right to respect for his family life, as provided for in Article 8 of the Convention, had been violated on account of the arbitrary removal of his parental authority over his son. The relevant part of Article 8 reads as follows:

> "1. Everyone has the right to respect for his ... family 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

33. 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

1. Submissions by the parties

(a) The applicant

34. The applicant argued that the deprivation of parental authority was a very drastic measure and should only be applied as an exception, in circumstances where there was no other way to protect a child's interests, and where there was sufficient evidence that the parent concerned had breached the child's rights. The applicant further argued that no such exceptional circumstances had been established in his case, as there had been no evidence proving that he had ever inflicted any harm on his son, or that contact between him and his child could be detrimental to the latter.

35. The applicant disputed the courts' findings to the effect that after the divorce from his son's mother, he had shown no interest in his son's life and had failed to maintain any contact with him. He argued that he had never avoided his parental obligations but rather had attempted not to traumatise his son, who lived in a new family, to let him adapt to that family, including his mother's new husband. In his submission, he had furthermore never evaded supporting his son financially; he had given the money in cash to his former wife, but had not taken receipts or kept written documents that could have confirmed those facts. In that connection, he argued that he had not expected that his former wife would ever seek to have him deprived of his parental authority. He had trusted her, and therefore he had not collected any documentary evidence showing that he had, in fact, expressed interest in his child's life.

36. The applicant further contested the accuracy of the conclusions of the assessment of the parent-child relationship. He pointed out that the assessment had been performed in his absence and that the child had been living with his mother and might have been influenced by her. Moreover, the assessment had been carried out by a person who had not been a professional psychologist. He also pointed out that the child had not been heard in court; the question of the child's presence in the court room should be decided by the court, rather than by a childcare authority, as had been the case. In the applicant's submission, there was no evidence in the materials

of the case that would have convincingly confirmed the child's negative attitude towards him, or demonstrated that contact with him would be damaging to the child's mental health.

37. The applicant argued that it had been unnecessary to apply the impugned measure. In particular, under Article 129 of the Russian Family Code (see paragraph 29 above), the child's mother could have sought his consent to their child's adoption by Mr M.K.; she, however, had preferred to lodge a claim seeking to have him deprived of his parental authority. As a result of the removal of his parental authority, all ties between him and his child had been interrupted. Moreover, he was now unable to seek reinstatement of his parental authority, given his child's adoption by Mr M.K.

38. The applicant also questioned the fairness of the decision-making process. His arguments had been dismissed by the domestic courts, which had exercised their powers in a perfunctory manner. He had thus been denied effective protection of his rights.

(b) The Government

39. The Government conceded that the removal of the applicant's parental authority over his son had constituted interference with his right to respect for his family life. They insisted, however, that the impugned measure had been based on the relevant provisions of the Russian Family Code, had pursed the aim of protecting the child's interests and had been "necessary in a democratic society".

40. The Government referred to the Court's relevant case-law, according to which the national authorities were better placed to decide on such matters, as they had the benefit of direct contact with all the persons concerned. In the present case, having regard to the written and oral evidence in their possession, the domestic courts had found it established that after the divorce from the child's mother and for seven years prior to the removal of his parental authority, the applicant had failed to maintain contact with his son and had not participated in his upbringing. Nor had he taken care of him or supported him financially. There had been no objective obstacles to the applicant's maintaining contact with his son, and therefore his relevant conduct had been of a guilty nature.

41. The courts had also taken into account the results of the assessment of the parent-child relationship, which had revealed that, although the boy knew about the existence of his biological father, he was reluctant to talk about him and was rather afraid of him. At the same time, the child was attached to Mr M.K., his mother's husband, and regarded him as his father. By that time, the child had been living as a family with his mother and Mr M.K. for seven years; he also had a half-brother in that family. Thus, having balanced the interests of all those involved, the domestic courts had taken a decision in the best interests of the child; that decision had, in fact,

consolidated and formalised the *de facto* family ties that existed between the applicant's son and Mr M.K. In that connection, the Government relied on the cases of *Chepelev v. Russia* (no. 58077/00, 26 July 2007), and *Söderbäck v. Sweden* (28 October 1998, *Reports of Judgments and Decisions* 1998-VII).

42. The Government also contended that the decision-making process had been fair and had safeguarded the applicant's relevant rights under Article 8. In particular, he had been represented throughout the proceedings; he and his representative had been able to present their oral and written arguments and evidence, to lodge applications which had been examined by the courts, to have a number of witnesses on his behalf examined and to have access to all evidence in the case.

43. Overall, the Government argued that the court decisions had been taken within the courts' margin of appreciation, and had not been arbitrary. Therefore, in their view, there had been no violation of the applicant's right to respect for his family life.

2. The Court's assessment

(a) General principles

44. 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, even if the relationship between the parents has broken down (see, among other authorities, *Kacper Nowakowski v. Poland*, no. 32407/13, § 70, 10 January 2017). 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* [GC], no. 41615/07, § 135, 6 July 2010, and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). Generally, a child's interests dictate that the child's ties with his or her family must be maintained, except in cases where the family has proved to be particularly unfit and this may harm the child's health and development (see, for instance, *K.B. and Others v. Croatia*, no. 36216/13, § 143, 14 March 2017). Severing such ties means cutting a child off from his roots, which may only be done in exceptional circumstances (see *Görgülü v. Germany*, no. 74969/01, § 48, 26 February 2004); everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see *Kacper Nowakowski*, cited above, § 75).

45. At the same time, it is clearly also in the child's interests to ensure his or her development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 207, 10 September 2019). The child's best interests may, depending on their nature and seriousness, override those of

the parents (see, for instance, *V.D. and Others v. Russia*, no. 72931/10, § 114, 9 April 2019). In particular, where contact with the parent might appear to threaten the best interests of the child or interfere with his or her relevant rights, it is for the national authorities to strike a fair balance between them (see *Khusnutdinov and X v. Russia*, no. 76598/12, § 80, 18 December 2018).

46. It must be borne in mind that generally the national authorities have the benefit of direct contact with all the persons concerned. It is accordingly not the Court's task to substitute itself for the domestic authorities but to review, in the light of the Convention, the decisions taken and assessments made by those authorities in the exercise of their power of appreciation (see, among other authorities, *X v. Latvia* [GC], § 101, and *Strand Lobben and Others*, § 210, both cited above). The margin of appreciation to be granted to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Whilst the Court recognises that the authorities enjoy a wide margin of appreciation when deciding on custody matters, stricter scrutiny is called in respect of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that family relations between parents and a child are effectively curtailed (see *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I; *Haase v. Germany*, no. 11057/02, § 92, ECHR 2004-III (extracts), and *Strand Lobben and Others*, cited above, § 211).

47. In assessing whether the impugned measure was "necessary in a democratic society", the Court has to consider whether, in the light of the case as a whole, the reasons given to justify the impugned measure were "relevant and sufficient" for the purposes of Article 8 § 2 of the Convention. To that end, the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and a whole series of factors, in particular factors of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child (see *Neulinger and Shuruk*, cited above, § 139). The Court will also have to determine whether the decision-making process, seen as a whole, was fair and provided the applicant with the requisite protection of her interests safeguarded by Article 8 (see *Strand Lobben and Others*, cited above, § 212).

(b) Application of the above principles in the present case

48. The Court observes at the outset that it has not been in dispute between the parties that the tie between the applicant and his child amounted to "family life" within the meaning of Article 8 of the Convention

(see *Khusnutdinov and X*, cited above, § 84). It is furthermore common ground that depriving the applicant of his parental authority constituted an interference with his right to respect for family life as guaranteed by Article 8 § 1 of the Convention. Such interference constitutes a violation of that provision unless it is "in accordance with the law", pursues one of the legitimate aims under Article 8 § 2 and can be regarded as necessary in a democratic society (see, among many other authorities, *Strand Lobben and Others*, cited above, § 202). The Court accepts the Government's argument that the measure complained of was based on Article 69 of the Russian Family Code (see paragraph 27 above), and that it pursued the aim of protecting the child's rights. It remains to be determined whether that measure was "necessary in a democratic society".

49. In the above connection, the Court observes that depriving the applicant of his parental authority extinguished all parental rights he had in respect of his son, including the right to have contact with him (see paragraph 28 above). The Court reaffirms that depriving a person of his or her parental rights is a particularly far-reaching measure which deprives a parent of his or her family life with the child, and it is inconsistent with the aim of reuniting them. As noted above, such measures should only be applied in exceptional circumstances (see paragraph 44 above). They can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests (see *Strand Lobben and Others*, cited above, § 209; *M.D. and Others v. Malta*, no. 64791/10, § 76, 17 July 2012; and *N.P. v. the Republic of Moldova*, no. 58455/13, § 65, 6 October 2015).

50. In the proceedings for deprivation of the applicant's parental authority, the domestic courts at two levels of jurisdiction assessed the situation in the light of the oral and written evidence available to them (see paragraphs 10-16 above). In particular, they observed that the applicant had not been living with V. since April 2003, when he had divorced (see paragraph 18 above), and that he had not had contact with him since 2004 (see paragraphs 19 and 21 above). It is therefore clear that, although the child had spent the first two years of his life with the applicant, by the time the decision to deprive the applicant of his parental authority was taken, he had not lived with the child for eight years and had had no contact with him for seven years.

51. It is also relevant that, during the entire period when there had been no contact between the applicant and V., the applicant had made no attempts to get access to his son and to resume contact with him. He submitted somewhat conflicting arguments in that connection, stating, on the one hand, that he had decided not to intervene in V.'s life to allow him some time "to adapt to the new family" of Ms A.K. and her new husband, and, on the other hand, that Ms A.K. had obstructed his contact with the child (see paragraphs 8 and 35 above).

52. The Court does not find any of those arguments convincing. On the assumption that the applicant had willingly withdrawn from his child's life to let the child adapt to his mother's new husband, it is unclear why that "adaptation" period would have lasted for seven years. In the Court's view, the applicant could and should have realised that such a long and complete separation from his son – in particular given the latter's young age at the time when their contact had ceased – could only have as its consequence a significant weakening, if not a complete rupture, of the bond between them and the child's alienation from him. Indeed, it was established in the domestic proceedings that, although V. had been aware of the existence of his biological father, he did not remember him and did not want to have contact with him. When they had once met, the child had not recognised the applicant and had felt scared when told that the applicant was his father (see paragraphs 7, 11 and 16 above).

53. Furthermore, on the assumption that the child's mother had opposed contact with the applicant, the Court finds it surprising that, as noted by the domestic courts (see paragraph 20 above), the applicant had never sought assistance from the childcare authorities or domestic courts for arranging access and determining his contact sessions with V. Indeed, contact between the applicant and his child had been lost in 2004, but it was not until seven years later – and only after the child's mother had brought a claim for removal of the applicant's parental authority – that the applicant applied for the first time for a contact order (see paragraph 8 above).

54. Be that as it may, the Court considers that it was the applicant's own inaction that led to the severance of ties between him and his son, and thus seemed to prompt the outcome of the case against him (compare *Söderbäck*, § 32; *Chepelev*, § 28; and *Khusnutdinov and X*, § 90, all cited above). It is clear that the removal of the applicant's parental authority did no more than cancel the legal link between the applicant and his son. Given the absence of any personal relations for a period of seven years prior to that decision, it cannot be said to have adversely affected those relations (compare *Eski v. Austria*, no. 21949/03, § 39, 25 January 2007).

55. The court decisions furthermore make it clear that the child was well integrated in his family and deeply attached to his mother, his half-brother and Mr M.K., with whom he had had a *de facto* family life for seven years. It is also relevant that Mr M.K. fully assumed the role of V.'s father and intended to adopt him; and that the boy consistently expressed his wish to be adopted by him and to have Mr M.K.'s surname (see paragraphs 7, 11, 13-14 and 22 above). The Court reiterates that the existing family ties between the spouses and the children they actually care for warrant protection under the Convention (see *Fröhlich v. Germany*, no. 16112/15, § 60, 26 July 2018, and the authorities cited therein). Moreover, if a considerable period of time has passed since the child has lived with his or her natural parents, the interest of that child not to have his or her *de facto*

family situation changed again may override the interests of the parents to have their family reunited (see, *mutatis mutandis*, *S.S. v. Slovenia*, no. 40938/16, § 86, 30 October 2018).

56. Against this background, the Court considers that the national authorities were faced with a difficult task of striking a fair balance between the competing interests – those of the applicant, V., his mother and his *de facto* family members – in a complex case. In particular, they were called upon to decide whether it was in V.'s best interests to set in motion his bonding with the applicant – his natural father – contact with whom had been lost for the previous seven years, or rather to consolidate the existing ties between V. and the family in which he had been living during that period. The Court finds that the domestic courts carried out a detailed and carefully balanced assessment of the entire situation and the needs of the child, in the light of the adduced evidence; they thoroughly considered the pertinent facts and gave due consideration to V.'s best interests. Taking into account the fact that the domestic courts had the benefit of contact with all those concerned, it further finds that they provided "relevant and sufficient" reasons for their decisions, within their margin of appreciation.

57. The Court notes that the domestic courts imposed on the applicant an obligation to pay a monthly amount in child support, starting from the date of the judgment until his son reached the age of majority, notwithstanding the fact that the applicant would no longer have parental authority over the child (see paragraph 22 above). This does not, however, mean that there were no relevant and sufficient reasons for the decision to deprive the applicant of his parental authority. Indeed, that decision did not change the fact that the applicant continued to be the child's parent and thus to bear parental responsibility for him; moreover, he had not paid for any child support during many years. It is also to be noted that the obligation to pay child maintenance came to an end once V. was adopted by Mr M.K. (see paragraph 26 above).

58. As regards the decision-making process, the Court observes that the decision in question was reached following adversarial proceedings in which the applicant was placed in a position enabling him to put forward all arguments in support of his position. He took part in the proceedings and was able to submit written and oral evidence. In their decisions the courts provided extensive reasons for their findings and addressed the arguments raised by him. A number of witnesses, including those who supported the applicant's claim (see paragraph 12 above), were heard, and a psychologists' assessment of V.'s relations with his parents (see paragraphs 10-11 and 22 above) was obtained. In so far as the applicant complained that the assessment had been carried out in his absence and that the child had not been heard in court, the Court notes, firstly, that it was open to the applicant to raise those questions before the courts at two levels of jurisdiction; and secondly, that it was open to him to challenge the findings

of the report and to seek another expert examination of V. However, there is no evidence in the Court's possession that the applicant ever sought to avail himself of any of those opportunities. Overall, the Court is satisfied that the domestic decision-making process was fair and provided the applicant with the requisite protection of his rights secured by Article 8 of the Convention.

59. In the light of the foregoing and having regard to the assessment of the child's best interests made by the domestic courts, as well as to the lack of relations between the applicant and V. during a period of seven years, the Court is satisfied that the impugned decision fell within the margin of appreciation afforded to the respondent State and did not have any adverse effect on those relations so as to render it disproportionate (compare *Söderbäck*, § 34, and *Chepelev*, § 31, both cited above; see also *Khusnutdinov and X*, cited above, § 93).

60. There has accordingly been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 30 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Elósegui;
(b) Dissenting opinion of Judge Serghides;
(c) Dissenting opinion of Judge Schembri Orland.

P.L.
M.B.

CONCURRING OPINION OF JUDGE ELÓSEGUI

1. I agree with the conclusion of the present judgment. I am writing a concurring opinion merely to indicate my reasons for supporting its approach. The applicant was deprived of his parental authority in respect of his only son essentially for being a "passive" father, that is to say for his alleged lack of interest towards his son after his divorce from the boy's mother several years before.

2. The applicant stated to the authorities that he wished to participate in his son's life, but that he had limited his contact with him at the request of his ex-wife, who had created a new family and wanted the boy to accept her new husband. The Russian national courts rejected the applicant's arguments, established that the applicant's contacts with his son had been diminished, considered that this was indicative of the applicant's loss of interest in his son, and found it sufficient to deprive the applicant of his parental authority in order to allow him to be adopted by the mother's new husband.

3. Under Article 69 of the Russian Family Code "a parent may be deprived of parental authority if he or she avoids parental obligations such as an obligation to pay child maintenance; refuses to collect the child from the maternity hospital or from any other medical, educational, social or similar institution; abuses his or her parental authority; mistreats the child by resorting to physical or psychological violence or sexual abuse; suffers from chronic alcohol or drug abuse; or has committed a premeditated criminal offence against the life or health of his or her child or spouse". Thus the deprivation of parental authority could be based on neglect of parental duties, including the persistent evasion of maintenance payments. However, divesting a parent of his or her parental authority is a very restrictive measure that should not be resorted to easily. Failure to pay maintenance alone should not lead to forfeiture or deprivation of parental authority. The domestic courts relied on more factors in this case. Abandonment would also justify loss of parental authority.

4. In the present case the first above-mentioned group of reasons or grounds is the relevant one. I would refer to the situation as a *de facto* abandonment or negligence in childcare. The facts that are proven in the file are the following. The applicant was in contact with his son only until the age of two. Then he got divorced and had no contact with the child in seven years: "... as noted by the domestic courts, the applicant had never sought assistance from the childcare authorities or domestic courts for arranging access and determining his contact session with V." (see paragraph 52). Of course, the reasons differ between the narrative of the applicant and the account of the mother. However the role of the domestic courts in these cases, after hearing both parties, is crucial: "... the Court observes that the decision in question was reached following adversarial proceedings in

which the applicant was placed in a position enabling him to put forward all arguments in support of his position" (see paragraph 57). The domestic courts carried out a detailed and carefully balanced assessment of the entire situation and the needs of the child. In conclusion, it was a fair decision-making process.

5. In fact, it is also proven that the father had taken almost no care of the child's financial support. He had helped with maintenance only during eight months, just when the mother started the process for deprivation of parental authority in the civil courts in order for her new husband to be able to adopt the child (between 6 May 2011, when the relevant judgment on deprivation of parental authority was adopted, and 24 January 2012, when following V.'s adoption by Mr M.K. that obligation was terminated).

6. It has to be taken into account that according to Russian civil law, as well as in the majority of European Civil Codes, a biological parent must be deprived of parental authority beforehand in order to permit judicial adoption. It is not compatible to have parental authority vested in two different fathers. For me this was a key question in the present case. Even if the origin of the lack of relationship between father and son could have been seen as a goodwill gesture on the part of the natural father to avoid being an obstacle in the child's new situation after the divorce, allowing him to create a new family with his mother's new husband, the reality is that the child *de facto* almost did not know his biological father, as the mother's husband had assumed the role of real father. Moreover the child wanted to be adopted by his *de facto* new father (see paragraph 54). From a legal point of view, I understand that it could have been different if they had reached some kind of previous agreement about family visits. But this was not the case. The applicant had never applied for any legal mediation or made any claim for any parental right to be in contact with his son.

7. In cases of lack of agreement between divorced parents, according to the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 27.05.1998, no. 10, "About application by courts of the legislation on the settlement of disputes related to the upbringing of children": "In accordance with paragraph 2 of Article 66 of the EF IC, the parents may conclude a written agreement on the exercise of parental rights by the parent living separately from the child. If the parents cannot come to an agreement, the dispute may be settled by the court at the request of the parents or one of them with the participation of a body of guardianship ...".

8. Moreover, the Russian Civil Code provides that children in situations of divorce have to be consulted and heard on matters affecting them (Article 57. Right of the child to express his opinion). It is true that their views are not necessarily immutable, and their objections, which must be given due weight, are not necessarily sufficient to override the parent's interests, especially in having regular contact with their child. Whether or not a child wishes to see his or her father is not necessarily relevant to the

issue of parental authority, though it would be relevant for custody and access. As I have said above, I find it quite important when there has been some prior agreement on access rights. But in this case the child has hardly known his father and at the age of ten he wanted to be adopted by his mother's new husband. By the time the case arrived before the Court the adoption had already been completed and the biological father had been deprived of his parental authority: "by a court decision of 24 January 2012 Mr. M.K. was granted full adoption of V." (see paragraph 25).

9. He reacted only when he was called to the civil court in the proceedings initiated by his ex-wife. Even in the hypothesis that the Court had recognised a possible violation of the biological parent's right because of the deprivation of his parental authority, it would only have been a symbolic finding without any practical effect. The new adoption cannot be changed. In fact, according to the applicant, he did not want to disturb the outcome of the adoption. Thus in practice, both things could not be compatible: his retention of parental authority and the new adoption.

10. I would also like to make some comments about the differences between this case and two recent Spanish cases, *Haddad v. Spain*, no. 16572/17, 18 June 2019, and *Omorefe v. Spain*, no. 69339/16, 23 June 2020 (not yet final), where the Court, unanimously, found violations of Article 8 because of two cases of deprivation of paternity of biological parents in order for the children to be given up for adoption. There is some common ground in these cases as well as some differences between them.

11. In both of those cases the biological parents had constantly opposed the pre-adoptive process started by the social services. In the case of *Omorefe*, the applicant was a Nigerian mother whose son was placed in a pre-adoption foster family at three months; she had immediately initiated a judicial process and for more than seven years had been fighting for her rights at more than five different instances. Moreover, before the Court she asked only to be allowed to exercise her right to visit her son and currently did not oppose the adoption that had been completed five years before. She did not seek before the Court to recover her maternal authority, but only to have contact with her son. Moreover, Spanish law allows for this possibility after a legal change in the Spanish Civil Code since 2015. However, this contact has to be authorised by the judge and in agreement with the adoptive family. Also a child up to the age of 12 has to be heard and the child's best interests must be taken into account.

12. In both cases, the Court recognised the possibility of an access right, such contact having been prevented by the social services and later by the domestic courts without any reasoning, although in the case of *Omorefe* they had recognised this right. In neither of those cases had the lack of contact originated in the inaction or passivity of the biological parents.

13. In the present case, the lack of ties between father and child was due to the applicant's own inaction (see paragraph 53). Even though the Court

has said many times that the State has positive obligations to facilitate family reunification (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 209, 10 September 2019; *M.D. and Others v. Malta*, no. 64791/10, § 76, 17 July 2012; and *N.P. v. the Republic of Moldova*, no. 58455/13, § 65, 6 October 2015), it was a *de facto* situation attributable to private parties, according to the District Court, "in the absence of any objective obstacles" (see paragraph 20). The child even has a half-brother and wanted to have the same family name as him; he thus wanted to be adopted. In this case, considering that the child has always lived with his biological mother and her new husband it would not be possible to send him back to his biological father. When a "a considerable period of time has passed since the child has lived with his or her natural parents, the interest of that child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited" (see paragraph 54).

14. In conclusion, the domestic courts provided relevant and sufficient reasons for depriving the applicant of his parental authority in respect of his son. The applicant's own inaction and passivity had led to the severance of ties between him and the child, thus resulting in the outcome of the civil case, while the applicant himself did not seem to object to his son's adoption by Mr M.K.

DISSENTING OPINION OF JUDGE SERGHIDES

1. The case concerns the removal by the domestic authorities of the applicant's parental authority in respect of his son, V., with whom he was considered to have had no contact for seven years, despite the applicant's counterclaim that he wished to participate in his son's upbringing, to have contact with him once a fortnight, and to spend his annual leave with him.

At the time of the domestic proceedings, which were instituted by his mother, the child was about ten years old. Shortly after the decision of the domestic courts which divested the applicant of his parental authority and also ordered him to pay a monthly amount in maintenance for his son until maturity, the new husband of the mother – with whom the mother had had another son – adopted V.

2. Regrettably, I am unable to join my distinguished colleagues in finding that there has been no violation of the right to respect for family life under Article 8 of the Convention, in relation to the decision to strip the applicant of all his parental authority and the absolute restrictions in the restoration of contact with his son. I respectfully disagree for the reasons I will explain below.

3. On the basis of Article 69 of the Russian Family Code (see paragraphs 26 and 47 of the judgment), the domestic courts removed the applicant's parental control totally, thus extinguishing all parental rights the applicant had had in respect of his son, including the right to have contact with him (see paragraph 48 of the judgment), on the ground that the applicant had not had contact with his son for seven years (see paragraphs 49 and 55 of the judgment), though the applicant in fact had, pending before the same courts, a request to grant him access to his son which was eventually rejected. Unfortunately, the applicant was punished for not having something which he subsequently asked the domestic courts to grant to him, namely access to his son. Instead, the domestic courts not only refused to grant him such access, they, on the contrary, stripped away all his parental authority, simply because of the delay in his initiative. In my view, parent-child relations and ensuing rights should not be treated like property rights which may lapse if not exercised for a period of time. Whenever there is hope that parent-child relations can be restored, the authorities ought to assist them and not terminate them totally and permanently, as they did in the present case.

4. Quite rightly, the Russian Supreme Court held that deprivation of parental authority was a measure of last resort (see paragraph 30 of the judgment) and the present judgment, also rightly, reaffirms that such a measure is a far-reaching one which is inconsistent with the aim of reuniting parent and child (see paragraph 48 of the judgment). It is also correct for the judgment to state that such a measure should only be applied in exceptional circumstances which can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests (ibid).

Furthermore, Article 69 of the Russian Family Code does not provide that whenever there is a ground for deprivation of parental authority, the court must automatically proceed with the deprivation without weighing it up against other factors or considerations.

5. With all due respect, the domestic authorities and the majority in the present case erred as to what constituted exceptional circumstances for the removal of parental authority to be justified by the child's best interests. Family relationships are complex and they are not linear; families can go through better and worse times. It is not easy for a domestic court to conclude that family relations cannot be salvaged, and, therefore, a court should only deprive parents of such a chance if they pose a real threat to the child's welfare. Such a risk did not exist in the present case. I am of the opinion that mere inaction of the parent is not sufficient to satisfy the exceptional circumstance under which authorities may resort to the impugned measure, depriving a parent of all connection with a child. In other words, even assuming that it was the applicant's own inaction that led to the severance of ties between him and his son – and not any alleged parental alienation or psychological manipulation caused to the child by the mother – I am not at all convinced that this factor was sufficient for the purpose of divesting the applicant of his parental authority in respect of his son. Especially so in a situation where the applicant insistently indicated that he wished to restore and develop a relationship with his son (see paragraphs 7 and 22 of the judgment and the present application before the Court).

6. I believe that this is a very restrictive and harsh measure. It is relevant in this connection that, apart from holding that the applicant had failed to maintain contact with V. and to participate in his upbringing for the past seven years, the domestic courts established no other aspects that could have justified the withdrawal of the applicant's parental authority. Indeed, in the domestic proceedings, it had never been established that the applicant was unfit for child-rearing, that he had ever inflicted any harm on his son, or that he posed a threat to the child's health and development or that contact with the applicant might interfere with the child's relevant rights (compare *Haddad v. Spain,* no. 16572/17, § 67, 18 June 2019). Stated otherwise, in the present case, neither the life, nor the physical integrity, nor the health nor the morality of the child were at stake and there was no other exceptional circumstance. It is true that during the seven years when there was no contact, the child established strong family ties with his mother, stepfather and half-brother. In the child's eyes, this was his family and he had no recollection of the applicant. However, there was nothing in these relations to warrant depriving him of the opportunity to rebuild his relationship with his biological father. In order to protect the child's best interests, it is conceivable that the child had to remain in the family unit with which he had already an existing connection. Yet, to reiterate, this is

not sufficient to justify depriving the father of all contact with the child, and all possibility of future contact. Thus, stripping the father of all parental authority does not satisfy the proportionality test and the principle of effectiveness. It is a requirement of the principle of effectiveness that human rights must be practical and effective and not theoretical and illusory. Hence, the interpretative approach to human rights provisions must be pragmatic and realistic, ensuring that they are meaningfully exercised.

7. Moreover, although the period during which the applicant had no contact with V. was one of considerable length, particularly for a child of his age, this factor alone could not have ruled out the possibility of restoring the ties between the boy and the applicant, his biological father. According to the Court's case-law, effective respect for family life requires that future relations between parent and child be determined in the light of all the relevant considerations, and not by the mere passage of time (see, as a recent authority, *V.D. and Others v. Russia*, no. 72931/10, § 116, 9 April 2019). Yet the domestic courts refused the applicant access to V. without examining whether renewed contact between V. and him would be in V.'s best interests. Moreover, according to the Court's case-law, Article 8 includes a parent's right to have steps taken with a view to being reunited with his or her child and an obligation on the national authorities to facilitate such reunion, in so far as the interest of the child dictates that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see, among many other authorities, *Kacper Nowakowski v. Poland,* no. 32407/13, § 74, 10 January 2017).

8. As the domestic courts noted, in an interview with the psychologists, V. stated that, although he knew of the existence of his biological father, the applicant, V. did not remember him and did not wish to have contact with him; his "dad" was Mr M.K. his stepfather (see paragraph 10 of the judgment), which is something that the mother should have discouraged in order not to contribute to the alienation of the biological father. Pursuant to the Court's case-law, children are entitled to be consulted and heard on matters affecting them. In particular, as children mature and, with the passage of time, become able to formulate their own opinions, the courts should give due weight to their views and feelings, as well as to their right to respect for their private life (see *Petrov and X v. Russia*, no. 23608/16, § 108, 23 October 2018). At the same time, those views are not necessarily immutable, and their objections, which must be given due weight, are not necessarily sufficient to override the parents' interests, especially their interest in having regular contact with their child. The right of a child to express his or her own views should not be interpreted as effectively giving an unconditional power of veto to children without any other factors being considered or any examination being carried out to determine their best interests. What is more, if a court based a decision on the views of children who were palpably unable to form and articulate an opinion as to their

wishes – for example, because of a conflict of loyalty and/or their exposure to the alienating behaviour of one parent – such a decision could run counter to Article 8 of the Convention (see *K.B. and Others v. Croatia*, no. 36216/13, § 143, 14 March 2017 and the authorities cited therein). In the latter connection, the applicant argues that the interview in question had been carried out with V. in his absence, and that V. had been living with his mother and might have been influenced by her (see paragraph 35 of the judgment). Besides, it must be pointed out that the judge did not have an interview with the boy to determine his genuine views and ascertain whether he was influenced by his mother (see, about children's rights to express their views, Articles 3(c) and 6 (b)(c) of the European Convention on the Exercise of Children's Rights; Article 12.1 of the United Nations Convention on the Rights of the Child, 1989; and Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice,* Strasbourg, 2010 (available also online), at p. 28, §§ 44-49).

9. Member States are under a positive obligation before terminating parental authority to make attempts to save the relationships between parents and children. Despite the applicant's attempt to request access to the child, he was not given the opportunity to salvage the relationship, or even to meet his son in person. Consequently, the door for such a relationship was closed harshly and permanently – given the child's subsequent adoption by his mother's new husband – by the domestic courts. The domestic courts should not have ruled out the prospect that regaining contact and building new ties with his biological father would be beneficial for V's future. Indeed, the authority of the case of *Mandet v. France*, no. 30955/12, 4 January 2016, should not be overlooked. The facts of *Mandet* are complex, but a strong analogy can be made with the present case. After a divorce, the mother of the child Ms Mandet entered into a relationship with Mr Glouzmann. She gave birth to a child which was registered in her name. Subsequently, Ms Mandet became reconciled with her ex-husband and they remarried, which had the effect of legitimising the child. The boy grew up believing that Mr Mandet was his father, but when he was 11 years old, Mr Glouzmann applied to the court, which found that the boy was his biological father. The Court also ruled that it was in the child's best interests to know his biological father. The fact that it took Mr Glouzmann 11 years in order to pursue recognition of paternity and that the child had already existing bonds with his other family members and Mr Mandet, whom he perceived as a father, did not extinguish the biological father's right to have contact with his child. The 11 years of inaction were not considered an exceptional circumstance such as to prevent recognition of parenthood. Instead, the Court recognised the potential benefit of a future relationship.

10. Equally, allowing the applicant a chance to regain contact with his son in the present case would not negatively impact the bonds that V shared with his existing family. To re-establish a connection with the applicant would only give the child an opportunity to gain something, not to lose out. Yet when making the decision about the best interests of a child, the domestic courts did not take into account the possibility of restoring their ties, but merely focused on the existing relationship.

11. Lastly, no complete and absolute contact prohibitions should be used as a means of disciplining or punishing parents. In the majority's eyes, the parental inaction of the applicant for seven years justified depriving him of his right to family life. Yet such measure, if used as a punishment, would be paradoxical in the light of the very strong case-law of the Court reaffirming that a prisoner, who committed a wrong against society at large should still enjoy his right to family life. As decided in *Dickson v. the United Kingdom* ([GC], no. 44362/04, 4 December 2007), not only should a prisoner maintain the right to existing family ties, but also the States are under a positive obligations to facilitate starting a family. In the light of this case-law, the rights entrenched within the Convention are of such importance that they should not be taken away as a means of punishing the individual beyond what is necessary to keep the public or, as in this case, a child, safe. It has previously been stressed that enabling the applicant to have contact with his son would not put V's welfare at risk, but on the contrary, regaining contact with his biological father would be in his best interests. Therefore, it is inappropriate, and contrary to the spirit of the Convention, to deprive the applicant of his right to family life simply because the Court disapproves of the lengthy period in which he did not initiate contact with his son.

12. It seems that in the mother's mind was the idea that her new husband would adopt the child – an adoption which eventually took place a few months after the applicant was deprived of his parental authority (paragraph 25 of the judgment). It is also striking that the domestic court imposed on the applicant an obligation to pay a monthly amount in maintenance until the boy reached the age of majority, notwithstanding the fact that he would no longer have parental authority over the child (see paragraphs 21 and 56 of the judgment), a point which the majority noted with a hint of implicit criticism.

13. In paragraph 55 of the judgment it is stated that "the national authorities were faced with a difficult task of striking a fair balance between the competing interests – those of the applicant, V., his mother and his *de facto* family members – in a complex case". The judgment then goes on to say that "[i]n particular, they [i.e. the national authorities] were called upon to decide whether it was in V.'s best interests to set in motion his bonding with the applicant – his natural father – contact with whom had been lost for the previous seven years, or rather to consolidate the existing ties between

V. and the family in which he had been living during that period" (ibid.). Subsequently, the judgment continues that "[t]he Court finds that the domestic courts carried out a detailed and carefully balanced assessment of the entire situation and the needs of the child ..." (ibid.). By stating the above, the Court found that the domestic courts "provided 'relevant and sufficient' reasons for their decision, within their margin of appreciation" (ibid). In my humble view, however, the national courts either made no proportionality test at all or erred in what that test should be, and in what the child's best interests were. With due respect I am unable to understand what is the meaning of "consolidation" of the existing relations of the child with his mother, his half-brother and his stepfather. The child's relationship with his mother, half-brother and stepfather was very good and there was no evidence that this relationship should be upset if the child's biological father were also to have contact with him every fortnight. This is a scenario which arises for almost all separated parents. The domestic courts did not take into account the child's best interests in terms of having contact with his father or the applicant's right to respect for his family life. What the domestic courts seem only to have taken into account was the wish of the mother and her new husband to legally alienate the child from his biological father. In that connection the intention of the mother and her new husband was for the latter to adopt the child and they ultimately succeeded.

14. In the light of the foregoing, I submit that the domestic courts did not fairly weigh up the competing interests involved in the decision-making process, and failed to provide "relevant and sufficient" reasons for depriving the applicant of his parental authority, thus extinguishing all his parental rights in respect of his son, including the right to have contact with him (see paragraph 48 of the judgment). It follows that the interference with the applicant's right to respect for his family life was not "necessary in a democratic society".

15. There is another reason why, in my view, there has been a violation of Article 8 of the Convention. The applicant wished to participate in his child's upbringing (see paragraph 7 of the judgment), which implies a request going beyond the right of access. Russian family law, seen as a whole, does not allow the different aspects of parental authority to be allocated to each parent, no matter to what degree or extent. Indeed, parental authority can be depicted as a wide circle which encompasses various smaller circles within it, representing the different aspects of the child's well-being over which the parents may exercise some control: for example, decisions concerning custody, everyday childcare, education, medical treatment, travel abroad, representation before a court, administration of property, etc. It is conceivable that it may be in the child's best interests for a parent to be stripped of some of these rights and obligations, such as for example that of everyday childcare, while also being able to participate in other aspects of the child's upbringing. Regrettably, the domestic courts not

only rejected the applicant's counterclaim regarding his access to the child, they completely ignored his more general request to participate in the upbringing of his child.

16. This inflexibility and harshness of the Russian family law system did not give discretion to domestic courts to make a decision allowing one parent to participate in some aspect(s) of the upbringing of the child while leaving the other parent with a more prominent role.

17. Furthermore, this inflexibility and stringency of the domestic law did not allow the national courts to endorse two of the most basic principles of the Convention, the principle of effectiveness and the principle of proportionality, in dealing with the participation of the two parents in different aspects of the needs of their child, for the sake of its best interests. Of course, the principle of subsidiarity cannot justify a lack of European scrutiny in ensuring that the requirements of Article 8 are met when a domestic legal system, as in the present case, by the indivisibility of parental authority as a legal concept, does not facilitate any proportionality test or any guarantee for the effective protection of the right to respect for family life. In other words, Russian family law by its stringency and inflexibility forces the domestic courts to apply an "all or nothing" approach regarding parental authority and in this sense can be understood the very existence and operation of Article 69 of the Russian Family Code.

18. The Court has shown its disapproval towards the inflexibility of Russian family law in two cases, namely *Nazarenko v. Russia*, no. 39438/13, §§ 64-68, ECHR 2015 (extracts), and *V.D. and Others v. Russia*, cited above §§ 127-131, by finding a violation of Article 8 of the Convention, because Russian family law did not permit a person who was the guardian of a child but not his or her biological parent to maintain access to the child after the biological parents regained their parental authority. The inflexibility of Russian family law is even more striking in the present case than in those other two cases, since here the applicant is the biological parent of the child.

19. For all the above reasons there has, in my view, been a violation of Article 8 of the Convention and the applicant would be entitled to an award in respect of non-pecuniary damage, which, however, I will not estimate, since I am in the minority.

DISSENTING OPINION OF JUDGE SCHEMBRI ORLAND

1. *Ilya Lyapin v. Russia* concerns the termination of parental rights, which the father had hitherto enjoyed at law, being a preliminary step in a legal *iter* which culminated in the adoption of his child by the child's stepfather. This latter procedure did not require the applicant's consent under Russian law. I was not part of the majority which decided to find that there had been no violation of Article 8 of the Convention in respect of Mr Lyapin's complaint.

2. I must admit that I was of two minds when assessing the facts of this case because it was apparent that, until the mother had brought the legal proceedings which form the merits of this case, the father had displayed no interest in asserting the rights which are encompassed under the umbrella of parental authority such as the right to participate in the decision-making process concerning his son's welfare or contact and visiting rights. Nothing in the records of the case shows that he had displayed the slightest interest in following his son's progress during the years preceding his former wife's request for termination of his authority. Similarly, it was also evident that he had, for the important formative years of his son's life, neglected the responsibilities which are at the heart of parental authority (a dynamic obligation to ensure his son's well-being, to follow his son's development or contribute towards his maintenance) to the extent that his son did not know him and would have nothing to do with him. Viewed from the perspective of the child, children are holders of rights as well as beneficiaries of protection. Parental authority is as much, if not more, an issue of parental responsibilities than a question of parental rights. This opinion is not, therefore, intended to diminish this child-centred approach.

3. It must be stated at the outset that the applicant did not contest the adoption of his child. If this had been so, then such contestation would have added another layer to this case, as adoption without the biological father's knowledge and consent has given rise to many applications before this Court (see *Keegan v. Ireland*, 26 May 1994, Series A no. 290; *Görgülü v. Germany*, no. 74969/01, 26 February 2004; and *K.A.B. v. Spain*, no. 59819/08, 10 April 2012). Yet it is undeniable that the proceedings at issue were a precursor to that adoption.

4. The Court has repeatedly held that measures which entail severing all parental links with a child would only be justified in exceptional circumstances by the overriding requirement of the child's best interests (see *R. and H. v. the United Kingdom*, no. 35348/06, § 81, 31 May 2011). That approach, however, may not apply in all contexts, depending on the nature of the parent-child relationship (see *P., C. and S. v. the United Kingdom*, no. 56547/00, § 118, ECHR 2002-VI). Where the decision is explained in terms of a need to protect the child from danger, the existence of such a danger should be actually established (see, *mutatis*

mutandis, *Haase v. Germany*, no. 11057/02, § 99, ECHR 2004‑III (extracts)).

5. In the present case, the domestic courts dismissed the applicant's request to be granted access to the child, finding that the lack of contact over a prolonged period of seven years had effectively severed all ties (see §§ 18, 20 and 21 of the judgment). In the difficult and turbulent context of family disputes, the domestic courts are best placed to assess the evidence, weigh up the facts and determine the child's best interests.

6. However, whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and ensure due respect for the interests safeguarded by Article 8. In particular, stricter scrutiny is called for as regards any further limitations such as those in the present case (see *Sahin v. Germany* [GC], no. 30943/96, § 65, ECHR 2003-VIII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 63, ECHR 2003-VIII). Furthermore, in assessing the quality of the decision-making process, the Court will have to see whether the conclusions of the domestic authorities were based on adequate evidence (see *N.P. v. the Republic of Moldova*, no. 58455/13, § 69, 6 October 2015).

7. The domestic court, in reaching its decision, applied Article 69 of the Russian Family Code (see paragraph 16) and decided that the deprivation of parental authority was a measure of last resort applicable only in a situation where it was impossible to protect a child's rights and interests in another way. It is not for this Court to interpret the provisions of domestic law but from a reading of Article 69 grave faults are considered by the legislator as a basis for the measure applied by the domestic courts, none of which appear to be specific to this particular case.

8. As to the balancing exercise undertaken by the domestic courts, the District Court focused entirely on the father's passivity during the intervening years – an important factor, no doubt, but one which, to my mind, in the absence of a direct threat to the child's well-being on the part of the father, required further evaluation. It has been held by the Court that effective respect for family life requires that future relations between parent and child be determined in the light of all relevant considerations and not by the mere passage of time (see *V.D. and Others v. Russia*, no. 23608/16, § 116, 23 October 2018).

9. In this connection, the assessment of the parent-child relationship, conducted exclusively with a 10-year old boy who had not seen his father for the past eight years, was one-sided and reliant on the child's declarations. The right of a child to express his or her opinion, whilst an important evidential element in family proceedings of this nature, is not of itself decisive of the outcome, especially when the father-son ties were to be completely truncated. The father's request for a rescheduling of the assessment session was rejected for no apparent justifiable reason by the

domestic court. Nor was a limited degree of contact, even if only supervised, contemplated prior to the ultimate decision. Consequently the domestic court did not have any opportunity to properly assess the father and child together. These measures would have provided important evidence in assisting the court in a fair balancing exercise prior to the decision to irreparably terminate family ties, in a situation where there were no risk factors for the child.

10. Without such a proper assessment, and given the absence of any accompanying risks of physical or psychological danger which the father could have posed for the child, a decision of total severance of family ties solely on the basis of the father's inactivity is disproportionate and consequently in violation of the applicant's rights under Article 8 of the Convention.