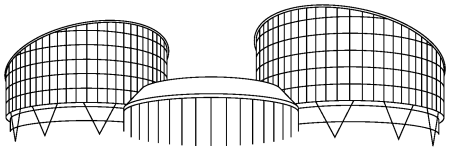

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KACPER NOWAKOWSKI v. POLAND

(Application no. 32407/13)

JUDGMENT

STRASBOURG

10 January 2017

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 Kacper Nowakowski v. Poland,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 22 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 32407/13) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Kacper Nowakowski ("the applicant"), on 10 May 2013.

2. The applicant was represented by Ms B. Skalimowska, a lawyer practising in Białystok. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the decision concerning his contact rights had amounted to a violation of Article 8 of the Convention and Article 14 of the Convention read in conjunction with Article 8.

4. On 29 September 2014 the above-mentioned complaints were communicated to the Government and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court. The application was granted priority treatment under Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and lives in Białystok.

A. Background facts

6. The applicant is deaf and mute. He uses sign language to communicate with other people.

7. The applicant and A.N. married on 20 August 2005. A.N. suffers from a hearing impairment and has had a hearing implant fitted. She communicates both orally and through sign language.

8. The son (S.N.) of the applicant and A.N. was born on 10 December 2006. He also suffers from a hearing impairment. In February 2007 the applicant and his wife separated. On 11 June 2007 A.N. filed a petition for divorce.

9. In the course of the divorce proceedings, on 19 July 2007 the Białystok Regional Court issued an interim decision on the applicant's contact with his son. Under that decision, the applicant could visit his son every Tuesday and Thursday between 4 p.m. and 6 p.m. and every Sunday between 2 p.m. and 5 p.m. at the child's place of residence and without the presence of any third parties.

10. The court ordered experts from the Białystok office of the Family Consultation Centre (*Rodzinny Ośrodek Diagnostyczno-Konsultacyjny* -"the RODK") to prepare an opinion on the suitable form and frequency of the applicant's contact with his son. In the course of his interview with the experts, the applicant underlined his commitment to maintaining contact with the child, without giving any details. The experts established that the applicant had not been visiting his son as frequently as he was allowed under the interim decision of 19 July 2007. The last contact had occurred on 25 August 2007.

11. In their opinion, dated 15 October 2007, the experts underlined that the emotional ties between the mother and the child were strong and natural. However, the ties between the applicant and his son were weak and superficial. In the view of the experts, taking into account the necessity to ensure the proper development of the child, contact between the applicant and the child should take place four times a month and last two hours on each occasion.

12. On 15 November 2007 the Białystok Regional Court granted a decree of divorce without ascribing blame for the breakdown of the marriage. In its judgment the court also ruled that parental authority should be exercised by both parents and that the child should reside with the mother. It further ruled that the applicant had a right to see his son on the first three Fridays of each month from 4 p.m. until 6 p.m. and on every fourth Sunday of each month from 11 a.m. until 1 p.m. Contact should take place at the mother's home in her discreet presence but in the absence of third parties. The applicant was further ordered to pay child maintenance.

13. It appears that neither of the parties appealed against the judgment, which consequently became final on 6 December 2007.

B. Proceedings concerning a change in contact arrangements

14. In August 2011 the applicant filed an application with the Białystok District Court for a change to his contact arrangements. He asked the court to be allowed to have contact with his son on every second and fourth weekend of each month from 3 p.m. on Friday until 6 p.m. on Sunday, away from the mother's home. He also asked to be allowed to see his son for some time over the Christmas and Easter periods and to spend with him half of the winter holidays and half of the summer school holidays. The applicant argued that the child had already reached the age of five and needed increased contact with his father in order to strengthen their ties.

15. The applicant admitted that after the divorce he had not seen his son for one year on account of his health problems. He submitted that his son was happy to spend time with him and to play with him. The applicant asserted that he had been able to provide appropriate care to his son and that in the event of need he could count on the support of his family. It was the mother of the child who had obstructed his contact with the child and made the atmosphere unfriendly. For example, she refused to pass on oral messages from their son to the applicant. The mother did not inform him about important decisions concerning the child and tried to marginalise him.

16. The mother submitted that the applicant had remained passive during his meeting with S.N. and that she had not obstructed those meetings. In her view, S.N. did not have any emotional ties with his father and did not need contact with him. Further, the applicant would be unable to properly care for S.N. The mother lived together with her parents and her son.

17. On 4 November 2011 a court guardian submitted a report to the court. According to that report, the applicant had not been visiting his son regularly on account of his being treated for depression and other illnesses. He had not seen his son since 12 October 2011. However, the mother of the applicant had been visiting her grandson regularly.

18. On 15 March 2012 the applicant applied for an interim decision and asked for the right to have contact with his son during the second day of the Easter holidays, from 10 a.m. to 5 p.m., and to take him away from his place of residence. On 23 March 2012 the Białystok District Court issued an interim decision allowing the applicant to visit his son during the second day of the Easter holidays from 11 a.m. to 1 p.m. at the child's place of residence.

19. On 30 April 2012 the RODK issued an opinion commissioned by the District Court. It had been prepared by a psychologist, an education specialist and a psychiatrist who had met the parents and the child and had been assisted by an interpreter of sign language. The experts stated that emotional ties between the mother and the child were strong – indeed, the mother had a tendency to be overprotective. The child's ties with the father were superficial and weak. The child recognised the applicant as his father

but did not consider him a part of his family. The father's ties with the child were positive, but founded on limited experience and high expectations. These ties were also affected by the communication difficulties between them. The experts further noted that the conflict between the parents impeded their cooperation with regard to the child. They suggested that the parents be counselled by a specialist with a view to their being taught how to accept each other as a parent.

20. The experts opined that an increase in contact, as requested by the applicant, was not advisable, on account of the limited level of communication between him and the child, the child's age and history, and the strength of the child's ties with the mother and maternal grandparents. They recommended, however, that contact should also take place outside the mother's home (at playgrounds, during walks) but in her presence. The mother should cooperate with the father and support him in making his contact with the child more diverse. The experts noted that the ability of the applicant to care independently for his son was considerably limited. In their view, the interests of the child required that the parents cooperate with each other, despite the communication problems. The experts added that the mother should be more proactive in this regard but that the father should not contest the mother's decisions concerning the child.

21. The applicant contested the experts' findings and alleged that the opinion should have been prepared with the assistance of a specialist in deaf education and a psychologist specialising in the needs of deaf people. He claimed that their finding that contact could not take place without the presence of the mother on account of his (that is to say the applicant's) disability amounted to discrimination. The experts had also disregarded the possibility of the paternal grandmother rendering assistance and of ordering the parents to undergo family therapy.

22. The District Court heard evidence from the RODK experts. The psychologist, G.H., admitted that the RODK did not have specialised methods of examining deaf people but stated that such methods were not necessary in respect of determining the advisability of maintaining contact. She noted that the child was well-developed and rehabilitated (*zrehabilitowanym*). The main obstacle in respect of contact was the conflict between the parents and the lack of cooperation between them. Such circumstances created a particular difficulty in the case of a child with a hearing impairment. The psychologist observed that the applicant's disability also constituted an objective obstacle. In her opinion, contact should take place two to three times a month.

23. The court dismissed the applicant's request for a second expert opinion since the earlier opinion was complete and comprehensive.

24. The court also heard the parties and witnesses (family members). It further took into account information submitted by a court guardian after

visiting the applicant's and the mother's respective homes, together with relevant documentary evidence.

25. On 9 August 2012 the Białystok District Court dismissed the applicant's application for a change to the contact arrangements.

26. The court established that the parents of S.N. remained in conflict and could not reach an agreement regarding the child's contact with the father. Since September 2009 the child had attended a nursery school with an integration unit, where he had remained under the supervision of a specialist in deaf education, a speech therapist and a psychologist. He suffered from a hearing impairment and used a hearing aid. The child required specialised medical care and followed a rehabilitation programme. He was certified as having a second-degree disability.

27. Having regard to all the evidence, and in particular the expert opinion, the court found that the requested change to the contact arrangements would not be in the child's best interests. It was true that the first decision in respect of contact had been given five years previously, when S.N. had been a baby and when the presence of his mother during contact had been justified by the child's age. However, the age of the child was not the only element to consider. Other relevant elements were the specifics of the child's development, his state of health, his disability, the need for his permanent medical rehabilitation and his heavy dependence on his mother and maternal grandparents. The court found that these elements still justified the discreet presence of the mother and at her home during the applicant's contact visits. It noted that the requested change to the contact arrangements would be too far-reaching, since the applicant wanted to see his son more often, outside S.N.'s place of residence and without the mother being present. The court observed that except for the first two months of the child's life the applicant had not lived with him or cared for him. The applicant admitted that he had not always kept to scheduled visits. Sometimes the reasons for this had been beyond his control (health problems or evening school commitments) and sometimes contact had been obstructed by the mother. However, in consequence, his limited and irregular involvement in the child's life had adversely influenced the emotional ties between the father and the son.

28. The court underlined that the applicant had not been fully availing himself of his rights to contact his son, as granted by the divorce judgment. Nonetheless, once their ties were strengthened and the applicant made full use of the rights already granted to him, it would be possible to extend contact.

29. The court also found that it could not disregard the communication problems between the applicant and his son. It did not agree with the applicant that this constituted a discriminatory measure against him; rather, it constituted an objective and independent factor that hampered his communication with the child. The applicant, irrespective of his own and

his son's disability, had an incontestable right to contact with his son. However, the communication problem should be taken into account in regulating the contact arrangements so they would remain as favourable as possible to the child. The court noted that the applicant used mostly sign language (and articulated a few single words), while the child communicated only orally, so communication difficulties naturally arose. For this reason, it was still justifiable that the mother, who was able both to use sign language and communicate orally, should be present during the applicant's visits. The mother's presence, which provided the child with a sense of security, could also help him to relax during his meetings with the father. The court disagreed with the applicant that the paternal grandmother could ensure proper communication between him and his son. The issue was not only about interpreting between sign language and speech but also about ensuring security and stability, which could only be provided by the mother. The applicant's son did not know his paternal grandmother well and so her presence would not compensate for the absence of his mother.

30. The court underlined that the applicant's contact with his son should first and foremost ensure the security and stability of the child. The stress to which he would be exposed in the event of a change to his current environment and in the absence of persons with whom he usually spent his time would certainly jeopardise the child's well-being and damage his sense of security. The court dismissed the applicant's argument that the child spent most of his day in a nursery school (that is to say outside his home and without his mother), so he could easily stay at the applicant's father's home. It noted that the mother had been preparing her son for nursery school over a long period of time and had at first attended the school with him for short periods of time so he could become familiar with the place.

31. The court observed that the child's paternal grandmother had not visited her grandson for some time and was therefore not a person with whom the child was familiar or who could assist as an interpreter between the applicant and his son.

32. The fact that the child had been paying short unsupervised visits to a neighbour of the mother's family did not support the applicant's argument either. The court noted that the neighbour was a familiar person to the child, since he had been regularly visiting the child's family. In addition, the unsupervised visits to the neighbour's flat did not last longer than one hour.

33. Lastly, the court did not consider it necessary to impose an obligation on the parents to undergo family therapy. It noted that the experts had opined that both parents required contact with a specialist who would assist them in mutually accepting each other as a parent. However, the only suitable place for such therapy for persons with impaired hearing was the premises of a foundation (*fundacja*) attached to the nursery school attended by the child. The mother stated that she already attended a parent support

group there and the applicant declared that he could do the same. In these circumstances, the court found that there was no need for its intervention.

34. The applicant lodged an appeal with the Białystok Regional Court. He argued that the District Court had failed to respect the principle of non-discrimination against deaf and mute persons by dismissing his application for unsupervised contact with his son. He invoked Article 4 § 1 of the Convention on the Rights of Persons with Disabilities. The applicant further argued that the lower court had erred in holding that the child's interests did not justify a change to contact arrangements. The expert opinion indicated that the presence of the mother during contact created tensions between the parents and that this was unfavourable to the child. In addition, according to some witnesses, the contact took place in the presence of third parties.

35. The applicant contested the lower court's finding that the child's paternal grandmother was a stranger to him; he argued that the child would not be exposed to stress in the event of contact without the mother's presence and outside her home in view of the fact that the child attended nursery school and was cared by a neighbour a few times a week. Lastly, the applicant contested the refusal to order a supplementary expert opinion.

36. On 23 November 2012 the Białystok Regional Court dismissed the applicant's appeal. It found that the lower's court assessment of the evidence had been correct and that the refusal to order a supplementary expert opinion had been justified.

37. The Regional Court noted that the contact arrangements could be amended if the interests of the child so required (Article 113^5 of the Family Code). It concurred with the lower court that there was no justification for a change to the existing arrangements since the applicant already had the possibility of regular contact with his son and if used this would enable the parties to strengthen their ties. The findings of the RODK experts clearly supported the conclusion that no change was necessary. The Regional Court also agreed that the existing conflict between the parents would certainly prevent the applicant from benefitting from increased contact. It stressed that the priority of the court in such cases was to take into account the interests of the child, not the interests of either of his or her parents.

38. It further underlined that the presence of the mother during visits was necessary in order to ensure the child's sense of security since the mother was the primary carer, with strong ties to the child. The paternal grandmother could not provide the same sense of security. In addition, the mother's presence would solve the problem of communication between the applicant and the child. The Regional Court did not agree with the applicant that the lower court's taking into account the issue of communication barrier had amounted to discrimination against him. The communication barrier was a real obstacle to the forging of ties between the applicant and his son and it could not be disregarded, given that the interests of the child were of primary consideration, overriding the individual interests of the parents. The

Regional Court stressed that this constituted an objective obstacle, not a form of discrimination against the applicant.

C. Proceedings concerning parental authority

39. In July 2011 A.N. brought an action in the Białystok District Court for an order limiting the scope of the applicant's parental authority over S.N. to those issues that concerned their son's education. She submitted that the applicant had refused to give his consent to an identity document being issued for the child.

40. In October 2011 the applicant brought a counteraction seeking an order to compel A.N. to undergo family therapy. He argued that A.N. was acting to the child's detriment by refusing to cooperate with the applicant in matters concerning the child. She also humiliated and insulted the applicant in the child's presence and undermined his authority.

41. On 2 August 2012 the Białystok District Court restricted the applicant's parental authority over S.N. to issues concerning his education. It dismissed the applicant's counteraction.

42. The court relied on the opinion prepared by the experts of the RODK for the purposes of the proceedings. The experts concluded that the joint exercise of parental authority was practically impossible. The reason for this was the permanent conflict between the parents, as well as the communication difficulties. The experts recommended that both parents undergo therapy with a view to developing their parenting skills. They further pointed out that that the possibility of communication between the applicant and his son was significantly restricted because of the different method that each used to communicate. In the view of the experts, the mother of the child properly exercised her parental authority, in particular with respect to the child's needs, the necessity of treatment, and the development of the child's social skills.

43. Having regard to the evidence, the court found that it was justifiable to restrict the applicant's parental authority and limit it only to matters concerning the child's education. Its decision was motivated by the lack of agreement between the parents in respect of the exercise of parental authority. The applicant was not to be solely blamed for this situation. Furthermore, communication with the applicant was limited on account of his disability; however, the mother had been aware of this fact since the beginning of their relationship. The court further took into account the fact that the child was being raised by the mother, the parents lived apart, and there was a communication barrier between the applicant and the child. This was of importance in respect of matters concerning the child's health.

The court underlined that the fact that communication between the applicant and his son was limited did not mean that the applicant was a bad father. The court found that it was not necessary to give the applicant the

possibility to have a say in matters concerning the child's medical treatment since these were sometimes urgent – therefore, it was the mother, with whom the child lived, who should decide on them.

44. With regard to the applicant's request for the mother to be obliged to undergo family therapy, the court did not find this justified. It took into account the fact that the mother had already been attending a support group and found no reasons to formally oblige her to undergo therapy. It was established that the mother had independently taken important decisions concerning the child of which she had not informed the applicant and that she was overprotective. Nonetheless, the court found that she properly exercised her parental authority and that the child's welfare was not endangered.

45. The applicant appealed.

46. On 23 November 2012 the Białystok Regional Court dismissed the applicant's appeal. It underlined that the court of first instance had comprehensively assessed the evidence in the case. In the view of the Regional Court, the limitation of the applicant's parental authority was in the interests of the child. It ruled that the communication barrier constituted an objective obstacle to relations between the applicant and his son and that taking it into account could not be considered to constitute a form of discrimination against the applicant.

II. RELEVANT DOMESTIC LAW

A. Constitution of the Republic of Poland

47. The relevant articles of the Constitution provide as follows:

"**Article 47**.

Everyone shall have the right to legal protection of his private and family life ...

Article 69.

Public authorities shall provide, in accordance with statute, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication."

B. Family and Custody Code

48. The relevant part of the Family and Custody Code of 1964, as in force at the material time, reads:

"**Article 113**.

§ 1. Regardless of [who exercises] parental authority, the parents and their child have the right and obligation to maintain contact with each other.

§ 2. Contact with the child will include, in particular, spending time with the child (visits, meetings, taking the child outside of his or her place of residence) and direct

communication, maintaining correspondence, and using other means of distance communication, including electronic communications.

Art. 113[1].

§ 1. If the child lives permanently with one parent, the manner of the other parent maintaining contact with the child shall be determined by the parents jointly, having regard to the welfare of the child and taking into account his or her reasonable wishes; in the absence of an agreement [between the parents] the guardianship court shall decide.

§ 2. ...

Article 113[2].

§ 1. If the welfare of the child so requires, the guardianship court shall limit contact between [either or both] parents and the child.

§ 2. The guardianship court may, in particular:

1) prohibit meetings with the child,

2) prohibit taking the child outside of his or her place of residence,

3) allow a meeting with a child only in the presence of the other parent or foster parent, a guardian, or another person designated by the court,

4) limit contact to specific kinds of distance communication,

5) prohibit distance communication.

Article 113[4].

When deciding on the matter of contact with the child, the guardianship court may compel the parents to undertake a specific course of action; in particular, [it may] refer them to institutions or specialists providing family therapy, counselling or other appropriate assistance to the family, at the same time indicating the manner of overseeing compliance with the orders issued.

Article 113[5].

The guardianship court may change its decision on contact, if the welfare of the child so demands."

III. INTERNATIONAL LAW INSTRUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

49. The relevant provisions of the Convention on the Rights of Persons with Disabilities, which came into force in respect of Poland on 25 October 2012, read as follows:

Article 5 - Equality and non-discrimination

"1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

Article 23 - Respect for home and the family

"1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

a. The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

b. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

c. Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

...

4. 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. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. ..."

B. Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 (Resolution 44/25)

50. The relevant provisions of the Convention on the Rights of the Child, which came into force in respect of Poland on 7 July 1991, read as follows:

Article 3

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

..."

Article 9

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...

...

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

IV. COUNCIL OF EUROPE MATERIALS

51. Recommendation No. R (98) 1 of the Council of Europe's Committee of Ministers to member States on the Family Mediation, adopted on 21 January 1998, recognised the growing number of family disputes, particularly those resulting from separation or divorce. Noting the detrimental consequences of conflict for families, the texts recommended that the member States introduce or promote family mediation or, where necessary, strengthen existing family mediation. In accordance with paragraph 7 of the Recommendation, the use of family mediation could "improve communication between members of the family, reduce conflict between parties in dispute, produce an amicable settlement, provide continuity of personal contacts between parents and children, and lower the social and economic costs of separation and divorce for the parties themselves and States" (see also the European Commission for the Efficiency of Justice's Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters (CEPEJ (2007)14)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicant complained that the dismissal of his application for an extension of contact with his son had infringed his right to respect for his family life. He alleged that the courts had offered him no assistance in

facilitating contact with his son. The applicant relied on Article 8 of the Convention, which reads as follows:

> "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. Admissibility

53. The Government maintained that the application was inadmissible on account of the applicant's lack of victim status. They underlined that the dismissal of the applicant's request for an extension of contact did not affect contact arrangements already in place. The applicant had not visited his son for one year after the divorce judgment and, when he had renewed contact, his visits had not been as frequent as had been possible under the divorce judgment.

54. The applicant disagreed with the Government's submission. It was true that after the divorce he had not made use of all the possibilities for contact with his son, but he underlined that he had been hospitalised during that period. There had been problems with diagnosing the applicant's medical problems and it had been suspected that he might have been suffering from some infectious disease. During the period in question, the applicant had not visited his son because he had not wanted to transmit a disease to him. Eventually, the applicant had been diagnosed with pernicious anaemia (which had been caused by stress related to the divorce) and Hashimoto's disease. The applicant was also suffering from depression, for which he had started undergoing therapy. Accordingly, the applicant could not be blamed for missing visits during 2007 and 2008.

55. The Court considers that the Government's objection regarding the lack of victim status is closely linked to the merits of the complaint under Article 8. It therefore joins this objection to the merits.

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

B. Merits

1. The applicant's submissions

57. The applicant submitted that his son, born in 2006, had been only eleven months old on the date of the divorce judgment. The applicant did

not question that an infant in the first months of his life should reside with the mother. However, with the passage of time, the child's needs had changed and for this reason the applicant had filed his motion for an extension of contact in August 2011. His son had started his pre-school education and he did not require the constant presence of his mother. In the applicant's view, this was the right moment to have contact with his son in places other than at the mother's home.

58. The applicant agreed that the interests of the child were of primary importance and should prevail over the interests of the parents. However, in order to ensure S.N.'s proper development, the child should have the possibility of seeing his father as often as possible. Many psychological studies had indicated that the marginalisation of the father's role could have a negative influence on a child's well-being and personal development. It was in the joint interests of the father and the child to have frequent and lasting contact in a diverse environment. The applicant alleged that the domestic courts had done nothing to promote the ties between him and his son and had deprived the applicant of the possibility of being a real parent to his son.

59. The applicant argued that the domestic courts had not taken into consideration many relevant factors of which they had been aware. For example, the mother and the maternal grandmother of S.N. had created an unfriendly environment when the applicant had been visiting his son. The applicant could visit his son only in a room of a surface area no greater than four square metres, even though S.N. had his own bedroom. The applicant wanted to spend more time with his son and felt a strong emotional connection with him. However, the conditions during his visits could not be described as neutral and did not guarantee freedom of communication between the applicant and his son. During visits, the applicant was treated dismissively. The mother and the maternal grandmother did not communicate with each other and with the child in sign language, so the applicant was excluded from any discussion and felt left out. In these conditions, it was really difficult to create closer ties with his son. Furthermore, the district court was aware that the mother was refusing to teach S.N. sign language and that the child consequently could not communicate with the applicant without the assistance of third parties.

60. The applicant disagreed that his disability and the resulting communication barrier were only one of many reasons for the dismissal of his application. It was the failure to adjust the contact arrangements to reflect the age of the child and the applicant's hearing impairment which had created the communication barrier. The applicant submitted that all parties to the case (that is to say the child and both parents) suffered from a hearing impairment. The mother had a problem with both oral and sign language communication and, contrary to the Government's assertions, she was unable to serve as an interpreter between the applicant and his son.

61. The applicant submitted that during visits he had taught sign language to his son. This was necessary for establishing stronger ties between them and moulding the identity of the child, as well as helping the child to avoid problems with functioning in the society. In addition, the fact that the mother did not teach S.N. sign language for the purposes of enabling him to communicate with the applicant could not be seen as conducive to the child's well-being.

62. The applicant's disability could not be seen as an objective obstacle to his communication with S.N. When the applicant and A.N. had decided to establish a family and to have a child, they had taken into consideration their respective disabilities and all consequences that might arise therefrom. The actions of the mother – who had tried to eliminate the applicant from his son's life by limiting their contact – had been irresponsible. The decision of the domestic courts should have furthered the child's interests, namely that the child should have had the opportunity to spend time with his father and his father's family in the applicant's home. The applicant should have been given a chance to make his son feel secure in his presence.

63. The applicant maintained that the child's best interests demanded a broader perspective than the one adopted by the domestic courts. It was essential to promote the ties between the applicant, his son and the applicant's family in order to ensure the optimum development of the child in the light of the child's disability. A deaf-mute father could understand better than anybody else what kind of obstacles his disabled son could encounter in his life. The applicant had the necessary experience and wanted to prepare his son for the challenges of adult life.

64. The applicant argued that the domestic courts had not taken any measures prescribed by the law or necessary for the well-being of the child which could have ended the conflict between the parents. On one hand, the domestic courts had made any future change in contact arrangements conditional upon the applicant developing stronger ties with his son, but on the other hand, they had not been proactive in encouraging this to happen. The mother had acted as an intermediary between the applicant and S.N., even though she had been in big conflict with the applicant. The conflict between the parents should not have been allowed to have an effect on the father's contact with his child.

65. The domestic courts had treated the applicant as if he were intellectually or emotionally disabled. On account of his disability the applicant was, to some extent, isolated from society, but at the same time he was fully physically and mentally capable. The applicant studied, worked and was independent in all his life activities. He had graduated from a high school for adults and had obtained a qualification as a masseur. The domestic courts' finding that the applicant, on account of his hearing impairment, would not be able to ensure his son's safety during contact outside the mother's house was highly discriminatory. In conclusion, the

applicant stated that the court decisions had violated his right to respect for his family life.

2. The Government's submissions

66. The Government were convinced that the conduct of the domestic courts had not violated Article 8 of the Convention. They submitted that the applicant had agreed to a no-fault divorce and for years had not questioned the ruling concerning his contact with his son. In addition, the applicant had not visited his son for one year following the granting of the divorce, and in the subsequent period his contacts with his son had not been as regular as that provided for by the divorce judgement.

67. The Government underlined that the disability of the applicant and the communication barrier had not been the only or primary reasons for issuing the decision complained of by the applicant. The domestic courts had been guided by the child's best interests and had taken into account various elements, such the child's development, his state of health, and his strong ties with his mother and with his maternal grandparents.

68. The right to maintain contact was primarily the right of the child and not the right of the parents. In the present case, the interests of the applicant's minor child, who was disabled like his father, should prevail. The Government underlined the necessity of continuing the child's treatment and rehabilitation so as to ensure the best prospects for his development in the future. The domestic courts had taken into account the fact that children with impaired hearing were more exposed to stress related to changes in their routines, since they were not always able to understand external factors. Accordingly, the necessity of guaranteeing a sense of safety and stability was crucial for the child's proper development which, in the domestic courts' view, could only be ensured by the child's mother. Furthermore, the child's mother could serve as an interpreter between the applicant and his son, since she used both oral and sign language.

69. In addition, the domestic courts underlined that the applicant's right to contact with his son remained unquestioned. Nonetheless, objective obstacles, such as the disability of a parent or of a child, should be taken into account when deciding on the form of contact. The Government emphasised that once the applicant established ties with his son and overrode the communication barrier there would be prospects for extending his contact rights. However, the applicant should first familiarise the child with himself within the scope of the existing contact arrangements.

3. The Court's assessment

(a) Relevant principles

70. 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, *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII, and *G.B. v. Lithuania*, no. 36137/13, § 87, 19 January 2016).

71. Even though the essential object of Article 8 is to protect the individuals against arbitrary interference by public authorities, there may be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see *Hämäläinen v. Finland* [GC], no. 37359/09, § 63, ECHR 2014). In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see, amongst other authorities, *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290, and *Zawadka v. Poland*, no. 48542/99, § 53, 23 June 2005). When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 117, 3 October 2014).

72. Where the measures in issue concern parental disputes over their children, however, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact questions, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, amongst other authorities, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 68, Series A no. 130).

73. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. The Court has thus recognised that the authorities enjoy a margin of appreciation when deciding on custody matters. However, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of contact, and as regards 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 the family relations between a young child and one or both parents would be effectively curtailed (see *Sahin v. Germany* [GC], no. 30943/96, § 65, ECHR 2003-VIII).

74. In relation to the State's obligation to take positive measures, the Court has held that in cases concerning the implementation of the contact rights of one of the parents, Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his 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; the State's obligation is not one of result, but one of means (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Cristescu v. Romania*, no. 13589/07, § 61, 10 January 2012; *Prizzia v. Hungary*, no. 20255/12, § 35, 11 June 2013; *P.K. v. Poland*, no. 43123/10, § 86, 10 June 2014).

75. The Court recalls that 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). The child's best interests may, depending on their nature and seriousness, override those of the parents (see *Sahin*, cited above, § 66). The parents' interests, especially in having regular contact with their child, nevertheless remain a factor when balancing the various interests at stake (see *Neulinger and Shuruk*, cited above, § 134). Child interests dictate that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX).

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

76. The Court observes that it was not disputed by the parties that the tie between the applicant and his son falls within the scope of "family life", within the meaning of Article 8 of the Convention. It takes the same view.

77. The Court notes that under the divorce judgment of 15 November 2007 the applicant's son, who was then eleven months old, was to reside with his mother, while the applicant was granted the right to see his son for two hours every week (see paragraph 12 above). At the time the applicant did not object to these arrangements. It was uncontested that the applicant had not fully availed himself of his contact rights owing, *inter alia*, to his health problems (see paragraphs 15 and 27-28 above).

78. It appears that subsequently the applicant was keen on developing a closer relationship with his son. In August 2011 the applicant applied to the Białystok District Court for an extension of contact rights. He asked to be allowed to have contact on the second and fourth weekend of every month, as well as over part of Christmas, Easter and half of the main school

holidays (see paragraph 14 above). The applicant wanted to increase contact with his son with a view to strengthening their ties, since his son had almost reached the age of five and had started his pre-school education.

79. The domestic courts refused the applicant's request for an extension of contact. They found that the requested change would not be in the child's best interests, having regard to a range of factors, such as the child's disability and his heavy dependence on the mother. It was still necessary that the contact took place in the presence of the mother and at her home. It was considered that the mother ensured security and stability for the child. Furthermore, the requested change of contact arrangements was going too far, given the previously limited extent of the contact between the applicant and his son. In addition, the domestic courts had to pay some regard to the communication problems between the applicant and his son, given that the applicant used exclusively sign language while his son communicated only orally (see paragraphs 27-32 and 37-38 above).

80. The decisive question in the present case is whether the national authorities took all the appropriate steps that could reasonably have been demanded to facilitate contact between the applicant and his son (see, *Ignaccolo-Zenide*, cited above, § 96; *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII; *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003; and, *mutatis mutandis*, in respect of the steps required to enforce existing contact arrangements, *P.K. v. Poland*, cited above, § 87; *Malec v. Poland*, no. 28623/12, § 69, 28 June 2016; *Cristescu*, cited above, § 61; and *Manuello and Nevi v. Italy*, no. 107/10, § 52, 20 January 2015).

81. The Court underlines the importance of the child's interests in preserving and developing his or her ties with his or her family, and in particular with his or her mother and father. It considers that, in principle, it is in the child's best interests to maintain contact with both parents, in so far as practicable, on an equal footing, save for lawful limitations justified by considerations regarding the child's best interests. The same rationale underpins Article 9 § 3 of the Convention on the Rights of the Child (see paragraphs 50 above).

82. The applicant's right to see his son was never in dispute for the national courts and they all agreed that the applicant should be able to enjoy that right. However, the national courts should have also ensured that the applicant was able to effectively exercise his right to contact with his son (*Gluhaković v. Croatia*, no. 21188/09, § 62, 12 April 2011, and *Bondavalli v. Italy*, no. 35532/12, § 81 *in fine*, 17 November 2015).

83. The Court considers that in its assessment of the reasons advanced by the domestic courts it must pay due regard to two specific features of the present case, namely (i) the serious conflict between the parents, and (ii) the disability of the applicant and of his son.

(i) Conflict between the parents

84. As can be seen from their decisions, both the Białystok District Court and the Białystok Regional Court were aware of the conflict between the parents. Their animosity surfaced in the parallel set of proceedings concerning the issue regarding the extent of the applicant's parental authority (see paragraph 43 above). Further, the District Court noted in its judgment of 9 August 2012 that sometimes contact had been "obstructed by the mother" (see paragraph 27 above). In addition, the experts commissioned by the District Court in respect of contact arrangements opined that the conflict between the parents impeded their cooperation with regard to the child. Those experts recommended that both parents be counselled by a specialist with a view to assisting them in accepting each other as parents (see paragraph 19 above).

85. However, the District Court did not heed the experts' recommendation, noting that the mother of the child had already attended a parent support group at the foundation attached to the specialised nursery school attended by the child and that the applicant had declared that he could join the same group. In those circumstances, the District Court found that it was not necessary to impose an obligation on the parents to undergo family therapy (see paragraph 33 above).

86. The Court observes that the Family and Custody Code contains a number of provisions pertaining to the regulation of contact between parents and a child (see paragraph 48 above). In particular, Article 113^4 of the Code provides that when deciding on the matter of contact with a child, the guardianship court may compel the parents to undertake a specific course of action. This provision indicates, in an non-exhaustive manner, that parents may be referred, for example, to institutions or specialists providing family therapy, counselling or other appropriate assistance to the family. In addition, Article 113^2 § 2 (3) of the Family and Custody Code stipulates that the guardianship court may order that contact between a parent and a child should take place in the presence of, *inter alia*, a court guardian or another person designated by the court (see paragraph 48 above).

87. The Court notes that the domestic legislation provides for a range of instruments that can assist in alleviating conflict between parents and facilitate contacts between the non-custodial parent and the child. However, the domestic legislation makes no provision for mediation in family-law cases. The Court has already observed in a similar case concerning the enforcement of contact rights that civil mediation "would have been desirable as a means of promoting cooperation between all parties to the case" (see *Cengiz Kılıç v. Turkey*, no. 16192/06, § 132 *in fine*, 6 December 2011). The Court referred in this respect to the Recommendation of the Committee of Ministers of the Council of Europe No. R (98) 1 on Family Mediation (see paragraph 51 above). The Recommendation provides, *inter alia*, that the use of family mediation can "improve communication

between members of the family, reduce conflict between parties in dispute, produce an amicable settlement, provide continuity of personal contact between parents and children, and lower the social and economic costs of separation and divorce for the parties themselves and States". In the Courts view, family mediation may be an efficient instrument for the implementation of rights protected under Article 8 of the Convention. However, it is not for the Court to assess in the instant case whether the existing instruments would have been sufficient or whether they should have been supplemented by means of legislative reform.

88. It is true that the RODK experts retained by the domestic courts stressed the need to develop a new pattern of contact. However, in the Court's view, the domestic courts did not properly examine the possibility of resorting to different existing legal instruments which could have facilitated the broadening of contact between the applicant and his son.

89. The Court acknowledges that the task of domestic courts was rendered difficult by the strained relationship between the applicant and the child's mother. However, the lack of cooperation between separated parents is not a circumstance which can, in and of itself, exempt the authorities from their positive obligations under Article 8. Rather, it imposes on the authorities an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child (see *Zawadka*, § 67; *Bondavalli*, § 82; *G.B.*, § 98; and *Malec*, § 72, all cited above).

(ii) The applicant's disability and the communication barrier

90. The second, important factor in the reasoning of the domestic courts was the respective disabilities of the applicant and of his son, which created a communication barrier between them. The domestic courts viewed this as an objective obstacle to contact and not as a discriminatory measure against the applicant (see paragraphs 29 and 38 above). The Court concurs with the position of the domestic courts that regardless of his disability, the applicant had an incontestable right to contact with his son and that the communication issue should have been taken into account in regulating contact arrangements.

91. The question before the competent domestic authorities was which solution, given the circumstances of the case, would, on the one hand, take into account the child's best interests and, on the other hand, permit the applicant to effectively develop a relationship with his child. The domestic courts' solution to the problem was to involve the child's mother in the contact arrangements, since she was able to communicate both orally and in sign language. However, this solution ignored the existing animosity between the parents and the frequent complaints by the applicant that the mother had attempted to obstruct contact and to marginalise his role. The Court also notes in this context that the development of the relationship

between the applicant and his child requires much more time than would be the case in a normal situation, given the difficulties in direct communication and the necessity of translation from and into sign language.

92. In the present case, the dismissal of the applicant's application for extension of contact meant that the applicant kept his right to two hours of contact per week in the presence of the child's mother. The Court accepts that the change to the contact arrangements sought by the applicant was possibly too far-reaching, having regard to the relatively limited prior contact between the applicant and his son. It might have been more appropriate to gradually increase the applicant's contact with his son and to make it more diverse. Nonetheless, the Court finds that the maintenance of the same restricted contact arrangements was likely to entail, with the passage of time, a risk of the severance of the applicant's relationship with his son (see, *mutatis mutandis*, *Gluhaković*, cited above, § 59).

93. In the Court's view, the domestic courts should have envisaged additional measures, more adapted to the specific circumstances of the case (see, *mutatis mutandis*, *Gluhaković*, cited above, where in regulating contact the authorities failed to take into account the father's work schedule). Having regard to the specifics of the applicant's situation and the nature of his disability, the authorities were required to implement particular measures that took due account of the applicant's situation. The Court refers here to the second sentence of Article 23 § 2 of the Convention on the Rights of Persons with Disabilities, which provides that "State Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities." (see paragraph 49 above).

94. The Court further notes that the domestic courts failed to obtain expert evidence from specialists familiar with the problems faced by persons suffering from a hearing impairment. The experts stressed their limited competence in respect of persons suffering from a hearing impairment. Furthermore, the expert report relied on by the courts did not address possible means of overcoming the barriers resulting from the disability in question. The experts focused on the existence of barriers instead of reflecting on possible means of overcoming them.

95. The domestic courts' duty, in cases like the present one, is to address the issue of what steps can be taken to remove existing barriers and to facilitate contact between the child and the non-custodial parent. However, in the instant case they failed to consider any means that would have assisted the applicant in overcoming the barriers arising from his disability.

(iii) Conclusion

96. Having analysed the reasons advanced by the national authorities, the Court finds that they have not taken all appropriate steps that could reasonably be demanded with a view to facilitating the applicant's contact with his son.

97. The Court concludes that, notwithstanding the State's margin of appreciation, the authorities have failed to adequately secure the applicant's right to respect for his family life as regards his right to effective contact with his son (see *Gluhaković*, cited above, § 79).

98. In the light of the above, the Court dismisses the Government's objection concerning the applicant's lack of victim status.

99. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

100. The applicant complained that the courts had dismissed his application for increased contact with his son solely on the ground of his disability. He relied on Article 14 in conjunction with Article 8 of the Convention. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

101. The applicant argued that the domestic courts had violated Article 14 read in conjunction with Article 8 of the Convention. He maintained that in a similar case involving a fully-bodied father the courts would have not set contact at two hours per visit and four visits a month and without the possibility of the child in question being taken to the father's home. The domestic courts had not only failed to assist the applicant, who was disabled, but they had discriminated against him with their decisions. In cases involving non-disabled parties, the Polish courts underlined that the child should be aware that he or she had two parents and should have the possibility of spending time with both of them. In the applicant's case, this right was refused to him.

102. The Government argued that the present case did not disclose a violation of Article 14 read in conjunction with Article 8 of the Convention. They submitted that that the domestic courts had underlined on numerous occasions that the applicant's disability was not, *per se*, a motive for the dismissal of his application for an extension of contact. However, taking into account the best interests of the child, it could not go unnoticed that the aforementioned disability had given rise to a communication barrier between the applicant and his son, since the applicant used only sign language and the child communicated orally. Therefore, the form of contact should be adjusted to reflect the situation of the family.

103. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

104. The Court has already found a violation of Article 8 of the Convention. In view of its analysis under that Article and the violation found, the Court considers that in the circumstances of the present case it is not necessary to examine any further complaint under Article 14 of the Convention, read in conjunction with Article 8 of the Convention (see, for a similar conclusion, *Schneider v. Germany*, no. 17080/07, § 108, 15 September 2011, or *A.K. and L. v. Croatia*, no. 37956/11, § 94, 8 January 2013).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. He submitted that he had suffered serious emotional distress on account of the erroneous decisions of the national authorities. The impugned decisions had prevented the applicant from building a stronger relationship with his son. Furthermore, the applicant received no assistance from the domestic courts in respect of his situation. The domestic courts' decisions had also influenced the applicant's mental health, since he was excluded from his son's life and that made him feel helpless.

107. The Government submitted that the applicant's claim was exorbitant. In the event that the Court established that there had been a violation of the Convention in the case, the Government submitted that the finding of a violation would constitute sufficient just satisfaction. In the alternative, they asked the Court to assess the issue of compensation on the basis of its case-law in respect of similar cases, with due regard to the national economic circumstances.

108. The Court considers that the applicant has suffered non-pecuniary damage as a result of the domestic courts' failure to secure him the effective enjoyment of contact with his son which cannot be sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 16,250 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

109. The applicant also claimed EUR 680 for the costs and expenses incurred before the domestic courts and EUR 2,000 for those incurred before the Court.

110. The Government observed that the applicant's lawyer had not produced any invoice confirming the amount paid for legal fees in respect of the proceedings before the Court, except for the sum of 72.80 Polish zlotys (EUR 18) for postal expenses. In this regard, they submitted that according to paragraph 9 (1) of the Regulation of the Minister of Finances of 28 March 2011 (Journal of Laws of 2011, no. 68, item 360 with subsequent changes) an invoice should be issued within seven days of the service in question being performed.

111. 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 awards EUR 680 for the domestic proceedings and EUR 18 for the proceedings before the Court. In respect of the latter, the Court notes that the applicant has not produced any invoice or other document showing that he actually incurred costs in respect of his legal representation in the proceedings before it. In those circumstances, and bearing in mind the terms of Rule 60 §§ 2 and 3 of its Rules, the Court rejects the claim in this part.

C. Default interest

112. 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. *Joins* to the merits the Government's objection and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 8 of the Convention;

4. *Holds* that there is no need to examine separately the complaint under Article 14, taken together with Article 8 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 16,250 (sixteen thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 698 (six hundred and ninety-eight euros), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 10 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	András Sajó
Deputy 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) separate opinion of Judge Sajó;

(b) separate opinion of Judge Motoc.

A.S.
A.N.T.

SEPARATE OPINION OF JUDGE SAJÓ

I concur in the judgment: the national authorities did not take proper measures to enable the applicant, a deaf and mute person, to have proper contacts with his son. I regret that the Court found it unnecessary to examine the complaint under Article 14 in conjunction with Article 8 of the Convention. The applicant is a disabled person and the disability was crucial in the problem that the Court had to deal with. The domestic authorities treated the disabled person as equal to people without the impairment. The rights of the disabled cannot be effectively protected without acknowledging the positive obligation of the State to provide a differentiated treatment.

CONCURRING OPINION OF JUDGE MOTOC

1. The Court concludes that there has been a violation of Article 8 of the Convention, the authorities having failed to adequately secure the applicant's right to respect for his family life as regards his right to effective contact with his son. In the Chamber's view, the domestic courts could have envisaged additional measures, such as expert evidence from specialists familiar with the problems faced by persons suffering from a hearing impairment, notably measures that would have assisted the applicant in overcoming the barriers arising from his disability (see paragraph 95). While I agree with the majority findings in respect of the violation of Article 8, I regret that the Chamber has not taken into account the discrimination against the applicant regarding his enjoyment of the rights and freedoms set forth in the Convention, that discrimination being based on his disability.

2. Disability is an evolving concept and disabilities result from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. The attitudinal and environmental barriers, not the physical impairment, prevent people with disabilities from enjoying full human rights; for people with a hearing impairment the major barrier is lack of recognition, acceptance and use of sign language in all areas of life, and lack of respect for the cultural and linguistic identity of persons with a hearing impairment.

3. In paragraph 104 of the judgment the Chamber states that in the circumstances of the present case it is not necessary to examine any further complaint under Article 14 of the Convention, read in conjunction with Article 8 of the Convention (see, for a similar conclusion, *Schneider v. Germany*, no. 17080/07, § 108, 15 September 2011, or *A.K. and L. v. Croatia*, no. 37956/11, § 94, 8 January 2013). In my view, the Court should have analysed more thoroughly whether the threshold required for a separate evaluation of whether the applicant suffered discrimination in his enjoyment of the rights and freedoms set forth in the Convention was reached.

4. It is well-established in the Court's case-law that Article 14 has no autonomous meaning, but can be invoked only in conjunction with another Convention guarantee. It is entirely true that the discriminatory nature of the State action has not been sufficiently addressed by the Court. This case is also an illustration of an approach by the Court which has been criticised by legal commentators[1] and separate opinions.[2] The case of *Kacper*

1. J. Small, *Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights* (2003) 6, European Journal of Discrimination and the Law, at p. 47; Gerards, *The Application of Article 14 ECHR by the European Court of Human Rights*, in Chopin and Niessen (eds), *The*

Nowakowski v. Poland is an illustration of the Court's practice of automatically absorbing Article 14 within the scope of the substantive right with which it must be invoked. In this connection the finding of a violation of Article 8 is a partial answer to the applicant's complaint. In this respect we can quote Marguerite Yourcenar in *How Wang-Fô was saved*: "Ling in despair looked smiling at his master, which for him was a gentler way of crying."

Inadequate response by the domestic courts to the applicant's disability

5. The domestic courts left aside the question of the effect that the applicant's disability and the language barrier might have had in his communication with his son, and also whether the disability played an essential role.

Proceedings concerning a change in contact arrangements

6. The District Court heard evidence from the RODK experts, who admitted that they did not have specialised methods of examining deaf people. The major obstacle in this respect was the conflict between the parents. An additional obstacle, and an objective one, was the applicant's disability (see paragraph 22).The Białystok District Court dismissed Mr Kacper Nowakowski's application for a change to the contact arrangement. While noting, among other elements, the communication problem, with the applicant using mostly sign language while the child communicated only orally, the Court stated that the mother's presence was necessary for the child's security during the meetings and disregarded the possibility of the presence of the paternal grandmother.

Proceedings concerning parental authority

7. The District Court considered that it was justifiable to restrict the applicant's parental authority and limit it only to matters concerning the child's education. The Court also found that communication with the applicant was limited on account of his disability and that the mother was aware of this. The District Court found no reasons to oblige the mother to

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Development of Legal Instruments to Combat Racism in a Diverse Europe (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 3; R. Wintemute, *Within the Ambit: How Big is the "Gap" in Article 14 European Convention on Human Rights?,* 2004; A. Baker, *The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR* (2006) 69 Modern Law Review, at p. 714.

2. See Dissenting opinion of Judge Keller in *Koncherov and Sergheyeva v. Russia***,** no. 16899/13, 29 March 2016.

undergo family therapy (see paragraph 44). The Białystok Regional Court ruled that the communication barrier constituted an objective obstacle to relations between the applicant and his son and that taking it into account could not be considered a form of discrimination against the applicant (see paragraph 46).

In my view, the domestic courts should have done more to avoid stereotypes in respect of persons with disabilities, and therefore should have addressed in a more careful and balanced way the situation of the applicant, who was isolated because of his disability but also studied and worked.

Disability based on hearing impairment and discrimination

8. The national authorities mentioned the disability of the applicant and his family, including the child. However, in my view, neither the national authorities nor our Court have analysed the matter in depth or addressed the question of the communication barrier between the applicant and his son.

9. The Convention on the Rights of Persons with Disabilities ("the CRPD") sets out the most important principles for the protection of the human rights of disabled persons. Some of the principles are: "respect for inherent dignity, individual autonomy including the freedom to make one's own choices" (3 (a)); "full and effective participation in society" (3 (c)); "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" (3 (d)); and "respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities" (3 (g)). Respect for difference, the right to preserve identities, and acceptance of deaf people and sign languages as part of human diversity and humanity imply that the recognition of sign language is inseparable from the recognition and acceptance of deaf people's cultural and linguistic identity. The CRPD also recognises that culture (principle (d), Article 30), identity (principle (h), Articles 24 and 30) and language (Articles 2, 21 and 24) constitute an inseparable triangle.

10. The definition of communication in Article 2 "includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology". The definition of language includes "spoken and signed languages and other forms of non-spoken languages" (Article 2). Thus, sign languages are included in all the Articles that mention "communication" or "language". The CRPD provides a powerful tool to enhance the human rights of people

with disabilities, and the above-mentioned Articles highlight the basic factors for protecting the human rights of deaf people[3].

11. In my view, the communication barrier was a fundamental aspect which could have led to a finding of discrimination if it had been properly addressed by the national authorities and by our Court. It is true that all the members of the family suffer from a hearing impairment, but the applicant is the only one who communicates by sign language. It is very difficult to imagine how a small child could feel at ease with a parent if that child is not also taught the parent's "language". It is essential for persons with a hearing disability, as well as for other disabled persons who communicate by non-spoken languages, that their children are also taught to communicate with them. The domestic authorities should have obliged the mother, A.N., not only to receive family therapy but also to make all efforts to ensure that the child could learn the sign language in order to communicate with his father.

3. A. Lawson (eds), *Disability rights in Europe: From Theory to Practice*, 2005.