

DERECHO A LA VIDA PRIVADA Y FAMILIAR

Caso Ismailova contra Rusia. Sentencia de 29 noviembre 2007 (TEDH, 2007\345343)

PROCEDURE

1. The case originated in an application (no. 37614/02) 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, Mrs Kurbankiz Ismailova , on 5 October 2002. She was represented before the Court by Mr A. Leontyev and Mr R. Daniel, lawyers practising in St Petersburg and Norfolk respectively.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that the decision to grant the custody of her two children to their father had been in breach of Articles 8, 9 and 14 of the Convention.

4. By a decision of 31 August 2006 the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The Court having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 in fine), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and lives in the town of Makhachkala.

A. Events prior to custody proceedings of 20017. The applicant married in 1990. The applicant and her husband were nominal but non-practising Muslims at that time.

8. Two children, a boy and a girl, were born to the couple in 1993 and 1997 respectively.

9. It appears that the family lived at a house of the paternal grandparents in the village of Novomugri, Sergokalinskiy District of the Republic of Dagestan.

10. Being upset with various difficulties in the relations with her husband who was a seaman and frequently away at sea, in June 1999 the applicant started associating with the Jehovah's Witnesses.

11. In June 2000 the mounting tensions between the spouses over the applicant's religious interests resulted in the applicant's decision to leave the matrimonial home together with the children. The applicant and children started living with the maternal grandparents.

12. In December 2000 the applicant was baptised as a Jehovah's Witness.

13. There appear to have been only occasional contacts between the applicant's husband and the children between June 2000 and July 2001. As the applicant's husband failed systematically to provide financial support for the upbringing of the children, in early 2001 the applicant filed in court a request for maintenance. On 26 April 2001 the court ordered the husband to pay for the support of the children.

14. On 1 July 2001 the children went to visit their paternal grandparents and on 26 August 2001 the grandparents refused to return the children to the applicant. The applicant submits that she has had no regular access to the children since then.

B. First-instance proceedings

15. On 17 September 2001 the father filed a divorce petition in the Leninskiy District Court of Makhachkala.

16. He also submitted that he was ready to provide the children with better living and moral conditions than the applicant, that the applicant had taken the children to religious meetings with a view to converting them to the faith of the Jehovah's Witnesses, that the children had become irritable and did not want to return to their mother, and requested the court to grant him custody of both children.

17. In response, the applicant accepted that the marriage had irretrievably broken down but contested the husband's claim for custody.

1. Report on the case by the Custody and Guardianship Agency

18. At a preliminary hearing the District Court ordered a report on the issue of custody of the children to be prepared by the Custody and Guardianship Agency attached to Leninskiy District Council of the town of Makhachkala.

19. A letter of instruction dated 24 October 2001 contained a request to report on the applicant's living conditions and to give a conclusion concerning "the possibility of leaving the children with

her, having regard to the fact that [the applicant] attends [meetings of] the sect 'Jehovah's Witnesses'".

20. On 4 December 2001 an official, U., drew up a report on the preliminary inquiry into [the applicant's] living conditions. The report described the three room flat measuring in total 68.5 square metres in which the applicant, her two parents and three brothers were living and then stated:

"... Additional information about [the applicant's] family: [the applicant] attends [meetings] of the organisation 'Jehovah's Witnesses'; members of the organisation sometimes meet at her home and study the relevant literature. [The applicant's] parents are critical of her religion.

I deem it, in the interests of the minor children, to be more advisable for them to live with their father... in the village of Novomugri, Sergokalinskiy District."

21. On an unspecified date the District Court added the report of 4 December 2001 to the case-file.

2. Observations by the Leninskiy District Council of the town of Makhachkala

22. On 11 December 2001, upon the District Court's request, the Leninskiy District Council of the Town of Makhachkala ("the District Council" – Администрация Ленинского районного г. Махачкалы) submitted to the court observations (заключение) in which it advised that custody of the children should be granted to their father.

23. The District Council reasoned as follows:

"The Custody and Guardianship Agency attached to Leninskiy District Council of the town of Makhachkala established that [the applicant] resided in her parents' house... In 1990 she had married Mr Magomed Gazimagomedov, from whom she bore two minor children: Abdul Gazimagomedov, born in 1993, and Aminat Gazimagomedova, born in 1997.

The spouses resided in the village Novomugri of the Sergokalinskiy District. She worked in a neighbour village as a school teacher; his work was related to sea trips.

As of June 2000 spouses Gazimagomedovy de facto interrupted their marital relations. The children started living with their mother in Makhachkala.

Long before their divorce, [the applicant] began attending [meetings of] the religious organisation 'Jehovah's Witnesses'. Her attendance at [these] meetings which involved travelling [to other towns] was the reason for the discord and break-up of the family. Villagers and relatives spoke out against the conduct of [the applicant].

When living with the children in Makhachkala, contrary to her parents' will, she did not refrain from regularly attending the meetings of the 'Jehovah's Witnesses'. She began actively advocating the ideas of this organisation. Sometimes her fellow believers gather together at her parents' home and they study the relevant literature. She would also take her children to the meetings. After attending these meetings, the children became shy and irritable, they perceived the surrounding world and natural phenomena in the way the 'Jehovah's Witnesses' teaching presents it (the children were afraid of the 'Worldwide Flood' whenever it rained, they called the [applicant's] mother-in-law 'Satan', they would not attend their classmates' birthdays or other celebrations because the religion did not permit this).

The children's father... was seriously concerned that the children's association with their mother threatened their upbringing; he was against their returning to Makhachkala.

The minor children are presently living with their father. [The son] is now getting good marks at [school]...

On the basis of the aforementioned, considering the fact that the parents must provide each child with the possibility of growing healthy, physically and spiritually, and based on the interests of the minor children, the Custody and Guardianship Agency deems it advisable for the children to reside with their father."

3. Judgment of 15 March 2002

24. On 15 March 2002 the District Court terminated the marriage between the applicant and her husband and granted custody of the children to their father.

25. The District Court reasoned as follows:

"... [The spouses] married on 6 December 1990, then resided in different locations, and since 1997 in a private house of Gazimagomedov in the village of Novomugri of the Sergokalinskiy District of the Republic of Dagestan.

[They] have children in marriage: Abdula, born on 30 May 1993, and Aminat, born on 15 January 1997.

In June 2000, having gone to visit her parents, [the applicant] joined the organisation 'Jehovah's Witnesses'. The family began to have problems and since that time they have not been living together as husband and wife. The family has split apart. The court fixed them a period for reconciliation but the parties failed to reunite and have requested to terminate their marriage.

It follows that the family cannot be preserved and the marriage should be dissolved.

From the submissions of [the applicant] and her mother... it transpires that the members of the 'Jehovah's Witnesses' organisation come to the flat in which [the applicant] and her parents reside a few times a week to conduct their activities. Furthermore, [the applicant] attends the weekly meetings of the 'Jehovah's Witnesses'.

[The applicant's mother] was questioned in court and confirmed the fact that at the beginning her grandchildren had been very afraid of rain and wind and had been saying that a 'Worldwide Flood' and an earthquake would take place. That is when [the applicant's mother] learned that [the applicant] had been taking the children to meetings of the sect 'Jehovah's Witnesses'.

From the case-file documents and the parties' submissions it transpires that at present [the applicant's husband] resides, along with his parents, in the village of Novomugri in a two-storey house. The household in fact belongs to him. For a few months of the year he works at sea and the same amount of time he spends at home.

The children have been living with him and his parents.

According to a certificate of a Novomugri Secondary School, [the applicant's son] has excellent results at school.

[The applicant] works as a teacher and has good references.

From a report on [her] living conditions it transpires that a three-room flat is occupied by the applicant, her parents and [the applicant's] three brothers.

The members of the 'Jehovah's Witnesses' organisation gather at the same place and study the relevant literature. According to a report on [the applicant's] living conditions and the observations of the Custody and Guardianship Agency, 'the parents are obliged to provide their children with an opportunity to grow physically and spiritually healthy; regard being had to the interests of [the children], the Custody and Guardianship Agency considers it appropriate to grant custody [of both children] to their father'.

The court too is of the view that, having regard to the fact that [the children] have been living with their father for more than five years and have not yet attained the age of 10, and also in the interests [of the children] as defined by sections 54-56 and 61-66 of the RF Family Code, that custody should be granted to their father..."

C. Appeal proceedings

26. The applicant and her counsel appealed against the judgment of 15 March 2002 to the Supreme Court of the Republic of Dagestan ("the Supreme Court" – Судебная коллегия по гражданским делам Верховного суда Республики Дагестан).

27. In her grounds of appeal she argued that the first-instance judgment was discriminatory in that it had been based on the applicant's affiliation to the Jehovah's Witnesses, that the first-instance court's findings were perverse, unsustainable and misconstrued, that the court had failed to take account of all the factors which were relevant to the case according to section 65 (3) of the Family Code (the father's frequent absence owing to his work at sea, the applicant's demonstrated pedagogical competence as a professional school teacher, a prior and recent history of both parents' involvement in the upbringing of their children, the father's allegedly immoral adulterous

behaviour, etc.) and that the court had acted on the presumption of the Jehovah's Witnesses being a dangerous organisation.

28. The applicant also cited domestic jurisprudence in child custody cases and the judgment of 23 June 1993 of the European Court of Human Rights in the case of Hoffmann v. Austria.

29. On 17 April 2002 the Supreme Court, sitting in a composition of three professional judges, examined the applicant's appeal and by two votes to one rejected it as unfounded.

30. In particular, the majority established the following:

"... In making the decision that the father should have custody of the children, the trial court came to the sound conclusion that this was in the best interests of the children. The court decision is based on the conclusion of the Custody and Guardianship Agency and the case circumstances established in court.

Thus the court established that the children's mother... who is a member of the Jehovah's Witnesses organisation, took the children with her to the sect's meetings, and involved them in associating with the sect's members at their homes. She thereby violated the requirements of Article 28 of the Constitution of the Russian Federation, under which everyone is guaranteed freedom of conscience and religion. Under Article 17 (2) of the Constitution fundamental human rights are unalienable and belong to everyone at birth. The [court] finds irrelevant [the applicant's] arguments that the court, by its decision, has deprived her of the right to educate her children because of her religion and membership of the Jehovah's Witnesses organisation. Pursuant to Article 17 (3) of the Constitution and Article 65 (1) of the Family Code, [the applicant's] exercise of her constitutional rights, including the right to practice any religion and her parental rights, must not impinge on the rights and freedoms of others or conflict with the interests of the children. The right of a parent to educate a child from whom he or she is living apart, is guaranteed by section 66 of the Family Code, which defines the procedure for a parent to exercise parental rights.

The court also established that [the applicant's husband's] financial status and housing conditions are better than those of [the applicant]. [The applicant's husband] is employed, lives with his parents, and owns a two-storey house with the necessary living conditions for the children. [The paternal grandparents] do not object to their grandchildren living with them. [The applicant] works as a history teacher in [a school] in Makhachkala. She lives in her parents' 48-square-metre, three-bedroom flat, along with her father, mother and three brothers, born in 1977, 1983, and 1985.

The Custody and Guardianship Agency concluded that it was in the best interests of the children that they remain in the custody of their father... [The applicant's] argument, stated in her appeal, that the granting of custody to the father would have negative repercussions on the children's emotional state in the future, was not substantiated. The argument that the religious organisation Jehovah's Witnesses has state registration, benefits society, and so forth, cannot be taken into

consideration since it is irrelevant to the matter being examined by the court. There are no reasons in [the applicant's] appeal to reverse [the first-instance judgment] handed down in the case..."

31. The dissenting judge gave the following opinion:

"... I hold that the decision handed down by the first-instance court was subject to reversal owing to the failure to investigate the circumstances specified in section 65 (3) of the Family Code of the RF."

32. The applicant's subsequent attempts to seek reconsideration of the decisions in her case by way of supervisory review were unsuccessful.

33. All her respective requests were dismissed as unfounded.

34. The latest decision in this respect was taken by the Supreme Court of the Republic of Dagestan on 28 November 2003.

D. Events subsequent to custody proceedings

35. The applicant alleged that her former husband had remarried and that his new wife had not attempted to assume the role or responsibilities of step-mother. In the absence of the father, who was frequently away at sea, the paternal grandmother had effectively become the sole carer.

36. The applicant further alleged that she was allowed to visit her children only occasionally and could never remain with them alone.

37. The Government submitted that, according to the information provided by the head of the Sergokalinskiy local administration of the Republic of Dagestan, the applicant's children resided with their father and paternal grandparents in a two-storey private house. They had all necessary facilities for the upbringing and education of the children. Their father had remarried and had had a third child. The applicant's children had developed emotional ties with the third child.

II. RELEVANT DOMESTIC LAW

38. Article 28 of the Russian Constitution of 12 December 1993 reads:

"Everyone shall be guaranteed the right to freedom of conscience, freedom of religion, including the right to profess, either alone or in community with others, any or no religion, to choose, have and disseminate religious or other convictions freely and to act according to them."

39. Section 65 (on the exercise of parental rights) of the Family Code of the Russian Federation provides as follows:

"3. The place of the children's residence, if the parents live apart, shall be established by an agreement between the parents.

In the absence of an agreement, the dispute between the parents shall be resolved in court, proceeding from the children's interests and taking into account the children's opinion. In doing so, the court shall take into account the child's affection for each of his parents and for his brothers and sisters, the child's age, the moral and other personal characteristics of the parents, the relations existing between each of the parents and the child, and the possibility of creating optimal conditions for the child's upbringing and development (the parent's kind of activity and work regime, their material situation and family status, etc.)."

40. Section 66 (on the exercise of parental rights by the parent residing separately from the child) of the Code provides as follows:

"1. The parent residing separately from the child shall have the right to communicate with the child and to take part in his upbringing and in resolving the issue of the child's education.

The parent with whom the child lives shall not prevent the child's communication with the other parent, unless such communication damages the child's physical and mental health or his moral development.

2. The parents shall have the right to enter into a written agreement on the way the parent residing apart from the child may exercise his or her parental duties.

If the parents cannot reach an agreement, the dispute shall be resolved in court with the participation of the guardianship and trusteeship body, upon the claim of the parents (or one of them).

3. In the event of failure to abide by the court decision, the measures stipulated by the civil procedural legislation shall be applied to the respective parent. In the case of persistent failure to comply with the court decision, the court shall have the right, upon the claim of the parent residing separately from the child to take a decision on passing the child over to that parent, proceeding from the child's interests and taking into account the child's opinion.

4. The parent residing separately from the child shall have the right to obtain information on his or her child from the educational establishments and medical centres, from the institutions for the social protection of the population and from other similar institutions. The information may be refused only if the parent presents a threat to the child's life and health. Refusal to provide information may be disputed in court."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

41. In their observations on the merits of the case the Government submitted that in its admissibility decision of 31 August 2006 the Court had failed to examine their non-exhaustion argument in its entirety. In particular, the Court failed to take into account the fact that the domestic legal system provided the applicant with the possibility of requesting the court to review the decision on the custody of the children if the conditions of their upbringing changed.

42. The Court notes that in its decision of 31 August 2006 it examined and rejected the Government's plea of non-exhaustion. The Court considered that the procedure for determination of the right of a parent living separately from the child to communicate with the child and to participate in his or her upbringing, as referred to by the Government, might have had some incidence on the applicant's relations with her children, but could not have remedied her personal situation and brought relief in respect of her complaint against the decisions determining the place of her children's residence at their father's home. The Court finds that similar considerations apply in relation to the Government's argument that the domestic legal system provided for a claim for review of the decision on the custody of the children in cases where the conditions of their upbringing changed. Had the applicant applied for review of the court decisions which granted custody of her children to their father under the above-mentioned procedure, the proceedings might have had some incidence on the applicant's relations with her children for the future. However, the findings and the ruling made in the domestic courts' decisions of 15 March and 17 April 2002 would have remained unaffected and the applicant would not have obtained any redress for the alleged violations of her Convention rights in the past.

43. In the light of the foregoing, the Court finds that that the proceedings referred to by the Government were not a remedy for purposes of exhaustion under Article 35 § 1. Therefore, the Court dismisses the Government's preliminary objection.

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

44. The applicant was dissatisfied with the decisions of the domestic courts to grant custody of her two children to their father. She complained that the decision had been in breach of Article 8 of the Convention in conjunction with Article 14. These Convention provisions, in so far as relevant, provide as follows:

Article 8

"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."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as... religion... or other status."

A. The parties' submissions

1. The Government's submissions

45. In their submissions on the admissibility of the case, the Government argued that the decision to grant custody of the children to their father had been lawful, reasonable and taken in the best interests of the children, and that the children would have been far worse off living with the applicant, not only because of Jehovah's Witnesses' meetings and strangers visiting the applicant's flat, but also because the applicant had insufficient financial means. They argued that the father's income and living conditions were much better than those of the mother and that the children did not want to live with their mother. The Government also relied on the findings of the District Council's report of 11 December 2002 from which it followed that after attending the religious meetings the children had become nervous, tearful and had lost touch with reality. Overall, the Government argued that there had been no interference with the applicant's Article 8 rights as a result of the decision in question and that, in any event, any interference was justified under the second paragraph of that Convention provision. In addition, the Government submitted that according to the information received from the head of a local council at the place of residence of the applicant's former husband, the children were living and studying at their father's home in very good conditions. In their observations on the merits of the case, the Government also argued that the applicant's religious affiliation had not been a decisive factor or a factor of any significance capable of affecting the custody decision and that in any event the decision in question had been taken in the best interests of the children. They argued that the applicant had not been stripped of her parental rights and that she could freely participate in the education and upbringing of her children.

2. The applicant's submissions

46. The applicant argued that the Government's reliance on events or facts subsequent to the proceedings in question was incorrect as those events were irrelevant to the issues of the present case. The applicant submitted that the court decisions in the custody proceedings had been in breach of Article 65 § 3 of the Family Code and were therefore unlawful. She also argued that the decisions were unreasonable, baseless and clearly discriminatory.

B. The Court's assessment

47. The Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v.*

the Netherlands, judgment of 21 February 1997, Reports of Judgments and Decisions 1997-I, p. 184, § 33, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

1. Whether the facts of the case fall within the ambit of Article 8 of the Convention

48. It should be noted at the outset that, in the instant case, the two children were living with their mother since she had left the matrimonial house in June 2000 and until August 2001 when the parental grandparents refused to return them to the applicant after a visit. In such circumstances, the Court considers that the subsequent judgment granting custody over the children to their father constitutes an interference with the applicant's right to respect for her family life and cannot be regarded merely as the judicial interference necessary in any divorce. The case therefore falls within the ambit of Article 8 of the Convention (see *Hoffmann v. Austria*, judgment of 23 June 1993, Series A no. 255 C, p. 58, § 29, and *Palau-Martinez v. France*, no. 64927/01, § 30, ECHR 2003 XII).

2. Whether the applicant and her former husband were in an analogous or substantially comparable situation and were treated differently

49. The Court further recalls that Article 14 of the Convention only comes into play where an applicant demonstrated that he or she has been treated differently from a person in a comparable position with respect to a substantive right guaranteed by the Convention (*Fredin v. Sweden* (no. 1), judgment of 18 February 1991, Series A no. 192, § 61).

50. The Court must therefore first examine whether the applicant can claim to have been treated differently from her husband and whether they were in a comparable position.

51. In establishing the children's residence at their father's home, the District Court ruled on the conditions in which the applicant and her ex-husband respectively were raising their children. To do this, the District Court, on the one hand, took account of the following factors concerning the applicant's former husband:

"From the case-file documents and parties' submissions it transpires that at present [the applicant's husband] resides, along with his parents, in the village of Novomugri in a two-storey

house. The household in fact belongs to him. For a few months of the year he works at sea and the same amount of time he spends at home....

The children have been living with him and his parents.

According to a certificate of a Novomugri Secondary School, [the applicant's son] has excellent results at school."

52. On the other hand, the District Court noted in respect of the applicant that:

"... From the submissions of [the applicant] and her mother... it transpires that the members of the 'Jehovah's Witnesses' organisation come to the flat in which [the applicant] and her parents reside a few times a week to conduct their activities. Furthermore, [the applicant] attends the weekly meetings of the 'Jehovah's Witnesses'....

[The applicant's mother] was questioned in court and confirmed the fact that at the beginning her grandchildren had been very afraid of rain and wind and had been saying that a 'Worldwide Flood' and an earthquake would take place. That is when [the applicant's mother] learned that [the applicant] had been taking the children to meetings of the sect 'Jehovah's Witnesses'....

From a report on [her] living conditions it transpires that a three-room flat is occupied by the applicant, her parents and [the applicant's] three brothers.

The members of the 'Jehovah's Witnesses' organisation gather at the same place and study the relevant literature. According to a report on [the applicant's] living conditions and the observations of the Custody and Guardianship Agency, 'the parents are obliged to provide their children with an opportunity to grow physically and spiritually healthy; regard being had to the interests of [the children]..."

53. The District Court concluded:

"... the Custody and Guardianship Agency considers it appropriate to grant custody [of both children] to their father'....

The court too is of the view that, having regard to the fact that [the children] have been living with their father for more than five years and have not yet attained the age of 10, and also in the interests [of the children] as defined by sections 54-56 and 61-66 of the RF Family Code, that custody should be granted to their father..."

54. Having examined the case on appeal, the Supreme Court held that:

"... In making the decision that the father should have custody of the children, the trial court came to the sound conclusion that this was in the best interests of the children. The court's decision was based on the conclusion of the Custody and Guardianship Agency and the case circumstances established in court.

Thus the court established that the children's mother... who is a member of the Jehovah's Witnesses organisation, took the children with her to the sect's meetings, and involved them in associating with the sect's members at their homes. She thereby violated the requirements of Article 28 of the Constitution of the Russian Federation, under which everyone is guaranteed freedom of conscience and religion. Under Article 17 (2) of the Constitution fundamental human rights are unalienable and belong to everyone at birth. The [court] finds irrelevant [the applicant's] arguments that the court, by its decision, has deprived her of the right to educate her children because of her religion and membership of the Jehovah's Witnesses organisation. Pursuant to Article 17 (3) of the Constitution and Article 65 (1) of the Family Code, [the applicant's] exercise of her constitutional rights, including the right to practice any religion and her parental rights, must not impinge on the rights and freedoms of others or conflict with the interests of the children. The right of a parent to educate a child from whom he or she is living apart, is guaranteed by section 66 of the Family Code, which defines the procedure for a parent to exercise parental rights.

The court also established that [the applicant's husband's] financial status and housing conditions are better than those of [the applicant]. [The applicant's husband] is employed, lives with his parents, and owns a two-storey house with the necessary living conditions for the children. [The paternal grandparents] do not object to their grandchildren living with them. [The applicant] works as a history teacher in [a school] in Makhachkala. She lives in her parents' 48-square-meter, three-bedroom flat, along with her father, mother and three brothers, born in 1977, 1983, and 1985.

The Custody and Guardianship Agency concluded that it was in the best interests of the children that they remain in the custody of their father [The applicant's] argument, stated in her appeal, that the granting of custody to the father would have negative repercussions on the children's emotional state in the future, was not substantiated. The argument that the religious organisation Jehovah's Witnesses has state registration, benefits society, and so forth, cannot be taken into consideration since it is irrelevant to the matter being examined by the court. There are no reasons in [the applicant's] appeal to reverse [the first-instance judgment] handed down in the case."

55. The Court finds that by contrast to the aforementioned Palau Martinez judgment (see §§ 33-38) it cannot be said that the domestic courts decided the present case solely or principally on the basis of the applicant's religious affiliation. In fact, the court decisions made it clear that the applicant and her former husband were in completely different situations in so far as the relevant factors, such as their financial status and housing conditions, were concerned. It is true that the domestic courts did examine the arguments concerning the incidence of and implications on the applicant's religious affiliation on the children's upbringing, but nothing in the reasoning of the domestic courts suggests that the case might have been decided differently had it not been for the applicant's religion (see also by contrast to Hoffmann, cited above, § 33 and Fretté v. France, no. 36515/97, § 32, ECHR 2002 I).

56. In any event, the Court does not consider that it has to resolve this issue, especially since the arguments on the effects on the applicant's religion on the children situation are of relevance in determining whether the difference of treatment was justified. The Court will proceed on the assumption the applicant and her former husband were in an analogous situation and that they were treated differently.

3. Whether any difference in treatment was justified

57. The different treatment is considered discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see Karlheinz Schmidt v. Germany, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and Camp and Bourimi, cited above, § 37).

58. The Court is of the opinion that the aim pursued in the instant case, namely protection of the children's interests, is legitimate.

59. As to whether there was a reasonably proportionate relationship between the means employed and the legitimate aim pursued, the Court notes that unlike in the mentioned Palau Martinez judgment (see §§ 42 and 43) the domestic authorities in the present case made conclusions concerning the incidence of the applicant's religious affiliation on her children's upbringing on the basis of the direct and concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life.

60. The Court accepts in this respect the Government's reference to the findings contained in the observations of the District Council of 11 December 2001 which were relied upon by the authorities in the course of the domestic proceedings. They read in their relevant parts as follows:

"... after attending these meetings, the children became shy and irritable, they perceived the surrounding world and natural phenomena in the way the 'Jehovah's Witnesses' teaching presents

it (the [applicant's] children were afraid of the 'Worldwide Flood' whenever it rained, they called the [applicant's] mother-in-law 'Satan', they would not attend their classmates' birthdays or other celebrations because the religion does not permit this)..."

61. The Court also notes the following findings of the District Court in its judgment of 15 March 2002:

"... the members of the 'Jehovah's Witnesses' organisation come to the flat in which [the applicant] and her parents reside a few times a week to conduct their activities. Furthermore, [the applicant] attends the weekly meetings of the 'Jehovah's Witnesses'....

[The applicant's mother] was questioned in court and confirmed the fact that at the beginning her grandchildren had been very afraid of rain and wind and had been saying that a 'Worldwide Flood' and an earthquake would take place. That is when [the applicant's mother] learned that [the applicant] had been taking the children to meetings of the sect 'Jehovah's Witnesses'....

The members of the 'Jehovah's Witnesses' organisation gather at the same place and study the relevant literature".

62. The reasoning presented by the domestic courts shows that they focused solely on the interests of the children. The courts did not rely on their mother being a member of the Jehovah's Witnesses, but on the applicant's religious practices, in which she had included her children and failed to protect them. In the view of the domestic courts, this had led to social and psychological repercussions for the children. The courts considered that this would have negative effects on the children's upbringing. Furthermore, this was only one of the elements in the courts' reasoning, which was largely based on the children's age and the financial, housing and general living conditions the parents could provide them with. There is nothing to suggest that the national courts' reasoning was arbitrary or unreasonable

63. In such circumstances, the Court cannot but conclude that there existed a reasonable relationship of proportionality between the means employed and the legitimate aim pursued (see Hoffmann, cited above, § 36, and Palau-Martinez, cited above, §§ 42-43). Accordingly, the Court finds that there has been no violation of Article 8 of the Convention taken in conjunction with Article 14.

III. ALLEGED VIOLATION OF ARTICLE 8 TAKEN ALONE AND ARTICLE 9 TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14

64. The applicant complained that there had been an interference with her freedom of religion within the meaning of Article 9, and that this interference was discriminatory within the meaning

of Article 9 taken in conjunction with Article 14. She also complained that there had been a breach of Article 8 taken alone.

65. The Court considers that no separate issue arises under Article 8 taken alone and Article 9 taken alone or in conjunction with Article 14, since the factual circumstances relied on are the same as those for the complaint under Article 8 taken in conjunction with Article 14, of which no violation has been found.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;
2. Holds by four votes to three that there has been no violation of Article 8 of the Convention taken in conjunction with Article 14;
3. Holds unanimously that no separate issue arises under Article 8 taken alone and Article 9 taken alone or in conjunction with Article 14;

DISSENTING OPINION OF JUDGE HAJIYEV, JOINED BY JUDGES VAJIĆ AND STEINER

To our regret, we are unable to share the opinion of the majority of the Chamber that there has not been, in the present case, a violation of Article 8 of the Convention taken in conjunction with Article 14.

The majority in the Chamber rely on the reasoning set out by the domestic courts which, in their opinion, was mainly based on the interests of the children and not on their mother's being a member of the Jehovah's Witnesses.

In our opinion, however, the national courts' judgments do not provide sufficient justification for such an unambiguous conclusion. On the contrary, we are of the opinion that, as in the *Hoffmann v. Austria* (no. 12875/87) and *Palau and Martinez v. France* (no. 64927/01) judgments, there has been a difference in treatment on the ground of religious convictions, based on the mother's religious practices as a member of the Jehovah's Witnesses. Our conclusion is supported by the tone and phrasing of the considerations regarding the practical consequences of the applicant's religion, whereas the requirement of a tolerant society is to respect the religious convictions of the mother that may accordingly affect her children's education. Moreover, the domestic decisions did not take into account all the circumstances of the case, especially those relating to the upbringing of the children, but mainly concentrated on the specific effects of the mother's religious practices upon their daily life (see paragraphs 23 and 25).

In this connection it should also be noted that the domestic courts did not take into consideration the age of the children, in particular that of the four-year-old daughter who should have stayed

with her mother and should not have been removed from her unless compelling evidence of grave harm to the child was proven. Further, they did not balance properly the interests of both parents before arriving at their decision. For instance, they did not refer to any fact that would show the mother generally to be unfit to bring up her children: no complaint of any kind was ever raised about the parenting and educational skills of the mother (who is a qualified teacher), or questioning whether she was a loving and caring mother capable of bringing up her children, or claiming that she had neglected her children. In addition, the fact that the father is a seaman who is absent for half the year, or that before the divorce, between June 2000 and July 2001, he had failed systematically to provide financial support for the upbringing of the children so that on 26 April 2001 the court had had to order the husband to pay such child support, was not examined by the courts.

In this regard we also wish to underline the significance of the Supreme Court's dissenting judge's opinion about the failure to investigate the circumstances specified in domestic law.

Thus, the national courts mainly balanced the financial situation of the father and the housing conditions he was providing to the children, on the one hand, and the mother's religious activities of which the family and villagers disapproved, on the other. Therefore, even if there are no direct negative declarations about the Jehovah's Witnesses to be found in the national courts' judgments, the arguments concerning the implications of the applicant's religious affiliation on the children's upbringing suggest that the case might have been decided differently had it not been for the applicant's religion (see *mutatis mutandis*, Hoffmann, § 33).

We are therefore of the opinion that there was a difference in treatment and that the difference was based on religion and was not justified. Thus such a decision interfered in a discriminatory way with the maternal rights and obligations of the applicant.

For these reasons we, unlike the majority, were in favour of finding a violation of Article 8 of the Convention taken in conjunction with Article 14.