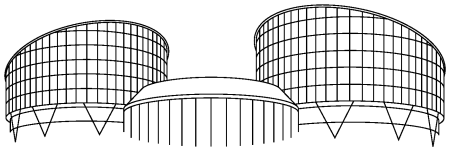

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF PENCHEVI v. BULGARIA

*(Application no. 77818/12)*

JUDGMENT

STRASBOURG

10 February 2015

*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 Penchevi v. Bulgaria,**

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

Guido Raimondi, *President,*
Päivi Hirvelä,
George Nicolaou,
Nona Tsotsoria,
Paul Mahoney,
Faris Vehabović, *judges,*
Pavlina Panova, ad hoc *judge,*

and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 20 January 2015,

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

# PROCEDURE

1. The case originated in an application (no. 77818/12) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Bulgarian nationals, Ms Irena Panayotova Pencheva and her minor son Vladimir Vladimirov Penchev ("the applicants"), on 16 November 2012.

2. The applicants were represented by Ms S. Razboynikova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms V. Hristova, of the Ministry of Justice.

3. The applicants alleged, in particular, a breach of their right to respect of their family life as well as of the second applicant's right to freedom of movement.

4. On 11 June 2013 the application was communicated to the Government.

5. Ms Zdravka Kalaydjieva, the judge elected in respect of Bulgaria, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Ms Pavlina Panova to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1979 and 2006 respectively and live in Würzburg, Germany.

### A. Background

7. In 2009 the two applicants and V.P., the first applicant's husband and the second applicant's father, travelled to Germany, to take up a nine-month paid traineeship in State institutions which the first applicant had been granted there.

8. On 27 February 2010 the father went to Bulgaria with the second applicant. He refused to return the child to Germany on 20 March 2010, despite the child's having a ticket for that date and contrary to what had been agreed with the mother.

9. As a result, the first applicant interrupted her training and returned to Bulgaria on 25 March 2010 where she joined V.P. and their child.

### B. Restraining order protecting the applicants from V.P.

10. The first applicant brought judicial proceedings seeking protection against V.P. The proceedings were suspended on an unspecified date, following a joint request by the first applicant and V.P. The proceedings were later resumed after the first applicant claimed that the abuse continued.

11. The Ruse District Court issued, on 28 April 2011, a protection order in favour of the two applicants, prohibiting V.P. from approaching them for the next six months. The court established that, during the period between 25 March 2010 and 31 March 2010, V.P. had subjected the two applicants to psychological abuse. In particular, he had repeatedly insulted the mother in front of the child, had called her a bad mother, had not allowed the two of them to have contact unsupervised by him and, for that purpose, had locked the bathroom and bedroom doors in the apartment at night. The court also found that V.P. had made the first applicant sleep on the floor, had driven at a high speed with the child on the front seat of the car, had held the child over the balcony banister pressing the child's carotid (neck) artery and had threatened the first applicant that he would "rip [her] open from top to bottom and serve the corresponding jail time".

12. As a result of the restraining order V.P. did not have contact with the child between 12 May 2011 and 26 November 2011.

### C. First applicant's studies in Germany

13. On 31 March 2010 the two applicants left the family home and the first applicant has exercised actual custody over the second applicant ever since. The first applicant was initially granted a scholarship to study for a master's degree in Germany during the academic year 2010/2011. The father did not give his consent to the child's travel to Germany. As a result, the second applicant lived with his maternal grand-parents from the autumn of 2010 onwards.

14. In order to spend as much time as possible with her child, the first applicant traveled frequently between Germany and Bulgaria. She submitted that between March 2010 and October 2012 she spent around half her time in Bulgaria with her child. This negatively affected her studies: because she was often absent from classes in order to visit her child, she needed longer overall time to complete her master's programme, namely two years instead of one year. She was awarded another scholarship for a doctorate degree in Germany, starting in the academic year 2012/2013.

### D. Divorce proceedings

15. On 9 April 2010, the first applicant filed a claim for divorce.

16. On 8 October 2010 the district court pronounced the divorce of the first applicant and her husband as being due to V.P.'s fault, and granted the exercise of parental rights to the first applicant. The father's contact rights were determined with a view to the child's possible residence in Germany and were as follows: one week every three months and twenty consecutive days in the summer before the second applicant started school, and half of every school holiday after that.

17. Following an appeal by V.P., the regional court upheld the lower court's findings. The Supreme Court of Cassation dismissed his subsequent cassation appeal as inadmissible. The judgment declaring the divorce final became enforceable on 28 February 2012.

### E. First set of proceedings for the second applicant's travel abroad

18. In parallel with the divorce proceedings, on 29 April 2010 the first applicant brought proceedings before the district court under Article 123 § 2 of the Family Code (see paragraph 26 below). She sought to obtain a court decision dispensing with the father's consent to the child's travel outside the country. More specifically, she requested permission freely to leave the country with her son for a period of one year as of the date of entry into force of the court judgment.

19. Several court hearings were held. The applicant informed the court about her intended studies in Germany for the academic year 2010/2011, the

fact that she had been granted a scholarship, that she had the financial means to take care of her son and that he had adapted well to the social environment in Germany. She did not specifically invoke a provision under the Convention; instead, she expressed her wish to live with and care for her child while she was pursuing her studies in Germany. However, it appears that she did not formally limit in writing her request for permission to travel with her child to Germany or to any other country.

20. The district court granted the first applicant's request on 31 August 2010. It found in particular that there was no reason to suspect that she would permanently leave the country with the second applicant. It also held that the father's access rights had been determined in a preliminary court decision (*определение*) of 3 August 2010 and, if the first applicant were to obstruct them, V.P. could bring separate proceedings in that connection.

21. After an appeal by V.P. the regional court upheld that judgment on 7 January 2011. The court observed that the second applicant's right to freedom of movement was protected under the United Nations Convention on the Rights of the Child, the Constitution of Republic of Bulgaria and the Bulgarian Identity Documents Act (see paragraphs 25, 28 and 32 below). The right to freedom of movement could only be limited in exceptional situations, namely in order to protect national security, public order, public health and morals or the rights and freedoms of others. None of those exceptions had been established or even claimed in the applicants' case. The court observed that the first applicant offered good material conditions to the child in Germany, that the child had adapted well during his stay there before March 2010, that the first applicant was going to specialise in European law in the Wurtzburg University and that the second applicant enjoyed considerable care and attention from his mother. The court also held that V.P.'s arguments about his access rights were unrelated to the present proceedings; those arguments had to do with the enforcement of a future court decision in which the exercise of the parental rights in respect of the second applicant were to be definitively determined. The court concluded that it was in the interest of the second applicant to have a passport issued and to travel with the first applicant abroad.

22. Upon a cassation appeal by V.P., the Supreme Court of Cassation refused the first applicant's request in a final judgment of 26 June 2012. The court relied on its well established and binding case-law according to which permission for a child's unlimited travel abroad with one parent only could not be granted because, as a matter of principle, that could never be in the best interest of the child. The reasons were more specifically that there was a risk that the requesting parent could take the child to countries which were in a state of war or in which there was a high risk of natural calamities, and thus endanger the child's well-being while depriving the State of the possibility to ensure his or her protection. Such permission could be granted, when that was in the interest of the child, in respect of concrete

destinations and for a limited period of time. Finally, the court rejected the first applicant's request that the court define of its own motion concrete boundaries within which travel could be permitted, stating that it was bound by the formulation presented in the applicant's request.

### F. Second set of proceedings for the second applicant's travel abroad

23. On 9 July 2012 the first applicant brought a new request for permission of the second applicant's travel with his mother to Germany and the other European Union countries for a period of three years without the father's consent. This time she brought her claim under Article 127a of the Family Code 2009, which provision was adopted in the meantime and which governs specifically the question of minors' travel abroad and the issuing of identity documents for that purpose (see paragraph 26 below). She pointed out that she had consistently facilitated V.P.'s access to the child in accordance with his contact rights determined in the divorce proceedings. She submitted that, because she could not take the second applicant with her to Germany while she was pursuing her studies there, both her child and she were deprived of personal contact with each other. She claimed this negatively affected their family life as she was practically deprived of the possibility to raise her child while the exercise of parental rights had been granted to her. She submitted that her doctoral studies in Germany, which were to last three years as of the fall of 2012, would give her the flexibility necessary for her taking care of her child, given that she could do most of her work from home. Finally, she pointed out that the second applicant continuously asked to be with his mother at all times as he is very attached to her.

24. In a decision of 6 December 2012, the Ruse District Court allowed the second applicant's travel to Germany and within the European Union, for the period of three years, accompanied by his mother. The decision was not appealed against and became enforceable on 29 December 2012.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Constitution

25. People have the right to move freely on the territory of Bulgaria as well as to leave the country. This right is only subject to restrictions imposed by law for the protection of national security, health and the rights of others (Article 35 (1)).

### B. Family Code 2009 and Code of Civil Procedure 2007

26. Article 123 (2) of the Family Code provides that parental rights and obligations are exercised following an agreement between the parents. If the parents disagreed, they could bring the matter before the district court whose decision is subject to appeal. Article 127 of the Family Code provides that, if parents who do not live together disagreed on the exercise of parental rights and obligations in respect of their child, the disagreement is to be decided by the district court whose decision is subject to appeal. As of 21 December 2010, a new Article 127a introduced in the Family Code specifically provides that the questions related to a minor's travel abroad and to the issuing of identity papers, are to be decided jointly by both parents. If the parents disagreed, the issue is to be settled by the district court in the minor's place of residence whose decision is subject to appeal before two higher judicial instances.

27. Article 310 of the Code of Civil Procedure provided between 5 June 2009 and 21 December 2010 that claims concerning a minor's travel abroad in the absence of parental consent were examined by the courts in rapid proceedings.

### C. Bulgarian Identity Documents Act 1998

28. Every Bulgarian citizen has the right to leave the country and return to it with a passport (section 33). That right is subject only to limitations as may be necessary for the protection of national security, public order, people's health or the rights and freedoms of others.

29. The police may refuse to allow a minor to leave the country in the absence of a written consent for that of his or her parents (section 76(9)). In case the parents disagree, at the time the applicants brought the proceedings in the present case, the matter was to be decided in accordance with Article 123 § 2 of the Family Code 2009. As of 21 December 2010, related claims are to be decided in accordance with Article 127a of the Family Code 2009.

30. The application for the issuing of a passport to a minor has to be made in person and by the minor's parents or legal guardians (section 45). The police has to issue a passport within 30 days of such an application (section 48).

### D. Relevant judicial practice

31. The Supreme Court of Cassation has held in a number of judgments, delivered in response to claims brought under the family Code, that permission for a child's travel abroad in the absence of both parents' agreement, for an unlimited duration and to unspecified destination, could

not be granted (see, among many others, реш. № 697 на ВКС по гр. д. № 1052/2010 от 01.11.2010 г., IV г. о.; реш. № 982/2009 на ВКС по гр. д. № 900/2009 от 15.03.2010 г.,, IV г. о.; реш. № 418 на ВКС по гр. д. № 1091/2008 от 17.07.2009 г.,, I г. о.).

## III. RELEVANT INTERNATIONAL LAW MATERIALS

### A. Protection of the rights of the child

#### *1. United Nations Convention on the Rights of the Child*

32. The Convention was ratified by Bulgaria on 3 June 1991. It provides 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 10**

"1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

**Article 18**

"1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

#### *2. The European Union's Charter of Fundamental Rights*

33. The Charter, which became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009, contains the following:

**Article 24 – The rights of the child**

"...

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

### *3. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (in force in respect of Bulgaria as of 1 August 2003)*

**Article 1**

"The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

**Article 3**

"The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

## B. Concept of the child's "best interests"

34. The concept of the child's best interests stems from the second principle of the Declaration on the Rights of the Child of 20 November 1959, which reads as follows:

"The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

35. The term was used again in 1989 in Article 3 § 1 of the UN Convention on the Rights of the Child:

"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."

36. According to the "Guidelines on Determining the Best Interests of the Child" issued by the UN High Commissioner for Refugees in 2008:

> "The term 'best interests' broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences."

37. The principle of "the child's best interests" is also embodied in Articles 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 5 (b) requires States Parties to take all appropriate measures to:

> "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

38. Article 16 (d) of CEDAW states that men and women should have

> "[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; [and] in all cases the interests of the children shall be paramount."

39. Even though the principle does not appear in the International Covenant on Civil and Political Rights, the Human Rights Committee in its General Comments 17 and 19 referred to "the paramount interest" of the child in event of separation or divorce of his or her parents. In its General Comment 17 (adopted in 1989) the Committee stated that if a marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to guarantee, so far as is possible, personal relations with both parents. In its General Comment 19 (adopted in 1990) the Committee indicated that any discriminatory treatment in regard to divorce, child custody, visiting rights, etc., must be prohibited, unless the paramount interest of the child required otherwise.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

40. The applicants complained about their inability to enjoy family life together as a result of the impossibility, for over two and a half years between 29 April 2010 and the time of submitting their application to the Court on 16 November 2012, for the second applicant to leave the country in order to join his mother in Germany. They relied on Article 8 of the Convention, the relevant parts of which read as follows:

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

41. The second applicant also complained that his inability for a prolonged period of time to leave the country, resulting from the proceedings before the civil courts which ended with the decision of 26 June 2012 of the Supreme Court of Cassation refusing his travel, breached his right to freedom of movement. He relied on Article 2 of Protocol No. 4 to the Convention, the relevant parts of which read as follows:

> "...
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of [this right] other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others..."

## A. Admissibility

### *1. The Government's submissions*

42. The Government submitted, first, that the Court should dismiss the application as the applicants were no longer victims, given that in December 2012 the Ruse District Court had allowed the child's travel within the European Union for a period of three years. Secondly, they claimed that the case should be struck out of the list of cases before the Court under Article 37 § 1 (b) of the Convention as the matter had been resolved.

### *2. The applicants' submissions*

43. The applicants disagreed. In particular they pointed out that the second applicant could only leave the country in the company of his mother because the father failed to appeal against the first instance court granting permission for the child's travel in December 2012. That court had neither explicitly recognised a violation of a Convention right, nor provided compensation for it.

### *3. The Court's assessment*

44. The Court notes that as of the end of December 2012, when the Ruse District Court's decision became enforceable, the second applicant could

travel with his mother to Germany and the other European Union countries (see paragraph 24 above).

45. Therefore, it has to be determined whether the application should be rejected as being incompatible *ratione personae* with the provisions of the Convention on the ground that the applicants could no longer claim to be "victims", within the meaning of Article 34, of a violation of the Convention. In that connection the Court is required to verify whether there has been an acknowledgment, at least in substance, by the authorities of a violation, between April 2010 and December 2012, of the rights protected by the Convention and whether appropriate and sufficient redress has been provided (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003; *Nardone v. Italy* (dec.), no. 34368/02, 25 November 2004).

46. As to the first condition above, namely the finding of a violation by the national authorities, the Court notes that, although the Ruse District Court allowed the second applicant's travel in December 2012, it did so without acknowledging any preceding violation of the Convention, either explicitly or in substance. In fact, the Ruse District Court could not pronounce on the question whether the refusal to allow travel in the first set of proceedings, or the time it took to complete those proceedings (see paragraphs 18 to 22 above), had been in violation of the Convention, because in the proceedings brought by the first applicant under Article 127a of the Family Code it could only rule in respect of the new request for the child's travel abroad.

47. For the same reason, in respect of the second condition of appropriate and sufficient redress, the Ruse District Court could not award any monetary compensation for a breach of the applicants' right to respect for their family life stemming from the accumulated delay or refusal to allow the child's travel in the first set of proceedings.

48. In view of the above, the Government's objection to the victim status of the applicants must be dismissed.

49. It remains for the Court to examine the Government's second objection to admissibility, namely that the case should be struck out of the Court's list of cases under Article 37 § 1 (b) of the Convention as the matter has been resolved. In that respect, the Court must examine, first, whether the circumstances complained of by the applicants still obtain and, secondly, whether the effects of a possible Convention violation on account of those circumstances have also been redressed (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 42, 24 October 2002). The Court notes that, while the second applicant was ultimately allowed to leave the country with his mother, this happened more than two and a half years after the applicants had asked the courts. During that time, the two applicants were separated and deprived of the possibility to enjoy unhindered family life together. As

noted above, the domestic court, which ultimately allowed the second applicant's travel in a final decision of December 2012, was not entitled in law and did not award in practice any compensation for the accumulated delay. In the light of these considerations, the Court concludes that the Government's objection on the ground that the matter has been resolved must be dismissed.

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

## B. Merits

### *1. The parties' submissions*

#### (a) The Government's submissions

51. The Government contended that there was no breach of either Article 8 of the Convention or of Article 2 of Protocol No. 4 to the Convention. They submitted that the refusal of the Supreme Court of Cassation on 26 June 2012 to allow the second applicant's travel was in strict application of the law, as well as that it was based on the highest court's constant practice in similar cases, which included a proportionality analysis of the relevant circumstances. They also pointed out that the second applicant was allowed to travel abroad with his mother as a result of the final decision of the Ruse District Court of December 2012.

#### (b) The applicants' submissions

52. The applicants disagreed. They submitted, in particular, that the law governing travel of minors abroad should allow travel with one parent's agreement only as it does in respect of a child's travel within the country, or in respect of other decisions about the child's life, such as where the child lives, studies or who is his or her doctor, all of which can be taken alone by the parent holding custody. Alternatively, the applicants claimed, the law should differentiate between the reasons for or duration of travel, or in respect of which of the parents is the primary care-provider for the child. Furthermore, the applicants alleged that the Supreme Court of Cassation did not carry out a proportionality analysis of all relevant circumstances in its decision of 26 June 2012. Instead, they claimed, the highest court confined itself to a mere reference to its invariable practice in similar cases in application of the relevant legal provisions under the Family Code 2009 and the Bulgarian Identity Documents Act 1998. The essence of that practice was that that permission for a minor's unlimited travel abroad should not be given, irrespective of whether it concerned travel of short duration or permanent settling abroad. The applicants also claimed that those

proceedings took too long. Finally, although the Ruse District Court allowed travel in December 2012, that came too late.

*2. The Court's assessment*

**(a) Article 8 of the Convention**

*(i) General principles*

53. The Court first notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and is protected under Article 8 of the Convention (see *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005; *Iosub Caras v. Romania*, no. 7198/04, §§ 28-29, 27 July 2006). According to the Court's well established case-law, domestic measures hindering such mutual enjoyment of each other's company amount to an interference with the right to respect for family life (see, *inter alia*, *W. v. the United Kingdom* judgment, p. 27, § 59; *McMichael v. the United Kingdom*, 24 February 1995, § 86, Series A no. 307-B; *Hoffmann v. Austria*, judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29; *Palau-Martinez v. France*, no. 4927/01, § 30, ECHR 2003-XII).

54. Any such interference would constitute a violation of this Article unless it is, first of all, "in accordance with the law". The phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be clear, accessible and foreseeable. Furthermore, the interference must pursue aims that are legitimate under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *W. v. the United Kingdom*, 8 July 1987, § 60, Series A no. 121). That in turn requires that "relevant" and "sufficient" reasons be put forward by the authorities to justify the interference.

55. Regard must be had to the fair balance which has to be struck between the competing interests at stake, those of the child and of the two parents, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007; *W. v. the United Kingdom*, cited above, § 59; *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). It is not for the Court to substitute itself for the competent domestic authorities in regulating disputes related to contact, residence or travel; it has to rather review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. In assessing those decisions, the Court must ascertain more specifically whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological,

material and medical nature, and whether they made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 139, 6 July 2010).

56. Undoubtedly, consideration of what is in the best interest of the child is of crucial importance (see *Diamante and Pelliccioni*, cited above, § 176, 27 September 2011; *Zawadka*, cited above, § 54; *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A). 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 (*X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013).

57. The Court reiterates too that in order to ensure "respect" for family life within the meaning of Article 8, the realities of each case must be taken into account in order to avoid the mechanical application of domestic law to a particular situation (see, *mutatis mutandis*, *Emonet and Others v. Switzerland*, no. 39051/03, § 86, 13 December 2007).

58. Finally, in conducting its review in the context of Article 8 the Court would also have regard to the length of the national authorities' decision-making process, including judicial proceedings. The Court reiterates on this point that, in matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see *Iosub Caras v. Romania*, no. 7198/04, § 38, 27 July 2006).

*(ii) Application of the above principles to the present case*

59. The Court observes that for the applicants, who are mother and child, the possibility of continuing to live together is a fundamental consideration which clearly falls within the scope of their family life within the meaning of Article 8 of the Convention (see, among many other authorities, *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII).

60. It then notes that the first set of proceedings for allowing the child's travel abroad lasted between 29 April 2010 and 26 June 2012, which was almost two years and two months for three levels of jurisdiction. The proceedings ended with the refusal of the Supreme Court of Cassation to allow the child's travel outside Bulgaria only with his mother (see paragraph 22 above). A second set of proceedings was brought by the applicants in July 2012 and it ended in a decision of 6 December 2012 in which the Ruse District Court allowed the child's travel to Germany and within the European Union, for the period of three years, accompanied by his mother. The decision was not appealed against and became enforceable on 29 December 2012.

(α) Whether there was an interference

61. The Court notes that the Supreme Court of Cassation's refusal on 26 June 2012, and the time it took the courts to decide, prevented the applicants from being together while the first applicant pursued her studies in Germany. Therefore, there was an interference with both applicants' right to protection of their family life under Article 8 (see, *mutatis mutandis*, *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 181, 27 September 2011; *Šneersone and Kampanella v. Italy*, no. 14737/09, § 88, 12 July 2011).

(β) Whether the interference was "in accordance with the law"

62. The Court then observes that the interference was provided for by law, namely Article 123 § 2 of the Family Code 2009 in conjunction with section 76(9) of the Bulgarian Identity Documents Act 1998 (see paragraphs 26 and 29 above).

63. As to the law's quality, and more specifically whether it was sufficiently clear, precise and foreseeable, the Court notes that the above-mentioned Family Code provision explicitly required both parents' agreement for all questions related to the exercise of parental rights. Although the Article is worded in rather general terms, it is clear from the domestic judicial practice that those questions included decisions about the child's travel abroad and the issuing of a passport to the child (see paragraph 31 above). In addition, section 76(9) of the Bulgarian Identity Documents Acts specifically entitles the police to disallow a minor's travel in case of absence of related parental consent and stipulates that, where such consent is missing, the matter is to be decided by the civil courts. It is true that, as the applicants pointed out, neither of those provisions differentiates between the reasons for or duration of travel, nor in respect of which of the parents is the primary care-provider for the child. The Court recalls in that connection that it has to confine itself, as far as possible, to an examination of the concrete case before it, as its task is not to review national law *in abstracto*, but to determine whether the manner in which it was applied gave rise to a Convention violation (see *Olsson v. Sweden (no. 1)*, 24 March 1988, § 54, Series A no. 130).

64. In view of the above, the Court concludes that the above-mentioned legal provisions were sufficiently clear and accessible, and the consequences of their application were foreseeable. Therefore, the interference was "in accordance with the law".

(γ) Whether the interference pursued a legitimate aim

65. The Court accepts that the interference pursued the legitimate aim of protecting the rights of others; in this particular case, the second applicant's father.

(δ) Whether the interference was "necessary in a democratic society"

66. It remains for the Court to determine whether the interference in question was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention. This is to say whether, when striking the balance between the competing interests at stake, the authorities took appropriate account of the child's best interests within the margin of appreciation afforded to the State in such matters (see paragraphs 55 - 58 above).

67. The Court first observes that the applicants complained that the relevant law itself, applied by the national courts in the present case, imposed a disproportionate limitation on their right to respect for their family life. This was because the law contained a condition in operation of which both parents' consent had to be present for any type and duration of travel abroad by their child. In the Court's view, this requirement as such does not appear to impose either an unreasonable or a disproportionate limitation on the applicants' right to family life, given that the State is called upon to ensure a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order (see, among many others, *Maumousseau and Washington*, cited above, § 62). This is especially the case, considering that the Court has been called a number of times to pronounce on complaints brought by a parent whose child had been taken abroad by the other parent without the knowledge or agreement of the former. In those cases, referring to the requirements of the Hague Convention on the Civil Aspects of International Child Abduction, the Court has repeatedly found that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life under Article 8 even when the relationship between the parents has broken down (see, on the one hand, *Karrer v. Romania*, no. 16965/10, § 37, 21 February 2012 and *Bianchi v. Switzerland*, no. 7548/04, § 78, 22 June 2006, as regards applications lodged by a parent whose child had been abducted by the other parent; see, on the other hand, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, 6 July 2010, as well as *Šneersone and Kampanella v. Italy*, no. 14737/09, 12 July 2011 and *B. v. Belgium*, no. 4320/11, 10 July 2012, as regards applications lodged by the abducting parent).

68. The Court then observes that in the present case the two lower instance courts allowed the child's travel abroad in the absence of the father's agreement (see paragraphs 20 and 21 above). They did so after carrying out a detailed analysis of the family situation and establishing that travel would be in the interest of the second applicant.

69. The highest court, however, refused to allow the child's travel. It relied on its well established case-law, according to which permission for a child's unlimited travel abroad with one parent only could not be granted. This was because, as a matter of principle, that could never be in the best

interest of the child, given that the requesting parent could take him or her to a place of high risk, and thus endanger his or her well-being while depriving the State of the possibility to protect the child. The Court observes that, in its examination of the request for travel by the second applicant, the Supreme Court of Cassation did not refer to the fact that the father had had a restraining order imposed on him in the past and that, in any event, he was not in practice taking care of the child even when the mother was abroad to pursue her studies. Similarly, in assessing the child's best interests the highest national court did not make any reference to elements of a psychological, emotional, material or medical nature. Thus, the court did not conduct an evaluation of the mother's qualities and the type of care that she had been providing for the child. Nor did the court look into whether there was any real and specific risk for the child if he travelled with his mother abroad. Furthermore, the court overlooked the information that the child had adapted well to a kindergarten in Germany and that his mother had the financial means to offer him adequate living conditions there, or that the father's access rights had been determined in a manner compatible with the child's living with his mother in Germany (see paragraph 16 above).

70. In addition, the Supreme Court of Cassation held that its examination of the request was confined by the very formulation of the written application submitted by the first applicant. It held that, given that the mother had only sought permission for the child's travel with her during a year, but had not specified the exact destination, permission for travel could not be granted. Although the first applicant had made it clear in the evidence and oral arguments presented to the court that she wished to take the child to Germany to live with her while she was pursuing her studies, the court based its refusal on a technical error made by her when submitting the application and, more specifically, her failure to specify in writing Germany as the country of destination to which travel was requested. Finally, although prompted by the first applicant to do so, the court refused to define of its own motion concrete boundaries within which travel could be permitted.

71. The Court finds that the above factors, taken together, cast doubts on the adequacy of the last instance domestic court's assessment of the child's best interests (see, *mutatis mutandis*, *Šneersone and Kampanella*, cited above, § 95). In these circumstances, the Court cannot but conclude that the highest domestic court's analysis was not sufficiently thorough and that, instead, it followed what could be described as an overly formalistic approach (see, *mutatis mutandis*, in the context of Article 6, *Koskina and Others v. Greece*, no. 2602/06, § 24, 21 February 2008; *Vasilakis v. Greece*, no. 25145/05, § 32, 17 January 2008; *Efstathiou and Others v. Greece*, no. 36998/02, § 33, 27 July 2006; *Běleš and Others v. the Czech Republic*, no. 47273/99, § 69, ECHR 2002-IX; *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 55, ECHR 2002-IX).

72. It remains for the Court to consider the length it took the courts to decide on the request for travel.

73. It observes that in the judicial proceedings under Article 123 § 2 of the Family Code 2009 the courts took more than two years, that is between 29 April 2010 and 26 June 2012, to rule on the first applicant's request for her child's travel (see paragraphs 18-22 above). Furthermore, as the first applicant subsequently brought another set of proceedings under the newly adopted Article 127a of the Family Code 2009, those new proceedings lasted for almost six months before they came to an end on 29 December 2012 when the first instance court's judgment became enforceable. Therefore, for almost two years and eight months in all the child was unable to travel to join his mother. Given that the proceedings at stake were decisive for both applicants' right to family life under Article 8 and in particular for their ability to continue to live together and enjoy each other's company, the Court considers that they had to be conducted with particular diligence (see paragraph 58 above). In view of the second applicant's very young age, and his close attachment to the first applicant, the Court considers that some urgency was required in the national authorities' handling of the applicants' request for travel.

74. The Court observes in that connection that, as from 21 December 2010 (see paragraph 27 above), the Code of Civil Procedure 2007 no longer contained a maximum time-frame for completion of such proceedings, nor did the Family Code 2009, applicable at the time, provide for any form of speedy examination of requests in those proceedings. Furthermore, although the request was made on 29 April 2010, that is to say at a time when the courts had to hear it in rapid proceedings (see paragraph 27 above), they did not do so. Neither did the courts handle the request during the proceedings before them with the swiftness required by the circumstances in the applicants' case. Bearing in mind that the applicants were living in two different countries while the first applicant pursued her studies there, the time the courts took to rule on the request for travel had a serious negative impact on the applicants' ability to live together and contributed to the related difficulties experienced by them. In particular, such a situation of prolonged separation was not respectful of their right to family life, given that the child's healthy and harmonious development required his mother's on-going involvement which she could not personally provide and that the mother had to endure the emotional burden of not being in a position to care for her child on a daily basis. The Government did not put forward a satisfactory explanation for this delay.

(ε) Conclusion

75. In the light of all the foregoing considerations the Court finds that the decision-making process at domestic level was flawed for the following reasons: a) no real analysis was conducted in the last instance court decision

of 26 June 2012, with a view to assessing the child's best interests, but the applicants' travel request was dismissed instead on what appear to be formalistic grounds; and b) the court proceedings deciding on the second applicant's travel lasted too long.

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

#### (b) Article 2 of Protocol No. 4 to the Convention

77. The Court considers that, while this complaint is admissible, no separate issue arises under this provision, since the factual circumstances relied on are the same as those for the complaint examined under Article 8 in respect of which a violation has been found. Consequently, the Court sees no need for it to consider whether there has also been a violation of this provision.

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

78. Relying on Article 6 § 1 of the Convention, the applicants complained that the proceedings before the Supreme Court of Cassation were unfair as the court's decision was not sufficiently reasoned. Relying further on Article 13, they complained that they did not have at their disposal an effective domestic remedy in relation to their complaint under Article 8.

79. Having regard to its findings in paragraph 75 above, the Court considers that these complaints must be declared admissible, but that it is not necessary to examine them on the merits (see, *mutatis mutandis*, *Laino v. Italy* [GC], no. 33158/96, § 25, ECHR 1999-I; *Canea Catholic Church v. Greece*, 16 December 1997, § 50, Reports 1997-VIII; *Ruianu v. Romania*, no. 34647/97, § 75, 17 June 2003; *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, § 213, 18 March 2014).

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicants claimed 3,393 euros (EUR) in respect of pecuniary damage. More specifically they claimed that this sum was spent by the first applicant to pay for forty return journeys between Wurzburg, Germany and

Ruse, Bulgaria in order to spend time with her child between October 2010 and October 2012. They claimed the travel was made necessary by the impossibility for mother and child to be together in Germany as a result of the applicable domestic procedure which they had to follow. They also each claimed EUR 6,000 in respect of non-pecuniary damage which they submitted they had sustained as a result of having had to endure being separated from each other for over two years at a time when the second applicant was very young and in particular need of his mother's daily care.

82. The Government submitted that the above claims were excessive and unsubstantiated.

83. The Court discerns a causal link between the violation found and the pecuniary damage alleged, given that had the violation not occurred the first applicant would not have had to travel to Bulgaria to be with her child during the mentioned period. However, on the basis of the documentary evidence before it, and in particular the flight and train bookings submitted by the applicant, the Court allows this claim only partially, awarding EUR 1,101 in respect of pecuniary damage. While it could be presumed that the first applicant incurred further expenses in connection with her travel, as she claimed for costs related to car journeys and tickets she did not keep, the documents she submitted evidence only the above amount.

84. The Court further accepts that the applicants must have suffered frustration and emotional hardship as a result of the impossibility for them to live together during more than two years, in respect of which a violation has been found. It therefore awards the applicants jointly EUR 7,500 in respect of non-pecuniary damage.

### B. Costs and expenses

85. The applicants also claimed EUR 3,454 for costs and expenses. In particular that amount included EUR 654 for costs and expenses incurred by the first applicant in the context of the domestic proceedings, EUR 80 for postal expenses and EUR 2,760 for legal fees incurred in the context of the proceedings before the Court which covered in particular research of domestic and Convention case-law, preparation of the application and of the subsequent observations presented to the Court.

86. The Government submitted that this claim was excessive and unsubstantiated. They asked the Court considerably to reduce the amount payable in legal fees.

87. 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. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met.

88. In the present case, as regards the domestic costs and expenses, the Court recalls that it will uphold such claims only in so far as they relate to the violations it has found. There is no evidence that the applicants incurred any costs and expenses before the domestic authorities in seeking redress in connection with the violation of the Convention found in the present case. Accordingly, the Court rejects this claim.

89. As regards the claim for costs and expenses incurred before this Court, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award EUR 2,495. This corresponds to EUR 80 for postal expenses and EUR 2,415 for legal fees incurred for 34 and a half hours of work in the context of the proceedings before the Court. The latter amount is reached with reference to the hourly rate of EUR 70 applied in respect of applicants' lawyers' fees in recent cases against Bulgaria with comparable complexity (see *Bulves AD v. Bulgaria*, no. 3991/03, § 85, 22 January 2009 and *Mutishev and Others v. Bulgaria*, no. 18967/03, § 160, 3 December 2009).

### C. Default interest

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

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 8, Article 6 § 1 and Article 13 in conjunction with Article 8 of the Convention, as well as under Article 2 of Protocol No. 4 to the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention in respect of both applicants;

3. *Holds* that there is no need to examine the merits of the complaints under Article 2 of Protocol No. 4 to the Convention, under Article 6 § 1 of the Convention and Article 13 in conjunction with Article 8 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following

amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:

(i) EUR 1,101 (one thousand one hundred and one euros) jointly to the applicants, plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 7,500 (seven thousand five hundred euros) jointly to the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 2,495 (two thousand four hundred and ninety-five euros) jointly to the applicants, plus any tax that may be chargeable, in respect of costs and expenses, this amount to be paid directly into the bank account of the applicants' representative;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 10 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Registrar

Guido Raimondi
President