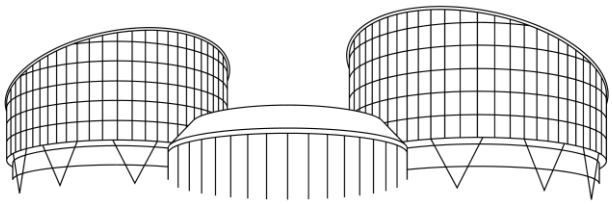

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.D. AND OTHERS v. MALTA

(Application no. 64791/10)

JUDGMENT

STRASBOURG

17 July 2012

FINAL

17/10/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.D. and Others v. Malta,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
David Scicluna, ad hoc *judge,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 26 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 64791/10) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Maltese nationals, M.D., R.D. and A.D., who were born in 1969, 2000 and 2002 respectively and live in Ħamrun, Malta ("the applicants"), on 12 November 2010. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Dr J. Brincat, a lawyer practising in Malta. The Maltese Government ("the Government") were represented by their Agent, Dr Peter Grech, Attorney General.

3. The applicants alleged that they did not have access to court to contest the care order following a change of circumstances.

4. On 24 March 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr Vincent De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). Accordingly the President of the Chamber decided to appoint Mr David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background of the case

6. The first applicant, M.D., is the mother of two minor children, the second and third applicants, R.D. and A.D.

7. Following reports to the *Aġenzija Appoġġ* (which forms part of the Foundation for Social Welfare Services and has as its aim the enhancement of the lives of people in need, through the provision and availability of professional care and support), an investigation by specialised social workers was undertaken in respect of the family. Meetings took place between the parents, social workers, professionals (doctors, police and lawyers) and the directors of the relevant agency. Finally, on the recommendation of the Director of Social Welfare, on 14 July 2005 the Social Policy Minister issued a care order under Article 4 (1) of the Children and Young Persons (Care Orders) Act ("the Act") placing the two minors, R.D. and A.D., in an institution run by nuns. By a decision of 17 August 2005, after having heard the first applicant's objections, the Juvenile Court confirmed the care order. It further solicited the social services to complete the fostering assessment of the maternal grandparents to enable the children to reside with them if it was found to be in their best interest.

B. Criminal proceedings

8. At the same time, criminal proceedings were brought against the first applicant and her partner, X., who is the alleged father of the minor children.

9. By a judgment of 16 March 2006 the Court of Magistrates as a court of criminal judicature found X. guilty of cruelty towards the two children and failure to protect them, causing them slight injuries, and of excessive correction of the two minors (under twelve years of age). X. was sentenced to two years' imprisonment. His appeal having been withdrawn, the judgment became final.

10. By the same judgment, M.D. was found guilty of cruelty towards the two children and failure to protect them, and excessive correction of the two minors (under twelve years of age). She was sentenced to one year's imprisonment, suspended for two years. M.D. appealed.

11. By a judgment of 4 August 2006 the Court of Criminal Appeal upheld the first-instance judgment. Having assessed the evidence the court found that M.D. had been present when X. repeatedly beat the children, aged three and five, and, possibly because of his threats, had not had the courage to report him or ask the relevant authorities for assistance, with the result that the children were severely bruised. They also suffered from bald patches and lice-infested hair, symptoms of serious neglect on the part of the mother. She had also repeatedly behaved roughly towards her children. She was therefore guilty of the first charge by acts of commission and omission (in so far as she had not taken the requisite steps to protect her children). The court also confirmed her guilt regarding the charge of excessive correction of the two minors. Considering it appropriate, in the event that the children were ever returned to her, the court confirmed the sentence handed down by the first-instance court.

12. Under Maltese law the provisions of Article 197 (4) of the Criminal Code were applicable to a conviction for an offence under Article 247 A (see "Relevant domestic law" below).

C. Subsequent developments

13. At the start of the criminal proceedings the relationship between M.D. and X. ended. While the care order was in place, M.D. was given supervised contact with her children for one hour a week and eventually three hours a week. Later, in 2009, the children spent weekends and public holidays with her.

14. Attempts to persuade the Minister to revoke the care order failed.

D. Constitutional redress proceedings

15. On 19 April 2007 the first applicant, in her own name and on behalf of her children, instituted constitutional redress proceedings. She relied on Articles 6 § 1, 8 and 13 of the Convention, particularly on the basis that there existed no remedy under the Act providing for re-examination by an independent and impartial tribunal of an issued care order, since such a revision depended solely on the discretion of the Minister who had issued the order. The circumstances having changed, she requested the court to revoke the order and grant any other necessary remedy.

16. On 12 July 2007, the Civil Court (First Hall) rejected a plea of non-exhaustion of ordinary remedies by the State (namely, in reference to that provided in Subsidiary Legislation 285.01) since no proof had been submitted in corroboration at that early stage of the proceedings. It therefore decided to examine the case.

17. By a judgment of 2 April 2009 the Civil Court (First Hall) held that M.D. could only act in her own name, and did not have a right to act on

behalf of her minor children. Indeed, according to Articles 8 and 9 of the Act, when a care order was issued the relevant parent was deprived of the right to represent his or her children or to sue on their behalf, and care and custody of the children concerned were entrusted to the Minister. It noted that in the proceedings nobody had requested the court to provide the children with a representative *ad litem* (Article 783 of the Code of Organisation and Civil Procedure (COCP)).

18. In respect of M.D., the court found a violation of Articles 6 and 13 of the Convention in that the law did not provide access to court to challenge the care order, but no violation of Article 8. It observed that the care order issued was a permanent one (valid until the minors reached 18 years of age). The Act provided for an objection to the care order to be lodged within twenty-one days of the order being issued, and that such an objection would be dealt with by the Juvenile Court. However, the applicant complained that it was not possible for an individual to request a revision of the order subsequently. The court considered that termination of custody fell under the concept of civil rights, particularly because a care order did not imply the end of natural ties between children and their parents. Consequently, a parent's right of access to court and to the possibility to regain custody of his or her children was a living right. The court considered that the remedy relied on by the State, namely judicial review proceedings, would not be appropriate in the circumstances. Judicial review was concerned with assessing the decision-making process, but not the merits of a decision itself, as the court would not act as a court of appeal from the body involved. In the event that an administrative decision was quashed the court could only remit the case to the authority for reconsideration, at most requesting the authority to bear in mind the reasons for the quashing. Moreover, the Children and Young Persons Advisory Board (Article 11 of the Act) was simply an advisory board subject to the authority and discretion of the Minister. Therefore, it could not be considered an impartial and independent tribunal. It followed, from an analysis of Maltese law, that there was no remedy granting access to court for the applicant or anyone in her position seeking re-examination of the merits of a care order. This constituted a violation of Article 6 § 1, which absorbed Article 13.

19. Under Article 8 it held that the care order had been in accordance with the law and pursued a legitimate aim. While bearing in mind that M.D. had made improvements and was changing her life, it considered that the grounds on which the care order was based had not disappeared and in view of the frequent reviews of the situation by the social services it could not be said that her rights under Article 8 had been breached.

20. The court rejected the claim for the revocation of the care order but, in accordance with Article 242 of Chapter 12 of the Laws of Malta, it ordered that a copy of the judgment be sent to the Speaker of the House of Representatives for consideration by parliament in respect of a possible

amendment to the law, as the only remedy that could provide redress to the applicant was a legislative change providing for access to court in such a situation.

21. Both parties appealed.

22. By a judgment of 14 May 2010 the Constitutional Court observed that on the day when the care order was issued M.D. had lost care and custody of her children in favour of the Minister, and therefore it confirmed that in the absence of an appointment by the court, M.D. could not represent her children in the proceedings. Moreover, following her conviction, M.D. had lost all authority and rights over her children in view of the automatic application of Article 197 (4) of the Criminal Code and therefore, in the absence of any request to the court for representation of the minors, she could not act on their behalf according to Maltese law (see "Relevant domestic law" below), notwithstanding any different procedure which might be applicable before the European Court of Human Rights. In this light, in relation to the merits of the complaints under Articles 6 and 13, the court considered that in the present case, M.D. having lost all her parental rights as a result of her conviction, could not exercise any right in respect of which she was deprived of access to court. It followed therefore that no violation of Article 6 could ensue. The situation would have been different had the applicant been affected only by the care order (which solely took away the rights relating to care and custody) and not the subsequent conviction. Neither could it be said that any rights under Article 8 came into play, since the applicant had regular contact with her children. However, the first-instance judgment in relation to whether the Act contravened the applicant's Article 8 rights had become final, as no appeal had been lodged in this connection.

II. RELEVANT DOMESTIC LAW

23. The relevant articles of the Children and Young Persons (Care Orders) Act, Chapter 285 of the Laws of Malta, read as follows:

Article 4

"(1) If, on representations made to him in writing by the Director of the Department responsible for social welfare and after giving the parents and the guardian, if any, of the child or young person an opportunity to express their views, and after hearing any other person he may deem likely to assist him, the Minister is satisfied that that child or young person is in need of care, protection or control, it shall be the duty of the Minister by an order in writing under his hand to take such child or young person into his care.

(2) A copy of any order made by the Minister under subarticle (1) shall forthwith be sent by registered letter to the person exercising paternal authority over the child or young person, or to his guardian, if any, who shall be asked to state to the Director of

the Department responsible for social welfare within twenty-one days from the date of receipt of the said letter, whether he objects to the said order.

(3) If the person to whom the registered letter is sent under subarticle (2) shall, within the time therein prescribed, signify, even verbally, his objection to the order, the Director of the Department responsible for social welfare shall, not later than seven days from the date on which he shall have become aware of the objection, refer the case to the Juvenile Court in such manner as shall be prescribed by regulations made under article 13.

(4) Where a case is referred to the Juvenile Court under subarticle (3), the said court shall, in such manner and within such time as shall be prescribed by regulations made under article 13, review the whole case and decide whether the child or young person is in need of care, protection or control and shall accordingly confirm or revoke the order made under subarticle (1).

(5) An order made under subarticle (1) shall, unless it has ceased to have effect earlier, cease to have effect on the date on which the child or young person in respect of whom the order is made attains the age of eighteen years."

Article 8

" The Minister shall, with respect to any child or young person committed to his care by an order made under article 3 or taken into his care by an order made under article 4(1), under article 5 or under article 6(1), have the same powers and duties with regard to his care and custody as the parents or guardian of such child or young person would, but for the order, have, and the Minister may, subject to any regulations made in pursuance of article 13, restrict the liberty of such child or young person to such extent as the Minister may consider appropriate (...)"

Article 9

"Where a child or young person is in the care of the Minister in pursuance of this Act, it shall be the duty of the Minister to exercise his powers with respect to the care and custody of such child or young person so as to further his best interests and to afford him an opportunity for the proper development of his character and abilities (...)"

24. The relevant articles of the Criminal Code, Chapter 9 of the Laws of Malta, in so far as relevant, read as follows:

Article 247A

"(1) Whosoever, having the responsibility of any child under twelve years of age, by means of persistent acts of commission or omission ill-treats the child or causes or allows the ill-treatment by similar means of the child shall, unless the fact constitutes a more serious offence under any other provision of this Code, be liable on conviction to imprisonment for a term not exceeding two years. (...)

(3) The provisions of article 197(4) shall also apply in the case of an offence under this article, when the offence is committed by any ascendant or tutor."

Article 197(4)

"(4) A conviction under this article shall entail the forfeiture of every authority and right granted to the offender over the person or property of the husband or wife or of the descendant to whose prejudice the offence shall have been committed, and, in the case of the tutor, his removal from the tutorship and his perpetual disability from holding the office of tutor."

Article 30

"(1) Without prejudice to the provisions of any other law imposing or authorising the suspension or cancellation of, or disqualification from holding or obtaining, any warrant, licence, permit or other authority held from the Government or any other public authority, where any person is convicted, whether as a principal or an accomplice, of a criminal offence which has been committed -

(*a*) in or in connection with the exercise of any profession, art, trade, calling or other occupation for which a warrant, licence, permit or authority has been or may be issued to him by the Government or any other public authority; or

(*b*) in the use or by means of any instrument, vehicle, substance or other thing whatsoever for the carrying, keeping or using of which a licence, permit or authority has been or may be issued to him, the court may, in addition to sentencing the person convicted as aforesaid to any punishment provided by law for the offence, order such person to be disqualified from holding or obtaining, for such time as the court deems fit, such warrant, licence, permit or authority.

(2) Where, by virtue of a conviction under this Code or any other law, any person has a warrant, licence, permit or authority suspended, or is disqualified from holding or obtaining any warrant, licence, permit or authority, the court may, on the application of such person, as it thinks expedient, having regard to his character, to his conduct subsequent to the conviction, to the nature of the offence and to any other circumstances of the case, and after hearing the Police in the case of an application before the Court of Magistrates or the Attorney General in the case of an application before any other court, either remove the suspension or disqualification as from such date as it may specify or refuse the application:

Provided that, where an application under this subarticle is refused, a further application thereunder shall not be entertained if made within three months after the date of the refusal. "

Article 28 A

"(5) A suspended sentence which has not taken effect shall for all intents and purposes of law be deemed, except as provided in subarticle (1), to be a sentence awarding punishment and nothing in this article shall be deemed to effect -

(*a*) the applicability of any other punishment which may be awarded, or any suspension, cancellation, disqualification, forfeiture, loss or removal which may be ordered, together with the punishment of imprisonment so suspended;"

25. Article 783 of the Code of Organisation and Civil Procedure, in so far as relevant, reads as follows:

"(1) In the cases referred to in this sub-title, the curator *ad litem* may be appointed by the same court before which the action has been brought, or is about to be brought, upon the application of any person interested.

(2) The application for the appointment of a curator to represent a minor who desires to sue, may be made by any person."

THE LAW

26. The applicants complained under Article 6 § 1 of the Convention that they did not have access to a court to contest the care order following a change of circumstances. For the same reasons, and on the basis of the conclusion reached by the Constitutional Court, they also complained that they did not have an effective remedy under Article 13.

27. Although there has been no objection on the part of the Government in this regard, the Court finds it relevant to reiterate that, in principle, a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and who criticises their decisions and conduct as not consistent with the rights guaranteed by the Convention. In the event of a conflict over a minor's interests between a natural parent and a person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his or her rights under the Convention. Consequently, even where a mother has been deprived of parental rights - and indeed that is one of the causes of the dispute which she has referred to the Court - her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the child's behalf too, in order to protect his or her interests. Moreover, the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve purposes different from those contemplated by Article 34 of the Convention and, whilst those purposes may sometimes be analogous, they need not always be so (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, §§ 138-39, ECHR 2000-VIII). For these reasons the Court considers that the first applicant has standing to appear on her own and her children's behalf.

28. The Court further reiterates that it is the master of the characterisation to be given in law to the facts of the case and a complaint is characterised by the facts alleged in it (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I). It reiterates

that Article 6 affords a procedural safeguard, namely, the "right to court" in the determination of one's "civil rights and obligations", whereas Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see, for instance, *McMichael v. the United Kingdom*, no. 16424/90, § 91, 24 February 1995, and *Iosub Caras v. Romania*, no. 7198/04, § 48, 27 July 2006).

29. The Court notes that while the original complaint before the domestic courts concerned the lack of access to a court to challenge a care order, as a result of the Constitutional Court's interpretation of domestic law the complaint brought before this Court also refers to the specific circumstances of the first applicant in this case.

30. The Court considers that the lack of access specific to the first applicant's situation may also raise an issue under Article 8 of the Convention. Nevertheless, in view of the fact that the Government have tackled the first applicant's complaint of her own lack of access to a court to challenge a care order under Article 6, the Court will deal with that aspect of the complaint under that provision.

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

31. The applicants complained that they did not have access to court to contest the care order following a change of circumstances. They relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

32. The Government contested that argument.

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

33. The Government submitted that the second and third applicants had not exhausted domestic remedies, in so far as domestic law precluded the mother from initiating proceedings on their behalf in the circumstances of the present case. According to the Code of Organisation and Civil Procedure a minor cannot be sued or sue except in the person of the parent exercising parental authority, or, in the absence of such parent, of a tutor and curator. In the present case the second and third applicants were under the State's responsibility and given their young age it was surprising that they were of their own free will challenging the very protection they were receiving.

Nevertheless, the Government submitted that if they felt aggrieved, the two applicants could have sued the Minister after seeking the appointment of curators to pursue such a claim on their behalf.

34. In accordance with Article 35 § 1 of the Convention, the Court may only deal with an issue after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. However, the rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (*Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009). The Court would emphasise that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that this rule is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Sammut and Visa Investments v. Malta* (dec.), no. 27023/03, 28 June 2005, and *Saliba and Others v. Malta*, no. 20287/10, § 37, 22 November 2011).

35. The Court is prepared to accept that the second and third applicants could have, in principle, pursued constitutional redress proceedings complaining that they did not have access to a court to challenge a care order. It is also willing to accept that the first applicant, although having lost parental authority over her children following her conviction, could have made a request for a curator *ad litem*, since the law allows such a request to be made by "anyone" (see paragraph 25 above), irrespective of any authority or interest. In this light, the Court considers that even the applicants' lawyer could have made that request, as could the Minister or the social worker appointed to follow the children, or any other family member or lay person willing to give assistance. However, in the present case, none of these persons made such a request. The mother and the lawyer insisted that the first applicant could indeed represent the children. Given the facts, it is unlikely that the father had the best interests of the children in mind, and in any event he was in prison when the proceedings were

instituted. As to the Minister and the social worker, it would not have been realistic to expect them to facilitate the children's bringing of a complaint which was essentially against the system they represented. Lastly, little is known as to the existence of any other family member. In those circumstances, the domestic courts limited themselves to highlighting that no curator or representative had been appointed to act for the minors, and rejected the children's standing as parties to those proceedings.

36. The Court is unable to endorse such an action. Indeed, in the context of machinery for human rights protection, the Court cannot accept that in circumstances such as those of the present case, the possibility of the children to pursue a remedy should depend entirely on the intervention of uninterested third parties.

37. Albeit in a different context and in relation to proceedings before it, the Court has previously held that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions, both procedural and substantive, be interpreted and applied so as to render its safeguards both practical and effective. The Court considers that the position of children under Article 34 calls for careful consideration, as they must generally rely on other persons to present their claims and represent their interests, and may not be of an age or capacity to authorise any steps to be taken on their behalf in any real sense. A restrictive or technical approach in this area is therefore to be avoided and the key consideration in such cases is that any serious issues concerning respect for a child's rights should be examined (see *C. and D. v. the United Kingdom* (dec.), no. 34407/02, 31 August 2004, and *Tonchev v. Bulgaria*, no. 18527/02, § 31, 19 November 2009).

38. The Court considers that the domestic courts should have approached the matter in the above light. In the context of the present case, and bearing in mind that the law provided that any person could make an application for a curator and that the same court before which the action had been brought could appoint a curator *ad litem*, the domestic courts should have *proprio motu* appointed a curator or representative to act on behalf of the children, instead of limiting themselves to pointing out this failure. That is what the interests of justice and those of the children would have required. Such an action would also be in conformity with the message which the Council of Europe is promoting in this area, particularly in the light of the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice adopted in 2010.

39. In the specific circumstances of the present case, where, moreover, an attempt to represent the children was made by the mother and the matter was brought to the attention of the domestic authorities, which had the opportunity to put right the violations but failed to do so, choosing not to take action to safeguard the interests of the children – whose vulnerable

position is highlighted in the present case – the Court is unable to accept that the remedy proposed by the Government was accessible to the children.

40. It follows that the Government's objection must be dismissed.

2. The Government's objection ratione materiae

41. The Government further submitted that Article 6 was not applicable to these proceedings. In the Government's view a care order issued in the public interest for the protection of a minor was a public law matter and did not concern civil rights and obligations.

42. The Court notes that, according to its case-law, Article 6 § 1 secures the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, Series A no.18, § 36). This right extends only to disputes ("*contestations*") over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, for instance, *Werner v. Austria*, 24 November 1997, *Reports* 1997-VII, § 34).

43. The Court has repeatedly dealt with cases concerning access, custody and care orders, and while it often considers such cases as falling under Article 8 of the Convention, including its "procedural" aspect (see, for example, *H.K. v. Finland*, no. 36065/97, 26 September 2006, *Scozzari and Giunta*, cited above; and *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 151, 27 September 2011), it does not preclude that such cases be examined also under Article 6 (see, for example, *B. v. the United Kingdom*, 8 July 1987, Series A no. 121, in respect of access rights; *H. v. the United Kingdom*, 8 July 1987, Series A no. 120, in respect of access rights and adoption; and *M. and S. v Italy and the United Kingdom*, (dec.), no. 2584/11, 13 March 2012, in respect of a taking into public care order). In particular the Court has applied the different safeguards provided by Article 6 in relation to proceedings regarding care orders and their equivalent numerous times (see for example, *P., C. and S. v. the United Kingdom*, no. 56547/00, § 100, ECHR 2002-VI, in respect of proceedings regarding a care order and a freeing for adoption order, particularly in relation to fair and effective access to a court; *Olsson v. Sweden (no. 1)*, 24 March 1988, Series A no. 130, §§ 86-91, regarding the fairness of proceedings requesting the termination of a taking into public care; and *R. v. Finland*, no. 34141/96, §§ 117-120, 30 May 2006, regarding the length of proceedings for the termination of public care). Finally, the Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life; furthermore, the

natural family relationship is not terminated by reason of the fact that the child has been taken into public care (see *Olsson*, cited above, § 59). Thus, an action to contest a care order which deprives a parent of care and custody rights is a matter of family law. On that account alone, it is "civil" in character (see, *mutatis mutandis*, *Mizzi v. Malta*, no. 26111/02, § 76, ECHR 2006-I (extracts)). It is therefore indisputable that a dispute in respect of a care order falls under the civil limb of Article 6.

44. It follows that the Government's objection must be dismissed.

3. Other grounds for declaring the complaint inadmissible

45. The Court reiterates that Article 34 of the Convention requires that an individual applicant should claim to have been actually affected by the violation he or she alleges. That Article does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against the state of law *in abstracto* simply because they consider that it contravenes the Convention. Nor, in principle, does it suffice for an applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law has been applied to his or her detriment (see *Klass and Others v. Germany*, 6 September 1978, Series A no. 28, § 33, and *C. and D. v. the United Kingdom* (dec.), no. 34407/02, 31 August 2004).

46. The Court notes that in respect of the first applicant the Constitutional Court, unlike the Civil Court (First Hall), in its constitutional jurisdiction, rejected the first applicant's claim on the ground that her inability to challenge the situation she found herself in was dependent on the finding of criminal guilt, and not the original care order. However, the Court notes that the care and custody order had been issued on 14 July 2005 and confirmed on 17 August 2005. The final criminal finding of guilt was dated 4 August 2006, when the judgment of 16 March 2006 was upheld. In consequence the Court considers that the first applicant suffered prejudice from the alleged defects in the procedural framework and can therefore be considered a victim for the purposes of the complaint regarding lack of access to a court to contest a care and custody order in relation to that interlocutory period of time.

47. The Court notes that this complaint in respect of the three applicants 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' observations

48. The applicants were not contesting the issuance of the initial order, nor the fact that access to the parties was granted before that order was issued. They complained that they could not contest the final care order following a change of circumstances as the law did not provide a procedure to that end. They noted that parental rights were terminated upon the issuance of a care order. In consequence the applicants were left without access to the courts. They referred to *B. v. the United Kingdom* (8 July 1987, Series A no. 121). They further noted that there could be no judicial review if no decision was ever taken subsequent to the order. Moreover, judicial review was limited in scope and in its application to specific circumstances.

49. The Government submitted that the right of access to court was not absolute and was subject to regulation by the State. Thus, the fact that a special judicial remedy was not provided did not imply that the provision had been violated. The Government submitted that the person exercising parental authority could object within twenty one days of the issuance of the care order before it was confirmed by a Juvenile Court. The fact that a decision of the Juvenile Court was not subject to appeal did not raise an issue under Article 6 of the Convention.

50. The Government submitted that care orders were issued in emergency situations which often changed rapidly. It was thus difficult for a court to evaluate these constantly changing circumstances. In cases where a care order had to remain in force for several years, the judicial mechanism would be unable to monitor all the developments that occurred over that considerable period of time. In the Government's view the right of access to a court did not imply a right of continuous and repeated petitioning of the courts to monitor and review a situation which was by its very nature dynamic. It sufficed for the situation to be monitored by the welfare service, which was clearly more competent to assess the situation and which reported directly to the Minister.

51. The Children and Young Persons (Care Orders) regulations established a procedure whereby cases were reviewed and through which M.D. was heard, as evidenced by the change in visiting regime in the present case. While the order is in place minors are assigned a social worker to safeguard their interests and review the care order. Once it transpired that it would be in the best interests of the children for them to stay with the mother, the care order would be revoked.

52. Moreover, the decisions of the Minister could be challenged through judicial review proceedings (Article 469 A of the Code of Organisation and Civil Procedure), which according to the Government provided sufficient access to court for the purpose of challenging the Minister's decisions.

2. The Court's assessment

53. The Court reiterates that in order for the right of access to court to be effective, an individual must have a clear and practical opportunity to challenge an act interfering with his civil rights (see *De Jorio v. Italy*, no. 73936/01, § 45, 3 June 2004, and *Bellet v. France*, 4 December 1995, Series A no. 333-B, § 36).

54. The Court notes that the applicants' complaint does not relate to the procedural safeguards in the procedure leading to the final care order, in relation to which the Government have made submissions. Neither does it concern the possibility of contesting any further decisions of the Minister. The Court observes that the applicants are solely complaining about the lack of access to an independent and impartial tribunal established by law following the issuance of the care order and its confirmation by the Juvenile Court, in that no procedure to that end was established in the law. It follows that the case does not concern a restriction on their right of access which would be subject to a proportionality test, but solely whether such access existed.

55. The Court notes that the Civil Court in its constitutional jurisdiction had found that there was no remedy granting access to a court for the first applicant or anyone in her position wanting to have the merits of a care order re-examined (see paragraph 18 above). Similarly, the Constitutional Court alluded to the same conclusion, although it did not make a finding on that issue (see paragraph 22 above). The Government have not submitted that a judicial remedy existed to challenge a care order during the time it was in force, namely until the minors reached eighteen years of age. Indeed, the Government argued that the courts would not be the right venue for such an assessment. The Court considers that such an argument runs counter to the entire basis of Article 6, which provides for access to an impartial and independent tribunal for the determination of civil rights and obligations. It is precisely a tribunal's role to supervise administrative action in any field and guarantee freedom from arbitrariness. Moreover, any assessment made by the courts would evidently take into consideration the input given by the relevant actors, such as the social workers in the present case. It follows that the Government's argument is no excuse for the fact that the Maltese system provided no access to a tribunal which could evaluate the applicants' situation.

56. Moreover, the Court cannot accept that a review by the social workers who reported to the Minister, who could in turn revoke a care order, would constitute an "impartial and independent tribunal". Furthermore, the legal framework providing for this process did not afford the possibility for the applicants to make such an application, nor has it been shown that any decision in this field would be written and made public in order to provide for the possibility of a judicial review.

57. The foregoing considerations are sufficient to enable the Court to conclude that the three applicants did not have access to a court to challenge the care order affecting their family situation.

58. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. As mentioned above, the Court considers that the lack of access specific to the first applicant's situation may also raise an issue under Article 8 of Convention, which reads as follows:

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

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

60. The Government submitted that the first applicant had failed to make use of the remedy provided under Article 30 (2) of the Criminal Code.

61. The applicant contested the application of Article 30 (2), claiming that it applied to administrative matters and not to parental authority.

62. The Court refers to the general principles set out in paragraph 31 above.

63. The Court considers that the provision of sub-paragraph (2) of Article 30 cannot be read in a vacuum and must necessarily be seen in the light of Article 30 as a whole. Having analysed Article 30 (paragraph 24 *in fine* above) the Court shares the view that the purpose of the provision is circumscribed by the circumstances mentioned in its sub-paragraph (1) and therefore does not apply to the present case in relation to a conviction leading to the forfeiture of parental authority. This interpretation is further confirmed by the fact that the Constitutional Court had not made any reference to this provision. Nor have the Government submitted any evidence of the provision being used in this context. Bearing in mind that there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Raninen v. Finland*, 16 December 1997, § 41, *Reports* 1997-VIII), the Court considers that the first applicant was not required to attempt such a procedure. The Government have not submitted that there existed

any alternative remedy in the first applicant's circumstances. Thus, the Court finds that the first applicant did not have a remedy against the deprivation of parental rights attached to her conviction.

64. It follows that the Government's objection must be dismissed.

2. Other grounds for declaring the complaint inadmissible

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

B. Merits

1. The parties' observations

66. The first applicant submitted that when the criminal court gave judgment against her it failed to specify that Article 197 (4) was being applied; indeed its suspended sentence and remark as to the eventual return of the children to the mother indicated that the article had not been applied. Indeed, the first time Article 197 (4) came into play was when it was mentioned by the Constitutional Court. The application of the article meant that the mother would lose all parental rights up until the children were of age, as no remedy existed against such a measure.

67. The Government submitted that the interference with the first applicant's rights was in accordance with the law and necessary in a democratic society for the protection of the rights and freedoms of others. The Government considered that deprivation of parental authority emanated from the issuance of the care order, which once in place transfers the exercise of powers with respect to care and custody to the Minister. It was therefore not the judgment of the Criminal Court that caused the interference. Thus, the Government considered the interference to have arisen from the issuance of the care order, which they submitted was in the best interests of the children, since at the time the first applicant had not been in a position to take proper care of her children. Moreover, her situation was subject to constant monitoring and review, which resulted in her having increased access to the children as approved by the Minister. This went to prove that all attempts were being made for an eventual reunification. In their view M.D. still enjoyed all remaining rights save for care and custody, which included visitation rights in accordance with her Article 8 rights.

68. In any event the Government considered that the measure emanating from the criminal court's judgment had been foreseeable and was not permanent in nature since the first applicant could ask for its revocation

under Article 30 (2) of the Criminal Code. They noted that the measure was automatic and consequential on a finding of guilt in relation to Article 247 A of the Criminal Code, and did not need to be mentioned in the court judgment.

2. The Court's assessment

(a) General principles

69. The Court reiterates that an interference with the right to respect for family life entails a violation of Article 8 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under Article 8 § 2 and is "necessary in a democratic society" for the aforesaid aim or aims. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *Kutzner v. Germany*, no. 46544/99, § 60, ECHR 2002-I).

70. Regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see *W. v. the United Kingdom*, 8 July 1987, § 59, Series A no. 121, and *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290).

71. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V (extracts).

(b) Application to the present case

72. Notwithstanding the Government's arguments, which are in contrast with the Constitutional Court's finding, the Court considers that the first applicant's deprivation of the entirety of her parental rights is a consequence of her criminal conviction and not the antecedent care order, which only deprived her of care and custody rights over her children.

73. The Court considers that the removal of parental rights which was automatic upon the criminal courts' finding of guilt, constitutes an interference with the first applicant's family life (see *Sabou and Pircalab v. Romania*, no. 46572/99, § 46, 28 September 2004).

74. The Court considers that the interference had its basis in Articles 247A and 197 (4) of the Criminal Code. As to the quality of the law requirement, the Court does not doubt that the application of the said provisions, even in the case of a suspended sentence (see Article 28 A (5) of the Criminal Code paragraph 24 *in fine* above), was automatic on the finding of guilt and that it did not require the competent court to make reference to the measure, which had been both accessible and foreseeable. Moreover, it is not in dispute that the application of such a measure, namely, the forfeiture of authority over the children, was perpetual (until the children attain majority) as held by the Constitutional Court, despite a perplexing remark by the Criminal Court (see paragraph 11 above).

75. The Court further considers that the measure had the legitimate aim of protecting the "rights and freedoms" of others, in particular the children. It remains to be determined whether it was proportionate.

76. The Court reiterates that in these types of cases, consideration of what is in the best interests of the child is of crucial importance. The deprivation of parental rights is a particularly far-reaching measure which deprives a parent of his or her family life with the child and is inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests (see *Sabou and Pircalab*, cited above, § 47, and, *mutatis mutandis*, *Johansen v. Norway*, 7 August 1996, §§ 64 and 78, *Reports* 1996-III).

77. The Court notes that only certain offences under the Criminal Code lead to the removal of parental rights. These offences include defilement of minors; inducing persons under age to engage in prostitution; the making of indecent photographs, films, etc., of persons under age; and ill-treatment or neglect of children under twelve years of age, as in the present case. In consequence the Court notes that unlike the case of *Sabou and Pircalab*, this is not a blanket provision applied to all offences but solely to offences where the offender has any authority or right over the child, victim of the criminal act. Given its limited scope the Court finds the measure under Article 197 (4) both reasonable and necessary and in view of the interests at stake, it cannot be said that in legislating for such a measure the State exceeded its margin of appreciation. Nevertheless, the Court observes that the measure is one which not only affects the parent but also the children and thus should be applied with the highest degree of caution. As mentioned above, the Court notes that the application of Article 197 (4) is automatic and thus it escapes scrutiny by the domestic courts in relation to whether it is in the best interests of the child to apply such a measure at the date of conviction. Indeed, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems, leading to excessively long proceedings, it cannot be precluded that the situation relevant to an accused may have changed between the date of the

commission of the offence and the date of sentencing. While it is true that the Court's examination is limited in scope to the circumstances of the case before it and that in the present case, the criminal proceedings had been timely, the Court considers that the automatic application of the measure to the applicant without any weighing of the interests of justice and those of the children whose interests are paramount, is of itself problematic.

78. Moreover, the Court, notes with concern that once such a conviction comes into play the forfeiture of parental rights is permanent until the child attains the age of majority and the Court has already found that the first applicant did not have a remedy against the deprivation of parental rights attached to her conviction (see paragraph 63 above). Indeed, in the present case this means that the first applicant, whose parental rights were forfeited by a judgment of 2006, when her children were six and four years of age, does not, and will not have the possibility in future to argue for the restoration of her parental rights in the light of a change in her circumstances.

79. In the Court's view, the automatic application of the measure as well as the lack of access to a court to challenge the deprivation of parental rights at a future date, fail to strike a fair balance between the interests of the children, those of the first applicant and those of society at large. It follows that the measure at issue, in so far as it was automatically applied, perpetual and not subject to any periodic revision or at least to subsequent assessments following a request in that regard, was not "necessary in a democratic society" for the aforesaid aim.

80. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 8 of the Convention in respect of the first applicant.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

81. The first applicant complained that she did not have access to a court to contest the care order following a change of circumstances. For the same reasons, and on the basis of the conclusion reached by the Constitutional Court, she complained that she did not have an effective remedy as required by Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

82. The Government contested that argument.

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

84. Having regard to the findings relating to Articles 6 and 8 above (see paragraphs 58 and 79 above), the Court considers that it is not necessary to

examine whether, in this case, there has been a violation of Article 13 (see, among other authorities, *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 67, 31 May 2011, and *Curmi v. Malta*, no. 2243/10, § 64, 22 November 2011).

IV. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

85. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

86. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, *Reports* 1998-IV; *Scozzari and Giunta*, cited above, § 249, ECHR 2000-VIII; and *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

87. With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, ECHR 2009-..., and *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012).

88. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 8, to indicate individual measures for the

execution of this judgment without prejudice to any general measures required to prevent other similar violations in the future. It observes that it has found a violation of that Article on account of the fact that the deprivation of parental rights imposed on the first applicant by the criminal jurisdictions was automatic and perpetual, thus not subject to any periodic review or at least to subsequent assessments following a request in that regard. It followed that the measure was not "necessary in a democratic society" (see paragraph 79 above).

89. The Court considers that in order to redress the effects of the breach of the first applicant's rights, the authorities should provide a procedure allowing her the possibility to request an independent and impartial tribunal to consider whether the forfeiture of her parental authority is justified. However, nothing in this judgment should be seen as expressing a view on what the outcome of such an assessment should be.

90. The Court notes that it has also found a violation of Article 6 § 1 on account of the lack of access to a court for persons who have been affected by a care order, such as the three applicants (see paragraphs 57-58 above). Having regard to that finding, the Court recommends that the respondent State envisage taking the necessary general measures to ensure the effective possibility of such access to a court.

B. Article 41 of the Convention

91. 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

92. The applicants claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

93. The Government submitted that EUR 2,000 would suffice, given that the care orders had been kept in force for the protection of the minors.

94. The Court awards the applicants EUR 4,000 each in respect of non-pecuniary damage. In respect of the two minor applicants the award is to be held in trust for their benefit.

B. Costs and expenses

95. The applicants also claimed EUR 3,922.43 for the costs and expenses incurred before the domestic courts and EUR 3,000 for those incurred before the Court.

96. The Government submitted that the applicants had not provided proof that the sum of EUR 1,970.53 owed to them in costs for the domestic proceedings had been paid. They further submitted that the sum of EUR 1,500 would suffice to cover the cost of the proceedings before this Court.

97. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, noting particularly that no breakdown of costs was submitted by the applicants, the absence of details as to the number of hours worked and the rate charged per hour, and noting that the domestic court expenses, if still unpaid, remain due to the Government, the Court considers it reasonable to award the first applicant the sum of EUR 5,500 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

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

4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

5. *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

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, to each applicant in respect of non-pecuniary damage;

(ii) EUR 5,500 (five thousand five hundred euros), to the first applicant, plus any tax that may be chargeable, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 17 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Lech Garlicki
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Scicluna is annexed to this judgment.

L.G.
T.L.E.

CONCURRING OPINION OF JUDGE SCICLUNA

I wish to point out, at the outset, that I fully endorse the conclusions reached by the Chamber in respect of Article 6 and that this opinion is only related to that part of the judgment dealing with Article 8.

While concurring with the Chamber in the sense that the automatic application of Article 197(4) of the Criminal Code and, therefore, without the possibility of scrutiny by the domestic courts before its application, constitutes a violation of Article 8, and while agreeing fully with the considerations made in the judgment in that respect, I am not of the opinion that the absence of procedures to challenge the application of such a measure at a future date in itself constitutes a breach. In other words, it does not follow that because automatic application of the measure constitutes a breach of Article 8, then, once applied, the perpetual application (until the attainment of majority by the child) of it constitutes a breach. Indeed, the facts of the case clearly show that, notwithstanding the application of Article 197(4), access by the first applicant, M.D., to her minor children had gradually increased, meaning that although she may have been deprived of parental authority, she was not deprived of seeing her children, of being with them and of having them residing with her for periods of time. Consequently, in the present case I only see a violation in respect of the automatic application of Article 197(4). Should the application of Article 197(4) be subject to an assessment by a domestic court, then I do not believe that future reviews would be required. The deprivation of parental authority is, vis-à-vis the parent, an extreme form of punishment, and this will be taken into consideration by a court when making its assessment as to whether such an extreme measure is required in the particular circumstances before it.

Naturally, the procedure mentioned in paragraph 89 of the judgment should be made available in all cases which have been subject to the automatic application of Article 197(4).