CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF SANCHEZ CARDENAS v. NORWAY

(Application no. 12148/03)

JUDGMENT

STRASBOURG

4 October 2007

FINAL

04/01/2008

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 Sanchez Cardenas v. Norway,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 13 September 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 12148/03) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Chilean national, Mr Jose Santo Sanchez Cardenas ("the applicant"), on 5 April 2003. Having originally been designated by the initials J.S.C., the applicant subsequently agreed to the disclosure of his name.

2. The applicant was represented, as from 1 September 2005, by Mr S. Klomsæt, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by their Agent, Ms T. Steen, Attorney, Attorney-General's Office (Civil Matters).

3. The applicant complained in particular of violations of Articles 6 § 1 and 8 of the Convention on account of the reasoning in a judgment of 27 September 2002 of Gulating High Court rejecting his claim for a right of access in respect of his children, L. and A.

4. By a decision of 1 June 2006, the Court declared the application admissible in part.

5. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is a Chilean national who was born in 1968 and lives in Bergen, Norway. He has worked *inter alia* as a kindergarten assistant for about 8 years.

7. The applicant has two sons L. and A. (born respectively on 11 June 1994 and 24 February 1996) with Ms H.T., a Norwegian national, with whom he entered into a relationship in 1992/1993 and cohabited from mid 1994 until the end of that year. In 1995 (before A. was born) the applicant and H.T. reached an agreement whereby he had certain access rights to L.

8. Since around 1997 he has cohabited with Ms G.A.D. and her adolescent son.

9. A dispute arose as to the applicant's access to L. and A. On 9 June 1997 H.T. reported him to the police for allegedly having sexually abused L. She based her allegations on statements made by L. The mother gave statements to the police and L. was interviewed by a judge without anything significant emerging in the case. In July 1998 the State Prosecutor discontinued the investigation, which decision the Director of Public Prosecutions confirmed on appeal in October 1998.

10. In the year 2000 the applicant brought judicial proceedings before the Bergen City Court (*byrett*), claiming a right of access to his two sons (sections 44 and 44A of the Children Act 1981). On 7 December 2000 the City Court refused a request by H.T. to have an expert witness appointed.

11. By a judgment of 18 April 2001 the City Court granted the applicant access every other week-end and for approximately half of the holiday periods and devised a plan for stepping up access. To give the above immediate effect, the City Court issued an interlocutory order.

In reaching the above conclusions, the City Court rejected the accusations made by the boys' mother that the applicant had sexually abused L. It observed that according to H.T. there were only 10 occasions on which the applicant had been on his own with his son, namely in that they had been in a room with the door shut in H.T.'s apartment. In her view it was most probable that the abuse had occurred on these occasions, though she did not have concrete evidence to this effect. The City Court found it excluded on the evidence before it that the applicant had sexually abused L. It attached decisive weight to the fact that the applicant's access to his son had taken place each time under the supervision of at least one other person and that on the 10 occasions on which he and the son had been on their own in the latter's room, it was for a very short time and in a situation where the child's mother could have entered the room at any moment. The visits in

question took place more than a year and a half ago - a very long period for a small child - before April 1997 when the son had made the statements that aroused the mother's suspicions that the applicant had sexually abused L. Finally, the City Court had regard to the fact that the physiological and psychiatric examinations carried out did not support the allegation that abuse had occurred. It found that the allegation had been the result of manipulation and fabrication by the mother as part of a strategy to obstruct the applicant's access. There was reason to assume that this had already had damaging effects on L., who had stated that he did not wish to live or to be with his father. The boy had become a go-between in a conflict between adults. The City Court stated that the applicant was more suitable than the mother to assume the daily care.

12. On 10 October 2001 H.T.'s lawyer lodged a disciplinary complaint against the judge who had heard the case before the City Court for having acted with prejudice against his client in expressing distrust and treating her with disrespect during her testimony. The judge was imposed a mild reprimand by the Ministry of Justice, which found that there were grounds for criticising his conduct of the proceedings.

13. H.T. appealed against the City Court's judgment and interlocutory injunction to Gulating High Court (*lagmannsrett*), requesting in the main that the applicant be refused a right of access to the children. She referred inter alia to the fact that the court appointed expert considered that L's strong negative attitude to his father was consistent with abuse having taken place. The applicant, denying that any abuse had occurred, requested the High Court to reject her appeal.

14. By a judgment of 27 September 2002, the High Court overturned the City Court's judgment and refused the applicant access to his two sons, *inter alia* after obtaining an expert report from a court appointed psychologist, dated 2 September 2002, and hearing evidence from the latter. It also had regard to a report of 11 September 2001 by a psychologist who had been counselling the boy at the mother's initiative and the psychologist's oral evidence to the court.

15. The High Court noted that from the psychologist's report of 2 September 2002 it emerged that the boy had felt great anxiety about the idea of meeting his father (he would kill himself rather than see his father); L. was unable to describe the reasons but his statements seemed founded on actual experience. Any access should be established gradually. Forcing the boy to have contact would be psychologically damaging.

16. The High Court observed that the applicant and L. met 23 times in 1996, 8 times in both 1997 and 1998, 3 times in 1999 and that no access had taken place during the last three years (since 11 August 1999). It did not consider that the mother had sabotaged access although it understood that the fact that access had to take place under supervision by her sister or her father had made it difficult for the applicant to exercise access.

17. The High Court's judgment included the following reasoning:

"Two arguments have been made against the father being granted a right of access.

Firstly, it is argued that the father has subjected [L.] to sexual assault. There is a complaint to the police dated 9 June 1997 from which it appears that an investigation of the case was initiated. The mother made statements to the police on 17 June and 18 December 1997, and there was also an interview of [L.] by a judge without anything of significance for the case coming to light. According to information presented, the case was dropped by the public prosecutor. This decision was appealed to the Director of Public Prosecutions on 22 October 1998 but the public prosecutor's decision was not reversed. The fact that there was insufficient evidence in the criminal case is, however, not decisive in this case, see *Rt* ([*Norsk Retstidende* (Supreme Court Reports)]-1989-320. It is further assumed that in a case involving minor children, no risk whatsoever may be taken in such circumstances, also concerning the issue of access rights, see *Rt* – 1994-940. In view of the information available in the case, where quite detailed descriptions have been provided of the abuse, together with [L.]'s strong objections to seeing his father, the High Court finds that there are many elements that may indicate that abuse has occurred. The High Court has nevertheless not found it necessary for its decision to go further into or take a stance on this.

Secondly, it is contended that the implementation of access rights vis-à-vis the father is impossible in view of the fact that [L.] is opposed to this. In light of the information available, the High Court assumes that [L.] is opposed to having access to his father, which is to be accorded weight pursuant to section 31 of the Children Act. Nevertheless, the implementation of access may not, in principle, be made dependent on the child not being opposed to being with his father. This question will depend on the concrete circumstances.

...

According to the report, the boy is unable to describe why he has such great anxiety about meeting his father. [Psychologist O.] considers the information he has obtained to be an expression of the boy's actual experiences. The report further states that if contact between the father and the boy is to be established, this must take place gradually over a longer period of time and in such a manner that [the child welfare services] can constantly monitor how this develops. If [L.] 's strong anxiety is maintained, forced contact is at present deemed to constitute a psychological assault on the boy, according to the report. [Psychologist O.] has given testimony before the High Court, which in its essentials concords with the aforementioned report. According to [Psychologist O.], [L.] has stated that he would not visit his father even in the presence of a third party, his mother or someone else.

In his report, the expert states inter alia the following:

'On the whole [L.] has a good level of functioning, though everything having to do with his father is an obviously vulnerable and difficult point for him. My own impression from an interview with [L.] accords well with what [Psychologist O.] has described. [L.] indicates with his entire being both in the interview and afterwards that this is a very uncomfortable and difficult topic.'

The expert evaluated three alternative resolutions for the access issue. The first alternative is an ordinary access arrangement between the father and the boys. The expert concluded that it is both impossible and indefensible to go straight to such an arrangement. He refers to the fact that [L.] 's aversion and emotional reactions to

contact with his father are so strong that such an arrangement could not be started without strong physical coercive measures. Furthermore, he refers to the fact that [L.] has made serious threats about what he would do, namely take his own life. The expert also pointed to the strain this would inflict on [L.] and that this may jeopardise his further development. This would, in addition, inflict substantial strains on the mother. As the second alternative the expert considered a limited access arrangement, with supervision, possibly with the aim of increasing it to ordinary access. The expert pointed out that such a process may involve relatively high human (and financial) costs and that it would be a stressful process for [L.] and the rest of the family. Furthermore, it was noted that the outcome may be uncertain, since neither the mother nor [L.] will, at the outset, be very motivated to attaining concrete results in the form of contact with the father. The expert concluded that this is a possibility, but that it would require support by both parties and having sufficient resources in and around the family at their disposal. He also pointed out that the chances of failing abysmally would be present. The third alternative considered is no access at all between the father and the boys. To justify such a solution, the expert referred to the necessity of safeguarding the good progress the boys are making and of sparing them, especially [L.], from further uncertainty and conflicts connected with the issue of access.

The expert did not reach any unambiguous conclusion in his report, except from finding that an ordinary access arrangement appears to be quite impossible to implement. As far as the other alternatives are concerned, he has kept the options more open. In his testimony before the court and after having been present during the appeal hearing, the expert expressed the view that he strongly favours that there should be no access between the father and the boys. In addition to [L.]'s clearly expressed unwillingness to have access to his father, the expert referred to the difficult situation that the family and [L.] in particular have been in over several years. He further referred to the fact that the mother was the sole provider for the children, and that she and the family had reached their 'limit of tolerance'. It is also the understanding of the High Court that the expert deems the costs of a supervised arrangement to be too high and the benefits to be too uncertain for the expert to have been able to recommend access under supervision as an alternative.

The High Court agrees that an ordinary access arrangement would not be an acceptable alternative, but has evaluated in particular whether an arrangement with supervised access would be possible. Like the expert, the High Court has concluded that such an arrangement would be disproportionately demanding and that it presumably may be difficult to find persons with the necessary competence who are willing to subject themselves to such a time consuming process as is in question here. The High Court also agrees with the expert that the strain that such a process will necessarily inflict on the family must also be considered, especially since the mother has sole care of the children. On the basis of its impressions during the hearing, the High Court agrees with the expert that the 'tolerance limit' for whatever additional strains that can be inflicted appears to have been reached. Even if neither the [Psychologist O.] nor the expert appears to have been able to clarify the reasons for [L.] 's strong objections to having contact with his father, this must, on the basis of the circumstances of the case, be accorded substantial weight in the decision. In view of this, there would in the view of the High Court be an not unappreciable risk that the boy's development may be directly jeopardised by having to go through such a process that is under discussion here. In addition, considerable flexibility would be required of both parties, which, on the basis of the High Court's impressions from the hearing, is uncertain, on the part of the mother, but especially on the part of the father.

> Despite the fact that ..., a refusal to grant access may be justified only in very special circumstances, the High Court has concluded that there should be no access in this case since, on the basis of an overall assessment, this would not be in the best interest of the children. Even though the issue of access is at the outset to be considered separately with regard to each of the boys and even though it is assumed that [A.] does not have the same antagonistic relationship to his father as [L.], the High Court finds no reason to grant access with regard to [A.] as well. As the High Court understands the expert, it would cause unpleasant tensions within the family if only one of the children were to have access and that such an arrangement was not advisable, something with which the High Court agrees. Given the strains that the family has been under over several years, in the High Court's view, it is now important that peace prevails in this matter.
>
> Having reached this conclusion, the High Court does not find it necessary to establish a provisional arrangement in respect of the access issue."

18. The High Court Judgment contained the following unanimous conclusion regarding the substantive questions:

> "[The applicant] is not granted a right of access to [L.], born on *,*, 1994, and [A.], born on *,*, 1996. "

19. The applicant appealed against the High Court's judgment as a whole, asking primarily that it be quashed and in the alternative that he be granted a right of access to his children. He challenged the High Court's procedure, namely its omission to deal with the interim order by the City Court.

He moreover appealed against the High Court's assessment of the evidence, notably its reasoning regarding the allegations on sexual abuse, including the following passage, which in his view was "curious".

> "In view of the information available in the case, where quite detailed descriptions have been provided of the abuse, together with [L.'s] strong objections to seeing his father, the High Court finds that there are many elements that may indicate that abuse has occurred. The High Court has nevertheless not found it necessary for its decision to go further into or take a stance on this."

The applicant submitted that in the light of the evidence it was hard to understand the High Court's conclusion on sexual abuse, even more so when it was stated in the judgment that it "has not found it necessary for its decision to go further into or take a stance on this". In the applicant's view, this was obviously an error; should a judge find that there were many elements to indicate that sexual abuse had occurred, it was evident that this conviction would also have an effect on a decision regarding access for the parent found to be a probable abuser. The applicant further disputed the lawfulness of the High Court's rejection of any access rights, which decision could not be reconciled with the rule that the best interests of the child should prevail. In the applicant's view, L's horror picture of his father should be removed by arranging for access. This was a clear case of the so-called Parental Alienation Syndrome, with clear hatred, fear and anxiety, unlike the ambivalence shown by children who have been exposed to actual abuse.

20. On 20 December 2002, the Appeals Selection Committee of the Supreme Court refused the applicant leave to appeal.

21. The applicant has submitted a medical certificate dated 7 June 2003 by Dr R.K., which stated:

> "I the undersigned have known [the applicant] since December 2000.
>
> He has had a very tough time psychologically during the period since the judgment. He feels that he has been unjustifiably held liable of sexual abuse against his son and feels powerless in the system. He has been very depressed lately. He is struggling with problems of sleeplessness, bad appetite and loss of weight. He is isolating himself. At times he has had suicidal thoughts. This has adversely affected his family life and members of his family have had a particularly difficult time during the past six months."

22. The applicant has moreover filed a statement by Dr H.V., Psychiatrist, of 4 September 2006, which concludes:

> "It is highly probable that [the applicant] has developed symptoms that are compatible with Post Traumatic Stress Disorder after what he had experienced in Chile. This has been further fortified by a situation combining anxiety and depression in the form of an adaptation disturbance as a result of his fight to get access to his children, especially when the court deprived him of his right of access.
>
> He presents a relatively high level of pressure from suffering but which he nevertheless manages to master satisfactorily. He receives regular treatment by a psychologist and medical treatment."

II. RELEVANT DOMESTIC LAW

23. At the time of the national courts' consideration of the present case, the right of access between a parent and a child was governed by sections 44 and 44A of the Children Act 1981 (*Lov om barn og foreldre* (*barnelova*)).

Under section 44 the child had a right of access to both parents, even if they lived apart, and the parents had mutual responsibility for implementing the right of access. Under section 44A the parent with whom the child did not live had a right of access to the child unless otherwise agreed or determined. The provision contained more detailed rules on the extent of access, its implementation and the procedure. It provided that decisions should first and foremost be based on what was best for the child.

24. Provisions governing the contents of judgments in civil proceedings may be found in Chapter 12 of the 1912 Code of Civil Procedure (*tvistemålsloven*). In so far as relevant Article 144 provides:

"A judgment shall contain:

...

3. A brief presentation of the object of the case and of the parties' submissions; when appropriate, reference may be made to written pleadings filed in the case, or to entries in the court record; if so, the material referred to shall be included in transcripts of the judgment;

4. Reasoning for the decision; they shall decisively and exhaustively indicate the facts of the case on which the court bases its decision

5. An operative part.

...."

THE LAW

I. THE SCOPE OF THE ISSUES BEFORE THE COURT

25. In his observations at the merits stage, the applicant firstly reverted to his complaint under Article 6 § 2 of the Convention and requested the Court to reconsider its decision of 1 June 2006 declaring this part of the application inadmissible on grounds of non-exhaustion. It was the fault of the lawyer who had represented him before the national courts that this complaint had not been pursued before the Supreme Court.

26. However, the above decision is final and the Court finds that no reasons have been brought forward for it to examine whether it should be re-opened.

27. Secondly the applicant complained about lack of impartiality of the High Court on account of the participation of a judge who had been divorced from a brother of the judge who had dealt with the case in the City Court.

28. However, the Court observes that this is a new complaint, which is not covered by its decision on admissibility and therefore falls outside the ambit of the case.

29. In the light of the above, the Court will confine its examination to the applicant's complaints under Articles 6 § 1 and 8 of the Convention, declared admissible on 1 June 2006, concerning the impugned reasoning in the High Court's judgment of 27 September 2002.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. Article 8 of the Convention reads:

"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. Arguments of the parties

1. The applicant

31. The applicant maintained that the relevant passage of the High Court's judgment amounted to an affirmation of suspicion that he had committed sexual abuse. Referring to a medical statement of 7 June 2003 (see paragraph 21 above) the applicant submitted that, having been labelled a sexual abuser, he had suffered serious psychological and social problems. He also invoked a psychiatrist's statement of 4 September 2006 (see paragraph 22 above). The impugned passage entailed an unjustified interference with his right to respect for private and family life in violation of Article 8 of the Convention.

2. The Government

32. The Government pointed out that that reference to the allegation and the evidence adduced in this respect was due to the fact that this was the main argument presented by the mother. They emphasised that the disputed passage did not determine the applicant's civil rights or determine the question of criminal guilt. The High Court's decision that it was not necessary to explore whether he had assaulted his son did therefore not in any respect affect the applicant's rights under Article 8. The question of abuse did not affect the outcome of the proceedings in question. Any such assessment would have been superfluous, since the other circumstances in the case were more than sufficient for the Court to determine that access should not be granted. Article 8 was therefore not applicable to the *obiter dictum* at issue.

B. Assessment by the Court

33. The Court does not find that the issue under Article 8 of the Convention can, as suggested by the Government, be analysed solely with reference to the outcome of the case before the High Court. Even though the impugned passage in the High Court's judgment of 27 September 2002 had no bearing on its conclusion with regard to the applicant's claim of access rights in respect of his sons, it nonetheless conveyed information to the

effect that the High Court, having regard to the state of the evidence, held a suspicion that the applicant had sexually abused L. It not only related to the most intimate aspects of the applicant's private life but it also suggested that he might have engaged in highly reprehensible conduct vis-à-vis a person to whom he had family ties, his son. The information was moreover capable of adversely affecting his enjoyment of private and family life, in the ordinary sense of these terms. Therefore, in the Court's view, the facts underlying the applicant's complaint fell within the scope of Article 8 of the Convention which provision is therefore applicable to the matter at hand.

34. Furthermore, the Court finds that the inclusion by the High Court of the disputed statement as a part of its own reasoning in the judgment constituted an interference with the applicant's right to respect for his private and family life as guaranteed by Article 8 § 1 of the Convention. It will therefore have to consider whether the interference was justified under Article 8 § 2.

35. In this regard the Court notes that it is undisputed that the interference was "in accordance with the law" and the Court finds no reason to hold otherwise.

36. As to the question of whether the inclusion of the statement pursued any of the legitimate aims enumerated in Article 8 § 2, the Court has taken note of the Government's explanation, made in the context of Article 6 § 1, that it was included because the abuse argument had been the mother's principal submission, though it had not affected the High Court's decision. The Court has further noted the applicant's submission, in connection with his complaint under Article 6 § 2 (declared inadmissible on 1 June 2006), that the relevant passage amounted to an affirmation of suspicion that he had committed sexual abuse and that, despite the High Court's statement that this matter had not been decisive for the outcome, it was hard to believe that this was not the case.

The Court for its part finds no reason to doubt that the impugned statement had been prompted by H.T.'s principal submission and the applicant's objection thereto, that he had sexually abused L. The Court is prepared to accept that when the High Court touched upon this matter in its reasoning concerning the applicant's request to be granted a right of access to the children, it was in the pursuit of one or more of the legitimate aims enumerated in Article 8 § 2, notably for the protection of the rights and freedoms of others.

37. However, turning to the next criterion in Article 8 § 2, the one of necessity, it is not apparent to the Court why the High Court, in the first part of the impugned statement, held:

> "In view of the information available in the case, where quite detailed descriptions have been provided of the abuse, together with [L.]'s strong objections to seeing his father, the High Court finds that there are many elements that may indicate that abuse has occurred."

when in the second part it went on to say:

> "The High Court has nevertheless not found it necessary for its decision to go further into or take a stance on this."

It thus appears that, without it serving any purpose for its resolution of the case, the High Court took judicial notice of the evidence before it and affirmed on this basis a suspicion of its own that the applicant had committed a serious crime, sexual abuse against one of his sons. No cogent reasons have come to light as to why the High Court in part dealt with, in part omitted to deal with the issue of sexual abuse. In the Court's opinion, the national court should either have disposed of the issue, with all that means in terms of evidentiary assessment and reasoning, or have left it on the side.

38. Furthermore, the Court observes that the above portrayal of the applicant's conduct in an authoritative judicial ruling was likely to carry great significance by the way it stigmatised him and was capable of having a major impact on his personal situation as well as his honour and reputation. Indeed, as it appears from the medical certificate of 3 June 2003, the statement had harmed him both psychologically and physically, had had a stifling effect on his social life and had prejudiced his family life. Despite its character and potentially damaging effects on his enjoyment of private and family life, the inclusion of the said passage in the High Court's judgment was not supported by any cogent reasons.

39. In the light of the above, the Court finds that the interference with the applicant's right to respect for his private and family occasioned by the impugned passage in the High Court's judgment, was not sufficiently justified in the circumstances and, notwithstanding the national court's margin of appreciation in such matters, was disproportionate to the legitimate aims pursued. Accordingly, the contested part of the High Court's judgment gave rise to a violation of Article 8 of the Convention.

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

40. Article 6 § 1 of the Convention, in so far as is relevant, reads:

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

A. Arguments of the parties

1. The applicant

41. Relying on the above provision, the applicant complained about the way in which he had been portrayed in the High Court's judgment and its

assessment of the evidence in this respect. He accepted that, in deciding on parental access to a child, a court should be able to consider the validity of an accusation that the parent concerned had sexually abused the child. However, he submitted that the High Court had pointed to sexual abuse whilst at the same time refraining from making a real assessment of the evidence and taking a stance on this matter. The impugned statement had caused him considerable moral injury and suffering and prejudice to his private and family life.

2. The Government

42. The Government argued that the disputed passage in the High Court's judgment did not involve the determination of a civil right within the meaning of Article 6 § 1 of the Convention. As clearly stated in the judgment, the High Court did not find it necessary to determine whether abuse had occurred. The outcome of the case depended solely on other elements and it was therefore not necessary to assess the question of abuse. The disputed passage was merely an *obiter dictum*. Article 6 § 1 was therefore not applicable to the said passage alone.

43. The sole civil right determined by the High Court concerned the applicant's right to access to his children. To assess whether the reasoning was adequate for the purposes of Article 6 § 1 in this respect, the Court ought to consider the judgment as a whole. The reasons given for not granting the applicant access were highly detailed, both with regard to fact and law. Although the mother had claimed before the High Court that the applicant had assaulted the oldest child, the sole question before the High Court was whether the applicant should be granted access to the children. Based on the evidence presented, the testimonies of the two parties and five witnesses and the statements from the court appointed expert, it was clear to the High Court that the applicant should not be granted access to the children irrespective of whether he had abused the oldest child.

The High Court was therefore in no respect obliged to address the issue of abuse. Its reference to the allegation and the evidence adduced in this respect was due to the fact that this was the main argument presented by the mother. However, it was nonetheless explicitly clear from the judgment that the allegations of abuse did not affect the High Court's decision not to grant the applicant access to the children. Thus, there was no need to give reasons with regard to this factual accusation by the mother.

44. In substance, the applicant argued that the High Court should have determined whether he had abused the child or should not have commented on the issue at all. If such an argument were to prevail, this would entail that national courts in the Member States could not give *obiter dicta* without also in this respect giving full reasons according to Article 6 § 1. This would be a severe break with the traditional view of the right to give *obiter dicta*,

and even more so in this case since the disputed passage did not determine a civil right according to Article 6 § 1.

45. In the view of the Government, the rationale for the requirement in Article 6 § 1 that lower courts give reasons, namely to enable the parties to make effective use of any existing right of appeal (see *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001), did not apply to *obiter dicta*. All in all, under existing case-law, the national courts could only be obliged to indicate the grounds on which they based their decision (see, *inter alia*, *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, p. 16, § 33). An explicit statement in a judgment that the court did not find it necessary to conclude on a factual argument presented by one of the parties could thus not violate the obligation to give adequate reasons.

B. Assessment by the Court

1. Applicability of Article 6 § 1

46. The Court notes that the Government do not seem to contest the applicability of Article 6 § 1 to the proceedings in which the national courts determined the applicant's claim for a right of access to his two sons. The Court for its part is satisfied that the relevant proceedings concerned a "right" that was arguably recognised under national law, namely under sections 44 and 44A of the Children Act 1981, in their respective versions as in force at the material time. Moreover, the dispute was genuine and serious; it related not only to the actual existence of a right but also to its scope and the manner of its exercise. The result of the proceedings was directly decisive for the right in question which, moreover, was "civil" in character. Thus, having regard to its own case-law (see, for instance, *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 32-35, §§ 72-79; *Zander v. Sweden*, judgment of 25 November 1993, Series A no. 279-B, and *Kerojärvi v. Finland*, judgment of 19 July 1995, Series A no. 322; see also more recent judgments, where the applicability of Article 6 § 1 was undisputed: *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, pp. 38-39, §§ 88-90; *Olsson v. Sweden (no. 2)*, judgment of 27 November 1992, Series A no. 250, pp. 37-40, §§ 95107; *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, pp. 1010-11, § 87-88; *Görgülü v. Germany*, no. 74969/01, § 56-60, 26 February 2004; *Bianchi v. Switzerland*, no. 7548/04, §§ 101-115, 22 June 2006), the Court finds that Article 6 § 1 was applicable to the proceedings in question.

47. Meanwhile, the Government argued that, because the impugned passage in the High Court's judgment of 27 September 2002 was an *obiter dictum*, the latter did not involve the determination of a dispute attracting the applicability of Article 6 § 1 to the matter at hand. However, the Court is

unable to accept this argument. Although the statement in question may not have had a bearing on the outcome, it was nonetheless closely related to the issue to be determined by the High Court. The Court is of the view that Article 6 § 1 was applicable to the proceedings as a whole, including to the reasons stated by the High Court in its judgment.

48. In sum, Article 6 § 1 was applicable to the subject-matter of the applicant's complaint.

2. Compliance with Article 6 § 1

49. Turning to the question of compliance the Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; and *Helle v. Finland*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2930, §§ 59 and 60). A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal (see *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001).

50. The Court sees no reason to doubt that the High Court's judgment provided reasons that must be deemed sufficiently detailed for its conclusion that the deprivation of access was on balance justified by the children's best interest.

51. However, the problem in the present instance is rather one of excess of reasoning on a matter that was of a particularly sensitive nature and of paramount importance for all the persons concerned. The Court, having regard to its findings above in respect of Article 8 of the Convention, does not find it necessary to carry out a separate examination in relation to Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant sought no compensation for pecuniary damage but claimed an amount, not exceeding 1,000,000 Norwegian *kroner* ("NOK", approximately 123,650 euros – "EUR"), to be determined by the Court according to its own discretion.

54. The Government did not offer any comments on the above claim.

55. The Court, having regard to the medical evidence adduced (see paragraphs 21-22 above), accepts that the applicant must have suffered some non-pecuniary damage as a result of the matter found to constitute violations of the Convention. Making an assessment on an equitable basis it awards the applicant EUR 7,000.

B. Costs and expenses

56. The applicant further sought the reimbursement of legal costs and expenses, totalling NOK 148,107.75, in respect of the following items:

(a) NOK 125,781.25 (approximately EUR 15,500) for his lawyer's work (125 hours at a rate of NOK 805 per hour, plus 25% value added tax- "VAT") in the proceedings before the Court;

(b) NOK 18,489 (approximately EUR 2,300) which he had reimbursed to the Norwegian legal aid authorities in respect of legal aid received in the national proceedings;

(c) NOK 3,475 for medical expenses;

(d) NOK 3,622.50 for a psychiatric opinion in connection with his application to the Court.

57. As regards item (a) the Government were of the view that the number of hours claimed was excessive and should be reduced by 50%. As to items (b), (c) and (d) they did not make any comments.

58. According to the Court's case-law, an applicant is entitled to reimbursement of his or her costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. As regards item (a) the Court notes that only parts of the pleadings of the applicant's lawyer related to the complaints in respect of which the Court has found violations of the Convention. It finds it reasonable to award EUR 7,500 in respect of this item. As to item (b), the Court is satisfied that parts of these costs were necessarily incurred in order to prevent or obtain redress for the matter found to constitute violations of the Convention and awards EUR 1,000. As to items (c) and (d) (altogether around EUR 865), the Court notes that the former item was substantiated in part whereas the latter item was substantiated in full; it finds it reasonable to award EUR 700 for these two items.

C. Default interest

59. The Court considers it appropriate that the default interest 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. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that it is not necessary to examine the applicant's complaint under Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 9,200 (nine thousand, two hundred euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that these sums are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
   (c) 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;

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

Done in English, and notified in writing on 4 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Registrar	Christos ROZAKIS President