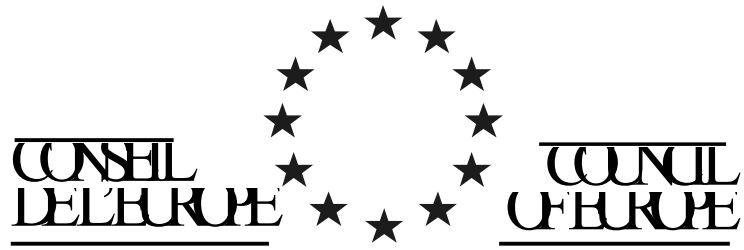

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

CASE OF BEVACQUA AND S. v. BULGARIA

(Application no. 71127/01)

JUDGMENT

STRASBOURG

12 June 2008

FINAL

12/09/2008

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 Bevacqua and S. v. Bulgaria,

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

Peer Lorenzen, *President,*
Rait Maruste,
Volodymyr Butkevych,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 20 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 71127/01) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Bulgarian nationals, Mrs Valentina Nikolaeva Bevacqua and her minor son S. ("the applicants"), on 23 November 2000.

2. The applicants were represented by Ms D. Gorbounova and Mrs G. Tisheva, lawyers practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Karadjova, of the Ministry of Justice.

3. The applicants alleged, in particular, that the courts failed to rule within a reasonable time on the dispute concerning the custody of the second applicant and failed to assist the first applicant, who was the victim of domestic violence by her former husband.

4. On 30 August 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Mrs Valentina Nikolaeva Bevacqua, is a Bulgarian national who was born in 1974 and at the relevant time lived in Sofia. In

2003 or 2004 she moved to Italy. The application is submitted by the first applicant on her own behalf and also on behalf of her son S. ("the second applicant"), a minor, who was born in 1997.

6. The first applicant married Mr N. in 1995 and gave birth to S. in January 1997.

7. Later, the relations between the spouses soured, Mr N. became aggressive and on 1 March 2000 the first applicant left the family home with her son and moved into her parents' apartment. On the same day the first applicant filed for divorce and sought an interim custody order, stating, *inter alia*, that Mr N. often used offensive language, battered her "without any reason" and did not contribute to the household budget.

8. On 7 March 2000 a judge at the Sofia District Court examined the case file and fixed the date of the first hearing for 11 April 2000, without examining the request for an interim order.

9. During the first two months following the separation, Mr N. visited his son every day and took him to his apartment on weekends, with the first applicant's consent.

10. On 11 April 2000 the District Court could not proceed with the examination of the divorce case as Mr N. had been taken ill and did not appear.

11. On 6 May 2000 Mr N. did not bring S. home after a walk. He telephoned the first applicant and told her that his son would live with him. For the next six days he refused the first applicant's requests for meetings or telephone conversations with her son.

12. On 9 May 2000 the first applicant complained to the prosecuting authorities. The relevant prosecutor apparently gave instructions that Mr N. should be summoned and served with an official warning. That was not done until 22 June 2000.

13. On 12 May 2000 the first applicant went to see her son at the kindergarten and took him to her home. In the evening Mr N. telephoned and then appeared outside the first applicant's home. He was shouting and banging on the door, thus frightening the child and the first applicant. Mr N. eventually managed to enter the apartment, when the first applicant's father came home. He allegedly hit or pushed the first applicant in the presence of her parents and the child. At one point Mr N. seized his son, but the first applicant was trying to hold him. The child was screaming. Eventually, Mr N. left with the child.

14. On 18 May 2000 the first applicant visited a forensic doctor who noted a small bruise on her face and a bruise on her hip. On 25 May 2000 she filed a complaint with the District Prosecutor's Office and enclosed the medical certificate.

15. The first applicant also sought the help of a non-governmental organisation assisting female victims of domestic violence. She was offered the possibility to stay with her son in a hostel for such victims in Bourgas.

On 25 May 2000 the first applicant collected her son from the kindergarten and travelled with him to Bourgas. She spent four days at the hostel there without disclosing her whereabouts to Mr N.

16. Mr N. complained to the local Juveniles Pedagogic Unit (see paragraph 43 below), stating that the first applicant had abducted their son. The first applicant was summoned by the police. On 31 May 2000 she returned to Sofia and met the district juveniles inspector. She explained that she had been the victim of violence and that her son's health was in danger because of the father's violent behaviour. It appears that the inspector disbelieved the first applicant's version of the events and allegedly insisted that she could be prosecuted for having abducted her son.

17. On the same day in the evening Mr N. visited the first applicant in her home, allegedly threatened her and took their son away.

18. On the following day, 1 June 2000, the juveniles inspector organised a meeting between the first applicant, her former husband and the child. According to the first applicant, the meeting lasted four hours. The child was asked whether he preferred to be with his mother or with his father. The meeting resulted in an oral agreement between the parents, according to which the child would live with his father for a month and then with his mother for another month. As a result of this agreement Mr N. withdrew his complaint for abduction.

19. According to the first applicant, the agreement was only implemented for a very limited period.

20. In the following days Mr N. allowed contacts between the first applicant and her son. On an unspecified date the child was ill and the first applicant took care of him in Mr N.'s apartment.

21. On 13 June 2000 the first applicant appeared before the District Court for a hearing in the divorce proceedings. She was not legally represented. Mr N. did not appear. His lawyer was present. The first applicant stated that she wished to pursue her claims. The court did not examine the request for an interim order. The first applicant did not raise the issue. The court fixed a time-limit for reconciliation, as required by law, and adjourned the examination of the case until 29 September 2000.

22. On 22 June 2000 the police summoned Mr N. and gave him an official warning in relation to the first applicant's complaint of 9 May 2000 (see paragraph 12 above). As a result Mr N. allegedly became aggressive. On 28 June 2000, when he brought S. for a visit to his mother's apartment, Mr N. reacted angrily to remarks by the first applicant and hit her in their son's presence. On the next day the first applicant visited a medical doctor who noted a bruise on her left eyelid and a swollen cheek. She also reported pain in her right wrist.

23. On 3 and 6 July 2000 the first applicant complained to the juveniles inspector at the local police station but was told that nothing could be done and that the dispute should be decided by the courts.

24. In July and August 2000 the first applicant complained to the Ministry of the Interior, stating that they should assist her to obtain the custody of her child and that measures should be taken to protect her son, who was in danger because Mr N. was not taking care of him properly and was aggressive towards her. The first applicant complained that nothing had been done in this respect by the police. In August 2000 she received replies stating that the matter had been examined and that no unlawful conduct on the part of police officers had been noted. The police had done what they could and the remaining issues concerned a private dispute.

25. On 11 September 2000 the first applicant filed written submissions with the District Court reiterating her request for an interim order. She informed the court about the relevant events since 6 May 2000 and referred to her complaints to the prosecuting authorities. She also stated that her son had been living in conditions which endangered his development. The first applicant sought leave to have two witnesses examined in this respect.

26. On 12 September 2000 the judge examined the applicant's submissions in private and decided that the request for an interim order should be dealt with on 12 October 2000, not at the hearing fixed for 26 September 2000.

27. On 26 September 2000 the District Court held a hearing in the divorce proceedings. It noted the failure of the parties to reconcile and fixed a hearing on the merits for 14 November 2000.

28. On 12 October 2000 the District Court held a hearing on the issue of interim measures. Mr N. requested that the files of the prosecutors and the police who had examined the first applicant's complaints be admitted in evidence. He stated that those authorities had heard impartial witnesses – several neighbours – and had convincingly established that the first applicant's allegations about physical violence were unfounded. The first applicant's lawyer objected, stating that the files could be relevant to the merits of the divorce proceedings but should not be examined in the interim measures procedure. The court decided to adjourn the hearing until 14 November 2000 in order to allow the production of the prosecutors' files.

29. On 14 November 2000 the District Court dealt with the request for an interim order. It heard one witness for each party. The first applicant's father, who was heard as a witness, confirmed that Mr N. had been aggressive on two occasions and that quarrels often erupted between the child's parents. A relative of Mr N. testified that he took good care of the child. The first applicant also presented a written opinion by a psycho-therapist working for the non-governmental organisation whose help she had solicited. The therapist described the first applicant's visits to the centre for victims of domestic violence and stated that in her opinion the first applicant had suffered a strong emotional upset as a result of the behaviour of Mr N. and the authorities' passive attitude. Mr N. disputed the statements contained in the written opinion. The court decided that that was tantamount

to contesting the authenticity of a document and invited the parties to adduce evidence in this respect. Having regard to the need to give the parties time to adduce such evidence and noting that the prosecutors' files concerning the applicants' complaints had not been transmitted to it, the District Court adjourned the matter until 12 December 2000. The hearing listed for 12 December 2000 was later adjourned on unspecified grounds.

30. The next hearing was held on 13 February 2001. In relation to the proceedings concerning the authenticity of the psycho-therapist's written opinion, the first applicant's lawyer presented documents demonstrating that the non-governmental organisation for which the therapist worked had been registered in 1997. Mr N.'s lawyer stated that in accordance with legislation in force since 1 January 2001 non-governmental organisations needed re-registration. On that basis he objected to the admission in evidence of the written opinion of the psycho-therapist. The court interpreted that objection as a challenge to the authenticity of the registration documents and invited the parties to adduce evidence in that respect.

31. At that point, the first applicant withdrew her request and asked the court to rule on the merits of the divorce claims, including the child custody claim. Thereupon, the court terminated the interim measures proceedings. It then heard two witnesses. A neighbour testified that she had heard the spouses quarrelling often in the past and had seen bruises on the first applicant's body. The latter had complained that Mr N. battered her. A colleague of Mr N. testified that he had never seen him being aggressive. The court also admitted in evidence the prosecutors' files concerning the first applicant's complaints submitted in 2000. As the parties sought leave to examine other witnesses, the court adjourned the hearing until 24 April 2001.

32. From the summer of 2000 the first applicant could only see her son at his kindergarten as the visits to Mr N.'s home created tension. On 7 March 2001 she collected her son and brought him to her home. Mr N. complained to the prosecution authorities and the police and also wrote to the judge dealing with the divorce proceedings. As a result, on 19 March and 17 April 2001 the first applicant was summoned by the police and given official warnings. According to the first applicant, Mr N. also threatened her with physical violence but she kept the child. According to Mr N., on 11 March 2001 in the evening he was attacked by men hired by the first applicant, in her presence.

33. The last hearing in the divorce proceedings was held on 24 April 2001. In accordance with the Child Protection Act (see paragraph 47 below), an expert of the newly created local Social Care Office gave an opinion after having studied the file and met the child. He reported that the child was afraid of his father as he had battered his mother and that the child preferred to live with his mother.

34. By judgment of 23 May 2001 the District Court pronounced the divorce and found that both spouses had been responsible for the failure of their marriage. The court further considered that both parties had been good parents but that in view of the low age of the boy he needed his mother. Therefore, the first applicant obtained custody of her child and Mr N. was given visiting rights.

35. Mr N. appealed, arguing that the allegations that he had been violent were untrue and that he had always cared better for his child.

36. In the appeal proceedings the Sofia City Court held a hearing on 19 March 2002. It heard two witnesses who confirmed Mr N.'s aggressive behaviour.

37. On 21 March 2002 the Sofia City Court upheld the lower court's judgment but considered that there was ample evidence that Mr N. had been aggressive and had battered the first applicant during their marriage. Such behaviour was a bad example for a young boy to witness. The first applicant was therefore better suited to raise the child.

38. On 18 June 2002 the first applicant visited Mr N.'s apartment, accompanied by two friends, to collect her belongings. Her former husband became aggressive and battered her. On the following day the first applicant visited a forensic doctor who noted bruises on her face, right arm and armpit and her left hip. She complained to the prosecution authorities, which by decisions of October and December 2002 and January 2003 refused to institute criminal proceedings against Mr N., noting that it was open to the first applicant to bring private prosecution proceedings, as the alleged injuries fell into the category of light bodily injuries.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Interim measures in divorce proceedings

39. In accordance with Article 261 of the Code of Civil Procedure, a court examining a divorce case shall order interim child custody measures upon request of a party to the proceedings.

40. The Supreme Court has held that in principle no such measures should be ordered during the mandatory two-month reconciliation period except where the interest of the children so requires and, in particular, where delaying them may adversely affect the children's development and upbringing (procedural decision no. 86 of 6 June 1973 in case no. 1518/73).

41. Article 71 § 2 of the Family Code provides that disputes about child custody between parents living apart may be submitted for examination to the local district court. This provision concerns disputes that have not been submitted for adjudication in the context of divorce or other proceedings (argument from Article 95 of the Code of Civil Procedure).

2. Appeals against delays in the proceedings

42. A party to pending civil proceedings may file an appeal against delays in the proceedings, in accordance with Article 217a of the Code of Civil Procedure. The appeal is examined by the President of the upper court, who may order specific measures to speed up the proceedings. It is unclear whether an appeal against delays may also be directed against delays in the examination of requests for interim measures.

3. The Juveniles Pedagogic Units

43. Sections 26 and 27 of the Antisocial Behaviour of Minors Act 1958, amended, set up Juveniles Pedagogic Units at municipal level. The Units are staffed by inspectors appointed by the Ministry of the Interior. Their task is to assist the prosecution authorities and the police in the investigation of offences committed by minors and also in the investigation of offences in which minors were victims. Juveniles Pedagogic Units have no power to issue binding orders on child custody and access issues.

4. The Penal Code and the Code of Criminal Procedure

44. Under Article 161, in conjunction with Articles 129 and 132 of the Penal Code, criminal proceedings in respect of "medium bodily injury" wilfully inflicted by a spouse, parent, child, brother or sister of the victim may only be instituted by the victim. According to Article 129(2), injuries having long-lasting repercussions on one's health without being life-threatening or injuries that may be life-threatening but do not result in long-lasting repercussions are considered "medium bodily injuries". Within the same category fall injuries causing long-lasting difficulties to the hearing, sight or limb movement, disfiguring of the face or other body parts, as well as injuries such as a broken jaw or teeth that cause difficulties in chewing and speaking.

45. Under Article 161, in conjunction with Articles 130-132 of the Penal Code, criminal proceedings in respect of wilfully inflicted "light bodily injury" may only be instituted by the victim, except where a State official is involved or in cases of repeated offences. According to Article 130(1), injuries other than those considered as heavy or medium bodily injuries fall within the category of "light bodily injuries". The courts have held that facial bruises, a broken nose and head contusions without loss of consciousness are examples of light bodily injuries (Supreme Court interpretative circular ППВС № 3, 27.11.1979).

46. Under the Code of Criminal Procedure, where criminal proceedings are instituted by the victim, he or she acts as private prosecutor. The proceedings are discontinued if the victim fails to appear when summoned or abandons the case.

5. The Child Protection Act 2000 and the Protection Against Domestic Violence Act 2005

47. The Child Protection Act, which came into force on 17 June 2000, instituted a State Child Protection Agency and municipal Social Care Offices empowered, *inter alia*, to order protection measures in respect of children in danger. In accordance with the transitory provisions of the Act, the Agency and the Offices became operational not earlier than in February 2001, when the relevant regulations and instructions were adopted.

48. The Protection Against Domestic Violence Act, which was enacted in March 2005, provides for administrative and policing measures in cases of domestic violence. In particular, the relevant court may issue injunctions to remove the perpetrator from the common home, ban him from approaching the victim's home, workplace or place of social contacts, temporarily remove the child from the custody of the perpetrator and impose compulsory education programs. Failure to comply with the measures imposed by the court may result in fines, arrest and prosecution.

III. RELEVANT INTERNATIONAL MATERIAL

1. Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe

49. In its Recommendation Rec(2002)5 of 30 April 2002 on the protection of women against violence, the Committee of Ministers of the Council of Europe stated, *inter alia*, that Member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention.

50. The Committee of Ministers recommended, in particular, that Member states should penalise serious violence against women such as sexual violence and rape, abuse of the vulnerability of pregnant, defenceless, ill, handicapped or dependent victims, or abuse of the position of the perpetrator. The recommendation also stated that Member states should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutor, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children's rights are protected during proceedings.

51. With regard to violence within the family, the Committee of Ministers recommended that Member states should classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas, to penalise all breaches of the measures imposed on the perpetrator and to establish a compulsory protocol for operation by the police, medical and social services.

2. Other material

52. The United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), in its Article 4(c), urges States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons".

53. In his third report, of 20 January 2006, to the Commission on Human Rights of the UN Economic and Social Council (E/CN.4/2006/61), the Special Rapporteur on violence against women considered that there is a rule of customary international law that "obliges States to prevent and respond to acts of violence against women with due diligence". This conclusion was based mainly on analysis of developments in the case-law of several international bodies, including this Court (reference to *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII), the Inter-American Court of Human Rights (reference to the case of *Velasquez Rodriguez v. Honduras*), the Inter-American Commission of Human Rights (reference to Report no. 54/01, Case 12.051, *Maria da Penha Maia Fernandes (Brazil)*) and the committee monitoring the UN Convention on the Elimination of All Forms of Discrimination against Women (reference to the case of *A.T. v Hungary* – 2005).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. Relying on Articles 3, 8, 13 and 14, the applicants complained that the authorities failed to take the necessary measures to secure respect for their family life and failed to protect the first applicant against the violent behaviour of her former husband.

55. The Court considers that in the particular circumstances of the present case these complaints fall to be examined under Article 8 of the Convention which reads, in so far as relevant:

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

A. Admissibility

56. The Government stated, *inter alia*, that the first applicant had not exhausted all domestic remedies as she had not insisted on the examination of her interim measures application, had not substantiated it before 11 September 2000 and had eventually withdrawn it. In these circumstances the complaints before the Court were abusive as the first applicant had voluntarily abandoned her request. The Government also stated that the first applicant could have filed an action under Article 71 § 2 of the Family Code and requested measures under the Child Protection Act.

57. The applicants replied that the urgency of the matter had been obvious as the first applicant had referred, in her divorce claim and interim measures application of 1 March 2000, to physical and psychological abuse by her husband. Since the very purpose of interim measures was the swift resolution of conflicts, it had been unnecessary for her to insist on rapid examination. The withdrawal of the application had been the result of the District Court's dilatory approach, which had rendered the interim procedure futile. The applicants further stated that despite the obvious need for urgent measures, assistance had been refused by the police and the prosecution authorities on the basis that the events had concerned a private dispute. Article 71 § 2 of the Family Code was inapplicable and the Child Protection Act had not been implemented in practice at the relevant time.

58. The Court notes at the outset that the Government have not raised an objection concerning the first applicant's failure to submit a complaint against delays under Article 217a of the Code of Civil Procedure. It is not necessary to examine, therefore, whether this was a remedy to be exhausted in the particular circumstances of the present case.

59. The Court considers that the first applicant, having filed an application for interim custody measures, was entitled to its examination without unjustified hindrance. Having regard to the first applicant's explanation and the facts of the case, the fact that she withdrew her request for interim measures after the accumulation of the impugned delays cannot lead to the conclusion that she failed to exhaust domestic remedies and

cannot suggest abusive behaviour on her part. The Court also observes that Article 71 § 2 of the Family Code was inapplicable (see paragraph 41 above) and that, apparently, at the relevant time the mechanisms provided for in the Child Protection Act had not yet been in place.

60. The Court also notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds and, therefore, declares them admissible

B. Merits

1. The parties' submissions

61. The Government took the view that the first applicant had presented the relevant facts out of their context. In reality, the case concerned querulous allegations exchanged between spouses in the course of divorce proceedings. Such allegations were a common occurrence and were often made with the aim to achieve a favourable outcome of the proceedings. Both the first applicant and her husband had filed numerous complaints against each other seeking the assistance of the police and the prosecution authorities without good reason.

62. The Government also stated that, in reality, no particular danger for the applicants had existed. At the relevant time the first applicant had lived separately from her husband. She had been responsible, on a par with her former husband, for the fact that her child, the second applicant, had become the witness of his parents' conflicts.

63. The applicants submitted, relying on Articles 3, 8, 13 and 14, that the relevant law according to which the burden to prosecute for light bodily injury rested with the victim was incompatible with the State's duty to provide protection against domestic violence and was discriminatory in that the law's shortcomings impacted disproportionately on women. Bulgarian law was deficient in that it treated domestic violence as a trivial family matter that did not warrant public prosecution. By characterising domestic violence as a private act, Bulgarian law did not ensure that the victims – who were often vulnerable – would be able to institute proceedings. In particular, the first applicant could not be expected to bring private prosecution proceedings against Mr N. as that would have meant acting as prosecutor and investigator in a highly sensitive matter and risking a violent reaction by her husband. Furthermore, the authorities not only refused to assist her in prosecuting her husband but even charged her with abduction when she sought refuge, together with her son, in a shelter for abused women.

2. The Court's assessment

(a) Relevant principles

64. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 23-24 and 27, and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003).

65. The right to respect for one's family life under Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation – albeit not absolute – on the national authorities to take such action (see, as a recent authority, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 51, 6 November 2007, with further references). As regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity. Furthermore, the authorities' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see the judgments cited in paragraph 85 above and, also, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, §§ 128-130, and *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII). The Court notes in this respect that the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasised in a number of international instruments (see paragraphs 49-53 above).

(b) Application to the facts of the case

66. The Court's task is to examine whether the authorities' response to the situation for which the first applicant, acting on her own behalf and on behalf of her son, the second applicant, sought their assistance was in line with their positive obligations flowing from Article 8.

67. The help of the relevant authorities was solicited in a situation where both the first applicant and her husband, who had separated and were divorcing, wished to obtain the custody of their three-year old son and seized the boy repeatedly from each other, including by using physical force. In addition, Mr N., the father, allegedly assaulted the first applicant

(see paragraphs 7-25 and 38 above). The first applicant requested interim custody measures and sought assistance in relation to her husband's aggressive behaviour.

(i) Examination of the interim measures application

68. The Court observes that because of its very nature and purpose, an application for interim custody measures must normally be treated with a certain degree of priority, unless there are specific reasons not to do so. No such reasons appear to have existed in the applicants' case. Indeed, the interim custody measures application was based, *inter alia*, on allegations of aggressive behaviour and thus clearly called for priority examination (see paragraph 7 above).

69. It is true that the allegations made by the first applicant, as well as all relevant circumstances regarding the child's situation needed verification which could not be done without the collection of evidence. Therefore, the applicants could not expect to obtain a decision immediately upon submission of the interim measures application.

70. The evidence is, however, that the District Court did not treat the matter with any degree of priority and, during the first six months, ignored the issue of interim measures. In June 2000 it started examining the divorce claim instead of dealing with the temporary custody arrangements first (see paragraphs 8, 10 and 21 above).

71. This delay was the result of the domestic courts' practice to adjourn custody issues in divorce proceedings pending the expiry of the statutory reconciliation period (see paragraphs 21, 27 and 40 above). While this practice had the legitimate aim to facilitate reconciliation, the Court considers that its automatic application in the applicants' case despite concrete circumstances calling for expedition was unjustified.

72. Furthermore, after 11 September 2000, when the first applicant informed the District Court about the scenes which the child had had to witness earlier that summer, it must have become obvious for the judge dealing with the case that the second applicant, three years old at the time, was adversely affected by the failure of his parents, who lived apart, to agree on temporary custody arrangements pending the divorce proceedings. Furthermore, Mr N. obstructed the possibility for contact between the first applicant and her child, the second applicant (see paragraphs 11- 32 above). It must have been obvious, therefore, that prompt measures were needed, in particular, in the child's interest.

73. The Court considers that in these circumstances, the authorities' duty under Article 8 to secure respect for the right to private and family life of both applicants – parent and child – required the examination of the interim measures application with due diligence and without delay. They were also under a duty to secure the enjoyment of both applicants' right to normal contacts between them.

74. However, the District Court continued to adjourn the examination of the interim custody application repeatedly, sometimes for reasons so far removed from the substance of the dispute – for example, to verify the registration of a non-governmental organisation (see paragraphs 25-30 above) – that at least one of those adjournments can fairly be described as arbitrary. Also, the District Court made no effort, as it could have, to collect all relevant evidence in one hearing. It also allowed long intervals between the hearings (see paragraphs 28-33 above).

75. The Court also considers that the first applicant's decision to withdraw her request for interim measures in February 2001 was not unreasonable in the circumstances, having regard to the unjustified delays in its examination (see paragraphs 8, 10, 21 and 25-31 above).

76. In sum, the District Court's handling of the interim measures issue for a period of approximately eight months (June 2000 – February 2001) is open to criticism as regards its insufficient attention to the need for particular expedition during that period. This attitude, during a period of tense relations between the first applicant and her husband that affected adversely the second applicant, a three-year old child at the time (see paragraphs 11, 13, 17 and 22 above), is difficult to reconcile with the authorities' duty to secure respect for the applicants' private and family life.

(ii) The first applicant's complaints about Mr N.'s aggressive behaviour

77. The Court notes that the medical certificate concerning the first incident complained about was issued several days after the events and has, therefore, less evidential value (see paragraphs 13 and 14 above).

78. There is no doubt about the evidential value of the second medical certificate, which recorded a bruise on the first applicant's eyelid and her swollen cheek following the incident of 28 June 2000 (see paragraph 22 above). The Court also notes that Mr N.'s violent behaviour, albeit during a period of time prior to the events at issue, was established by the Sofia City Court in its judgment of 21 March 2002 (see paragraph 37 above).

79. On the basis of these facts the Court is satisfied that the first applicant's complaints about Mr N.'s behaviour concerned her physical integrity and well-being and that, having regard to the nature of the allegations and the facts of the case as a whole, the question about the adequacy of the authorities' reaction may give raise to an issue under Article 8 of the Convention. Moreover, in the concrete circumstances this question also concerned the second applicant's right to respect for his private life, as he could not effectively exercise his right to regular contacts with the first applicant and, whenever such contacts materialised, was adversely affected by the incidents he had to witness (see paragraphs 11-32 above).

80. The Court observes that the police and the prosecutors, to whom the first applicant turned for help, did not remain totally passive – Mr N. was

issued with a police warning and an attempt was made to broker an informal agreement between the parents, albeit with little effect in practice (see paragraphs 12, 14 and 16-20 above).

81. Furthermore, the Bulgarian legal system provided legal means whereby the first applicant could seek establishment of the facts, as well as Mr N.'s punishment, and compensation – it was open to her to bring private prosecution proceedings and a civil claim for damages against Mr N. (see paragraph 44 above).

82. Without overlooking the vulnerability of the victims in many cases of domestic violence, in this particular case the Court cannot accept the applicants' argument that her Convention rights could only be secured if Mr N. was prosecuted by the State and that the Convention required State-assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence. While the Court cannot exclude that the relevant Bulgarian law, according to which many acts of serious violence between family members cannot be prosecuted without the active involvement of the victim (see paragraphs 44-46 above), may be found, in certain circumstances, to raise an issue of compatibility with the Convention, its task is limited to the examination of the particular facts before it. It is not the Court's role to replace the national authorities and choose in their stead among the wide range of possible measures that could suffice to secure respect for the applicants' private and family life. Within the limits of the Convention, the choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation.

83. On the basis of the concrete facts in this case, the Court considers that certain administrative and policing measures – among them, for example, those mentioned in Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe or those introduced in Bulgarian law by the Domestic Violence Act 2005 (see paragraphs 48-53 above) – would have been called for. However, at the relevant time Bulgarian law did not provide for specific administrative and policing measures and the measures taken by the police and prosecuting authorities on the basis of their general powers did not prove effective. The Court also considers that the possibility for the first applicant to bring private prosecution proceedings and seek damages was not sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of. In the Court's view, the authorities' failure to impose sanctions or otherwise enforce Mr N.'s obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their

positive obligations to secure the enjoyment of the applicants' Article 8 rights."

iii. Conclusion

84. In the Court's view, the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8 of the Convention to secure respect for their private and family life.

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

85. The applicants complained of the length of the custody proceedings. Article 6 § 1 reads, in so far as relevant:

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

A. Admissibility

86. The Government considered that the complaint was abusive and inadmissible for failure to exhaust all domestic remedies as the first applicant had withdrawn her request for interim measures. The applicants disagreed.

87. The Court notes that the Government have not raised an objection concerning the first applicant's failure to submit a complaint against delays under Article 217a of the Code of Civil Procedure (see paragraph 42 above). It is not necessary to examine, therefore, whether this was a remedy to be exhausted in the particular circumstances of the present case.

88. In the Court's opinion, the fact that the first applicant withdrew her request for interim measures has no bearing on the question of exhaustion of domestic remedies in respect of the length of the proceedings, which concerned the merits of the dispute. Furthermore, it does not consider that the application was abusive.

89. The Court also notes that the applicants' complaint under Article 6 § 1 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

90. The Government stated that the District Court had proceeded with reasonable expedition. All adjournments had been justified as the parties, including the first applicant, had sought to adduce evidence. Moreover, the first applicant had objected to the admission of relevant evidence. The applicants replied that the dilatory approach of the District Court had caused unjustified delays in the resolution of the custody dispute.

91. The Court observes that the period to be taken into consideration began on 1 March 2000 and ended on 21 March 2002. It thus lasted two years and three weeks for two levels of jurisdiction.

92. The Court is mindful that in cases relating to civil status, special diligence is required in view of the possible consequences which the excessive length of proceedings may have, notably on enjoyment of the right to respect for family life (*Laino v. Italy* [GC], no. 3158/96, § 18, ECHR 1999-I). It has examined above, in the context of Article 8, the effects of the delays in the examination of the first applicant's request for interim custody measures. The issue under Article 6 § 1 is different as it concerns the examination of the merits of the civil case and the question whether that was done within a reasonable time.

93. The Court, having regard to the relevant criteria as established in its case-law (see *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII) and taking into consideration, in particular, the nature of the proceedings but also their overall length which was far from being unreasonable as such and the fact that the examination of witnesses and collection of other evidence inevitably required time, considers that the child custody dispute was determined within a reasonable time as required by Article 6 § 1 of the Convention. It follows that there has been no violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicants claimed 300,000 euros (EUR) in respect of non-pecuniary damage for the prolonged custody proceedings, the repeated acts of violence by Mr N. and the indifference of the authorities. The first applicant submitted that as a result of the violations of her rights her life in

Bulgaria became so unbearable that she moved to Italy with the second applicant.

96. The Government did not comment.

97. The Court notes that the authorities cannot be held responsible for Mr N.'s behaviour and the resulting damage to the applicants. It considers, however, that the applicants have undoubtedly suffered anguish and distress on account of the authorities' failure to undertake sufficient measures to secure respect for their private and family life. Having regard to the relevant facts of the case and deciding on an equitable basis, the Court awards EUR 4,000 jointly to the applicants.

B. Costs and expenses

98. The applicants claimed EUR 4,650 in respect of legal fees for 93 hours of work on the proceedings before the Court at the hourly rate of EUR 50. They also claimed EUR 186 for courier expenses and EUR 418 for translation costs. The claims were supported by time sheets, legal fees agreements and courier receipts. The total sum claimed was EUR 5,254.

99. The Government did not comment.

100. According to the Court's case-law, an applicant is entitled to reimbursement of his 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. In the circumstances of the present case, regard being had to the information in its possession and the above criteria, and also taking into consideration the fact that part of the applicants' complaints were rejected, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads.

C. Default interest

101. 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

1. *Declares* unanimously the application admissible;
2. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention;
4. *Holds* by six votes to one

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

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

(ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses.

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

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

Done in English, and notified in writing on 12 June 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President

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

P.L.

C.W.

PARTLY DISSENTING OPINION OF JUDGE MARUSTE

The Court was called to examine whether the authorities' response to the situation for which the first applicant, acting on her own behalf and on behalf of her son, the second applicant, sought their assistance was in line with their positive obligations flowing from Article 8. The help of the relevant authorities was solicited in a situation where both the first applicant and her husband, who had separated and were divorcing, wished to obtain the custody of their three-year-old son and seized the boy repeatedly from each other, including by physical force. The first applicant requested interim custody measures and sought assistance on account of her husband's aggressive behaviour. The majority found that the State failed in that respect.

While there is some room to blame the State about its prompt and effective reaction I am nevertheless loath to hold the State responsible when two private persons are hostile to each other and are unable to behave in a reasonable manner. It is clear that both parties contributed to the conflict and did not show good faith in attempting to solve the problem in their private life in a proper manner.

It must be observed that the allegations made by the first applicant as well as all the relevant circumstances regarding the child's situation needed verification, which could not be done without the collection of evidence. Therefore, the applicants could not expect to obtain a decision immediately upon submission of the interim measures application.

It is true that the District Court did not start examining the interim measures application promptly. However, the relevant law and established practice required time to be allowed for reconciliation before any other issue in the divorce proceedings could be examined. The District Court had no reason to deviate from that rule, in particular having regard to the fact that when she appeared before it in June 2000, the first applicant did not raise the issue of interim measures and did not request that her application for such measures be examined first.

I accept that after 11 September 2000, when the first applicant asked for the examination of the interim measures request, certain delays may be imputable to the District Court in that some of the adjournments were not fully justified and that insufficient effort was made to collect all the evidence in one or two hearings. However, the cumulative effect of these delays did not prolong the proceedings by more than three or four months.

Unjustified delays of comparable length may violate Article 8 in certain exceptional circumstances, where there exists a risk of grave consequences for the interests of those concerned. However, it does not seem that this was so in the present case. It should be noted that during part of the relevant period the first applicant lived with her son and that there was only a very limited period during which she was unable to contact him. Therefore, the

impugned delays cannot be said to have resulted in serious consequences such as those that have led the Court to find violations of Article 8 of the Convention in other child custody cases. Those cases concerned lengthy proceedings lasting several years (see *Maršálek v. the Czech Republic*, no. 8153/04, § 49, 4 April 2006; and *Kříž v. the Czech Republic*, no. 26634/03, § 72, 9 January 2007). For these reasons I consider that the District Court's handling of the interim measures application cannot be seen as giving rise to an issue in relation to the authorities' positive obligation under Article 8 of the Convention to secure respect for the applicants' private and family life.