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

SECOND SECTION

CASE OF PALAU-MARTINEZ v. FRANCE

(Application no. 64927/01)

JUDGMENT

STRASBOURG

16 December 2003

FINAL

16/03/2004

In the case of Palau-Martinez v. France,

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

Mr A.B. BAKA, *President*,
Mr J.-P. COSTA,
Mr GAUKUR JÖRUNDSSON,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 4 March and 25 November 2003,

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

PROCEDURE

1. The case originated in an application (no. 64927/01) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Ms Séraphine Palau-Martinez ("the applicant"), on 20 December 2000.

2. The applicant was represented by Mr P. Goni, of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant alleged that a decision by the French courts to establish her two under-age children's residence with their father had interfered with her private and family life within the meaning of Article 8 of the Convention and was discriminatory for the purposes of Article 8 taken in conjunction with Article 14. She also complained of the discriminatory infringement of her freedom of religion within the meaning of Article 9 of the Convention, taken alone and in conjunction with Article 14, and alleged that she had not had a fair hearing within the meaning of Article 6 § 1 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 4 March 2003 the Chamber declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a French citizen who was born in 1963 and lives in Alcira, near Valencia (Spain).

8. The applicant married in January 1983. She and her husband had two children, born in 1984 and 1989.

9. In August or September 1994 the applicant's husband left the matrimonial home and moved in with his mistress. In December 1994 the applicant petitioned for divorce.

10. By a judgment of 5 September 1996, the Nîmes *tribunal de grande instance* ruled on the divorce petition. It found, firstly, that a reading of the submitted documents had not established that the applicant's membership of the Jehovah's Witnesses had been the cause of the break-down in the couple's relationship, but that it had been attested that her husband had left the matrimonial home to live with his mistress, and had also prevented the applicant from working in the pizzeria they ran. Accordingly, it granted the divorce, attributing fault to the husband alone.

11. With regard to the children, the court decided that they would reside with their mother in Spain and that parental responsibility would be exercised jointly. The father was to have visiting and residence rights on an unrestricted basis and, in the absence of agreement, during the whole of the children's school holidays, provided that he collected them himself and escorted them back to their mother's home. It set the amount of the father's maintenance payments at 1,500 French francs (FRF) per month and per child.

12. On 21 November 1996 the applicant appealed against this judgment. She asked to be given access for one month during the children's summer holidays and one week during the Christmas and Easter holidays. She also renewed her request for a complementary allowance. In her pleadings in reply, the applicant complained that her ex-husband had not returned the children to her at the end of the 1997 summer holidays and had enrolled them in a school in Aigues-Mortes, where he lived with his new companion. She submitted that the father had influenced the children so that they would express a wish to live with him; she filed statements and photographs intended to show that she was bringing up her children with great care and

that they were allowed to take part freely in any activity that interested them. She requested that a social inquiry report be drawn up.

13. The Nîmes Court of Appeal delivered judgment on 14 January 1998. It upheld the judgment with regard to the divorce pronouncement and awarded the applicant a complementary allowance of FRF 1,500 per month for three years. With regard to the children's place of residence, the court found as follows:

> "The two under-age children, C., aged 13, and M., aged 8, currently live with their father in Aigues-Mortes, where they attend school.
>
> This is a *de facto* situation which has been brought about by the father, who, contrary to the provisions of the appealed judgment, failed to return the children to their mother's home at the end of the summer holidays.
>
> In justifying his behaviour, R. claims that he has acted in the children's interests, in order to remove them from the detrimental influence of their mother and her circle, who oblige them to practice the religion known as 'the Jehovah's Witnesses'.
>
> Furthermore, R. has submitted a letter from child C., expressing the latter's wish to remain with his father, together with a medical certificate drawn up by Doctor D., a psychiatrist, on 7 January 1997, which states that child C. 'experiences his mother's prohibitions, via the Jehovah's Witnesses, as distressing and frustrating' and that 'child M. suffers from the religious constraints imposed on him and expressed a wish to live in Aigues-Mortes with his father as far back as the beginning of 1997'.
>
> Finally, numerous other witness statements testified to the children's expressed wish not to return to Spain.
>
> Séraphine Palau-Martinez does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion.
>
> Admittedly, she has submitted numerous statements attesting to her affection for her children and showing that she provides for their well-being, and has filed group photographs in which her children appear happy.
>
> Taken together, however, the submitted documents are not inconsistent with the arguments of R., who does not wish to deny the mother's maternal attributes but restricts himself to criticising the strict upbringing received by the children on account of their mother's religious convictions.
>
> The rules regarding child-rearing imposed by the Jehovah's Witnesses on their followers' children are open to criticism mainly on account of their strictness and intolerance and the obligation on children to proselytise.
>
> It is in the children's interests to be free from the constraints and prohibitions imposed by a religion whose structure resembles that of a sect.
>
> There is no reason to order a social inquiry report which, in the present circumstances, would serve only to unsettle the children.

In the light of the above analysis, the Court considers that, contrary to the lower court's decision, the two under-age children's place of residence should be their father's home, but that parental responsibility should continue to be exercised jointly.

Should no agreement be reached [between the parents], Séraphine Palau-Martinez will enjoy free right of access and the right to have the children to stay:

– for the whole of the February and All Saints holidays;

– for one month during the summer holidays;

– for half of the Easter and Christmas holidays, when it will be for the mother to collect the children from the father's home and for the latter to collect them from the mother's home; ...”

14. The applicant appealed on points of law. In particular, she complained that the Court of Appeal had reversed the first-instance judgment on the central ground that the rules regarding child-rearing imposed by the Jehovah's Witnesses on their followers' children were open to criticism mainly on account of their strictness and intolerance and the obligation on children to proselytise; in so deciding, it had done no more than apply a general and abstract ground and had failed to investigate whether, in reality, the children's upbringing was disrupted to an extent that justified changing their place of residence. She considered that this value judgment on the way in which she practised her religion, taken *in abstracto*, did not justify the court's decision. She added that the manner in which the court had asserted that it was in the children's interests to be free from the constraints and prohibitions imposed by a religion whose structure resembled a sect had been just as abstract. She also complained that the Court of Appeal had refused to grant her request for a social inquiry report. Referring to freedom of conscience and religion and to the rules of a fair hearing, she relied on Articles 9 and 6 of the Convention.

15. The Court of Cassation delivered its judgment on 13 July 2000. After summarising the grounds of the Court of Appeal's judgment, it ruled as follows:

“It is apparent from these findings and considerations that the Court of Appeal, which replied to the submissions without inconsistency, was not obliged to order a social inquiry report and did not interfere with Ms Palau-Martinez's freedom of conscience, ruled, on the basis of the evidence which it alone is empowered to assess, that the children's interests required that their father's home be established as their habitual place of residence; ...”

II. RELEVANT DOMESTIC LAW

16. The relevant provisions of the Civil Code provide:

Article 287
(in the version applicable at the material time)

"Parental responsibility shall be exercised jointly by both parents. Failing an agreement or where the court considers that such an agreement goes against the child's interests, the court shall designate the parent with whom the children shall habitually reside.

Where it is necessary in the interests of the child, the court may confer parental responsibility on one of the two parents.

On their own initiative or at the court's request, the parents may submit their observations on the arrangements for exercising parental responsibility."

Article 287-2
(as worded at the material time)

"Prior to any interlocutory or final decision setting out the arrangements for the exercise of parental responsibility and visiting rights, or entrusting the children to a third party, the court may instruct any qualified person to draw up a social inquiry report. The aim of this document is to gather information on the family's material and moral situation, the conditions in which the children live and are brought up, and the measures which should be taken in their interests.

If one of the spouses disputes the conclusions of the social inquiry report, he or she may request a second expert opinion.

The social inquiry report may not be used in the divorce proceedings."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

17. The applicant complained firstly that the residence order stating that the children should live with their father had infringed her right to respect for her private and family life and had been discriminatory. She relied on Articles 8 and 14 of the Convention, the relevant parts of which provide as follows:

Article 8

"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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Alleged violation of Article 8 taken in conjunction with Article 14

18. The applicant referred firstly to *Hoffmann v. Austria* (judgment of 23 June 1993, Series A no. 255-C). She considered that the same reasoning should be applied in the instant case and that the fact that custody of her two children, which she had enjoyed for two years, had been withdrawn ought to be regarded as interference with her right to respect for her family life.

19. She stressed that, in seeking to justify the interference, the Government based their arguments almost exclusively on allegations by her former husband, witness statements from his friends, the opinion of a psychiatrist consulted by him alone and the opinions of the children, which were necessarily dependent on the circumstances in which they had been obtained.

20. The applicant further asserted that the Nîmes Court of Appeal, having refused to order a social inquiry report, had assessed the situation *in abstracto* and had delivered a socially stigmatising judgment based mainly and decisively on her religious beliefs. She also claimed that the use of evidence provided by her former husband alone was merely a pretext for a value judgment against the Jehovah's Witnesses' convictions regarding family life, the national courts' real motivation having been the applicant's religious beliefs.

21. The applicant considered that she was justified in alleging a serious interference with her maternal rights and obligations, given firstly that the decision against her had been based on discriminatory grounds, and secondly that the father's home had been named as the children's habitual residence despite his conduct. She emphasised that he had abandoned his family and that he had subsequently refused to return the children to their mother's home, in violation of a judgment by the family-affairs judge.

22. Further, she challenged the statement that the children's interests had been carefully examined and, in consequence, denied that there was any justification for this interference. The applicant considered that the Court of Appeal had based its decision on erroneous and *ex parte* opinions, had rendered the proceedings unequal by refusing a psychological expert opinion and had been discriminatory in grounding its judgment of 14 January 1998 on her religious beliefs.

23. The Government did not dispute that the applicant's complaint fell within the scope of Article 8 of the Convention.

However, they considered that, in the context of a divorce, court "intervention" was necessary but could not be considered "interference" within the meaning of Article 8 § 2.

If, however, the Court were to consider that there had been interference with the applicant's rights, the Government argued that this was in accordance with the law, namely the Civil Code, served a legitimate aim, namely the children's interests, and was proportionate, since children's interests could, and sometimes must, prevail over those of their parents.

24. The Government submitted that the domestic courts might legitimately have considered, on the basis of objective evidence and after hearing the children's opinion, that the upbringing imposed by their mother obliged them to comply with constraints that were scarcely compatible with a balanced upbringing, requiring them in particular to engage in proselytising activities.

25. Furthermore, they considered that the conditions required for the application of Article 14 of the Convention had not been fulfilled.

They submitted that the applicant and her ex-husband were in similar situations in that both could have the children's residence established at their respective homes.

26. They also submitted that in the instant case, as distinct from the situation condemned by the Court in *Hoffmann*, cited above, it was indeed the consequences of religious observance on the children's health and equilibrium that had been taken into account, and not merely the fact that the mother was a Jehovah's Witness.

27. The Government acknowledged that the Court of Appeal's judgment had condemned the results of the Jehovah's Witnesses' precepts regarding child-rearing in general terms, but asserted that the mere fact of the applicant's religious beliefs had not been the basis of this decision. According to the Government, the basis of the Court of Appeal's judgment, which had specified the damage suffered by the children, lay in the disadvantages already experienced by them, in that the medical certificate pointed to the existence of a degree of frustration due to the religion imposed by their mother, no medical certificate to the contrary having been submitted to invalidate the psychiatrist's opinion. In addition, the judgment noted that the applicant took her children with her when attempting to

spread her religious beliefs, and that numerous witnesses had confirmed the children's wish to live with their father. Consequently, the Government considered that the Court of Appeal had ruled with reference to the particular circumstances and had justified its decision objectively and reasonably.

28. In the alternative, the Government considered that any possible distinction made in respect of the applicant on account of her religious convictions had been proportionate and justified on objective and reasonable grounds, namely the best interests of the children, which the national courts had assessed in a concrete manner in the light of objective factors.

29. The Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 184, § 33, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

30. The Court notes at the outset that, in the instant case, the two children had been living with their mother for almost three and a half years, ever since their father had left the family home, when the judgment by the Nîmes Court of Appeal established residence at their father's home. Accordingly, the Court considers that this judgment constitutes interference with the applicant's right to respect for her family life and cannot be regarded merely as the judicial intervention necessary in any divorce, as the Government submitted. The case therefore falls within the ambit of Article 8 of the Convention (see *Hoffmann*, cited above, p. 58, § 29).

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

32. The Court must therefore first examine whether the applicant can claim to have received different treatment.

33. In reversing the first-instance judgment and establishing the children's residence at their father's home, the Court of Appeal ruled on the

conditions in which the applicant and her ex-husband respectively were raising their children.

34. To do this, the Court of Appeal had before it, on the one hand, a letter written by one of the children and submitted by the father, "expressing [the child's] wish to remain with his father" and a medical certificate from a psychiatrist, drawn up in January 1997, stating that child C. "experiences his mother's prohibitions, via the Jehovah's Witnesses, as distressing and frustrating", and that "child M. suffers from the religious constraints imposed on him and expressed a wish to live in Aigues-Mortes with his father as far back as the beginning of 1997". The Court of Appeal also mentioned "numerous statements" submitted to the court which testified to the children's wish not to return to Spain.

35. On the other hand, the applicant had filed with the Court of Appeal "numerous statements attesting to her affection for her children and showing that she provides for their well-being" and "group photographs in which her children appear happy".

36. The Court of Appeal considered that, taken as a whole, the documents submitted by the mother "[were] not inconsistent with the arguments of R., who [did] not wish to deny the mother's maternal attributes, but [restricted] himself to criticising the strict upbringing received by the children on account of their mother's religious convictions".

37. It appears from the remainder of the judgment that the Court of Appeal attached decisive importance to the applicant's religion.

Having noted that the applicant "does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion", the Court of Appeal ruled as follows:

> "The rules regarding child-rearing imposed by the Jehovah's Witnesses on their followers' children are open to criticism mainly on account of their strictness and intolerance and the obligation on children to proselytise.
>
> It is in the children's interests to be free from the constraints and prohibitions imposed by a religion whose structure resembles that of a sect."

38. There is therefore no doubt, in the Court's view, that the Court of Appeal treated the parents differently on the basis of the applicant's religion, on the strength of a harsh analysis of the principles regarding child-rearing allegedly imposed by this religion.

39. Such a difference in treatment is discriminatory in the absence of an "objective and reasonable justification", that is, if it is not justified by a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among other authorities, *Darby v. Sweden*, judgment of 23 October 1990, Series A no. 187, p. 12, § 31, and *Hoffmann*, cited above, p. 59, § 33).

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

41. It remains to be determined whether there was a reasonably proportionate relationship between the means employed, namely establishing the children's residence at their father's home, and the legitimate aim sought.

42. The Court notes firstly that the Court of Appeal, in the two paragraphs of its judgment cited above, asserted only generalities concerning Jehovah's Witnesses.

It notes the absence of any direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life and, in particular, of the reference which the Government alleged was made in the Court of Appeal's judgment to the fact that the applicant took her children with her when attempting to spread her religious beliefs. In this context, the Court cannot accept that such evidence is constituted by the Court of Appeal's finding that the applicant "does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion".

It further notes that the Court of Appeal did not consider it necessary to grant the applicant's request for a social inquiry report, a common practice in child custody cases; such an inquiry would no doubt have provided tangible information on the children's lives with each of their parents and made it possible to ascertain the impact, if any, of their mother's religious practice on their lives and upbringing during the years following their father's departure when they had lived with her. Accordingly, the Court considers that the Court of Appeal ruled *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests. Although relevant, that reasoning was not in the Court's view sufficient.

43. In those circumstances, the Court cannot conclude that there was a reasonably proportionate relationship between the means employed and the legitimate aim pursued. There has accordingly been a violation of Article 8 of the Convention taken in conjunction with Article 14.

B Alleged violation of Article 8 taken alone

44. In view of the conclusion reached in the preceding paragraph, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 taken alone, the arguments advanced in this respect having already been examined in respect of Article 8 taken in conjunction with Article 14.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 9 TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14

45. The applicant complained that she had not had a fair hearing within the meaning of Article 6 § 1 of the Convention, in that the Court of Appeal had refused to order a social inquiry report. She also claimed that there had been interference with her freedom of religion within the meaning of Article 9, that this interference was discriminatory within the meaning of Article 9 taken in conjunction with Article 14, and referred in the submissions in support of her arguments to Article 2 of Protocol No. 1.

46. The Court considers that no separate issue arises under Article 6 or Article 9 taken alone or in conjunction with Article 14, or under Article 2 of Protocol No. 1, since the factual circumstances relied on are the same as those for the complaint under Article 8 taken in conjunction with Article 14, of which a violation has been found.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government considered that the finding of a violation would constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

50. The Court has found a violation of Articles 8 and 14, taken together, on account of the discrimination suffered by the applicant in the context of interference with the right to respect for her family life. It considers that the applicant sustained some non-pecuniary damage on account of this violation. Making its assessment on an equitable basis, the Court awards the sum of EUR 10,000 claimed by the applicant under this head.

B. Costs and expenses

51. The applicant claimed EUR 3,125 in respect of costs and expenses incurred before the Court of Cassation and EUR 6,000 in respect of her lawyer's fees before the Court.

52. In this regard, the Government considered that only the costs incurred before the Court could be taken into account, subject to production of the relevant vouchers.

53. The Court notes, firstly, that the applicant's appeal to the Court of Cassation related primarily to the violation found. Accordingly, it awards her the totality of the costs incurred in lodging this appeal, namely EUR 3,125.

As to presentation of the application to the Court, the Court notes that the costs are made up of a report by a university professor, for a fee of EUR 4,573.47, and the lawyer's fees proper, in the sum of EUR 1,426.53, for which no voucher was produced.

The Court considers that, bearing in mind the nature of the case and the existing legal precedents, it had not been necessary to commission a report from an academic, and that the applicant's lawyer could have carried out the necessary research himself. In addition, no relevant vouchers have been submitted as to the latter's fees.

In those circumstances, the Court awards the applicant EUR 1,000 for her representation before the Court.

The Court therefore awards the applicant a total of EUR 4,125 for costs and expenses.

C. Default interest

54. 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. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention taken in conjunction with Article 14;

2. *Holds* by six votes to one that it is unnecessary to rule on the alleged violation of Article 8 taken alone;

3. *Holds* unanimously that no separate issue arises under Article 6 § 1 of the Convention and Article 9 taken alone or in conjunction with Article 14;

4. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums:
(i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
(ii) EUR 4,125 (four thousand one hundred and twenty-five euros) in respect of costs and expenses;
(iii) any tax chargeable on these sums;
(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 applicant's claim for just satisfaction.

Done in French, and notified in writing on 16 December 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence EARLY
Deputy Registrar

András BAKA
President

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

A.B.B.
T.L.E.

DISSENTING OPINION OF JUDGE THOMASSEN

(*Translation*)

I am unable to agree with the majority who consider that the Court of Appeal's decision regarding the children's residence constitutes discrimination between the father and mother on account of the latter's religious beliefs as a Jehovah's Witness.

Whilst it is true that the Court of Appeal ruled in very general terms on the adverse implications of the Jehovah's Witnesses' beliefs for the children's education, it did nevertheless establish a link with the adverse effects which, according to a psychiatrist, the mother's religious convictions were producing on the children. In addition, the Court of Appeal based its decision on a letter from one of the children, stating his wish to remain with his father, and on witness statements which confirmed that the children had said that they would prefer to live with the latter parent.

According to the Court's established case-law, the underlying principle which must guide court decisions in respect of a child is the latter's interests. Where necessary, a parent's interests must be subordinated to these.

Every court decision taken after a divorce concerning a child's residence creates, in principle, a distinction between the two parents, in that elements such as each of the parent's educational and emotional abilities, financial resources, housing conditions or place of residence may be decisive in the choice which must be made. It is clear that such a distinction, which, in a way, excludes the other parent from his or her child's daily life, may be perceived as unjust by that person.

A court's intervention in choosing between two parents may be compared to the judgment of Solomon. Such intervention is an inevitable consequence of the parties' decision to separate and it always represents interference in the family life of one of the parents.

In this context, a court may be obliged, in the child's interests, to examine more closely a parent's attributes and living conditions when reaching its decision, although certain arguments would be insufficient to justify another form of State interference in a parent's family life, such as for the purpose of child protection.

It was in those circumstances, that is, in the context of choosing one of the parents, that the Court of Appeal considered the adverse consequences on her children of the mother's religious convictions.

In my opinion, this distinction between the mother and father, made by the Court of Appeal on the basis of the effects of the mother's religion, does not amount to discrimination contrary to Article 14.

On the other hand, I consider that the Court of Appeal's decision is open to criticism for another reason.

After the father had left the mother and her family, the mother looked after the children by herself for three and a half years, on the basis of a court decision. The father ignored this decision by preventing the children from rejoining their mother in Spain after the holidays.

In my opinion, endorsement of this unlawful act, which deprived the mother of her right to a family life with her children, could not be justified without having heard the children and/or ordering a social inquiry report to establish whether it was indeed in the latter's interests to stop living with their mother.

Given the circumstances of this case, the lack of any such report on the relationship between the mother and children infringed the mother's right to a family life with her children. The same would have been true had the Court of Appeal based its decision on considerations relating to prohibitions and constraints imposed on the children by their mother without reference to any religious convictions.

I consider that the applicant has been deprived of adequate participation in the decision-making process, thus rendering arbitrary the Court of Appeal's decision and amounting to a violation of Article 8 in her regard.