The Family Coexistence in cases of custody arrangements and parental responsibilities in the light of the case law of the European Court of Human Rights

Ana Rita Gil

Invited Teacher of the Faculty of Law of the New University of Lisbon

Researcher at CEDIS, Center for R & D in Law and Society of the Faculty of Law of the New University of Lisbon.

1. Protection of the right to family in the ECHR

1.1. Protection standards

Like other international instruments for the protection of human rights, the European Convention on Human Rights (ECHR) establishes the protection of the family in several norms. The art. 8.9 of the ECHR has a central value in this respect, establishing in its paragraph 1 that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. In this norm, the ECHR protects the family life as a fundamental right of the person, determining that the same should enjoy this right without arbitrary external interference, in particular by the State. Thus, contrary to other international rules, this law is not intended to protect the family itself, as an institution, but rather the family as the individual’s right. In fact, contrary to the Universal Declaration of Human Rights (UDHR), the ECHR does not contain a specific provision designed to protect ‘the family as a natural and fundamental element of society’. It is therefore a question of protecting the individual right of each one of his family.

The ECHR also contains other rules concerning the protection of the right to family. This is the case of art. 12.9, which establishes the right to marry and found a family. This right differs

\[132\] Thus, arts. 12 and 16 (3) of the Universal Declaration of Human Rights, arts. 17 and 23 of the International Covenant on Civil and Political Rights and arts. 16 and 18 of the Convention on the Rights of the Child.

from the right to family life, protected in art. 8.º, since it is primarily intended to protect the right to form an ex-new family, while art. 8.º protects individuals against interference in families already constituted.134.

However, in the present study we intend to analyze the case law of the European Court of Human Rights (ECHR)135 on the protection of family coexistence in cases of arrangements and exercise of parental responsibilities following divorce, separation or even absence of any previous bond to unite the parents. Thus, art. 8.º will be of central importance in our analysis.

In addition to this standard specifically designed for the protection of the family, others will be convened for the analysis of the subject in hand. The art. 14.º of the ECHR is also of particular relevance to the matter concerning the protection of family coexistence in the subject that we specifically intend to develop. This principle enshrines the principle of prohibiting discrimination in the enjoyment of the rights provided for in the Convention, thus establishing, as will be seen, important limits to the state regulation of parental responsibilities, preventing it from being discriminatory. This standard is further complemented by Protocol No. 7, which enshrines the principle of equality between spouses.

Finally, reference will also be made to art. 6 of the ECHR, which enshrines the right to a fair trial. This guarantee is, as we shall see, a number of demands in the processes of keeping and regulating parental responsibilities, so that the right of all parties to the family process to be duly cared for.

1.2. The Family Concept in the ECHR Case Law

Although it contains a number of rules designed to protect family life, the ECHR in no way defines what is meant by "family," "family ties," or even "family life." Thus, for the densification of these concepts, the jurisprudential work developed by the ECHR is of paramount importance. The judges in Strasbourg have been analyzing case by case if a given interpersonal relationship can be considered a family. In this context, they adopt a simultaneously evolutionary and open perspective. First, it has made the principle of evolutionary interpretation the touchstone of the application of the Convention, making it a

135 The art. 14 of the ECHR is considered to be an accessory and autonomous clause of the other rights contained in the Convention. It does not prohibit discrimination in itself, but only as regards the enjoyment of the rights protected by the ECHR. Nevertheless, the violation of art. 14 does not presuppose that there has been an infringement of a right guaranteed by the Convention. It means that this norm can be violated autonomously, in relation to the enjoyment of a right, even if the substance of this right in itself has not been disrespected. About the regime of art. 14 of the ECHR, Loukis G. Loucaides, The European Convention on Human Rights - Collected Essays, Martinus Nijhoff Publishers, 2007, p. 55 ff.
living instrument to be read in the light of the presently dominant conceptions.\textsuperscript{136} In this task, it has been based on the evolution of mentalities, the state of scientific knowledge and the internal Member States Law maker.\textsuperscript{137} Second, it has followed an open perspective, which analyzes the existence of family life beyond legal formalism. It thus adopts a material or substantial concept of the family, and is chiefly concerned with ascertaining the existence of affective and effective bonds that unite the persons in question.\textsuperscript{138} Thus, with such ties in place, family life can encompass the interwoven relations between grandparents\textsuperscript{139} and grandchildren, between siblings\textsuperscript{140}, and even between uncles and nephews\textsuperscript{141}. These ties may have the form of living together, of financial dependence, or of a right to visit often exercised.\textsuperscript{142} Cohabitation, therefore, is not an indispensable element for the recognition of family life, especially with regard to relations between children and parents. In fact, as far as the connection between parents and children is concerned, the ECtHR has since established the understanding that there is always a family relationship between them for the simple fact of birth, and only exceptional circumstances can determine otherwise.\textsuperscript{143} Thus, in principle, there will always be family life between the parents and the children, whether in the framework of a natural, biparental, single-parent, or even adulterine family. The family bond is independent of the source of the parent’s relationship of origin and must be appreciated in itself as the bond that binds the child to the parent.\textsuperscript{144} There are always family ties between children and parents, even if the parents do not

\textsuperscript{136} On this point see, among us, Susana Almeida, O Respeito pela Vida (Privada) e Familiar na Jurisprudência do Tribunal Europeu dos Direitos do Homem: A Tutela de Novas Formas de Família, Coimbra Editora, 2008, p. 66 e ss.
\textsuperscript{137} Susana Almeida, Família a luz do Convenio Europeo de Derechos Humanos, Jurua Editorial, 2015, p. 75.
\textsuperscript{139} In the case of Marckx c. Belgium, the ECtHR stated that family life should cover relations between close relatives, and stressed the importance of grandparents in the life of grandchildren. B.C. of 06/13/1979, complaint no. 6833/74.
\textsuperscript{140} Case of 18/02/1991, Moustaquin c. Bélgica, complaint n.º 12313/86.
\textsuperscript{141} Case of 28/02/1994, Boyle c. Reino Unido, complaint n.º 55434/00.
\textsuperscript{143} Case of 08/03/1985, Berrehab e Koster c. Holanda, complaint n.º 10730/84
live together at the time of the child’s birth or there is no cohabitation between them. Moreover, divorce, as has been repeatedly emphasized by the ECtHR, does not end the family relationship between parents and children. One of the exceptional circumstances that may determine otherwise is the lack of any real and personal connection between a child and the parent beyond simple biological ties. It follows, therefore, that for the ECtHR, what really matters in the existence of family life is the effectiveness of real ties to unite the persons in question. The criterion of effectiveness has also led the ECHR to consider protected by art. 8 of the ties like those that unite the various members of "recomposed" families, such as the ties between child and stepmother or stepfather.

1.3. Protection of the right to family life

The art. 8 has as its primary purpose to protect the individual against arbitrary interference by the State in its right to live with the family. The scope of protection of art. 8 therefore includes, first and foremost, the right to family unity or coexistence, such as the right of everyone to live with his family, and thus not to be arbitrarily separated from other members of the family or prevented from enjoying your company. Although this guarantee rule protects the family life in relation to other interferences, it is this specific dimension that it aims to analyze in the present study.

The ECtHR has stated in an illustrative way that the reciprocal enjoyment of the company between children and parents is a fundamental element of family life. Thus, national measures involving separation between parents and children constitute a restriction of that right. On the other hand, when they are unlawfully deprived of their coexistence, the State is under a positive obligation to carry out all necessary measures to restore contact between them. There are several state measures that may influence an interference of the State in family coexistence. In this situation, for example, measures to institutionalize children, arbitrary detention of a parent and lack of information given to the family, as well as expulsion from

147 Case of 10/28/1998, Söderbäck c. Sweden, complaint No 113/1997/897/1109. In this case, the ECHR considered that the bonds that had been woven between the daughter and her mother's spouse, though her adoptive father, were family ties.
149 Case of 08/07/1987, B. c. Reino Unido, complaint n. 9840/82.
151 Case of 23/02/2016, Nasr e Ghali c. Itália, queixa n. 44883/09.
the territory of foreigners with minor children residing in it. With regard to cases of exercise of custody and parental responsibilities arrangements, interference may arise from the assignment of custody to one of the parents, from the impediment to the legal exercise of pre-assigned custody or visitation, or even omission of measures that prevent or correct situations of parental abduction. In this context, it is true that often the starting scenario corresponds to a family breakdown between the two parents of the child. However, the ECtHR has stated that such breakdown does not break the family bond that each of them has - and maintains - with the child, nor does it constitute an obstacle to the formation of that bond. Thus, parents and children should continue to enjoy each other’s company. Only very exceptional circumstances can lead to the breakdown of such family ties, and the divorce or separation of the parents is not one of those circumstances.

1.4. Interference in family life

Contrary to other international rules that are dedicated to the protection of the human right to the family, art. 8 of the ECHR allows for legitimate state interference in family life, but does not allow such interference to be unlawful or arbitrary. In order for the interferences to be legitimate, they must respect the provisions of paragraph 2 of art. 8 of the ECHR, according to which ‘there can be no interference by the public authority in the exercise of this right except where such interference is provided for by law and constitutes a measure necessary in a democratic society for national security, for the economic well-being of the country, for the defense of order and for the prevention of criminal offenses, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

At first glance, the statement of paragraph 1 of art. 8 of the ECHR, in referring to ‘respect’, refers to a state obligation which is non-interference in family life, it means, to a negative obligation. However, the case-law of the ECtHR has developed the idea that it may also entail positive obligations. Thus, in addition to the negative obligation not to interfere illegitimately with family life, the State also has a positive obligation to ensure that the right to family life is guaranteed and fully enjoyed. From this idea can derive other concrete positive obligations that may cover the most diverse nature. An example of interference that

152 Case Berrehab, cit. About this cases see Imigração e Direitos Humanos, Petrony, 2017, p. 365 e ss.
154 This understanding came for the first time in case of 13/06/1979, Marckx c. Bélgica, complaint n.º 6833/74. About this point v., among us, Susana Almeida, O Respeito pela Vida (Privada) e Familiar..., cit., p. 87 e ss.
155 Jacobs & White, The European Convention on Human Rights, 6th Edition, Oxford University Press, 2014, p. 174. Thus, for example, the ECtHR removed from art. Article 8 (8) of the ECHR requires States to provide
represents a violation of a negative obligation may be a restriction or exclusion from a visitation regime of a parent. Violation of a positive obligation may, for example, consist in the failure of the state organs to act as a result of the illicit removal of a child.

There may therefore be various types of interference, whether or not they are legitimate depending on whether or not they comply with the requirements of Article 2.º of the ECHR. As is clear from the statement of that rule, interference must be proportional (a condition which is inherent in the express requirement of necessity in a democratic society) – it means, the seriousness of interference must be balanced with the importance of the legitimate interest to be protected. On the other hand, in this context, the ECtHR has also stated that measures to remove or restrict contacts between children and parents must be regarded as temporary and have the ultimate aim of reuniting them. Thus, proportionality is assessed not only with regard to the gravity of the measure but also with regard to its duration.

With regard to the legitimacy of the aims to be protected, art. 8 lists the purposes that may justify a restriction on the right to family life. In the context of the issue that we analyze in the present work, the legitimate end justifying an interference in family life will almost always correspond to the best interest of the child. It is true that such interest is not enumerated, *qua tale*, in n.º 2 of art. 8.º. Even so, it is not only part of the protection of the rights and freedoms of others, but is still considered a genuine public interest. In this context, it should be noted that the ECtHR has not only asserted the legitimacy of that interest to justify restrictions on the right to family life of the parents, but also stressed that protection of that interest is paramount. The safeguarding of the best interests of the child is therefore interpreted in accordance with art. 3 of the Convention on the Rights of the Child, in the sense that, in all decisions that may affect it, that interest must be given priority.

At this point, it should be stressed that, although it does not contain any rules concerning the protection of children in particular, the ECHR has proved to be an essential instrument for the protection of children’s rights, as a result of the jurisprudential work of the ECtHR, strongly inspired by the Convention on Human Rights of child. The famous case Maumousseau and Washington c. France, judges in Strasbourg stated that, since the adoption

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157 Case of 06/12/2007, complaint n.º 39388/05.
of the Convention on the Rights of the Child, the best interest of the child has become fundamental in all matters relating to the protection of children, and the family constitutes the fundamental unit of society and the natural environment for their growth and well-being. In this context, the ECHR has reiterated that there is a broad consensus - including in international law - that all decisions concerning children should be of paramount importance.

2. Family coexistence in cases of regulation and exercise of parental responsibilities: general decision principles

Having analyzed the general lines of protection of the familiar coexistence, as they are derived from the structure of art. 8 of the ECHR, it is now time to set out a number of principles which guide decisions in the specific cases in which ECHR is confronted. In fact, the ECHR always decides on the basis of a relatively homogeneous reasoning structure and a predetermined methodology. First, it examines whether the relationship in question is considered to be the "family life," and whether the contested state constituted real interference in that family life. Subsequently, it verifies whether such interference is legitimate: if it is provided by law and if it is intended for one of the legitimate purposes enumerated in n.º 2 of art. 8th. Finally, it examines whether interference is necessary in a democratic society, or, in other words, proportional. Here, it has already been pointed out, it has affirmed the need for a balanced choice between the interests of the child and those of the parents, giving priority to the superior interest of the first, which may derogate from the protection granted to the interest or rights of the parents.

On this point, the ECHR has consistently recognized that the national authorities are better placed to assess the need for an interference measure, since they are in direct contact with all those involved and therefore recognize a relative discretion. In order to ascertain whether States exceed this discretion in cases concerning the protection of family life, in cases of regulation and exercise of custody rights, in the context of parental responsibilities, the ECHR has followed a number of guidelines that must now be fulfilled.

First of all, the judges in Strasbourg are examining whether the national authorities have struck a balance between the two interests concerned - those of the child and those of the

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159 B.C. 9/23/1994, Hokkanen c. Finland. It concerns the application of the principle of discretion, according to which the national authorities have a certain freedom in choosing the measures necessary to respect the rights set out in the Convention, only when the "margin of appreciation" is exceeded which the guarantee bodies of the ECHR intervene. On this point, v. Howard C. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Martinus Nijhoff, 1996, p. 118.
parent - but insists that the interest of the child must be prevalent. Even so, the interests of parents, especially with regard to regular contact with their children, should also be considered, since the right to live with their children is protected by art. 8.9. Thus, while it is true that the ECHR recognizes that the national authorities enjoy a wide margin of discretion as regards determining which parent to whom custody is to be granted, as regards subsequent restrictions on rights of access, closer scrutiny will take place in order to ensure effective protection of the right of the parent who does not have custody to the family relationship with the child. Secondly, in all cases concerning the regulation and exercise of custody and parental responsibilities and right of access, the ECHR has insisted on the need for state authorities to act diligently and especially rapidly, as the passage of time is susceptible of having a decisive influence on the parental and family relations, which could lead to the risk that the mere passage of time would, in itself, determine a factual solution to the situation in question. Thus, delays in the procedures for determining custody and parental responsibilities, as well as the taking of necessary measures for the enforcement of rights in this matter, may lead to an unlawful interference with the family life of the visas. The judges in Strasbourg have also reiterated that the lack of cooperation between separate parents, or even actively obstructive attitudes on the part of one of them, does not constitute circumstances capable of exempting States from their obligations under art. 8.9 of the ECHR. On the contrary, the ECHR has stated that the authorities are under an obligation to carry out measures which reconcile the conflicting interests of the parties. However, the ECHR has also stated that the use of coercive measures in the present context should be avoided to the maximum extent so as not to jeopardize the best interests of the child. Already the imposition of sanctions on the parents should not be dismissed, in case of illegitimate behavior on the part of one of them.

Referred to some basic general principles of the structure of art. 8 of the ECHR and the case-law of the European Court of Human Rights on the subject, it is now necessary to examine the cases in which they were applied in matters of family life. We will look at three types of cases: those relating to decisions to award custody or parental responsibilities following divorce.

161 "The Court has recognised that the authorities enjoy a wide margin of appreciation when deciding on custody matters. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed". Ac. de 08/07/2003, Sahin c. Alemanha, complaint n.º 30943/96.
162 Case of 18/02/2014, Fernández Cabanillas c. Spain, complaint No 22731/11.
164 Case of 01/12/2009, Eberhard e M. c. Eslovénia, complaint n.º 8673/05 and 9733/05.
or parental separation, those relating to the exercise of custody and visitation rights, and finally, by one of the parents.

3. Issues relating to custody decisions following divorce or separation of parents.

The first type of decisions that the ECtHR may be called upon to scrutinize are the decisions relating to the attribution of custody and parental responsibilities to one parent over another. There are several cases in which the deprived parent resorts to the ECtHR on the grounds of violation of his right to family life. The assignment of the custody to the other parent would therefore amount to a violation of the negative obligation, of not interfering with the State in their family life. The ECtHR has stated that neither parent can rely on art. 8.º to invoke the right to take custody of the child to the detriment of the other parent. Nevertheless, it recognizes that, in fact, the attribution of custody to one of the parents represents a restriction on the right to family life of the deprived parent, and therefore must respect the conditions established in n.º 2 of art. 8 and, in particular, should give priority to the best interests of the child.

As already mentioned, it is in the context of the scrutiny of decisions on custody that the ECtHR reserves the greatest discretion to the Member States. Being closer to the people, it is they who can best determine which parent should exercise the right of custody. The ECtHR will therefore examine whether the Member States have exceeded that margin of discretion. And there are several cases where this can happen, as we shall see.

3.1. First, the assignment of custody to one of the parents must comply with other general principles of the ECHR. In particular, it can not represent a violation of art. 14, which implies that the choice of one parent to the detriment of another can not be based on discriminatory grounds. The art. Of Protocol n.º 7, which enshrines the principle of equality of spouses, must also act in this context, although it is a more limited principle, since it only applies to married persons. Some authors also argue that, from the combination of these various norms, a principle of parental co-responsibility is derived, in the sense that, since neither parent will have the advantage to be the custodian, custody solutions should be preferred shared. Nevertheless, the ECtHR has already stated that art. 5 of Protocol No. 7 is not necessarily violated by a law excluding the possibility of joint custody, provided that such a measure is

"necessary" for the best interests of the child and guarantees the right of access and information rights and consultation of the parent without custody\textsuperscript{166}.

The ECHR has already had the opportunity to sanction the "discriminatory" choice of one parent over another in a variety of situations, in application of art. 14, in conjunction with art. 8.\textsuperscript{9}. Thus, let us begin with a very illustrative case, which merited the condemnation of the Portuguese State. This is the Salgueiro da Silva Mouta c. Portugal, in which our country was sanctioned for having decided on the attribution of custody and parental responsibilities solely on the basis of the father's sexual orientation\textsuperscript{167}. In the Hoffman c. Germany\textsuperscript{168}, the ECHR sanctioned the decision to grant custody of a child to the father due to the fact that the mother was a witness of Jehovah, considering that the decision was based on a discrimination based on the religion professed.

It should be noted that the discriminatory grounds enumerated in art. 14 of the ECHR are not discriminatory, and other discriminatory situations not considered by the drafters of the Convention may occur. Illustrative in this context is the case Zaunegger c. Germany\textsuperscript{169}, in which a complaint was made of a natural father who, because he was not married to his mother, could only benefit from shared custody if his mother asked for it. Otherwise, the guard was automatically assigned to the mother. The applicant invoked the violation of art. 14, since the possibility of shared custody was left open to the mother. Such a solution was still discriminatory towards former spouses, since in the case of parents who had been married together, anyone could request such custody. In deciding this case, the ECHR first of all pointed out that in cases of parents not wedded together, it might be lawful for the law to establish cases where custody and parental responsibilities were borne by the mother in order to ensure that, the child would have someone responsible for it. However, he stressed that such a solution should not be adopted as a general rule for all situations of children born out of wedlock. On the other hand, the ECHR rejected the Government's objection that the legislature could presume that the mother would certainly have legitimate reasons for that, based on the best interests of the child, because she did not seek shared custody. Thus, he argued that shared custody against the will of the mother did not necessarily mean that the guard was contrary to the best interests of the child, even if it led to conflicts between the parents. Finally, it considered that, under national law, shared custody was, as a rule, attributed to cases of divorce, the failure to apply the same

\textsuperscript{166} Case of 11/07/2000, Cernecki c. Áustria, complaint n.\textsuperscript{o} 31061/96.
\textsuperscript{167} Case of 21/12/1999, complaint n.\textsuperscript{o} 33290/96.
\textsuperscript{168} Case of 11/10/2001, complaint no. 34045/96. In the same direction and on the same date, Sommerfeld c. Germany, complaint No 31871/96 and Sahin v. Germany, complaint No 30943/96.
\textsuperscript{169} Case of 03/12/2009, complaint n.\textsuperscript{o} 22028/04.
solution to cases of parents not united by marriage constituted a violation of art. 14, in conjunction with art. Of the ECHR.

3.2. Decisions concerning the determination of the person to whom custody is granted must, on the other hand, comply with art. 8 in conjunction with art. 6 of the ECHR, it means, be taken in the course of a fair trial. In this case it is important to assess not only the duration of the procedure, but also the way the decision was taken. It is important to know, for example, whether both sides were heard, whether they had access to relevant evidence and whether all relevant factors were taken into account.

In case M. and M. c. Croatia, the ECHR considered that the right to private and family life of the daughter of a divorced couple had been disregarded because of the excessive length of the legal proceedings and the fact that the national courts had not allowed the minor to express her views on the parent who should take care of it. In the Monory case c. Romania and Hungary, the ECHR considered that the almost five-year duration of a divorce and custody case exceeded the reasonable time required by art. 6 of the ECHR. In a similar sense, also in the cases Bargagli c. Italy and Szakály c. Hungary, the ECHR considered that there was a violation of art. 6 of the ECHR because of the excessive duration of the procedure.

As regards the taking into account of the child's opinion, the ECHR adopts a position which we consider to be balanced. First, in cases where the non-custodial parent claimed that the decision was arbitrary, the ECHR relied on the views expressed by the child in the course of the proceedings to demonstrate that the state decision had not been arbitrary. However, it has stated that the national authorities must verify whether the child's expressed will, given his or her maturity and age, is free and clear or, on the contrary, has been influenced or manipulated by one of the parents or another family member. On the other hand, it considers that the will of the child can not correspond to an "absolute veto". In case C. c. Finland, the ECHR considered precisely that the national body had placed an excessive burden on the views of children without taking into account the rights of the father.

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171 Case of 05/04/2005, complaint n.º 71099/01.
172 Case of 09/11/1999, complaint n.º 38109/97.
173 Case of 25/05/2004, complaint n.º 59056/00.
174 Thus, the aforementioned case of 07/07/2003, Sommerfeld c. Germany.
175 Case of 09/05/2006, complaint n.º 18249/02.
In the case of Elsholz c. Germany176, the ECtHR examined a complaint that a mother prevented a natural father from seeing the child, who was in fact unable to visit the child for two and a half years. The national courts heard the child, who stated that he did not want to see his father, claiming that "he was bad and beat his mother repeatedly". It was proved that the mother had reproduced to the child her objections to the visitation of the father, having influenced her negatively against the parent. Thus, the courts considered that if the father's visits without retakes, the child would enter into a conflict of loyalty that would be detrimental to its development, and it is not relevant to know who had caused such a situation.

In that sense, they decided there was no reason for the visits to continue. Turning to the case, the ECtHR considered that the considerations on which the decisions of the national courts were based were, in the abstract, appropriate and relevant.

However, it considered that the father had not been given the opportunity to properly defend his rights in the course of the proceedings, and there was no recourse to the psychological assessment of the child, as required. It considered, therefore, that the national courts had taken the decision on the basis of insufficient evidence, and that there had been a violation of art. 8, in conjunction with art. 6th.

In this regard, the ECtHR also examines whether the deprived parent has the right to properly defend his position, including the possibility of bringing the relevant evidence together. Therefore, it considered that art. 8 of the ECHR had been breached in a case where the applicant mother, deprived of her daughter's rights of access on the grounds of her emotional instability, alleged that she had not been subjected to any new psychiatric expertise for more than eight years177.

The ECtHR has also examined whether the judicial procedures ensured the impartiality of the decision. In the Bondavalli case c. Italy, sanctioned the fact that, in the judicial proceedings, the alleged - and alleged - lack of impartiality of several experts involved, who worked with the child's mother, had been taken into account in favor of the child178.

3.3. In some cases the ECtHR has also established some principles concerning the very content of custody and parental responsibilities. At this point it is important to note the important principle that custody decisions should ensure that siblings are not separated and

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176 Case of 07/07/2000, complaint no. 25735/94. In a similar sense, Ac. 07/07/2003, Sommerfeld c. Germany, complaint No 31871/96.
177 Case of 04/28/2016, Cincimino c. Italy, complaint No 68884/13.
178 Case of 17/11/2015, complaint n.º 35532/12.
enjoy their mutual companions as much as possible. In these cases, the need for respect for family relationships among siblings is concerned.

3.4. On the other hand, the protection of family coexistence also derives the need to recognize the parent who does not hold custody the possession of a right of access, which also derives from art. 7. of the Convention on the Rights of the Child, and the right to contact both parents. This right, which is above all a right of the child, also derives from a Recommendation of the Committee of Ministers of the Council of Europe on parental responsibilities, which provides, precisely, that the parent with whom the child does not live must have, the possibility of maintaining personal relations with the child, unless such relationships seriously undermine the child’s interest. The ECHR has followed this understanding, stating that only exceptional and exclusively justified reasons in the child’s interest may dictate the restriction or exclusion of the right of access.

In such situations, as already mentioned, the ECHR carries out a rigorous analysis of the legitimacy of the measure, granting States less discretion. In an exceptional case, the Commission on Human Rights considered that, for example, suspension of contact with one of the parents could be in accordance with the Convention if there was a serious conflict between the two parents and it was found that the visitation scheme could lead to a crisis in the custody family or in a conflict of loyalty to a parent. This decision had several votes in favor, which considered that the reasons given were not serious enough to substantiate one of the alleged exceptional grounds. We tend to follow the latter opinions, and we believe that the ECHR would now require more important reasons.

In the Marsalek case c. Czech Republic, the ECHR considered that the provisional interdiction of contacts between the complainant and the daughter was justified by the applicant’s inadequate behavior, conflicts with his mother, as well as various medical information attesting that continued contact with his father would be harmful to his daughter’s health. In the case of Schaal c. Luxemburgo, the ECHR also considered justified the suspension

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179 Case of 06/04/2010, Mustafa and Armagan Akin c. Turkey, complaint No 24014/05.
180 Case of 18/02/2003, Schaal v. Luxembourg, complaint No 51773/99.
181 Case of 18/02/2003, Schaal c. Luxembourg, complaint n. 51773/99.
182 Case of 07/07/2003, Sommerfeld c. Germany, complaint No 31871/96. In this case, the ECHR held that the national courts had not arbitrarily decided to deprive the father of the right of access, since it had been his own 13-year-old daughter expressing that will.
184 Case of 04/04/2006, complaint n. 8153/04.
of the father's right to visit, following a criminal proceeding for alleged sexual abuse by him to his daughter\textsuperscript{185}.

4. Issues relating to the exercise of custody and visiting rights

The state obligations derived from art. 8.\textsuperscript{9} relate not only to the determination of custody and visits. In fact, that rule also gives rise to obligations relating to the enforcement of judgments, whether in the matter of custody or in the exercise of rights of access. Most of the state obligations in question are positive obligations, and can arise when one of the parents, or another person, is impeding the exercise of parental rights.

Also in this context, the ECHR gives priority to the best interest of the child, stressing the importance of contact with both parents for a healthy development of the same.

In order to concretize this idea, the ECHR has stated that of art. 8 of the ECHR may lead to an obligation on the national authorities to take measures to facilitate the meeting between a child and the parent who does not have custody or access to the child by the holder of the right of access. Thus, the ECHR may be infringed where, in the event of a situation of obstruction of one of these rights, the national authorities do not make every effort to ensure respect and enforcement\textsuperscript{186}.

4.1. In other cases, the ECHR has considered that, in fact, the Member States have violated their positive obligations aimed at restoring unlawfully disrupted family life. In this regard, it has stated that States must provide themselves with an adequate and sufficient legal arsenal to ensure compliance with these positive obligations\textsuperscript{187}.

In the case of Reigado Ramos c. Portugal\textsuperscript{188}, our country was convicted in a case where the custodial mother prevented her father from exercising her right of visit, in violation of the parental responsibility regulation regime in force. The ECTHR considered that the national authorities had failed to fulfill their positive obligations to promote effective respect for family life. In fact, they had simply adopted a set of automatic and stereotyped measures which proved to be totally ineffective in combating the unlawful conduct of the mother.

In the same sense, in the Vorozhba c. Russia, the ECHR examined a case concerning the non-enforcement of a judgment which ruled that the child should live with the mother in the face of her father's refusal to comply with that decision. The parent alleged that the national

\textsuperscript{185} Case of 18/02/2003, complaint n.\textsuperscript{o} 51773/99.
\textsuperscript{186} Susana Almeida, Familia..., cit., p. 325.
\textsuperscript{187} Case of 09/01/2007, Mezl c. Czech Republic complaint No 27726/03.
\textsuperscript{188} Case of 22/11/2005.
authorities, in failing to execute the sentence, violated art. 8 of the ECHR, and the ECtHR was right to do so.

Following the case-law which has stated that States must provide themselves with an arsenal to enable effective enforcement of custody and visitation measures, the Court has held that the use of automatic and stereotyped measures may not satisfy this requirement. In the Giorgioni case c. Italy, the ECtHR criticized the fact that for four years the mother was effectively able to avoid the father’s visits to the child, while the courts merely issued orders to comply with the judicial decision but were not concerned with their effectiveness.

4.2. The ECtHR has postulated that the obligation for the national authorities to carry out the measures necessary to facilitate contact between the child and the parent constitutes an obligation of means, not of result. In a number of cases, the ECtHR has stated that resumption of meetings or reinstatement may not be possible immediately or automatically, and preparatory measures such as a phased meeting plan or intervention of social or psychological services are necessary. The need for such preparatory measures is further strengthened in cases where there is evidence of "parental alienation". In these cases, it is even stressed that the use of coercion should be very limited. On the other hand, the separation may have already reached such an extreme that compliance with the decision to surrender the custody to the parent, or visits, may no longer be possible because it does not conform to the best interests of the child.

These are some of the cases that we will analyze below.

First of all, mention should be made of the Hokkanen v. Finland, concerning a situation in which the maternal grandmothers, after the death of the mother of a child, had taken over the granddaughter. Although the national courts awarded custody to the father, such a decision was never enforced in the face of the grandparents’ opposition, and was permanently suspended to the extent that, in view of the granddaughter’s guard was not adequate. The father appealed to the ECHR, invoking a violation of his right to family life. The ECtHR considered that, as regards the question of the place of residence of the child, the national courts had not exceeded their margin of discretion, since they had been based on the superior interest of the

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189 Case of 10/16/2014, Vorozhba c. Russia, complaint No 57960/11.
190 Case of 15/09/2016, complaint n.º 43299/12.
191 In the same sense, in a case where the father was prevented from seeing his son for seven years, the conviction in the Strumia case c. Italy, Ac. of 06/23/2016, complaint no. 53377/13.
192 Susana Almeida, Família..., cit., p. 327.
193 Thus, in case 11/01/2011, Bordeianu c. Moldova, cit ..
194 Case of 23/09/1994, complaint n.º 19823/92.
child. However, since the grandparents prevented the father from visiting the child, the ECHR held that there had been a violation of art. 8, because the courts have not effectively promoted the enforcement of their right of access to the child.

In the Nuuniten case c. Finland, the ECtHR has shown that the positive obligations of the State to promote family reunification are not absolute, especially in cases where children and parents may consider themselves "strangers" to each other. In this case, the mother, invoking fears of various orders, had permanently obstructed her father’s visits to their children. The national courts considered that the mother’s fears were well-founded in the face of aggressive conduct on the part of the father and his criminal past, thus revoking the established visiting arrangement. The ECtHR ruled that there had been no violation of art. 8 of the ECHR, on account of the facts invoked. He further considered that the child’s permanent subjection to internal procedures designed to reassess his superior interest proved to be a breach of his own interest.

4.3. Lastly, the ECtHR has also insisted on the need to confer urgent measures on the execution of custody and visits, due to the aforementioned effect of the passage of time on the relationship between the child and the private parent. Let’s look at some cases.

In the case Ribic c. Croatia, as a result of delays in the judicial process concerning custody and parental responsibilities (which lasted seven years and eight months), and subsequent lack of measures to enforce the judgment guaranteeing the father the right to visit against the will of the mother (which took six years to be taken), he only had contact with the child three times throughout his childhood. The ECHR considered that the Croatian authorities had violated their positive obligations to facilitate the child’s family reunion with the parent, which had resulted in a de facto “removal” of the father’s removal.

More recently, in Malec c. Poland, the ECHR sanctioned the delay of the Polish courts, which took about two years to issue a precautionary measure to enable the applicant to contact his daughter. Even after the final decision, the mother continued to impede her father’s contacts, leading to legal proceedings to continue, with her father having deducted more than 50 requests for enforcement of court rulings.

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195 Case of 27/06/2000, complaint n.º 32842/96.
196 Thus, in Acase 11/01/2011, Bordeianu c. Moldova, complaint No 49868/08.
197 Case of 02/05/2015, complaint n.º 27148/12.
198 Case of 28/06/2016, complaint n.º 28623/12.
5. Case law on parental abduction

The judges in Strasbourg have pointed out, illustratively, that the child has the right not to be withdrawn from one parent and detained by another, who is deemed to have more rights in relation to it.199

Thus, cases in which one of the parents subtracts the child, preventing the other from exercising his right of custody or visitation also causes positive obligations on the State, which should promote the return of the child and the reunion with the private parent of the child. their respective rights.

In this context, the ECtHR has stated that the obligations derived from art. 8 of the ECHR should be read in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and Council Regulation 2201/2003 / EC of 27 November 1980 on jurisdiction,200 recognition and enforcement of judgments in matrimonial matters and parental responsibility.201

So much so that the ECHR considered that Albania had violated art. 8 of the ECHR simply because it has not ratified the Hague Convention.202

5.1. As mentioned above, also in cases of parental abduction, the ECHR insists that it is a positive obligation on the part of the Member States to promote family reunification, which is a means obligation. Thus, even if states can not carry out such a meeting, if they demonstrate that they have done everything in their power to achieve it, they can not be punished.

This was the case in the case of Tapia Gasca and DC Spain,203 where the ECtHR considered that, despite the lack of practical results for the child’s reunion with the parent, the national authorities had done all in their power to carry out the restitution of the child, they had issued an international search warrant for the father, and carried out a number of research activities. Thus, in view of the actions of the Spanish authorities, the ECtHR did not consider that article had been violated.

199 Case of 06/12/2007, Maumousseau and Washington c. France, complaint No 39388/05.
202 Case of 12/12/2006, Bajrami c. Albania. The ECtHR considered that the lack of ratification of that Treaty implied that the State in question did not have an effective system to comply with the positive obligations derived from art. 8 of the ECHR in cases of parental abduction.
203 Case of 22/12/2009, complaint n.º 20272/06.
In the case of Raw c. France204, it was considered that the French authorities had failed to take all necessary measures to facilitate the return of a child who had been illegally abducted by the father. The ECtHR stressed that the authorities should have taken coercive measures if necessary. He further stated that the abducted child, as well as the brothers, were also victims of a violation of their right to respect for family life. Similarly, in the Macready c. Czech Republic, the ECtHR stated that the Czech Republic205 did not implement the obligations arising from the Hague Convention and that the child was immediately returned to the injured parent, and compensation for the child was not satisfactory or sufficient.

The ECtHR has strongly emphasized the need for States to provide themselves with the means to effectively implement the obligations under the Hague Convention. In this context, the ECtHR makes a reference to art. 7.ª of the Hague Convention, which contains a list of measures that national authorities may take to ensure the return of the child removed206.

5.2. Also in cases of parental abduction - and even a fortiori - respect for positive obligations is judged by the speed of state action. To this end, the Hague Convention provides for a series of measures to ensure the immediate return of children who have been displaced or are being unlawfully detained in the Contracting State. In general, the ECtHR considers that the excessive overshoot of the six-week period provided for in art. 11 of the Hague Convention, and in the absence of sufficiently serious grounds to justify it, may raise problems of respect of art. Of the ECHR207.

In the Maire c. Portugal208, our country was convicted of violation of art. 8 because, following an unlawful transfer of a child by the mother, from France to Portugal, the Portuguese authorities took more than four years after the request made by the French central authority to locate the child. The Court admitted that those difficulties were essentially due to the mother's behavior. However, it was for the competent authorities to take appropriate measures to remedy this lack of cooperation.

In the Monory case c. Romania and Hungary, the European Court of Human Rights examined a complaint by a father against the Romanian and Hungarian states following an unlawful detention of her daughter in Romania. The father alleged that the Romanian

\footnotetext{204}{Case of 06/07/2013, Raw and others c. France, complaint No 10131/11.}
\footnotetext{205}{Case of 22/04/2010, complaint n.º 4824/06 and 15512/07.}
\footnotetext{206}{Case of 01/25/2000, Ignaccolo-Zenide c. Romania, cit.}
\footnotetext{207}{Case of 07/21/2015, G.S. w. Georgia, complaint no. 2361/13, Ac. of 19/97/2016, G.N. w. Poland, complaint No 2171/14.}
\footnotetext{208}{Case of 26/06/2003, complaint n.º 48206/99.}
\footnotetext{209}{Case of 05/04/2005, complaint n.º 71099/01.}
authorities had not arranged for a quick return of the child and that, because of this delay, they later decided that it was no longer possible to remove the child from the environment in which he was. In this case, the ECtHR agreed that, because of the passage of time, the child should now remain in Romania, as it is the most appropriate to pursue his interest. Although such a solution may have resulted in an illegitimate act of one of the parents, this would be irrelevant for the protection of the child’s prevailing interest. However, this does not mean that the authorities have not infringed the Convention by allowing such a lapse of time and the crystallization of an illegitimate situation. Thus, it considered that there had been disrespect both of art. 8 or of art. 6 of the ECHR.

5.3. The case just presented demonstrates that the obligation to promote the return of the child as quickly as possible in cases of parental abduction is also not absolute. In fact, here too, the removal of the child from the parent may require the adoption of preparatory measures\textsuperscript{210}, and should not take place abruptly or mechanically. That is why the ECtHR must be interpreted not only in the Hague Convention but also in the Convention on the Rights of the Child.

In this context, the ECtHR has already had the opportunity to condemn a State because, following parental abduction and the denial of children to see their mother, the authorities failed to provide for any preparation for reunion, in particular with a refusal of psychological and social support\textsuperscript{211}.

5.4. Finally, the ECtHR has also pointed out that States have a duty to examine possible factors that may make it impossible for the child to return immediately, particularly those that may represent a “serious risk” in the assertion of art. 13 of the Hague Convention\textsuperscript{212}.

In the case of Neulinger and Shuruk c. Switzerland\textsuperscript{213}, the ECtHR stated that the return of the child should not be determined in obedience to his superior interest if it were shown that the child was deeply integrated in his new environment. In applying this principle, it is finally important to mention that Case X c. Latvia\textsuperscript{214}. In this case, the mother had moved from Australia to Latvia with her daughter and, at the end of long procedures to return her daughter to

\textsuperscript{210} Case of 25/01/2000, Ignaccolo-Zenide c. Romania.
\textsuperscript{211} Case of 01/25/2000, Ignaccolo-Zenide c. Romania.
\textsuperscript{212} Under Article 13, the judicial or administrative authority of the requested State is not obliged to order the return of the child if, inter alia, the person, institution or body opposing the child, on his return, is subject to physical or mental danger or, in any other way, to an intolerable situation.
\textsuperscript{213} Case of 06/07/2010, complaint no. 41615/07.
\textsuperscript{214} 26/11/2013, queixa n.° 27853/09.
Australia, where her father was, she argued that her daughter was deeply integrated into Latvia and that his separation and return to his father's country would cause him serious psychological damage. Such allegations were substantiated with psychological expertise. Their arguments were not followed, however, and the Latvian authorities considered that they related to the substance of the custody, to be decided by the Australian courts. It is at this point that the mother resorts to the ECHR, claiming that her daughter’s return to Australia violated her right to respect for family life. The ECTHR considered that the Latvian authorities should have taken into account the allegations and evidence provided by the mother, by subjecting them to a contradiction. They should also have looked into whether it was possible for the mother to follow her daughter to Australia. It further emphasized that the obligations of expeditious action, embodied in the Hague Convention, could not prevent States from considering in detail the best interests of the child. The judges in Strasbourg therefore concluded that the Latvian authorities had carried out a disproportionate interference with the applicant's private and family life.

6. Conclusions

Attempts have been made to review the main case-law on family cohabitation with regard to cases concerning decisions and enforcement of custody and parental responsibilities.

From the course just expounded, we can extract some principles of decision that guide the reasoning of the ECTHR.

Thus, in the first place, the ECTHR always assumes that the relationship between parents and children continues after divorce or separation. Secondly, decisions regarding custody cannot be motivated by discriminatory factors and the same procedural rights must be given to both parents. Finally, States have the positive obligation to make every effort to ensure the effective exercise of the custody and visits regime that has been agreed or decided, including in child abduction cases.

It should be noted that in several of these cases, the ECTHR does not sanction decisions that choose to allow the child to remain in the custody of the offender, because it is more favorable to his interest. The course of time, in these cases, eventually sediments a de facto situation that began illicitly. However, States are not prevented from being sentenced because they have failed to fulfill their positive obligations to promote a speedy process of restitution of the child illegally withdrawn.
Above all, the main note to be retained is that decisions are always guided by the best interest of the child in the matter we are proposing to study - which, in the absence of the express consecration of such a good worthy of protection in the letter of the ECHR, demonstrates that in fact the ECHR follows the most current and consensual guidelines of family and child law.