FOURTH SECTION

**CASE OF GAKHARIA v. GEORGIA**

*(Application no. 30459/13)*

JUDGMENT

STRASBOURG

17 January 2017

FINAL

17/04/2017

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

In the case of Gakharia v. Georgia,

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

András Sajó, *President,* Vincent A. De Gaetano, Nona Tsotsoria, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, Iulia Motoc, Marko Bošnjak, *judges,*  
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 6 December 2016,

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

PROCEDURE

1.  The case originated in an application (no. 30459/13) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Mr Revaz Gakharia (“the applicant”), on 17 April 2013.

2.  The applicant was represented by Mr A. Kvinikadze, a lawyer practising in Tbilisi. The Georgian Government (“the Government”) were represented by their Agent, Mr L. Meskhoradze, of the Ministry of Justice.

3.  The applicant alleged that his right to adversarial proceedings, his right of access to a court and his right to respect for his family life had been infringed because his parental rights had been restricted by domestic court judgments made by default in his absence.

4.  On 4 March 2014 the application was communicated to the Government.

THE FACTS

I.  THE CIRCUMSTANCES OF THE CASE

5.  The applicant was born in 1966 and lives in Tbilisi.

A.  Background

6.  The applicant and K.G. began living together in 1999. On 9 January 2000 their daughter, L.G., was born. She was raised mainly by her maternal grandmother in Georgia while both parents, whose relationship soon ended, left to work abroad.

B.  Proceedings related to the issuing of default judgments

7.  On 31 March 2008 K.G. applied to the Tbilisi City Court for her daughter to be officially registered as resident at her address. On 19 May 2008 a summons was sent to the applicant at his registered address, informing him of K.G.’s action. According to the courier, the summons could not be served as the house was closed up and no one was living there. The summons was only sent once. On 3 June 2008 the court of first instance, acting on the basis of Article 78 of the Code of Civil Procedure (hereinafter, “the CCP” – see paragraph 15 below), ordered information concerning the proceedings to be published in a daily newspaper called *24 hours*. On 24 June 2008 the Tbilisi City Court granted K.G.’s application. The decision was taken in the absence of the applicant, whose whereabouts, according to the ruling, could not be established.

8.  On 12 December 2008 the Tbilisi City Court, acting upon another application by K.G., ruled again by default that L.G. could be issued with an international passport and leave the territory of Georgia without her father’s consent. No specific time-limit for that restriction of the applicant’s parental rights was given in the ruling. The court again stated that the applicant’s whereabouts were unknown and ordered the information about the proceedings to be published in *24 hours*. Unlike the first set of default proceedings, the summons was sent twice to the applicant at the address he had registered at. It was again not delivered. The courier noted that the house was closed up.

9.  It appears from the case file that the custody and guardianship authority, which represented the interests of the child in the above proceedings, made its own attempts to contact the applicant. In conclusions submitted to the Tbilisi City Court, the authority noted that during its visit to the applicant’s registered address it had learnt from neighbours that he had sold the house in 2003 and left for Moscow. Both default decisions were sent to the applicant’s registered address and, as they could not be served, were consequently published in *24 hours* according to the procedure provided for in Article 78 of the CCP (see paragraph 15 below).

C.  Proceedings relating to the annulment of the default judgments

10.  On 6 June 2012 the applicant lodged a complaint with the Tbilisi City Court, seeking to have both default decisions set aside. He stated that he had learnt about the decisions only in May 2012. He also explained that he had not been living in Georgia at the material time, which his former partner had well known. The default proceedings had been unfair as he had not been properly summoned to the hearings.

11.  By a decision of 16 August 2012 the Tbilisi City Court rejected the applicant’s application. The court ruled, with reference to Articles 71 § 3 and 422 of the CCP (see paragraphs 15 and 17 below), that the applicant had been duly informed about the proceedings via public notifications in a newspaper and that there was therefore no legal basis to set the impugned decisions aside. It noted that the applicant had been registered at the address where the summonses had been sent and that for the purposes of the proceedings the courts had been justified in using that very address.

12.  That decision was upheld by the Tbilisi Court of Appeal on 31 October 2012. It reasoned that the domestic courts had been right to send the summonses to the applicant’s only available registered address. Furthermore, as it had not been possible to serve the summonses on the applicant, the procedure of delivering a summons via a public notification, as provided for in Article 78 of the CCP, had been duly employed.

13.  In his last communication with the Court on 15 December 2014, the applicant stated that he could still not have any contact with his daughter.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A.  The Civil Code

14.  The relevant Articles of the Civil Code (hereinafter, “the CC”) read as follows:

Article 1201. The place of residence of a minor when parents divorce

“1. If parents live apart due to divorce or for any other reason, they shall agree on who will have the right to decide with whom the minor shall live.

2. If the parents disagree, the dispute over the place of residence of a minor shall be decided by a court, taking account of the best interests of the child ...”

Article 1202. Rights and duties with respect to children in case of divorced or separated parents

“1. Parents enjoy equal rights and duties with respect to their children, notwithstanding whether they are divorced or live apart.

2. A parent, with whom the child lives, has no right to restrict the other parent’s rights.”

Article 1205. Restriction of parental rights and responsibilities

“1. The rights and duties of a parent may be restricted only on the basis of a court order, unless otherwise provided for by this Code.

2. A court may restrict one or several rights or duties of a parent independently from the other rights and duties ...”

Article 1209. Restoration of parental rights and responsibilities

“1. The restoration of parental rights and duties is only possible via the initiation of court proceedings either by a child, one of the parents or by a custody and guardianship body.

2. The restoration of parental rights and duties shall be possible only if it is established that the basis for restricting or depriving a parental right has ceased to exist.”

B.  The CCP

15.  The relevant Articles of the CCP, as in force at the material time, concerning the service of court documents on parties to proceedings, read as follows:

Article 71. Serving of a summons and consequences of failure to do so

“1. A court summons is served on a recipient at the main address (place of residence) indicated by a party, at an alternative address, at a work address or any other address that is known to the court. ...

3. If the address of the respondent party indicated by the applicant is correct, but the court fails to serve a summons ..., the court shall be guided by the rules set out in Article 78 of the present Code.

4. If the address of either of the parties supplied by an applicant is found to be incorrect, the court shall leave the action unexamined.”

Article 73. Delivery of a court summons

“1. A court summons shall be delivered by electronic means pursuant to Article 70 § 3 of the present Code, by post or by courier. The court itself decides which method of delivery to use ...

11. If the court summons could not be served on a recipient at the first attempt the summons shall be sent at least one more time to the same address or any other address known to the court. ...

7. If the parties or their representatives ... could not be notified of the date and place of a court hearing in accordance with the procedure set out in the present Code ... a judge may order a local administration body or a territorial body of the Ministry of Internal Affairs of Georgia ... to deliver a court summons to the relevant individuals. A local administration body or district police officers are obliged to ensure that a summons is served on the parties or their representatives within the period set out by the ruling ... and to inform the judge that it has been so served, or give reasons for any failure to do so ...”

Article 78. Public announcement

“1. If a party’s whereabouts are unknown or it has been impossible to serve a court summons by other means, the court is authorised to order the publication of the summons. Public notification shall be done in a newspaper which is widely distributed in the administrative-territorial unit of the party’s place of residence ...

3. In the case provided for in the first paragraph of the present Article, the court summons shall be considered as being served on the party on the seventh day after its publication in the newspaper.”

Article. 210. Opening of the main hearing

“...

2. The clerk of the court reports to the court which of the summoned persons are in attendance, whether the absent persons have been served with summonses according to the procedure provided for in Articles 70-78 of the present Code and what information is available about the reasons for their absence. ...”

16.  In December 2010 Article 78 of the CCP was amended to replace notices in newspapers with notices on a public notice board in a court building or on the Internet page of the court. At the same time, the amended Code maintained the possibility of publishing notices in newspapers at the request and at the expense of the applicant party.

17.  As regards default proceedings, the relevant Articles of the CCP, as in force at the material time, read as follows:

Article 230. Absence of a respondent

“1. If a respondent party who has been duly summoned pursuant to Articles 70-78 of the present Code fails to appear at a court hearing and the applicant requests delivery of a default judgment, the factual circumstances indicated in the complaint are considered to be proven.

2. If the factual circumstances indicated in the complaint legally substantiate the request, it shall be granted. Otherwise, the court shall reject the applicant’s request.”

Article 233. Instances in which a default judgment shall not be delivered

“1. A court shall not deliver a default judgment if

a) the absent party has not been summoned in accordance with the rules of Articles 70-78 of the present Code;

b) the court has been informed of *force majeure* or other circumstances which could have prevented the party from appearing in court on time;

c) the absent party was not informed of the factual circumstances of the case in good time. ...”

Article 236. Appeal against a default judgment

“A party who has failed to appear at a court hearing, which has led to a default judgment being delivered against him or her, or a respondent party in the cases referred to Article 232 § 1 of the present Code, can lodge an action with the same court to have the default judgment set aside and the case reopened.”

Article 237. Time-limits for appeal against a default judgment

“An appeal lies against a default judgment within ten days. That period shall run from the day when a copy of the default judgment is served on a party in a manner provided for in Article 70-78 of the present code. The default judgment shall enter into force upon expiry of the time-limit.”

Article 241. Grounds for setting aside a default judgment

“A default judgment shall be set aside and the case reopened if any of the grounds listed in Article 233 are present, or if a party was absent for a valid reason of which he or she could not inform the court at the relevant time.”

Article 366. No appeal against a default decision

“1. A decision taken by default is not subject to appeal [to a higher court] by a party against whom it was taken ...”

Article 422. Action for annulment of a judgment (decision)

“1. A final court decision may be annulled on the application of an interested party, if:

...

(b) one of the parties or their legal representative ... was not summoned to a hearing; ...”

C.  The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (22 January 1993, Minsk), acceded to by Georgia in 1996

18.  The above Convention regulates a wide range of legal matters, including the service of court or other documents, the recognition and enforcement of civil and criminal judgments and cooperation between competent authorities in the field of civil, family and criminal law. The Convention sets out that the judicial authority to which a request has been addressed serves the documents according to the law of the State to which it belongs. In addition the Convention allows diplomatic or consular agents to serve documents on their citizens and to question them without any coercion.

D. Case-law of the Supreme Court regarding service of documents

19.  According to the case-law of the Supreme Court, when court proceeding involve a person residing on the territory of any of the States Parties to the Minsk Convention outside Georgia, the Minsk Convention comes into play. The Supreme Court has established that the service of court documents in such a case is to take place in accordance with the procedure provided for by the Minsk Convention rather than by the CCP (see, for example, decisions nos. a-2257-sh-73-09, 2 March 2010, and as‑214-199-2014, 8 April 2015).

THE LAW

I.  ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 8 OF THE CONVENTION

20.  The applicant complained that he had lost all contact with his daughter because of the two court decisions delivered in his absence by default and because of the subsequent refusal of the domestic courts to set them aside. He relied on Article 6 § 1 and Article 8 of the Convention, which, in so far as relevant, read as follows:

**Article 6 § 1**

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

**Article 8**

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

A.  Admissibility

1.  The Government’s preliminary objection

21.  The Government argued that the applicant had not exhausted the available domestic remedies. In particular, the applicant could have applied to the domestic courts for the restoration of his parental rights by, *inter alia,* complaining under Article 1209 of the CC about the loss of contact with his daughter (see paragraph 14 above). He could also have initiated custody proceedings.

22.  The applicant did not comment on the Government’s non-exhaustion objection.

2.  The Court’s assessment

(a)  Admissibility of the complaint under Article 6 § 1 of the Convention

23.  The Court notes that the non-exhaustion objection raised by the Government concerns in substance solely the applicant’s complaint under Article 8 of the Convention. As for his complaints under Article 6 § 1, it observes the following: the applicant alleged that the default proceedings had been unfair because he had not been properly summoned and had subsequently been deprived of the possibility to challenge the default decisions. He had made use of the available remedy for that issue, which was a complaint under Article 422 of the CCP (see paragraphs 10-12 and 17 above). The Court does not see how the initiation of custody proceedings or an application for the restoration of the applicant’s parental rights could have remedied the alleged unfairness of the initial default proceedings. The Government’s non-exhaustion argument is therefore invalid as regards the applicant’s complaint under Article 6 § 1 and must be rejected.

24.  The Court further notes that the complaint under Article 6 § 1 of the Convention is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

(b)  Admissibility of the complaint under Article 8 of the Convention

25.  The Court observes that the applicant’s core complaint under Article 8 of the Convention is about the restriction of his parental rights and the loss of contact with his daughter as a result. The two court decisions which are at issue allowed the applicant’s daughter to be issued with an international passport and to leave Georgia without her father’s consent. The Court notes that the applicant challenged the validity of those decisions. It doubts, however, that the applicant’s use of that avenue of redress after a delay of more than three years could have helped him reach his objective of seeking to re-establish contact with his daughter and/or having her returned to Georgia. As pointed out by the Government, the domestic courts could, at best, have quashed the impugned decisions. This measure, however, could not have effectively remedied the applicant’s underlying complaint as his daughter would still have been inaccessible on account of her being abroad. Rather than engaging in purely procedural proceedings complaining about the alleged unfairness of the initial default decisions, the applicant should have applied directly to the Georgian courts for the restoration of his parental rights under Article 1209 of the Civil Code (see paragraph 14 above). The initiation of custody proceedings was also an option for him to regain access to his daughter by requesting contact or visiting rights.

26.  For the above reasons, the Court considers that the applicant failed to take adequate steps to secure the exercise of his right of access to his daughter. It therefore accepts the Government’s objection as regards the applicant’s complaint under Article 8 of the Convention and declares that complaint inadmissible for non-exhaustion of domestic remedies.

B.  Merits of the complaint under Article 6 § 1 of the Convention

1.  The parties’ submissions

27.  The Government alleged that the applicant’s right to a fair trial had not been breached. They noted that the right to take part in proceedings was not absolute. Article 6 of the Convention did not guarantee a right to appear in person before a civil court but rather a more general right to present one’s case effectively before the court and to enjoy equality of arms with the opposing side. States had a free choice of means to be used in guaranteeing those rights to parties in a case (see, among other authorities, *Gryaznov v. Russia*, no. 19673/03, § 45, 12 June 2012).

28.  In the circumstances of the present case, the Government claimed that the relevant authorities had acted in full compliance with the requirements of Article 6 of the Convention. In particular, the domestic courts had employed all the resources available to them to establish the applicant’s whereabouts and to inform him of the actions brought against him; summonses had been sent to his registered address and published in a national daily newspaper. The default decisions had later been sent to his registered address and published in the same newspaper. The relevant domestic procedures, as set out in Articles 70-78 of the CCP, had been scrupulously observed by the domestic courts. Hence, the failure to appear before the domestic courts had been attributable only to the applicant.

29.  In connection with the time-limits specifically, the Government submitted that an indefinite extension of the proceedings in order to trace someone involved in a case could prove to be incompatible with the principle of legal certainty and the proper administration of justice.

30.  As for the inability to challenge the default decisions, the Government noted that under Article 422 § 1 (b) of the CCP, the applicant was entitled to request the annulment of judgments adopted by default (see paragraph 17 above). The fact that the domestic courts had dismissed the applicant’s request by concluding that a condition for such a decision – a failure to properly summon the applicant – had not been met, did not imply that there was no effective access to court as such.

31.  In reply, the applicant maintained his allegations. He stated that he had not been properly informed of the actions brought by his former partner. In those circumstances, the refusal of the domestic courts to set aside the impugned decisions and to allow him to present his case to the courts had been wholly unjustifiable.

2.  The Court’s assessment

(a)  General principles

32.  The Court reiterates that the principle of equality of arms, which is one of the elements of the broader concept of a fair hearing, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, *Reports of Judgments and Decisions* 1997-I; *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001‑VI; *Yvon v. France*,no. 44962/98, § 31, ECHR 2003‑V; and *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 56, ECHR 2004-III). It further emphasises that it is for the national authorities to ensure that the requirements of a “fair hearing” are met in each individual case (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274).

33.  Article 6 § 1 of the Convention does not provide for a specific form of service of documents (see *Bogonos v. Russia* (dec.), no. 68798/01, 5 February 2004, and *Orams v. Cyprus* (dec.), no. 27841/07, 10 June 2010). However, the general concept of a fair trial, encompassing the fundamental principle that proceedings should be adversarial (see *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262), requires that all parties to civil proceedings should have the opportunity to have knowledge of and comment on the observations filed or evidence adduced with a view to influencing the court’s decision (see *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports* 1996‑I). Above all, that presupposes that the person against whom proceedings have been initiated should be informed of that fact (see *Dilipak and Karakaya* *v. Turkey*, nos. 7942/05 and 24838/05, § 77, 4 March 2014). If court documents, including summonses to hearings, are not served in person, then an applicant might be prevented from defending himself or herself in the proceedings (see *Ozgur‑Karaduman v. Germany* (dec.), no. 4769/02, 26 June 2007; *Weber v. Germany* (dec.), no. 30203/03, 2 October 2007; and *Zavodnik v. Slovenia*, no. 53723/13, § 70, 21 May 2015).

34.  The Court further notes that Article 6 requires and allows the States to organize their legal systems in a manner which facilitates expeditious and efficient judicial proceedings, including provision for the possibility of issuing default judgments (see *Aždajić v. Slovenia*, no. 71872/12, § 49, 8 October 2015, and *Gankin and Others v. Russia,* nos. 2430/06, 1454/08, 11670/10 and 12938/12, § 26, 31 May 2016). However, that cannot be done at the expense of other procedural guarantees, notably the principle of equality of arms (ibid.; see also, *mutatis mutandis*, *Zavodnik,* cited above, § 72).

35.  The Court reiterates that it decided in the case of *Dilipak and Karakaya* (cited above, §§ 78 and 80) to draw inspiration from its approach to criminal-law matters and to apply the principles initially developed in respect of criminal trials *in absentia* to civil proceedings as well. Hence, in that case it relied on the Court’s case-law according to which a denial of justice is found when a person convicted *in absentia* is subsequently unable to obtain a fresh determination on the merits of the charge in circumstances where it was not established that he had waived his right to appear and to defend himself (see, *mutatis mutandis*, *Colozza v. Italy*, 12 February 1985, § 29, Series A no. 89; *Einhorn v. France* (dec.), no. 71555/01, § 33, ECHR 2001‑XI; *Krombach v. France*, no. 29731/96, § 85, ECHR 2001‑II; and *Sejdovic v. Italy* [GC], no. 56581/00, § 82, ECHR 2006‑II), or that he had intended to escape trial (see *Medenica v. Switzerland*, no. 20491/92, § 55, ECHR 2001‑VI).

36.  The Court also reiterates that neither the letter nor the spirit of Article 6 of the Convention prevent a person from waiving, of his or her own free will, either expressively or tacitly, the safeguards of a fair trial (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006‑XII). However, such a waiver must be established in an unequivocal manner, must be attended by the minimum safeguards commensurate with its importance (see *Poitrimol v.*France, 23 November 1993, § 31, Series A no. 277‑A), and must not run counter to any important public interest (see *Sejdovic*, § 86, and *Dilipak and Karakaya,* § 79, both cited above; see also *Natsvlishvili and Togonidze* *v. Georgia*, no. 9043/05, § 91, ECHR 2014 (extracts)).

37.  Finally, the Court reiterates that its task is not to review the relevant law and practice *in abstracto*, but to determine whether or not the manner in which they were applied to, or affected the applicant, gave rise to a violation of the Convention (see, *Padovani v. Italy*, 26 February 1993, § 24, Series A no. 257‑B).

(b)  Application of those principles to the present case

38. The Court considers, in view of the general principles outlined above, that it has to examine two principal issues: firstly, whether the State displayed sufficient diligence by taking all the necessary steps to inform the applicant of the initiation of proceedings concerning the possible restriction of his parental rights and, in that connection, whether the applicant waived his right to appear in court and defend his case; and secondly, whether or not domestic law provided the applicant with the appropriate means to secure a fresh adversarial hearing once he had learnt of the default judgments (see, *Dilipak and Karakaya*, §§ 80 and 88, and *Aždajić*, §§ 50 and 53, both cited above).

(i)  Whether the applicant was duly informed

39.  As to the first question, according to the case file, there were three attempts altogether to serve summonses on the applicant at the address supplied by the claimant party during the two sets of proceedings. In all three cases the attempts were unsuccessful (see paragraphs 7 and 8 above). The courier noted that delivery had been impossible because the house was closed up and no one was living there. Information regarding the initiation of proceedings was therefore published in a daily newspaper, in accordance with Article 78 of the CCP as in force at the time (see paragraph 15 above).

40.  The Court notes at the outset that the Government have not explained why, in the course of the first set of proceedings, the Tbilisi City Court did not send the summons twice to the applicant, in violation of Article 73 § 11 of the CCP (see paragraph 15 above), before making the public notification. However, even leaving that procedural failure to one side, the Court doubts that the manner of service employed by the domestic authorities in this case was sufficient to make sure the applicant was indeed informed about the proceedings (see, for example and *mutatis mutandis*, *Övüş v. Turkey*, no. 42981/04, §§ 48-51, 13 October 2009; see also *S.C. Raisa M. Shipping S.R.L. v. Romania*, no. 37576/05, §§ 30‑34, 8 January 2013, and *Zavodnik*, cited above, §§ 76-81).

41.  In particular, the applicant stated that he was in Russia at the time and that his former partner had known that. It appears from the case file that the information concerning the possible whereabouts of the applicant had reached the Tbilisi City Court via the custody and guardianship authority involved in the proceedings (see paragraph 9 above). The court, however, made no effort whatsoever to check that information. Thus, the claimant, who never denied being in relatively regular telephone contact with the applicant, was never asked to provide additional information about where he lived. This omission seems to be at variance with Articles 71 and 210 of the CCP, which imply, under a due diligence principle, an obligation on the courts to check the correctness of the address of a respondent party as indicated by an applicant party (see Articles 71 §§ 1 and 4 and 210 § 2, both cited in paragraph 15 above). Should the address provided be incorrect, the courts are to leave the action unexamined (see Article 71 § 4 cited in paragraph 15 above).

Similarly, no attempts were made to contact the local administration or the local police to ascertain the applicant’s whereabouts (see, for example, *mutatis mutandis*, *Dilipak and Karakaya*, cited above, §§ 83-85). That option was also available to the court under Article 73 of the CCP (see paragraph 15 above).

42.  The passivity of the Tbilisi City Court is all the more questionable given that the domestic courts could also have requested, under the Minsk Convention, legal assistance from the relevant State party, that is Russia. (see paragraph 18 above). The Court notes in this connection the particularly sensitive nature of the issues at stake in the impugned proceedings, namely the possible restriction of the applicant’s parental rights. The domestic courts should therefore have acted with the utmost diligence (see, *mutatis mutandis*, in relation to the “parental participation” requirement *Glaser v. the United Kingdom*, no. 32346/96, § 70, 19 September 2000; see also, *mutatis mutandis*,in relation to the “reasonable time” requirement*,* *Veljkov v. Serbia*, no. 23087/07, §§ 85 and 87, 19 April 2011), which they clearly failed to do. The negligent attitude of the Tbilisi City Court was particularly evident during the second set of default proceedings, when the court simply sent the summons to the address which had already been established as being invalid as a result of the first set of proceedings (see, *mutatis mutandis,* *Miholapa v. Latvia*, no. 61655/00, § 28, 31 May 2007). Then it opted for public notification, knowing in advance that that approach would be useless if it was confirmed that the applicant was abroad (compare with *Weber* (dec.)*,* cited above, where the applicant was aware of the initiation of the civil proceedings against him and, hence, of the risk of being issued with a default judgment).

43.  The Court notes that in the particular circumstances of the current case, where the interests of a child were at stake, the domestic courts were required to act with a certain speediness (see *Monory v. Romania and Hungary*, no. 71099/01, § 92, 5 April 2005, and, *mutatis mutandis*, *M. and M. v. Croatia*, no. 10161/13, § 179, ECHR 2015 (extracts)). However, the Court is not convinced that the importance of expeditious proceedings which generally attaches to family proceedings necessitated a procedural shortcut to default proceedings and the circumvention of the rules on summonses (see, *mutatis mutandis,* *P., C. and S. v. the United Kingdom*, no. 56547/00, §§ 98-99, ECHR 2002‑VI). It was not argued before the domestic courts that the departure of L.G. was urgently required for a particular reason. Although the case file had information concerning her medical condition, the domestic courts did not make an assessment of that information. Furthermore, the unlimited restriction of the parental rights concerned (see paragraph 8 above) was made without any attempt on the part of the domestic courts to balance the possible competing interests of the father and the daughter.

44.  To sum up, the Court does not rule out the possibility that the service of court summons and decisions by means of publishing them in the media could serve the legitimate aim of ensuring that proceedings are expeditious and efficient (see, *mutatis mutandis, Zavodnik*, § 76; *Weber* (dec.)*,* and *Gankin and Others,* § 35, all cited above). However, as noted above, that procedure cannot be used to the detriment of other procedural guarantees, notably the principle of equality of arms (see paragraph 34 above). According to the Georgian legislation in force at the material time the possibility of serving summonses by publishing them should have been used with due diligence and as a measure of last resort (see Articles 71 § 3 and 78 § 1 of the CCP; see also, in this regard, *Miholapa,* cited above, § 29). In the Court’s view, the rigid application of that rule in the current case undermined the applicant’s ability to participate in the proceedings and defend his interests.

45.  Furthermore, the Court notes that there is nothing to suggest that the applicant had waived his right to participate in the proceedings concerned. It has not been argued that the applicant obtained information about the proceedings from any other source. The main condition for waiving a right is that the person concerned must know of the existence of the right in question and, therefore, of the related proceedings. There was no omission on the applicant’s part as such as he simply did not know about the proceedings instituted by his former partner (compare with *Perihan and Mezopotamya Basın Yayın A.Ş.* *v. Turkey*, no. 21377/03, §§ 38-39, 21 January 2014).

46.  Accordingly, it remains to be determined whether domestic law afforded the applicant, with sufficient certainty, an opportunity to have his case re-examined with his participation.

(ii)  Whether the applicant had an opportunity to have his case re-examined with his participation

47.  The Court notes that no appeal to a higher court as such lay against the default decisions (see Article 366 of the CCP cited in paragraph 17 above). The procedure for setting aside the decisions was also unavailable to the applicant due to the application of statutory time-limits (see Article 237 of the CCP, paragraph 17 above). The Court observes that the time-limit of ten days for lodging an application to reinstate the proceedings expired ten days after the publication of the judgments in question in the newspaper *24 hours*. The applicant, however, alleged that he had only learned of those decisions in May 2012 (see paragraph 10 above).

48.  The only legal remedy available to the applicant was to seek the annulment of the default decisions owing to the improper delivery of the summons, in accordance with Article 422 of the CCP (see paragraph 17 above). The applicant lodged such an application, but it was unsuccessful. Both the first-instance court and the appeal court held that the notifications had been validly made by being published in a newspaper (see paragraphs 11-12 above).

49.  In the Court’s opinion such an overly formalistic approach by the domestic courts to the interpretation of the rules on the service of court documents was unreasonable in the circumstances of the case at hand (see, *mutatis mutandis,* *Aždajić,* cited above, §§ 67-71). It was apparent during the re-examination proceedings that the applicant had indeed been in Russia when the two default decisions had been taken. It hence should have become obvious to the courts, that neither the summonses nor the decisions had reached the applicant. In those circumstances, and bearing in mind the Supreme Court’s relevant case-law on the Minsk Convention (see paragraph 19 above), the conclusion that the summonses had been served on the applicant properly only because the procedure set out in the domestic legislation had been formally observed, had a disproportionate impact on the applicant’s right of access to court.

50.  The Court is mindful of the fact, also referred to by the domestic courts in their reasoning, that the applicant had not given updated information about his actual place of residence to the relevant registration authorities. Even if the applicant’s conduct demonstrated a certain lack of diligence, the adverse consequences which the Georgian judicial authorities attributed to it were clearly disproportionate (see, *mutatis mutandis, Colozza,* cited above, § 32). The Court considers that the domestic courts’ own lack of diligence during the default proceedings meant that the applicant should have had an opportunity to obtain a fresh examination of his case with his participation.

51.  In the light of the above considerations, the Court finds a violation of Article 6 of the Convention.

II.  APPLICATION OF ARTICLE 41 OF THE CONVENTION

52.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

53.  The applicant claimed 100,000 euros (EUR) in respect of non‑pecuniary damage, arguing that he had lost contact with his daughter as a result of the negligence of the domestic courts.

54.  The Government argued that the amount requested was excessive.

55.  The Court notes that it has found the applicant’s complaint under Article 8 of the Convention inadmissible. As to the violation of the applicant’s rights under Article 6 of the Convention, ruling on an equitable basis, the Court awards the applicant EUR 1,500 in respect of non‑pecuniary damage.

B.  Costs and expenses

56.  The applicant also claimed EUR 3,000 to cover his lawyer’s fees.

57.  The Government objected to the reimbursement of the applicant’s expenses for that purpose, noting that the claim was not supported by any evidence.

58.  According to the Court’s case‑law, costs and expenses can be awarded under Article 41 only if it is established that they were actually and necessarily incurred and were reasonable as to quantum. In the present case the applicant did not produce any documentary evidence to support his claim for reimbursement. The Court therefore decides to reject it.

C.  Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1.  *Declares* the complaint under Article 8 of the Convention inadmissible and the remainder of the application admissible;

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

3.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non‑pecuniary damage;

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

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

Done in English, and notified in writing on 17 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli András Sajó  
 Registrar President

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

A.S.  
M.T.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1.  I agree with my colleagues that the applicant’s rights under Article 6 of the Convention have been infringed; however, I am unable to subscribe to the reasoning of the judgment. In my view, it applies the yardstick devised for the purpose of assessing civil proceedings regarding rights having a pecuniary value and ignores the specific features of proceedings in family matters.

2.  Any proceedings in which binding decisions are taken should be appropriate to their purpose and object. The fairness of proceedings is to be assessed in the light of their purpose and object (that is, the nature of the question to be decided).

Procedures governing family-law matters, in many legal systems, are completely different from civil procedures pertaining to rights having a pecuniary value. Firstly, in family matters, a court may on certain occasions act of its own motion or upon a motion brought by a State organ. This branch of the law allows exceptions to the principle *nemo iudex sine actore*. Secondly, the judge is not bound by the principle *ne eat iudex ultra petita partium*. Thirdly, the parties cannot dispose freely of their family-law claims. The courts, acting of their own motion, have to take into account the best interests of the child. Fourthly, the judge has to adjudicate on the basis of the factual circumstances existing at the time of the decision. He has to take into account the dynamics of family relations and establish the latest developments. Fifthly, the proceedings have to be conducted speedily as delays may cause detrimental effects to the child. The urgency of the situation may justify a departure from certain procedural principles. Sixthly, the court may often issue temporary orders with the purpose of determining urgent questions for a limited period. Such temporary orders may be particularly justified if there are difficulties in establishing the whereabouts of a parent. Seventhly, the principle of *res iudicata* has a limited practical meaning because judicial decisions pertaining to the child can be changed at any time depending upon the changing circumstances. It is interesting to note in this respect that the German Federal Constitutional Court stated as follows in its order of 5 April 2005, 1 BvR 1664/04, concerning a constitutional complaint against a custody decision of the Naumburg Higher Regional Court in the case of *Görgülü*:

“For custody proceedings do not admit the plea of *res judicata*. The care of the minor always has priority over the finality of a decision once taken. An amending decision requires cogent reasons that have a long-term effect on the welfare of the child.”

Finally, parents who have separated and who are engaged in a conflict over the exercise of parental rights should be aware that sooner or later – in the absence of consensus between them – the domestic courts will render decisions concerning their children. It is therefore in their interests to keep the competent authorities informed of their whereabouts. The national legislation may impose such an obligation for the purpose of ensuring the speediness of proceedings concerning the children in such situations.

In this context, procedural justice standards devised for civil litigation concerning rights having a pecuniary value are not applicable as such to proceedings concerning the interests of children. The Court’s approach concerning the standards of procedural fairness under Article 6 should be revisited to accommodate the particular characteristics of family law.

3.  The majority states the following principle:

“Above all, that presupposes that the person against whom proceedings have been initiated should be informed of that fact (see *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, § 77, 4 March 2014).”

I note in this respect that the proceedings in the instant case were not proceedings *against* the applicant. They were proceedings to determine an issue concerning the child in a situation of conflict between the parents.

The majority further expresses the following view:

“The Court reiterates that it decided in the case of *Dilipak and Karakaya* (cited above, §§ 78 and 80) to draw inspiration from its approach to criminal-law matters and to apply the principles initially developed in respect of criminal trials *in absentia* to civil proceedings as well.”

In my view, it is not possible to transpose regulations from criminal to family proceedings. Moreover, in many jurisdictions decisions in family matters rendered in the absence of a parent are not regarded as default judgments, and the rules applicable to default judgments do not apply to such decisions.

4.  There is no doubt that the domestic-law provisions concerning the summoning of the parties were infringed. As a result, the applicant’s right to be heard in proceedings concerning his parental rights was infringed. The breaches of domestic law in this respect are sufficient basis for finding a violation of Article 6 of the Convention.

5.  According to my colleagues, the applicant was deprived of an opportunity to have his case re-examined with his participation. I do not share this view. In any event, this question has not been examined by the Court with the required diligence.

The answer to the question whether the applicant had an opportunity to have his case re-examined requires a comprehensive survey of all the procedural possibilities open to the applicant (compare, for instance, the approach adopted in *Buchleither v. Germany*, no. 20106/13, 28 April 2016). In the instant case the reasoning examines only one issue, namely whether the applicant had a remedy by which to directly challenge the impugned judicial decision. It does not examine whether – given the limited significance of the *res iudicata* principle in family law – he also had an opportunity to have his rights protected by requesting a new decision on the questions submitted to the domestic courts.

In this respect, the reasoning contains the following assessment:

“25.  The Court observes that the applicant’s core complaint under Article 8 of the Convention is about the restriction of his parental rights and the loss of contact with his daughter as a result. ... **Rather than engaging in purely procedural proceedings complaining about the alleged unfairness of the initial default decisions, the applicant should have applied directly to the Georgian courts for the restoration of his parental rights under Article 1209 of the Civil Code (see paragraph 14 above). The initiation of custody proceedings was also an option for him to regain access to his daughter by requesting contact or visiting rights.**

26.  **For the above reasons, the Court considers that the applicant failed to take adequate steps to secure the exercise of his right of access to his daughter.** It therefore accepts the Government’s objection as regards the applicant’s complaint under Article 8 of the Convention and declares that complaint inadmissible for non‑exhaustion of domestic remedies” (emphasis added).

This part of the reasoning clearly establishes that the applicant had available to him remedies by which to have the impugned judicial decisions set aside and replaced by new ones. These remedies are considered effective for the purpose of asserting the rights protected under Article 8 but are completely disregarded for the purpose of assessing the applicant’s situation under Article 6. In my view, there is a fundamental contradiction in such an approach.