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## Constitutional judgment 3-2-1-4-13

### SUPREME COURT EN BANC COURT ORDER

<b>No. of the case</b>	3-2-1-4-13
<b>Date of order</b>	Tartu, 17 December 2013
<b>Composition of court</b>	Chairman: Priit Pikamäe; members: Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Ivo Pilving, Jüri Pöld, Harri Salmann and Tambet Tampuu
<b>Court Case</b>	Appeal of E.D. M against a decision of enforcement officer Mati Roodes to impose a coercive payment in enforcement case no. 026/2010/447.
<b>Contested judicial decision</b>	Order of Tallinn Circuit Court of 2 July 2012 in civil case no. 2-12-6527
<b>Appellant and type of appeal</b>	Appeal by E.D. M
<b>Participants in proceedings and their representatives in the Supreme Court</b>	Applicant E.D. M; representative: Ene Ahas, Attorney-at-Law Person concerned: Mati Roodes, enforcement officer in Tallinn Person concerned: S.N. A, representative: Viktor Turkin, Attorney-at-Law The <i>Riigikogu</i> Chancellor of Justice Minister of Justice Minister of Social Affairs, representing the Government of the Republic Estonian Union for Child Welfare Estonian Chamber of Enforcement Officers and Bankruptcy Trustees
<b>Hearing</b>	24 September 2013, written hearing

### OPERATIVE PART

**1. To quash the order of Harju County Court of 30 April 2012 and of Tallinn Circuit Court of 2 July**

**2012 in civil case no. 2-12-6527. To make a new order in respect of the complaint of E.D. M of 14 February 2012 by which to refuse to hear her complaint against the warning concerning the imposition of a coercive payment. To refer the case in respect of the complaint filed on 12 March 2012 by E.D. M against imposing a coercive payment to the same county court for a new hearing.**

**2. To grant the appeal in part.**

**3. To refund the security paid on 17 July 2012 on E.D. M's appeal in the amount of 50 (fifty) euros to Advokaadibüroo Ahas & Heringson GLO OÜ.**

**4. To leave the division of procedural expenses to the discretion of the court that adjudicates the case.**

## **FACTS AND COURSE OF PROCEDURE**

1. On 14 February 2012, E.D. M (the applicant, the mother of the child) filed a complaint with Harju County Court against a decision made by enforcement officer Mati Roodes on 3 February 2012 in enforcement case no. 026/2010/447. By this decision, the enforcement officer dismissed the complaint filed by the applicant against the warning concerning the imposition of a coercive payment issued by the enforcement officer on 1 December 2011.

On 12 March 2012, the applicant filed a complaint with Harju County Court against a decision made on 2 March 2012 by the same enforcement officer in the same enforcement case. By this decision, the enforcement officer dismissed the complaint filed by the applicant against the enforcement officer's decision of 3 February 2012, by which the enforcement officer imposed a coercive payment on the applicant.

By its orders of 21 February 2012 and of 15 March 2012, Harju County Court accepted the applicant's complaints and joined the complaints into one procedure by its order of 2 April 2012.

According to the reasons of the complaints, on 6 May 2010, the party seeking enforcement S.N. A (the person concerned, the father of the child) filed an application for enforcement with the enforcement officer for gaining access to the child. The enforcement officer commenced enforcement proceedings (enforcement case no. 026/2010/447) for enforcing the order of Harju County Court of 9 February 2010 (in civil case no. 2-08-16627). This order of the county court had declared the conciliation proceedings of the parents to have failed and determined the schedule of the father's access to the child. By its order of 31 May 2010, Tallinn Circuit Court amended the access schedule determined by the county court. During the enforcement proceedings, the mother of the child filed an application with the court for amending the schedule of the father's access to the child (civil case no. 2-10-50766) and, by its order of 21 September 2011, Harju County Court determined a schedule of the father's access to the child in accordance with the procedure for provisional legal protection for the period of the proceedings. All the judicial decisions were presented to the enforcement officer for enforcement.

On 1 December 2011, the enforcement officer issued to the applicant a warning concerning the imposition of a coercive payment and informed her that if the applicant has not started to follow the order of Tallinn Circuit Court of 31 May 2010 and of Harju County Court of 21 September 2011 by 13 January 2012, the enforcement officer will impose a coercive payment on the applicant.

Prior to that, on 1 November 2011 the enforcement officer had delivered to the applicant an enforcement notice, according to which the enforcement of point 2 of the operative part of the order of Harju County Court of 21 September 2011 had to be checked at the nursery school on 4 November 2011 at 16:30. This date was not a day on which the person concerned could have had access to the child according to the judicial decision. On that day the child was in Tallinn Children's Hospital for treatment and examinations, where the father of the child also was present.

According to the enforcement notice of 9 November 2011 that was delivered to the applicant, the next check of enforcement had to take place at the nursery school on 11 November 2011 at 16:30. That day the mother took the child to the nursery school, but the child refused to stay at the nursery school and displayed diagnosed symptoms of behavioural and mental disorders. Since according to the judicial decision the mother had to leave the territory of the nursery school no later than at 9:00 and the child refused to stay at the nursery school, the mother left with the child. The child refused to return to the nursery school.

The applicant has taken the child to the nursery school on all the dates set out in the enforcement titles and by the correct time, except if the child has fallen ill or has stayed in hospital for examinations. The applicant has always notified if the child is ill or in hospital and has filed certificates about the illness of the child, but the enforcement officer refused to accept the documents. Thus, the applicant has followed the judicial decisions.

Since the applicant disagreed with the warning concerning the imposition of a coercive payment, on 13 January 2012 she filed a complaint with the enforcement officer against the warning concerning the imposition of a coercive payment. By his decision of 3 February 2012, the enforcement officer dismissed the complaint. On the same day, the enforcement officer made a decision to impose a coercive payment on the applicant, by which he required from the applicant a coercive payment of 192 euros for failure to perform the obligation arising from the order of Tallinn Circuit Court of 31 May 2010 and of Harju County Court of 21 September 2011. The enforcement officer dismissed the complaint filed by the applicant against the decision to impose a coercive payment.

The applicant has not impeded compulsory enforcement of the judicial decisions. The applicant has made every effort to follow the judicial decisions, but a judicial decision cannot be enforced against the interests of the child, incl. the child cannot be forced to stay at the nursery school by force or during illness or to meet the father against the child's will. Upon compulsory enforcement of a judicial decision, an enforcement officer cannot follow only the interests of the party seeking enforcement and enforcement titles, but they must also take into account the rights and interests of the child. When imposing a coercive payment on the applicant, the enforcement officer did not take into account the interests of the child and violated the principle of proportionality and purposefulness, since considering the specificity of this enforcement case the request of a coercive payment from the applicant is not a proper or necessary measure for enforcing the judicial decision and achieving the purpose of compulsory enforcement.

When imposing a coercive payment, it is not possible to take into account the meetings with the child that did not take place in 2010.

## **2. The person concerned contested the complaints and asked to dismiss these.**

During the judicial proceedings that lasted more than four years, the applicant has shown that she does not voluntarily follow the judicial decisions that regulate the father's access to the child. The courts have repeatedly discussed the father's access to the child and established that the access schedule is in compliance with the child's interests. The materials of civil case no. 2-10-50766 reveal the concern repeatedly expressed by the child's representative and child welfare officials that the applicant influences the child and instils a fear of the father in order to prevent the father's access to the child.

The enforcement officer repeatedly made written proposals to the applicant for following the court order voluntarily and checked the following of the court order. The enforcement officer has repeatedly explained to the applicant that the court order must be followed voluntarily and in good faith, but the applicant has impeded the father's access to the child systematically over a longer period of time. The applicant has no right not to follow a judicial decision for a reason that the child does not want to stay at the nursery school. The exercise of the coercive measures provided for by law is the only possibility for inducing the applicant to follow judicial decisions that have entered into force.

Granting the complaints filed by the applicant would mean that the applicant's tactics achieve their aim and make enforcing orders on the schedule of the father's access to the child impossible. Taking into account the situation that has evolved, the enforcement officer acted within the rights granted to him and imposed on the applicant a coercive payment in the minimum amount correctly.

## **3. The enforcement officer contested the complaints and asked to dismiss these.**

The enforcement officer checked the enforcement of the judicial decisions on 18 May 2010, 1 June 2010, 6 July 2010, 3 August 2010, 4 November 2011 and 11 November 2011. On none of these days the applicant

appeared with the child at the meeting. On 14 November 2010 the party seeking enforcement applied for the imposition of a coercive payment on the applicant. On 1 December 2011, the enforcement officer sent to the applicant a warning concerning the imposition of a coercive payment. On 3 February 2012, the enforcement officer made a decision to impose a coercive payment, since regardless of the warning the applicant did not start enforcing the judicial decisions and the application of the coercive payment has not been postponed. Since the applicant constantly failed to follow the court order, the enforcement officer was forced to take all of the coercive measures permitted by law in order to enforce the court orders.

**4.** By its order of 30 April 2012, Harju County Court dismissed the complaints filed by the applicant and ordered that the procedural expenses be borne by the applicant.

According to the reasons of the order of the county court, when taking enforcement steps, an enforcement officer follows, above all, the enforcement title submitted by the party seeking enforcement and, under the formalisation principle, an enforcement officer cannot settle substantial issues of a judicial decision. Under subsection 7 of § 536 of the Code of Civil Procedure (CCP), enforcement steps can be taken only if a parent has initiated conciliation proceedings in court and these have not produced any results. In civil case no. 2-08-16627, conciliation proceedings took place, which failed, and the court made a new order about the father's access to the child, which the enforcement officer can enforce. The Code of Enforcement Procedure does not contain a provision any more that would grant the court the right to impose a fine. The former provision has been replaced by the institution of a coercive payment, which is imposed by the enforcement officer and whose purpose is to force the party against whom enforcement is sought to perform the obligations imposed on them.

The enforcement officer issued to the applicant a justified warning concerning the imposition of a coercive payment, since the applicant repeatedly evaded the enforcement of both the order of Harju County Court of 21 September 2011 (civil case no. 2-10-50766) as well as the order of Tallinn Circuit Court of 31 May 2010 (civil case no. 2-08-16627). Regardless of the warning made on 1 December 2011 and concerning the imposition of a coercive payment, the applicant has not started to follow the court orders. Under subsection 7 of § 26<sup>1</sup> of the Code of Enforcement Procedure (CEP), coercive payments may be imposed if a valid decision is communicated to an addressee and the decision is not complied with during the term indicated in a warning. Due to the constant failure to follow the court orders, the enforcement officer was forced to take all the coercive measures permitted by law in order to enforce the court orders. Since the applicant did not start to follow the judicial decisions during the term indicated in the warning concerning the imposition of a coercive payment, the enforcement officer was forced to impose a coercive payment on the applicant.

If, in the opinion of the applicant, the access schedule determined by the order of Harju County Court of 21 September 2011 in civil case no. 2-10-50766 and by the order of Tallinn Circuit Court of 31 May 2010 in civil case no. 2-08-16627 is in conflict with the interests of the parties and the child, the applicant can have recourse to the court for amending the access schedule.

**5.** The applicant lodged an appeal against the court order in which she asked to quash the order of the county court and to make a new order by which the complaints are to be granted or to refer the case back to the county court for a new hearing. The applicant asked to order the procedural expenses to be borne by the enforcement officer.

**6.** The person concerned and the enforcement officer asked to dismiss the appeal.

**7.** The county court dismissed the appeal and sent it for adjudication to Tallinn Circuit Court.

Decision and reasons of circuit court

**8.** By its order of 2 July 2012, Tallinn Circuit Court dismissed the appeal and upheld the order of the county court, without repeating the reasons given by the county court. The circuit court ordered that the procedural expenses be borne by the applicant.

In reply to the appeal, the circuit court noted that the county court applied correctly the formalisation principle in force in enforcement proceedings. In enforcement proceedings an enforcement officer must follow an enforcement title that has been enforced. The appeal includes numerous statements according to which the order of the county court subject to enforcement is incorrect, unfair and harms the interests of the child. These statements are not relevant in this case and they had to be submitted when adjudicating the dispute concerning access to the child. Neither an enforcement officer nor the court hearing the complaint filed against activities of the enforcement officer can assess whether a judicial decision that has entered into force is reasoned or not. Judicial decisions that have entered into force are subject to enforcement. In the present proceedings the court establishes only whether the warning concerning a coercive payment issued by the enforcement officer and the imposition of the coercive payment are lawful.

An enforcement officer must ensure, within the possibilities provided for by law, that enforcement proceedings were fast and effective and that the persons, who have had recourse to the court in order to protect their rights and thereafter addressed an enforcement officer with a judicial decision that has entered into force in order to enforce a claim accepted by the judicial decision, would also in reality receive effective assistance in a legal order. One of those means is the institution of the coercive payment. In a situation where in enforcement proceedings a party against whom enforcement is sought does not enforce a judicial decision that is in force and is subject to enforcement, the enforcement officer must weigh the application of all possible measures and ensure thereby efficient protection of rights of persons. Therefore, the opportunity to apply a coercive payment is not only the right but also an obligation of an enforcement officer in the situations referred to above.

When applying a coercive payment, an enforcement officer must check only the prerequisites for the application of the coercive payment provided for in subsection 2 of § 179, § 183 and § 26<sup>1</sup> of the CEP. The applicant's understanding that, as a prerequisite for the application of a coercive payment, the enforcement officer also has to establish and check other prerequisites not provided for in law is not correct. The enforcement officer and the county court have established the prerequisites provided for in law and in this respect the circuit court agrees with the conclusions of the county court.

The enforcement officer and the county court established correctly that the applicant has not performed the obligations arising from the enforcement title and the statements and evidence presented by the applicant do not provide any grounds for refusing to apply the coercive payment. The enforcement officer and the county court established correctly that the applicant has violated the obligations that she could perform and that are in force in respect of her arising from the enforcement title. At the time, when the child is under the applicant's parental authority, the applicant is responsible for the child and has to ensure, through realising her statutory parental authority, that she will perform the obligations that she is obliged to perform under a judicial decision that is in force. However, it is also important that both parents contribute to the enforcement of the parent's access schedule to the child so that they mutually respect the other parent and try to make every effort in order for the enforcement of the order on the access schedule to be without any failures and that the child also has a positive attitude towards the access schedule and enforcement thereof. It may be difficult for a four-year-old child to understand why the parents do not agree with each other and why the access must take place under an access schedule determined by the court. In order for such a little child to understand all that and be emotionally ready to follow the access schedule, the parent must make a positive contribution thereto. Without such support and the parent's contribution the enforcement of the access schedule may cause problems. At the same time such problems do not serve as grounds for suspending enforcement proceedings or for refusing to apply means that secure enforcement proceedings.

The county court noted correctly that the applicant can apply for an amendment to the access schedule in judicial proceedings if there exist, in her opinion, any grounds for amending the access schedule in force. A mother of a child must take every possible care for her child. Such care also includes creating a positive attitude that is a prerequisite for enforcing the access schedule determined by the court. Should there indeed be a situation that meetings with the father are psychiatrically not advisable and harmful for the child, then the proper behavioral pattern is that the mother of the child files an application for amending the access

schedule and applies thereby for provisional legal protection, and not that the mother of the child refuses to follow a judicial decision in legal force.

No such circumstances have been submitted or proved in the case, on the basis of which it could be concluded that the party seeking enforcement had acted against the principle of good faith. A child's meeting with their father is not degrading to human dignity and does not constitute a non-permissible infringement of anybody's fundamental rights. This is also by itself not contrary to human dignity or fundamental rights if a parent issues orders to their child or obliges them to do certain things in the course of exercising their parental authority. The child's opinion and the child's interests were weighed and considered in the proceedings for determining the access schedule. The applicant's statements, according to which in the event that the order of the county court remains in force, the case law that would become established is one that obliges parents, under the threat of imposing a coercive payment, to force their children, by any means necessary and using violence, to communicate with their violent parent, incl. communicate with the parent also when the child is ill, have no connection with the present case. The reference of the county court that it is possible to apply for an amendment to the access schedule in proper proceedings if respective grounds exist is relevant in every respect. The fact that the person who filed the appeal has submitted such requests does not mean that she could evade complying with a judicial decision in force before the request is adjudicated or before she has obtained provisional legal protection.

#### Proceedings in the Supreme Court

**9.** The applicant lodged an appeal with the Supreme Court in which she asked to quash the orders of the courts of lower instance and to make a new order by which the complaints are granted and the decisions of the enforcement officer are quashed.

According to the reasons of the appeal, the order of the circuit court is not lawful or reasoned, since it has been made without taking into account the fundamental rights and interests of the child, incl. the right of the child to refuse to communicate with their parent. Such a decision obliges a parent, under the threat of a coercive payment, to use violence towards their child and ignore the state of health of the child when enforcing a judicial decision. The state of health of a child may be an objective circumstance that gives grounds for refusing to enforce a judicial decision. When enforcing an access schedule, an enforcement officer must, among other things, ensure that this would take place in the best interests of the child.

The circuit court applied subsection 2 of § 179 of the CEP incorrectly. Under this provision, an enforcement officer may apply a coercive payment, but need not necessarily do that. Imposition of a coercive payment is a decision of discretion of an enforcement officer and, when making such a decision, the enforcement officer must weigh whether the imposition of a coercive payment will motivate the obligated person to enforce a judicial decision. To this end, the enforcement officer must provide an assessment of the circumstances that impede the enforcement of the judicial decision and take into account the child's interests, state of health and reluctance to communicate with the parent.

When taking steps in enforcement proceedings, it is also necessary to take into account the principle of supremacy of the child's interest and, when providing substance to the purpose of the enforcement proceedings provided for in § 8 of the CEP, it is not possible to take into account only the interests of the party seeking enforcement, the interests of the obligated person and the enforcement title, but the rights and interests of the child as the subject of law, including the child's right to refuse to communicate with their parent, must also be taken into account. Without taking into account the child's interests in enforcement proceedings, the enforcement officer violates the principle of proportionality and purposefulness of the enforcement proceedings. The enforcement officer must find a balance of interests and place the child's interests in the foreground. Under Article 3 of the United Nations Convention on the Rights of the Child, Article 24 of the Charter of Fundamental Rights of the European Union and § 3 of the Child Protection Act (CPA), when enforcing a judicial decision concerning a child, the best interests of the child shall be a primary consideration.

Imposing a coercive payment in such cases instigates the parent who lives with the child to use violence towards the child in order to enforce a judicial decision, which is contrary to both the parent's right of custody provided for in subsection 2 of § 124 of the Family Law Act (FLA) as well as the fundamental rights of the child.

In her supplementary reply the applicant submitted that the enforcement officer's right to impose a coercive payment provided for in § 261 of the CEP is not constitutional.

**10.** The enforcement officer contested the appeal and asked to dismiss it.

An enforcement officer must enforce a judicial decision unconditionally and follow the enforcement title. Following the formalisation principle, an enforcement officer has no right to settle substantial issues of a judicial decision. To enforce a decision, an enforcement officer must take all the measures provided by law. The court can assess whether a parent's access to a child must be impeded in the interests of the child by determining a schedule of the parent's access to the child. Since the applicant constantly evaded the enforcement of a court order, the enforcement officer was forced to apply coercive measures.

**11.** The person concerned contested the appeal, asked to dismiss it and to uphold the order of the circuit court, by agreeing with the reasons of the courts.

An enforcement officer must follow the formalisation principle. The primary interest of a child is to maintain relations with both parents. The idea of the institution of a coercive payment is to avoid using force in every possible event when enforcing the access schedule and to affect the behaviour of the parent who ignores acts and the interests of the child and those of the other parent. Granting the applicant's complaints would make enforcing the judicial decisions that regulate a parent's access to a child impossible.

## **DECISION AND REASONS OF CIVIL CHAMBER OF SUPREME COURT**

**12.** By its order of 17 April 2013, the Civil Chamber of the Supreme Court referred the case to the Supreme Court *en banc* under clause 3 of subsection 4 of § 19 and subsection 1 of § 690 of the CCP and subsection 3 of § 3 of the Judicial Constitutional Review Procedure Act (JCRPA). When hearing the case, the Chamber started to suspect that the enforcement officer's right to impose a coercive payment on a parent who impedes enforcement in a case concerning access to a child arising from subsection 2 of § 179 in conjunction with §§ 183 and 261<sup>1</sup> of the CEP may be in conflict with §§ 3, 10, 13, 14 and 146 of the Constitution in their combined effect.

The Civil Chamber is of an opinion that the competence granted to an enforcement officer in § 261<sup>1</sup> of the CEP as of 24 March 2011 to themselves impose a coercive payment may be unconstitutional. The Chamber started to doubt whether the coercive payment provided for in § 261<sup>1</sup> of the CEP can be considered a penalising measure, i.e. as a proprietary penalty, and whether the Legislature can grant to an enforcement officer such a competence, taking into account, among other things, the fact that imposing a coercive payment requires weighing the interests of the parties and an assessment of the circumstances, which resembles, at least in the event of assessing the violation of the access schedule to the child, the administration of justice and may be in conflict with the fundamental principles of enforcement proceedings. Also, it can be concluded from § 7 in conjunction with the second sentence of subsection 3 of § 23 of the Enforcement Officers Act (EOA) that the step of imposing a coercive payment need not be taken by an enforcement officer personally, but it may also be taken by an assistant enforcement officer. The Chamber doubted whether the delegation of such competence both to an enforcement officer as well as to an assistant enforcement officer is constitutional. According to the majority of the Chamber, such competence should be within the court's competence.

The constitutionality of subsection 2 of § 179, § 183 and § 261<sup>1</sup> of the CEP must be reviewed only to the extent that the enforcement officer imposed a coercive payment due to the failure to follow the order of Harju County Court of 21 September 2011 (civil case no. 2-10-50766), since the grounds for imposing a coercive payment could have been only the failure to follow the access schedule in force at the time the warning was issued.

## OPINIONS OF PARTIES

13.–26. [Not translated.]

## CONTESTED PROVISIONS

27. Sections 26<sup>1</sup> and 183 and subsection 2 of § 179 of the Code of Enforcement Procedure have provided:

“§ 26<sup>1</sup>. Imposition of coercive payment

(1) An enforcement officer will make a decision enforcing an obligation and a warning concerning the imposition of a coercive payment:

1) to a person required to provide information in the event of failure to perform the obligation provided for in § 26 of this Act;

2) to a third person obligated with respect to a party against whom enforcement is sought if the third person refuses without legal basis to abide by the instrument of seizure or does not abide by it as required.

(2) The written warning specified in subsection 1 of this section must include:

1) the given name and surname and address of the addressee or the name and postal address of the legal person;

2) the decision, compliance with which is requested;

3) the date by which the decision can be voluntarily complied with;

4) if the decision contains an obligation to refrain from a certain act, the date need not be indicated;

5) the amount of the coercive payment applied upon failure to comply with the decision;

6) the name of the enforcement officer who issued the warning;

7) the date on which the warning was prepared.

(3) The term for voluntary compliance with a decision granted in a warning must allow the addressee to perform the obligation.

(4) The set amount of a coercive payment is indicated in a warning to impose the coercive payment. If a coercive payment is imposed for the first time, the amount thereof must not be less than 192 euros or more than 767 euros, and upon repeated imposition of coercive payments the amount thereof must not be more than 1917 euros.

(5) An enforcement officer may impose coercive payments on natural persons and on legal persons in private or public law. No coercive payments are imposed on state and local authorities.

(6) Coercive payments are collected into the state budget.

(7) Coercive payments may be imposed if a valid decision is communicated to an addressee and the decision is not complied with during the term indicated in a warning. The decision and the warning will be delivered to the obligated person pursuant to the procedure provided for in section 10 of this Code.

(8) The enforcement officer who made a decision may postpone the imposition of coercive payments at a reasoned request of the addressee of coercive payments and issue a new warning where a new term is set for compliance with the decision. The term must not be longer than two months.

(9) An enforcement officer may repeatedly impose coercive payments on a person until the obligation is performed or an appeal is filed against the decision made concerning the imposition of a coercive payment.

(10) No coercive payments will be imposed if:

1) the grounds for the imposition of coercive payments provided for in subsection 7 of this section have lapsed;

2) the provision of law which served as the grounds for the decision is repealed;

3) the imposition of coercive payments is postponed.

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§ 179. Return of child and right of access to child

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(2) If an obligated person impedes compulsory enforcement, the provisions of § 183 of this Code may be applied to the person.

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§ 183. Enforcement proceedings for taking of step that can be taken only by party against whom enforcement is sought



If a step can be taken only by a party against whom enforcement is sought, but the party fails to do so by the designated due date or the party violates the obligation to tolerate a certain step or refrain from a certain step, an enforcement officer may impose a coercive payment on the party pursuant to the procedure specified in § 26<sup>1</sup> of this Code.”

### **OPINION OF COURT *EN BANC***

**28.** In the adjudication of the case, the Court *en banc* will first discuss the relevance of the disputed provisions (I) and thereafter the constitutionality thereof (II). Thereafter, the Court *en banc* will adjudicate the applicant’s appeal (III).

### **I**

**29.** The Civil Chamber of the Supreme Court referred to the Supreme Court *en banc* for the adjudication of a case, in which the applicant’s (the child’s mother’s) appeal against the order of Tallinn Circuit Court of 2 July 2012, by which the circuit court dismissed the applicant’s appeal and upheld the order of Harju County Court of 30 April 2012, is heard.

**30.** By its order of 30 April 2012, Harju County Court dismissed the complaints filed by the applicant against the decisions of the enforcement officer M. Roodes of 3 February 2012 and of 2 March 2012 in enforcement case no. 026/2010/447.

**31.** By his decision of 3 February 2012, the enforcement officer dismissed the applicant’s complaint against the warning issued by the enforcement officer on 1 December 2011 in which the applicant contested the enforcement officer’s warning concerning the imposition of a coercive payment if the applicant does not start, by 13 January 2012, to follow the schedule of the father’s access to the child determined in the order of Harju County Court of 21 September 2011 (civil case no. 2-10-50766) and in the order of Tallinn Circuit Court of 31 May 2010 (civil case no. 2-08-16627).

**32.** By his decision of 2 March 2012, the enforcement officer had dismissed the applicant’s complaint that the applicant had filed against the decision of the enforcement officer of 3 February 2012 to impose on the applicant a coercive payment of 192 euros due to the failure to perform the obligations arising from court orders that regulate father’s access to the child. Thus, the applicant disagrees with the fact that the enforcement officer issued to her a warning concerning the imposition of a coercive payment due to the failure to follow the judicial decisions that regulate the father’s access to the child and eventually also imposed a coercive payment of 192 euros for that.

**33.** The Civil Chamber of the Supreme Court referred the adjudication of the case to the Supreme Court *en banc*, since the Chamber started to feel doubt about whether subsection 2 of § 179 in conjunction with §§ 183 and 26<sup>1</sup> of the CEP is in line with §§ 3, 10, 13, 14 and 146 of the Constitution. In the judicial constitutional review procedure, the Supreme Court reviews the constitutionality of a provision that is relevant to the adjudication of the case (subsection 2 of § 14 of the JCRPA). A relevant provision is one that is of decisive importance in the adjudication of a case and in the event of whose unconstitutionality and invalidity the court would have to decide otherwise than in the event of the constitutionality thereof (the opinion of the Supreme Court *en banc* of 22 December 2000 in case no. 3-4-1-10-00, point 10, and the judgment of 28 October 2002 in case no. 3-4-1-5-02, point 15).

**34.** The Court *en banc* holds that the enforcement officer’s right to impose a coercive payment on the applicant in enforcement case no. 026/2010/447 arises from subsection 2 of § 179 of the CEP in conjunction with §§ 183 and 26<sup>1</sup> of the CEP and these are relevant provisions when adjudicating the case.

**35.** The enforcement of a judicial decision in cases concerning the return of a child and the right of access to a child is regulated, above all, by § 179 of the CEP. Subsection 2 of § 179 of the CEP provides that if an obligated person impedes compulsory enforcement of a judicial decision, the provisions of § 183 of the CEP concerning the taking of a step which can be performed only by a party against whom enforcement is sought

may be applied to the person. Under this provision, an enforcement officer may impose a coercive payment, in accordance with the procedure provided for in § 26<sup>1</sup> of the CEP, on the party against whom enforcement is sought if a step can be taken only by a party against whom enforcement is sought, but the party fails to do so by the designated due date or the party violates the obligation to tolerate a certain step or refrain from a certain step. Section 26<sup>1</sup> of the CEP is a general provision that regulates the conditions and procedure for imposing a coercive payment in enforcement proceedings. On the basis of the aforesaid provisions, in the present case the enforcement officer also issued to the applicant a warning concerning the imposition of a coercive payment and imposed thereafter a coercive payment.

## II

**36.** First, the Court *en banc* notes that upon enforcing the judicial decision, the rights and interests of the parents, i.e. those of the obligated person and the party seeking enforcement, contrast. In cases concerning access to a child, there are also the rights and interests of the child, which need not coincide with those of either of the parents.

**37.** According to the Court *en banc*, the imposition of a coercive payment in enforcement proceedings affects directly the obligated person's fundamental right of ownership (§ 32 of the Constitution), but it may also indirectly affect the fundamental right to family life (subsection 1 of § 27 of the Constitution). On the other hand, failure to enforce a judicial decision in cases concerning access to a child and the lack of or failure to apply any coercive measures therefor may have an adverse impact on the fundamental right to family life of the parent who lives apart from the child (the party seeking enforcement). Regardless of the rights of the obligated person and the party seeking enforcement, in cases concerning access to a child both enforcement proceedings as well as the imposition of a coercive payment affect the child's own fundamental right to the inviolability of family life.

**38.** The Civil Chamber held that the contested provisions may be unconstitutional for the reason that the performance of the core function of the state has been transferred to the enforcement officer. According to the Civil Chamber, a coercive payment may be a penalty, the imposition of which should be within the competence of the court.

**39.** Under the first sentence of subsection 1 of § 3 of the Constitution, governmental authority is exercised solely on the basis of the Constitution and laws that are in conformity therewith. The requirement that governmental authority must be exercised solely on the basis of the Constitution includes, among other things, the requirement that exercise of governmental authority must not be in conflict with the Constitution (the judgment of the Supreme Court *en banc* of 16 May 2008 in case no. 3-1-1-86-07, point 21). The Supreme Court *en banc* has held that delegation of penal power as the core function of the state to a legal person in private law would be in conflict with the requirement arising from the first sentence of subsection 1 of § 3 of the Constitution and § 10 of the Constitution (the judgment of the Supreme Court *en banc* of 16 May 2008 in case no. 3-1-1-86-07, points 21-22).

**40.** However, the Court *en banc* still holds that a coercive payment cannot be regarded as a penalty in the formal or substantive meaning and the Constitution does not prohibit transfer of the function of imposing a coercive payment to a person in private law (a natural person or a legal person in private law).

**41.** The coercive payment established in the Code of Enforcement Procedure is not a penalty in the formal sense. A penalty in the formal sense is only such a legal effect that has been provided for in penal law as a penalty for committing an offence. This principle is followed by subsection 1 of § 23 of the Constitution, according to which no one may be convicted of an act that did not constitute a criminal offence under the law in force at the time the act was committed.

**42.** Under the law in force, the Legislature has not deemed a coercive payment applied by an enforcement officer to be a penalty, but a coercive measure. A coercive payment applicable by an enforcement officer has been regulated in the Code of Enforcement Procedure, but it can be compared with the coercive payment

that has been regulated in the Substitutive Enforcement and Coercive Payment Act (SECPA) and is applicable upon the performance of administrative duties (§ 10 of the SECPA). Under subsection 2 of § 3 of the SECPA, the application of a coercive measure is not deemed to be a penalty.

**43.** The issue of whether a certain coercive measure of the state is a penalty for the purposes of the Constitution cannot be resolved only formally, but it needs to be assessed whether the coercive measure should not be regarded as a penalty (i.e. substantively). Guarantees set out for the application of a penalty in the Constitution must be guaranteed also upon implementation of such coercive measures of the state, which have not been established as penalties in the formal penal law but which are substantively penalties (see the judgment of the Supreme Court *en banc* of 25 October 2004 in case no. 3-4-1-10-04, point 17).

**44.** In essence, a penalty means a restriction of a convicted offender's rights or freedoms through repression of the person. The guilt of a person is the basis for applying a penalty (subsection 1 of § 56 of the Penal Code) and a penalty expresses a socio-ethical reproach of society for a committed act (see e.g. the judgment of the Supreme Court *en banc* of 25 October 2004 in case no. 3-4-1-10-04, point 18). Thus, an essential feature of a penalty is the socio-ethical disapproval expressed in respect of the offender by the state, which also entails stigmatisation of the person. Although the imposition of a coercive payment also entails restrictions of the proprietary rights of an obligated person, which is also a substantial feature of a penalty, despite this similarity a coercive payment cannot be regarded as a penalty in the substantive meaning. This is so, above all, due to the fact that the purpose of a coercive payment in enforcement proceedings is to motivate an obligated person to enforce an obligation determined by a judgment.

**45.** A coercive payment may be imposed on a person if the person does not perform their obligation and as long as they do not perform it. The imposition of a coercive payment must be preceded by a warning about the fact that if the person does not perform the obligation voluntarily by the date set out in the warning, a coercive payment will be imposed on the person and the warning must set out the possible amount of the coercive payment (subsections 1 to 4 of § 26<sup>1</sup> of the CEP). Under subsection 7 of § 26<sup>1</sup> of the CEP, coercive payments may be imposed if a valid decision is communicated to an addressee and the decision is not complied with during the term indicated in a warning. Coercive payments may be imposed on a person repeatedly, but only until the obligation is performed (subsection 9 of § 26<sup>1</sup> of the CEP). Under clause 1 of subsection 10 of § 26<sup>1</sup> of the CEP, no coercive payments will be imposed if the grounds for the imposition of coercive payments have lapsed. The purpose of a coercive payment applied under subsection 2 of § 179, § 183 and § 26<sup>1</sup> of the CEP is to influence the addressee to take a step that has been determined by a judicial decision and can be performed only by the party against whom enforcement is sought, i.e. to terminate impeding access to the child. In the event of such enforcement proceedings the enforcement officer has no other effective means for influencing the obligated person, unlike in the event of enforcement of proprietary claims in the case of which it is possible, e.g. to seize the bank account and sell the property of the party against whom enforcement is sought. It follows from the aforesaid that the purpose of imposing a coercive payment as applied by an enforcement officer in enforcement proceedings is only to influence an obligated person to enforce a judicial decision.

**46.** Second, the Court *en banc* admits that, in respect of the impact on a person's fundamental right of ownership, a coercive payment can indeed be compared with a fine imposed for a misdemeanour. Under subsection 4 of § 26<sup>1</sup> of the CEP, if a coercive payment is imposed for the first time, the amount thereof is not less than 192 euros or more than 767 euros. Upon repeated imposition of coercive payments, the amount thereof is not more than 1917 euros. Coercive payments may be imposed on natural persons and on legal persons in private or public law (subsection 5 of § 26<sup>1</sup> of the CEP). A fine in misdemeanour matters for a natural person is up to 300 fine units; a fine unit is equal to 4 euros (subsection 1 of § 47 of the Penal Code). Thus, the maximum fine for a natural person is 1200 euros, for a legal person 32 up to 32 000 euros (subsection 2 of § 47 of the Penal Code). This does not mean, however, that a coercive payment could be regarded as a penalty in substantive terms. When applying a coercive payment, no socio-ethical reproach following the principle of guilt is made to an obligated person. Instead, the person is forced, under the threat of causing material loss, to enforce a judicial decision.

**47.** Third, the fact that the application of a coercive payment does not entail any stigmatisation of a person also does not support regarding a coercive payment as a penalty in the substantive meaning, which is, among other things, also confirmed by the fact that, unlike a penalty applicable for an offence, the addressee of a coercive payment is not entered in the punishment register. Unlike a penalty, a coercive payment is thus a value-neutral coercive measure.

**48.** The Court *en banc* is of an opinion that the imposition of a coercive payment in enforcement proceedings is also not the administration of justice for the purposes of § 146 of the Constitution. It does not arise from the Constitution that imposing a coercive payment should necessarily be within the competence of the Judiciary.

**49.** Under subsection 1 of § 146 of the Constitution, justice is administered exclusively by the courts, who are independent in discharging their duties and administer justice in accordance with the Constitution and the laws. The Court *en banc* means under the administration of justice the duties granted to the competence of the court by the Constitution and law, primarily the adjudication of civil disputes, establishment of guilt of persons who have committed a criminal offence or a misdemeanour and imposition of a penalty on such persons as well as review of the legality of instruments of public authorities. When imposing a coercive payment in enforcement proceedings, an enforcement officer does not settle a dispute between parents of the child (the party seeking enforcement and the obligated person). Parents' dispute over access to the child is adjudicated following the interests of the child by the court who hears the civil case, taking into account all the circumstances and legitimate interests of the parents (subsection 1 of § 123 of the FLA). Regardless of the fact that, when imposing a coercive payment, an enforcement officer has a right of discretion, the enforcement officer must enforce a judicial decision that regulates the schedule of a parent's access to a child according to the formalisation principle.

**50.** In addition to the aforesaid, the Court *en banc* notes that the duty of both the Legislature as well as the governmental authority is to ensure the protection of fundamental rights and to find balance between different opposing interests. Such an obligation arises from § 14 of the Constitution, which safeguards, among other things, the general fundamental right to organisation and procedure. "Under § 14 of the Constitution the state is obliged to establish proper procedures for the protection of fundamental rights. The court procedure as well as administrative procedure must be fair. This means, among other things, that the state must establish a procedure to guarantee efficient protection of persons' rights" (the judgment of the Constitutional Review Chamber of the Supreme Court of 14 April 2003 in case no. 3-4-1-4-03, point 16).

**51.** An enforcement officer is a person in private law who performs public duties (subsection 1 of § 2 of the EOA). Therefore, the binding obligation of the entire governmental authority to guarantee fundamental rights and freedoms also extends to an enforcement officer (§ 14 of the Constitution). Under § 11 of the Constitution, rights and freedoms may only be circumscribed in accordance with the Constitution and the infringement of fundamental rights must be in compliance with the principle of proportionality. As a part of the public authority, an enforcement officer must in their activities take into account the Constitution and laws.

**52.** The Court *en banc* indicates that by transferring the function of enforcing judicial decisions to enforcement officers as persons in private law, the Legislature has extensively regulated, by the Enforcement Officers Act, the status and organisation of the work of the enforcement officer. An enforcement officer shall be impartial in the performance of professional activities and appear trustworthy to all persons for whose benefit or with regard to whom they take steps (subsection 3 of § 2 of the EOA). An enforcement officer must follow the oath of office and also act in a dignified manner outside of their professional activities (subsection 4 of § 2 of the EOA). The Enforcement Officers Act sets out the grounds for the professional activities of enforcement officers, the competence of the Ministry of Justice to exercise supervision over enforcement officers and the procedure for disciplinary liability as well as the procedure for remuneration of enforcement officers and the grounds for the activity of a common professional association of enforcement officers and bankruptcy trustees. The act establishes restrictions on enforcement officers

related to their office, liability for damage wrongfully caused, compulsory professional liability insurance, an obligation of professional confidentiality and an obligation of professional development. The Enforcement Officers Act also regulates enforcement officers' appointment to office, incl. the verification of trustworthiness of applicants for the position of enforcement officer, release from office and suspension of authority.

**53.** The Court *en banc* notes that, following from clause 5 of subsection 1 of § 7 of the EOA, an enforcement officer must perform personally official duties related to enforcing an enforcement title in the case of establishing the right of access to a child and the return of a child. Thus, the right arising from subsection 2 of § 179 of the CEP to impose a coercive payment on an obligated person in a case concerning the right of access to a child is only with enforcement officers, not with assistant enforcement officers.

**54.** Taking into account the aforesaid reasons, the Court *en banc* is of an opinion that the enforcement officer's right arising from subsection 2 of § 179 in conjunction with §§ 183 and 26<sup>1</sup> of the CEP to impose a coercive payment on a parent who impedes enforcement in a case concerning access to a child is not unconstitutional.

**55.** However, the Court *en banc* draws attention to the fact that the procedure for the enforcement of a specific judicial decision that regulates a parent's access to a child as a whole has not been regulated clearly enough in the Code of Enforcement Procedure, due to which these provisions in conjunction with § 563 of the CCP would need supplementation or amendment in order to ensure clear procedure for enforcement of a judicial decision that regulates a parent's access to a child and effective and fast enforcement of such a judicial decision.

### III

**56.** The Court *en banc* holds that the appeal is to be granted in part on the basis of subsection 3 of § 701 of the CCP and the order of the county court and the circuit court must be quashed on the basis of clauses 3 and 4 of § 691 of the CCP in conjunction with § 695 of the CCP, a new order must be made, in respect of the applicant's complaint of 14 February 2012 by which the complaint is to be refused to be heard, and, in respect of the applicant's complaint of 12 March 2012, the case must be referred to the same county court for a new hearing.

**57.** According to the Court *en banc*, the Courts were correct to hear the applicant's complaint of 12 March 2012 in which the applicant contested the enforcement officer's decision made concerning the imposition of a coercive payment, but they also started incorrectly to hear the applicant's complaint of 14 February 2012 in which the applicant contested the enforcement officer's decision about the warning concerning the imposition of a coercive payment.

**58.** Although generally a party to enforcement proceedings may, under subsection 1 of § 217 of the CEP, file a complaint to an enforcement officer about a decision or the activities of an enforcement officer upon enforcement of an enforcement title and, under subsection 1 of § 218 of the CEP, the party may file a complaint against a decision of an enforcement officer made regarding a complaint to a county court, the Court *en banc* is of an opinion that, following the meaning of the Code of Enforcement Procedure, in the event of an enforcement officer's decision made about the warning concerning the imposition of a coercive payment no legal protection is required in a situation where the person can also file a complaint against an enforcement officer's decision to impose a coercive payment. Under § 26<sup>1</sup> of the CEP, a warning serves as a prerequisite for imposing a coercive payment, without which an enforcement officer cannot impose a coercive payment, but the warning does not entail any other negative consequences for a party to enforcement proceedings, against which they should protect themselves by filing a complaint and against which they would not receive any protection by contesting the decision to impose a coercive payment. The purpose of a warning is to notify an obligated person that if they do not start to enforce an enforcement title by a certain date, the enforcement officer will impose a coercive payment on them. Furthermore, under subsection 8 of § 26<sup>1</sup> of the CEP, an obligated person can, with good reason, request that the enforcement

officer postpone the imposition of coercive payments and set a new term for the enforcement and also file a complaint against the enforcement officer's decision, by which the enforcement officer dismisses the request.

**59.** Taking into account the aforesaid, the Court *en banc* is of an opinion that the applicant's complaint of 14 February 2012 has not been filed for the protection of the right or interest protected by law or for a purpose for which the state should provide any legal protection, due to which it should be refused to be heard on the basis of subsection 1 of § 477 and clause 2 of subsection 2 of § 423 of the CCP.

**60.** The Court *en banc* notes that the primary prerequisite for imposing a coercive payment in enforcement proceedings is the fact that a judicial decision for the enforcement of which the enforcement officer wants to apply coercion can be enforced by the enforcement officer in accordance with the enforcement procedure and the enforcement officer can require that the obligated person enforce such a judicial decision.

**61.** A judicial decision that has entered into force or has been declared to be subject to immediate enforcement in a civil case is, under clause 1 of subsection 1 of § 1 of the CEP, generally an enforcement title that can be enforced in enforcement proceedings. Thereby, a judicial decision that regulates a parent's access to a child is a specific one, since both parents may require its enforcement and both parents may therefore be a party seeking enforcement as well as an obligated person in enforcement proceedings. In addition, the Code of Civil Procedure has established a special procedure concerning the enforcement of the judicial decisions that regulate a parent's access to a child. Following from that, under § 563 of the CCP, upon violating an order that regulates a parent's access to a child, first, judicial conciliation proceedings must be carried out. In order to ensure compliance with and eliminate the violation of a court order that regulates access to a child, enforcement proceedings may be initiated under subsection 8 of § 563 of the CCP (before 1 January 2013 under subsection 7 of § 563 of the CCP in force) only based on such an order by which the court has determined, following a failure of the conciliation proceedings, which coercive measures are to be applied. Thus, under § 563 of the CCP that was and is in force, a parent is required to complete judicial conciliation proceedings before enforcement proceedings can be initiated for enforcing a judicial decision that regulates a parent's access to a child. A court order that has been made before conciliation proceedings and determines a schedule of the parent's access to the child is not an enforcement title and such a judicial decision is not subject to compulsory enforcement. However, regardless of the aforesaid, an order for securing an action to be made under clause 1 of subsection 3 of § 378 of the CCP and an order for application of provisional legal protection to be made under subsection 1 of § 551 of the CCP are also subject to compulsory enforcement (see the order of the Supreme Court of 16 June 2010 in civil case no. 3-2-1-64-10, points 29 and 34; the order of the Supreme Court of 25 November 2009 in civil case no. 3-2-1-118-09, point 13).

**62.** In the present case the enforcement officer enforced two judicial decisions on the basis of the father's application: the order of Tallinn Circuit Court of 31 May 2010 in civil case no. 2-08-16627 and the order of Harju County Court of 21 September 2011 in civil case no. 2-10-50766.

**63.** In the first of these, Harju County Court had declared, by its order of 9 February 2010, the conciliation proceedings failed and determined a schedule of the father's access to the child. In addition to that, the county court had determined that the court order can be enforced in accordance with the procedure provided for in the Code of Enforcement Procedure, by using the assistance of an enforcement officer under § 179 of the CEP, and the enforcement officer has the right to make a proposal to the court for imposing a fine on the applicant or for imposing arrest on the person under § 183 of the CEP in force then. By its order of 31 May 2010, Tallinn Circuit Court amended the order of Harju County Court in part, i.e. modified the access schedule to the child to some extent. Taking into account the aforesaid reasons, the enforcement officer could, considering the provisions of § 563 of the CCP, start enforcement proceedings for compulsory enforcement of such a judicial decision, as the county court correctly held.

**64.** Thereafter, on 14 October 2010, the applicant (the mother of the child) filed with the county court an application for amending the access schedule to the child, against which the father of the child filed a request for amending the right of custody. During the judicial proceedings of the case, the applicant repeatedly asked

to amend the schedule of the father's access to the child in accordance with the procedure for provisional legal protection and to determine a different access schedule for the period of the judicial proceedings. Harju County Court determined a different schedule of the father's access to the child in accordance with the procedure for provisional legal protection for the period of the judicial proceedings and amended that several times, incl. by its order of 21 September 2011. Since this is the determination of the schedule of a parent's access to a child in accordance with the procedure for provisional legal protection, this court order was also subject to compulsory enforcement for the aforesaid reasons. Neither the county court nor the circuit court adopted their opinion on that.

**65.** Although according to the aforesaid, both judicial decisions are, in principle, subject to compulsory enforcement, the Court *en banc* is of an opinion that the enforcement officer could not require from the applicant the enforcement of both of the judicial decisions or impose a coercive payment for ensuring the enforcement of both of the court orders.

**66.** According to the circumstances presented in the case, the father of the child filed both of the aforesaid judicial decisions, following the entry into force thereof, to the enforcement officer for enforcement. On 1 December 2011, the enforcement officer warned the applicant that if the applicant does not start to voluntarily enforce both of the judicial decisions by 13 January 2012, the enforcement officer will impose on the applicant a coercive payment. Since the applicant did not start to follow the decisions, the enforcement officer imposed, by his decision of 3 February 2012, a coercive payment by relying on the failure to enforce both of the judicial decisions. The county court and the circuit court adopted the opinion that the enforcement officer imposed a coercive payment correctly, since the applicant did not start to follow the judicial decisions.

**67.** The Court *en banc* disagrees with the courts and considers the opinion of the Civil Chamber of the Supreme Court justified, according to which the enforcement officer could not oblige the applicant to enforce both of the judicial decisions, since the schedule of the parent's access to the child determined in accordance with the procedure for provisional legal protection replaced the schedule of the parent's access to the child that had been determined earlier upon declaration of a failure of the conciliation proceedings. Thus, the enforcement officer could require that the applicant enforce only the last judicial decision, i.e. the schedule of the parent's access to the child determined in accordance with the procedure for provisional legal protection by the order of Harju County Court of 21 September 2011 in civil case no. 2-10-50766. Following from that, the enforcement officer could also impose a coercive payment for ensuring only the latter judicial decision.

**68.** The Court *en banc* agrees with the county court and the circuit court on the fact that, when applying a coercive payment, an enforcement officer must check the prerequisites for the application of the coercive payment provided for in subsection 2 of § 179, § 183 and § 26<sup>1</sup> of the CEP. However, the understanding of the courts that, under the provisions referred to above, a prerequisite for imposing a coercive payment is the circumstance that a judicial decision has not been enforced and that other circumstances have no importance in imposing a coercive payment, is not correct.

**69.** According to the Court *en banc*, subsection 2 of § 179 in conjunction with §§ 183 and 26<sup>1</sup> of the CEP is to be interpreted so that, when enforcing a judicial decision that regulates a parent's access to a child, an enforcement officer may impose a coercive payment on the parent who lives with the child, if the parent impedes compulsory enforcement of the judicial decision, i.e. impedes the parent who lives apart from the child to have access to the child at the time, in the place and in the manner determined in the judicial decision. Therefore, the fact of decisive importance in imposing a coercive payment is not that the parent has had no access to the child at the time, in the place and in the manner determined in the judicial decision, but that the parent who lives apart has had no access to the child due to activities or inactivity of the parent who lives with the child. Impeding compulsory enforcement of a judicial decision that regulates a parent's access to a child can be deemed to include, among other things, a situation, where the parent who lives with the child refuses to grant the parent who lives apart access to the child and makes access impossible.

**70.** Furthermore, the Court *en banc* is of an opinion that although, when imposing a coercive payment, an enforcement officer can take into account the fact that a parent has earlier repeatedly impeded compulsory enforcement during enforcement proceedings and this serves as grounds for warning the parent against imposing a coercive payment, but a coercive payment can be imposed only if the parent also impedes the other parent's access to the child during the term indicated in the warning concerning the imposition of a coercive payment. The purpose of imposing a coercive payment is to affect the parent who impedes access to the child and to persuade them of the necessity for enforcing the judicial decision, not to apply a coercive measure for earlier acts.

**71.** In light of the above, when imposing a coercive payment, an enforcement officer must establish that a parent impeded the other parent's access to the child during the term and cannot proceed only from the fact that the parent has had no access to the child at the time, in the place and in the manner determined in the judicial decision.

**72.** In the present case the courts took the view that the enforcement officer was correct to impose a coercive payment on the applicant, since the applicant did not start to follow the judicial decisions during the term indicated in the warning about imposing a coercive payment.

**73.** Taking into account the aforesaid reasons, the Court *en banc* does not agree with the opinion of the courts. Since an enforcement officer can impose a coercive payment only if a parent impedes the enforcement of a judicial decision that regulates the other parent's access to the child, the enforcement officer and the courts had to establish whether in the present case the applicant has impeded the father's access to the child during the term indicated in the warning concerning the imposition of a coercive payment at the time, in the place and in the manner determined in the judicial decision.

**74.** By misinterpreting the law, the courts adopted the opinion that the applicant has impeded the enforcement of the judicial decision, since she has not started to follow the judicial decision during the set term. Thereby, the circuit court has held incorrectly that the enforcement officer and the county court have checked and established the prerequisites for imposing a coercive payment. The circumstances presented in the case really allow concluding that during the term indicated in the warning concerning the imposition of a coercive payment the father and the child did not meet, but the courts have not established when the father had to meet the child during the aforesaid term and whether the meetings did not take place due to a reason caused by the mother, i.e. whether the mother impeded the father's access to the child during that period.

**75.** The Court *en banc* also notes that the understanding of the courts per se is correct that, when enforcing a judicial decision that regulates a parent's access to a child, an enforcement officer must also follow the formalisation principle and cannot start to assess in enforcement proceedings whether a judicial decision that has entered into force is reasoned or not, incl. take into account the statements that would serve as grounds for amending the schedule of the parent's access to the child. If the court has made a judicial decision concerning a parent's access to a child that is enforceable in enforcement proceedings, an enforcement officer can rely on the presumption that the enforcement of the judicial decision is in the best interests of the child.

**76.** If the parent who lives with the child finds that the access schedule of the parent who lives apart is not in compliance with the interests of the child due to the appearance of new circumstances, the parent must have recourse to the court with an application to amend the parent's access schedule to the child on the basis of subsection 3 of § 143 of the FLA. Only the court is competent to assess and decide whether the access schedule is in compliance with the interests of the child for the purposes of subsection 1 of § 123 of the FLA.

**77.** When requesting amendment of the access schedule from the court, the parent can also ask that the court suspend, in accordance with the procedure for provisional legal protection, the enforcement of a judicial decision that has regulated access to the child until then, which also helps avoid the imposition of a coercive payment due to impeding compulsory enforcement of the judicial decision. The Court *en banc* draws



attention to the fact that, when processing a non-contentious family case, the court may, under subsection 1 of § 551 of the CCP, apply, either based on an application or at the initiative of the court, measures for securing an action as a measure of provisional legal protection, incl. suspend the enforcement of a judicial decision that regulates access that harms the interests of the child on the basis of clause 6 of subsection 1 of § 378 of the CCP and determine, on the basis of clause 2 of subsection 3 of § 378 of the CCP, an access schedule for the period of the judicial proceedings that is in compliance with the interests of the child.

**78.** If a parent finds that the enforcement of a judicial decision that regulates the access that the parent who lives apart has to the child is temporarily in conflict with the interests of the child and therefore the parent impedes compulsory enforcement of the judicial decision, the parent can ask, in the event of a warning concerning a coercive payment, that the enforcement officer postpone the application of the coercive payment on the basis of subsection 8 of § 26<sup>1</sup> of the CEP and issue a new warning in which a new term would be determined for enforcing the judicial decision. Taking into account the specificity of enforcing a judicial decision that regulates a parent's access to a child, postponing the imposition of a coercive payment may be justified, among other things, if the child is not ready to meet the parent in accordance with that set out in the judicial decision and the parent needs time to prepare the child for access by the other parent. The Court *en banc* agrees with the opinion of the circuit court and adds that both parents must contribute to the enforcement of the parent's access schedule to the child so that they respect the child's as well as mutually each other's rights and interests and try to make every effort in order for the enforcement of the access schedule to be without any failures and that the child also had a positive attitude towards the access schedule and enforcement thereof.

**79.** The opinion of the circuit court is also correct that an enforcement officer must ensure, within the possibilities provided for in law, that enforcement proceedings in cases concerning access to a child were fast and effective. Therefore, an enforcement officer has both the right as well as the obligation to warn the parent who impedes access to a child in enforcement proceedings against imposing a coercive payment as fast as possible and impose a coercive payment if the parent impedes compulsory enforcement of a judicial decision regardless of the warning. According to the Court *en banc*, an enforcement officer must also do that, if necessary, at their own initiative, without waiting when the party seeking enforcement submits a corresponding request.

**80.** When imposing a coercive payment, an enforcement officer must, according to the Court *en banc*, assess whether the parent who lives with the child impedes the parent who lives apart to have access to the child under a judicial decision and weigh whether and to what extent a coercive payment must be applied in order for the enforcement of the judicial decision to be successful.

**81.** Taking into account the aforesaid reasons, the order of both the county court as well as the circuit court must be quashed. Since the courts have not established the prerequisites for imposing a coercive payment, the case must be referred to the county court for a new hearing in respect of the complaint filed against the imposition of a coercive payment.

**82.** Since the order of both the county court as well as the circuit court is quashed and the case is referred to the county court for a new hearing, the division of procedural expenses is to be left to the discretion of the county court under the second sentence of subsection 3 of § 173 of the CCP.

**83.** Due to the partial granting of the appeal, the security paid on the applicant's appeal on the basis of the first sentence of subsection 4 of § 149 of the CCP is to be refunded. Under subsection 8 of § 149 of the CCP, the security is refunded on the basis of an order of the court that adjudicates the application to the party in the proceedings who has paid it or for whom it has been paid or at the request of the party to another person. In this case it was requested to refund the security to Advokaadibüroo Ahas & Heringson GLO OÜ.

*The judgment includes two dissenting opinions from a total of eight Justices, which have not been translated.*