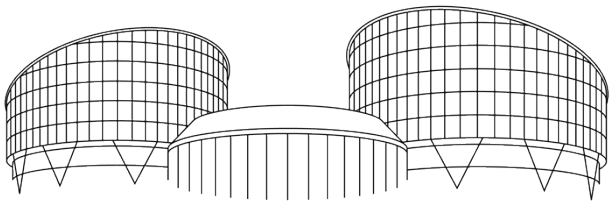

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BERISHA v. SWITZERLAND

(Application no. 948/12)

JUDGMENT

STRASBOURG

30 July 2013

FINAL

20/01/2014

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

In the case of Berisha v. Switzerland,

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

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 2 July 2013,

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

PROCEDURE

1. The case originated in an application (no. 948/12) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Kosovar[1] nationals, Mr Sait Berisha ("the first applicant") and Mrs Selvije Berisha ("the second applicant"), on 21 December 2011.

2. The applicants were represented by Mr Ph. Liechti, a lawyer practising in Lausanne. The Swiss Government ("the Government") were represented by their Agent, Mr A. Scheidegger, of the Federal Office of Justice.

3. The applicants alleged, in particular, that the refusal by the Swiss authorities to allow their three children, R. Berisha, L. Berisha and B. Berisha, to reside in Switzerland constituted a breach of their right to respect for family life as guaranteed by Article 8 of the Convention. They further held that expulsion of the children, who were residing in Switzerland illegally, would violate Article 3 of the Convention. Pending proceedings before the Court the applicants therefore requested that Rule 39 of the Rules of Court be applied.

4. On 9 March 2012 the Vice-President of the Second Section, to which the case was allocated, decided not to apply Rule 39 of the Rules of Court but to grant priority to the application under Rule 41 of the Rules of Court.

[1] All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

5. On 29 June 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant was born in 1967 and the second applicant in 1974, both in Kosovo. Their children R., L. and B. were also born in Kosovo in 1994, 1996 and 2003 respectively. The applicants have a fourth child, E., who was born in Switzerland in 2010. They all live in Lausanne, Canton of Vaud.

8. In June 1997 the first applicant entered Switzerland, where he applied for asylum. His asylum request was rejected by the Federal Office for Migration on 19 November 1997 and it ordered that he should be expelled. The expulsion was not executed, and on 21 May 1999 the first applicant received a temporary residence permit for Switzerland.

9. On 28 February 2000 the first applicant married a Swiss national. On 2 March 2005 he received a permanent residence permit for Switzerland. On 26 August 2006 he got divorced.

10. On 10 January 2007 he married the second applicant - whom he had known since 1993 and with whom he had had the three children - in Rahovec (Kosovo). The second applicant entered Switzerland on 6 April 2007 with a visa. On 7 June 2007 the first applicant applied for a residence permit for the second applicant on the ground of family reunification. The second applicant announced her arrival in Lausanne on 8 June 2007. When she filled in the arrival form she left the question regarding family members unanswered. On 6 September 2007 the Office for Migration of the Canton of Vaud (*Le service de population du canton de Vaud*; hereafter "the Migration Office") granted her a residence permit valid until 5 April 2012.

11. On 4 December 2007 the second applicant applied to the Swiss representation in Pristina (Kosovo) for residence permits on the ground of family reunification for the three children, R., L. and B. She enclosed with the application the birth certificates of the three children, which named the first applicant as the father. On the basis of that application the Migration Office decided on 2 June 2008 to investigate the applicants' family situation. Both applicants, as well as the first applicant's ex-wife, were

interviewed. On this occasion the ex-wife declared that the first applicant "had abused her naivety and her good will" and "had lied to her by hiding from her the fact that he had children, especially one born during their marriage". The first applicant in turn stated that he had hidden those facts from his ex-wife because "his relationship with the second applicant was not a serious one at that time" and "he was not sure whether he was the father of the children". Further, "[he] did not know then whether he was going to marry the second applicant". On 18 December 2008 the second applicant wrote another letter to the Migration Office, informing it that her oldest daughter, L., had fallen seriously ill and had been hospitalised in Pristina. L.'s only relative who could care for her in Kosovo was her elderly grandmother. She therefore urged the Migration Office to decide the matter promptly. She attached a medical certificate of 11 December 2008 issued by the children's hospital in Pristina, which stated that L. was suffering from rheumatic fever (*febris rheumatica*).

12. On 9 January 2009 the Migration Office informed the second applicant that it was minded to refuse the request for residence permits for the children on the ground of family reunification. The Migration Office held that neither she nor the first applicant had previously mentioned the existence of the three children, and it doubted whether the first applicant was in fact the father of the three children. The second applicant was however given the opportunity to contest those findings within a time-limit.

13. By a letter of 2 March 2009 the second applicant answered that she had never concealed the existence of her three children from the Swiss authorities. She explained that when she had entered Switzerland she had had no knowledge of the French language and had had to "improvise" when completing the entry form. That was why she had not answered the question regarding her children. However, in her personal visa application to the Swiss representation in Pristina on 13 March 2007 she had revealed the identity of her three children. She stated furthermore that her children had been mentioned regularly in the tax declarations to the Swiss authorities, and that the first applicant's employer in Switzerland had paid child allowances for them for many years. Therefore, the Swiss authorities had always been aware of the existence of the children. As evidence she attached a copy of the tax declaration for the year 2007.

14. On 28 April 2009 the Migration Office refused the applicants' request for family reunification with their children. It ruled that neither the first nor the second applicant had mentioned the existence of their three children when they entered Switzerland, and they doubted that the first applicant was the father of the three children. They established that the applicants had not conducted themselves correctly with regard to the application, and accordingly they were no longer entitled to family reunification. The applicants did not appeal against this decision and it became final.

15. On 15 August 2009, the three children, R., L. and B., entered Switzerland clandestinely.

16. On 12 April 2010 the second applicant gave birth to a fourth child, E.

17. By a letter of 31 May 2010 the first applicant informed the Migration Office that R., L. and B. had been living in Switzerland illegally since 15 August 2009. He explained that it had been urgent to bring them to the respondent State because L.'s chances of recovery were better in Switzerland. Furthermore, he alleged that it had been for various reasons impossible for the children to remain in their home country. On 1 June 2010 the Migration Office officially registered the entry of the three children into Switzerland on 15 August 2009, and noted that the applicants had submitted a request for residence permits for them on the ground of family reunification.

18. On 13 July 2010 the Migration Office informed the applicants that it intended to dismiss their request. It established that the applicants had brought the children to Switzerland illegally despite the negative decision of the Migration Office of 28 April 2009. Therefore, the applicants had acted contrary to the rules of the immigration authorities. The Migration Office also reiterated that the children's existence had previously been concealed from the Swiss authorities, and that the paternity of the first applicant had not been established. In addition, the legal requirements for family reunification had not been met. According to Article 47 (1) together with Article 47 (3b) of the new Foreign Nationals Act (see below, § 31), the right to family reunification had to be exercised within five years after the granting of a residence permit to the family member. This time-limit was only twelve months if the children were more than twelve years old. The request regarding R. and L., aged fifteen and fourteen respectively at the time of the application, was therefore late. Conversely, the request for B., aged seven at that time, was within the set time-limit. The Migration Office however found that, according to Rule 6.8 of the Federal Directive regarding family reunification, the purpose of a residence permit on the ground of family reunification was to enable all the members of a family to live together in the respondent State. Since R. and L. did not fulfil the prerequisites for a residence permit, it was not possible for the whole family to live together in Switzerland. Therefore, in the case of B. the requirements for family reunification were not met either. The Migration Office further added that, given that the second applicant had been granted a residence permit on 6 September 2007, the applicants had waited quite a while before applying for family reunification, and they had not cited any other important family reasons for seeking reunification. Finally, they established that R., L. and B. had lived their entire lives in their home country of Kosovo, where they had attended school, that the two oldest siblings would soon attain the age of majority and that in the circumstances of the case it

remained doubtful whether it had always been the applicants' true intention to construct family life in Switzerland. The Migration Office gave the applicants another opportunity to contest those findings.

19. By a letter of 29 July 2010 the applicants informed the Migration Office that they wanted to maintain their request. They affirmed that the children had come to live in Switzerland because their grandmother, with whom they had been living in Kosovo, was old and could no longer care for them. Furthermore, it had always been the intention of the applicants to be reunited with their children once the second applicant had obtained a residence permit in Switzerland; this was illustrated by the first request for family reunification, made on 4 December 2007. They held that they could not be reproached with tardiness in applying for family reunification, because it was the Migration Office which had taken a year and four months to decide on the first application. They further reiterated that they had never attempted to deceive as to the existence of the children, and they indicated that a refusal to issue residence permits to the three children would breach Article 8 of the Convention and be against their best interests as children as established in Article 3 (1), 8 (1), 9 (1) and 10 (1) of the United Nations Convention on the Rights of the Child (see below § 33). Finally, they drew attention to the birth of the applicants' fourth child and the risk that a refusal of family reunification would separate the siblings.

20. By a decision of 23 August 2010 the Migration Office rejected the applicants' request for family reunification with their three children, on the grounds given previously. It further ordered that the children had to leave Switzerland within a month of the notification of the decision.

21. The applicants and their children appealed against this decision to the Cantonal Administrative Court of the Canton of Vaud ("the Cantonal Court"). They attached Swiss school certificates for R., L. and B. which stated that they were well integrated in Switzerland. In particular, the applicants reiterated that, if returned to their home country, the children would be obliged to live in an orphanage, because their grandmother was no longer able to care for them. Furthermore, they stated that the first applicant had always been officially recognised as the father of the children and that he had regularly visited them and financially supported them in Kosovo as well as now in Switzerland.

22. At the Cantonal Court's request, a DNA examination was conducted. In a report of 30 December 2010 the University Centre of Legal Medicine Lausanne-Geneva established that the applicants were indeed the parents of the three children.

23. By a fax of 22 February 2011 the Cantonal Court asked the Swiss embassy in Pristina to send it a copy of the visa application the second applicant had made on 13 March 2007, in which she had allegedly mentioned the existence of her three children. In its answer the embassy informed the Cantonal Court that it could not provide a copy of the visa

application because in accordance with internal instructions it had been destroyed after two years.

24. By a decision of 23 March 2011 the Cantonal Court dismissed the applicants' appeal. It first concluded that the decision of the Migration Office of 28 April 2009 had indeed become final. Therefore, only the facts as presented by the request for family reunification made on 1 June 2010 were relevant. On the merits, the Cantonal Court established that the domestic law indicated that the request for residence permits on the ground of family reunification for R. and L. had been submitted late. Residence permits could therefore only be issued to them if there were important family reasons as set out in Article 47 (4) of the Foreign Nationals Act. According to Article 75 of the Federal Ordinance "Admission, Residence and Exercise of a Lucrative Activity" (see below, § 32) - the operative provision to Article 47 (4) of the Foreign Nationals Act - "important family reasons" were given when the best interests of the child could only be guaranteed by family reunification in Switzerland. The Cantonal Court however considered that in the case of R. and L. no such important family reasons could be identified; in particular, the positive development of L.'s recovery would not justify the permanent establishment of the children in Switzerland. Regarding the request of B., the Cantonal Court reiterated that in application of Article 96 (1) of the Foreign Nationals Act (see below § 31), the applicants had failed to establish that their private interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory, although the second applicant had applied within the legal time-limit. In particular, it held: that in light of the statements made by the first applicant's ex-wife, the applicants had engaged in deliberate deception between July 1997 and December 2007 as regards the existence of their three children; that according to Article 51 (2) and 62 (a) of the Foreign Nationals Act (see below § 31) this dissimulation alone justified the refusal of the children's residence permits, because it breached public order; that the applicants had illegally brought the children to Switzerland and thereby presented the authorities with a *fait accompli*; that the applicants had not substantiated the age of the children's grandmother in Kosovo and had not produced any medical evidence that the grandmother was no longer in a position to care for them; and that neither the birth of the fourth child nor the three children's positive (Swiss) school certificates were decisive elements which would justify the issuing of residence permits. The application for residence permits for the three children should therefore be dismissed.

25. The applicants and their children appealed to the Federal Supreme Court against the Cantonal Court's decision. They argued in particular that the Cantonal Court had not considered whether the refusal of the residence permits for the children was in breach of Article 8 of the Convention.

Furthermore, they claimed that expulsion of the three children would violate Article 3 of the Convention, because in their home country the children would have to be dependent on social services or be sent to an orphanage.

26. By a decision of 18 November 2011 the Federal Supreme Court rejected the applicants' appeal. It endorsed the Cantonal Court's findings, and ruled that the refusal of the residence permits was proportionate under domestic law as well as under Article 8 of the Convention. It further ruled that the applicants' claim of a breach of Article 3 of the Convention in the event of the children's expulsion to Kosovo was manifestly ill-founded.

27. By a letter of 29 February 2012 the applicants addressed the Court requesting that, pending the proceedings before it, the Swiss Government be invited to revoke the expulsion of their three children. By a letter of 12 March 2012 the applicants were informed that their request for the application of Rule 39 of the Rules of the Court had been dismissed but that their application had been granted priority.

28. In addition to the documents produced in the domestic proceedings, the applicants also submitted to the Court new certificates from the schools where B. and L. were enrolled. With respect to B., the school certificates of the primary school of 15 February 2012 and 13 December 2012 indicated that she was an excellent student, speaking French fluently and being well integrated. Her teacher expressed incomprehension regarding the proposed expulsion, and stated that it would be against B.'s best interests as a child. Regarding L., the Director of the secondary school (é*tablissement secondaire*) wrote in a certificate dated 8 February 2012 that L. was very well integrated and that her high marks would presuppose her entry into high school (*le lycée*) the following school year.

29. On 17 July 2012 the cantonal authorities of the Canton of Vaud issued a permanent residence permit to the second applicant.

30. By a letter of 18 April 2013 the applicants' lawyer confirmed that R., L. and B. were still residing in Switzerland.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Domestic Law

31. Articles 43, 47, 51 (2), 62 (a) and 96 of the Foreign Nationals Act of 16 December 2005, as in force at the relevant time, read as follows:

> **Art. 43 Spouses and children of persons with a permanent residence permit**
>
> « 1. The foreign spouse and unmarried children under 18 of a person with a permanent residence permit who live with that person are entitled to be granted a residence permit and to have their residence permit extended.

2. After a law-abiding and uninterrupted residency of five years, spouses are entitled to be granted a permanent residence permit.

3. Children under twelve are entitled to be granted a permanent residence permit. »

Art. 47 Time limit for family reunification

« 1. The right to family reunification must be exercised within five years. Children over twelve must be reunified with their family within twelve months.

2. [...].

3. The time limits for family members of:

a. [...] ;

b. foreign nationals begin with the granting of a residence or permanent residence permit or with the constitution of the family relationship.

4. A subsequent family reunification shall be authorised only if there are important family reasons therefor. If necessary, the views of children over 14 on family reunification shall be heard. »

Art. 51 Expiry of the right to family reunification

« [...]

2. The rights in terms of Articles 43, 48 and 50 expire if:

a. they are exercised in abuse of the law, in particular to circumvent the regulations of this Act and of its implementing provisions on admission and residency;

b. there are grounds for revocation in terms of Article 62. »

Art. 62 Revocation of permits and other rulings

« The competent authority may revoke permits, with the exception of the permanent residence permit, and other rulings under this Act if the foreign national:

a. or their representative in the permit procedure makes false statements or conceals material facts;

b. [...]. »

Art. 96 Exercise of discretion

« 1. In exercising discretion, the competent authorities shall take account of public interests and personal circumstances, as well as the degree of the integration of foreign nationals.

[...]. »

32. Article 75 of the Federal Ordinance "Admission, Residence and Exercise of a Lucrative Activity" of 24 October 2007 *(L'Ordonnance relative à l'Admission, au Séjour et à l'Exercise d'une Activité lucrative),* as in force at the relevant time, reads as follows:

Article 75

« Important family reasons as set out in Article 47(4) of the Foreign Nationals Act and [...] may be cited if the best interest of the child can only be guaranteed through family reunification in Switzerland. »

B. International Law

33. The relevant provisions of the United Nations Convention on the Rights of the Child of 20 November 1989, which entered into force in respect of Switzerland on 26 March 1997, read as follows:

Preamble

« The States Parties to the present Convention,

[...]

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, [...]

Have agreed as follows:

[...]. »

Article 3

« 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[...]. »

Article 8

« 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference

[...]. »

Article 9

« 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will [...].

[...]. »

Article 10

« 1. In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

[...]. »

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicants complained that the refusal of the Swiss authorities to grant their three children, R., L. and B., residence permits on the ground of family reunification in Switzerland and the decision to expel them to their home country was in breach of Article 8, which provides:

"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."

35. The Government contested that argument.

A. Admissibility

36. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicants

37. The applicants claimed that the Swiss authorities had not complied with their obligations, inherent in Article 8 of the Convention, to allow R., L. and B. to reside legally in Switzerland, thereby enabling them to enjoy family life in that country. They submitted that their interest in their children being allowed to reside in Switzerland outweighed those of the respondent State in refusing that permission. They insisted that the three children, who had been living in Switzerland illegally since 15 August 2009, were well integrated in the respondent State and especially in the school system. Therefore, no public interest of the respondent State would justify the refusal of residence permits for the children.

38. With respect to the question of whether the refusal of the residence permits for the children was proportionate under Article 8 of the Convention, they reiterated the arguments made before the domestic authorities. In particular, they claimed that the children should be allowed to continue their life with their immediate family in Switzerland and that it would be difficult to maintain a family life at a distance. They argued that expulsion would lead to separation from the applicants, their parents, and their little brother E., and to their being to a significant extent uprooted from the environment the children had been living in for the last three years. They further held that important family reasons for a family reunification did indeed exist: B. and L. were enrolled in school in Switzerland and R. still depended not only emotionally but also financially on the applicants because, despite having obtained a school certificate, he had been denied access to a professional apprenticeship as he was an illegal resident in Switzerland.

39. The applicants also claimed that the Swiss authorities had disregarded completely the situation to which the three children would be exposed if sent back to Kosovo. Even if they were still socially and culturally attached to their home country, which the applicants contested, they disputed that there was any proof that the children's grandmother or other relatives would be able to care for them. They explained that the

grandmother only temporarily took care of the children between 2007 and 2009 on condition that they would join the applicants in Switzerland as soon as the second applicant had obtained residence permits for them. Therefore, in the event of expulsion to their country of origin, the children would be at risk of spending their lives in an orphanage. This would be contrary to the children's best interests and in violation of their rights under Article 3(1), 8(1), 9(1) and 10(1) of the United Nations Convention on the Rights of the Child (see above §33).

b. The Government

40. While the Government accepted that a family life within the meaning of Article 8(1) of the Convention existed between the applicants and their children L. and B., they disputed the existence of such a family life between the applicants and R. They argued that the latter, born in 1994, had reached the age of majority in the meantime and, aside from "normal affective ties with his parents", the applicants had not given any other reasons for being especially dependent on them.

41. The Government further held that the refusal of the residence permits for the three children on the ground of family reunification was proportionate under Article 8 of the Convention and in accordance with their right to control the entry of non-nationals into their territory. The Government reiterated that the applicants had deliberately concealed the existence of their three children when they entered Switzerland. The Swiss authorities had learned of their existence only on 4 December 2007. Furthermore, the applicants had not only concealed the existence of their three children but they had also brought them to Switzerland illegally. Instead of appealing against the decision of 28 April 2009, which had become final, they had presented the domestic authorities with a *fait accompli*. The Government thus maintained that in view of the applicants' wrongful conduct, the public interests of Switzerland outweighed their private interest in being reunited on its territory.

42. The Government further reasoned that it could not be concluded from the applicants' conduct that they had always wanted to be reunited with their children in Switzerland (*a contrario*, *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 45, 1 December 2005*)*. Their second application for family reunification had only been made on 1 June 2010 which was, according to the domestic law, outside the time-limit in respect of R. and L. Furthermore, the applicants had not given any important family reason for a family reunification. The Government considered it as not established that the children's grandmother or other relative in Kosovo could not take care of them, *a fortiori* because the two older siblings were of an age at which they could, at least in part, look after themselves. Moreover, the children had spent most of their life in Kosovo and had gone to school there.

43. The Government further maintained that Article 8 of the Convention did not impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. The Government stated that it had been the applicants who had left their children behind in their home country. Furthermore, the grounds on which the first applicant had applied for asylum in 1997 had disappeared, as was illustrated by his frequent journeys to Kosovo even before 2007. Under those circumstances it could not be concluded that the issuing of residence permits for the three children in Switzerland was the only way to reunite the applicants' family.

44. The Government concluded that with consideration to the age of the children, their degree of dependency on the applicants, and their social integration in Switzerland and in Kosovo, as well as to the conduct of the applicants, the domestic authorities had not overstepped the margin of appreciation they had under Article 8 of the Convention.

2. The Court's assessment

a) The existence of a family life according to Article 8 of the Convention

45. The Court notes that the parties agreed that there was a family life within the meaning of Article 8(1) of the Convention between the applicants and their daughters L. and B. In contrast, the Government disputed that a family life as set out in Article 8 of the Convention still existed between the applicants and their older son R. With reference to the case-law of the Court they argued that the relationship between R., who had reached the age of majority during the proceedings before this Court, and his parents did not fall within the protective scope of Article 8 because no "[...] additional factors of dependence, other than normal emotional ties" had been established (see *Emonet and Others v. Switzerland*, no. 39051/03, § 35, 13 December 2007). The applicants argued in opposition to this that R. was indeed still dependent on them, because as an illegal resident in Switzerland he was excluded from the labour market and was in need of their financial support.

46. The Court considers that when deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant (see *Emonet and Others,* cited above*,* § 35*).* In view of the following considerations (infra *§§ 59-62*), the issue of whether the applicants' relationship with R. still falls under the protection of Article 8 of the Convention may be left open.

b) Scope of the obligation under Article 8 of the Convention

i) General principles

47. The Court considers that the present case hinges on the question whether the authorities of the respondent State has the duty to allow R., L. and B. to reside legally on its territory with their parents and their younger brother, and thus should not expel them to their country of origin and should allow them to develop family life in Switzerland.

48. The Court notes that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Ahmut v. the Netherlands*, 28 November 1996, § 63, *Reports of Judgments and Decisions* 1996-VI).

49. In order to establish the scope of the State's obligations, the Court must examine the facts of the case in the light of the applicable principles, which it has previously set out as follows (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports* 1996-I, and *Ahmut*, cited above, § 67):

(a) the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest;

(b) as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory;

(c) where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunification in its territory.

50. In this context it must be borne in mind that cases like the present one do not only concern immigration, but also family life, and that it involves aliens - the applicants - who already had a family life which they left behind in another country until they achieved settled status in the host country (contrast *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 68, Series A no. 94). In its assessment, the Court must therefore determine whether, in refusing to issue residence permits for the family members, the Government can be said to have struck a fair balance between the applicants' interest in developing a family life in the respondent State on the one hand and the State's own interest in controlling immigration on the other.

51. The Court has further held that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010). For that purpose, in cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents (see *Tuquabo-Tekle,* cited above, § 44).

ii) Application of the principles in the present case

52. Firstly, the Court notes that the applicants did not appeal against the first decision of the Migration Office, delivered on 28 April 2009, which refused them the right to family reunification with their three children on Swiss territory. That decision became final. With respect to that decision the applicants have not exhausted domestic remedies. For the assessment of the present case, the Court is therefore bound by the facts that led to the present application, which originated in the applicants' second request for family reunification to the Migration Office on 1 June 2010.

53. The Court notes that the Government have not disputed that the applicants made efforts to obtain residence permits for their three children in Switzerland. As they did not appeal against the first negative decision of the Migration Office, the Government however argued that it had taken the applicants quite a while to apply again for family reunification and that the second application had been outside the time-limit in domestic law. Therefore, in the Government's view, it could be doubted whether it had always been the applicants' real intention to be reunited with their children in Switzerland.

54. The Court has previously held that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunification (see *Sen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001). Contrary to the Government's contentions, it appears clear to the Court that in the present case the applicants had always intended that their three children should join them in Switzerland once the second applicant had settled there. The second applicant applied for family reunification only three months after obtaining a residence permit herself. While the question why the applicants did not appeal against the first negative decision of the Migration Office remains open, that question does not allow the conclusion that they abandoned the idea of family reunification at that time. To enable them to live with their children despite all this, they subsequently brought them illegally to Switzerland and applied again for residence permits for them.

55. As regards the question of to what extent it is true that the three children's settling in Switzerland would be the most appropriate means for the applicants to develop family life together, the Court observes that the facts of the present application have to be compared to similar cases in which it has had to evaluate whether the domestic authorities breached Article 8 of the Convention in refusing to issue residence permits on the ground of family reunification.

56. The Court has previously rejected cases involving failed applications for family reunification and complaints under Article 8 where the children concerned had in the meantime reached an age where they were presumably not as much in need of care as young children and were increasingly able to fend for themselves. In cases of this nature, the Court has also examined whether the children have grown up in the cultural and linguistic environment of their country of origin, whether they have other relatives there, and whether it could be expected that the parents would return to that country (see, for instance, *Benamar v. the Netherlands* (dec.), no. 43786/04, 5 April 2005; *I.M. v. the Netherlands* (dec.), no. 41266/98, 25 March 2003; and *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003).

57. By contrast, in *Sen* (cited above), which concerned parents who had left their daughter behind in the care of relatives in their home country of Turkey to settle in the Netherlands, the Court established that the applicants were facing major obstacles to a return to their home country since they had been legally resident in the Netherlands for many years; their two youngest children had been born and brought up there and were attending school. With regard to those children, who had minimal ties with their home country, and in view of the young age of the daughter who had remained in Turkey (she was nine years old when the application to the domestic authorities was made), the Court considered it more appropriate to let the daughter come to the Netherlands to be reunited with her family there. The refusal of a residence permit for the daughter had therefore been in breach of Article 8 of the Convention (ibid. §§ 39-42).

58. Moreover, in the case of *Tuquabo-Tekle and Others,* (cited above, §§ 47-52), the Court found a violation of Article 8 of the Convention regarding the refusal of a residence permit on the ground of family reunification to Mrs Tuquabo-Tekle's daughter, who was, at the time of the domestic application, already fifteen years old. As well as establishing that the parents were facing major obstacles to a return to their country of origin, Eritrea, the Court ruled that the particular circumstances of the daughter's situation in her home country - her grandmother, who was taking care of her, had taken her out of school and she had reached an age where she could be married off - were such that she should be allowed to be reunited with her family in the Netherlands. The Court held in that case that the daughter's age should not be the sole element that led to a different

assessment from that arrived at in the case of *Sen* (cited above), in which the daughter had been some years younger.

59. Turning to the present application, the Court notes that as, *inter alia*, in the case of *Sen* (cited above), the applicants are living where they are because of their conscious decision to settle in Switzerland rather than remain in their home country. After their marriage in 2007, the second applicant joined her husband, the first applicant, who had already been living in Switzerland for ten years and was in possession of a permanent residence permit, with the aim of establishing a family life there. Subsequently, a fourth child was born to them and the second applicant also received a permanent residence permit for Switzerland. Nevertheless, the applicants were not prevented from maintaining the degree of family life they had had for many years before 2007. After the first applicant had moved to Switzerland in 1997, he had visited the second applicant and his children regularly and had a third child with the second applicant in 2003. He had also supported them financially.

60. As regards the situation of the three children, the Court considers that, despite the applicants' contentions, they must still have solid social and linguistic ties to their home country, where they grew up and went to school for many years. Although the children are now also well integrated in Switzerland, the Court is of the view that their period of stay in the respondent State is not long enough for them to have completely lost their ties with their country of origin. With regard to the fact that their grandmother looked after them for more than two years and is, after all, still living there now, it must also be assumed that they have strong family ties to Kosovo. Furthermore, the applicants have not disputed that L.'s health has in fact improved to the extent that it would not be a hindrance for her to return to her home country, and, with regard to the alleged financial dependence of R. on the applicants, the Court cannot see why he, as well as his sister, could not be supported at a distance, especially when it is considered that they are now 19 and 17 years old respectively. Lastly, with particular regard to the youngest of the three children, B., the Court notes that the applicants are not prevented from travelling - or even staying - with her in Kosovo in order to ensure that she is provided with the necessary care and education so that her best interests as a child are safeguarded.

61. In conclusion, and also taking into account the applicants' conduct in the domestic proceedings, which was not irreproachable, it cannot be found that the respondent State has failed to strike a fair balance between the applicants' interest in family reunification on the one hand and its own interest in controlling immigration on the other. Although it may well be that the applicants would prefer to maintain and intensify their family links with the three children in Switzerland, Article 8 does not guarantee a right to choose the most suitable place to develop family life (see above, §§ 48,

49). The respondent State has therefore not overstepped the margin of appreciation it enjoys under Article 8 of the Convention.

62. It follows that no violation of Article 8 can be found on the facts of the present case.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

63. The applicants complained that expulsion of the children to their home country would be in breach of Article 3 of the Convention, because they would be separated from their immediate family and sent to their home country, where they have no one to care for them. They would probably be sent to an orphanage and would depend on social services in Kosovo. Their expulsion would therefore put them at risk of inhuman or degrading treatment contrary to Article 3 of the Convention.

64. The Court notes that, apart from the separation from their parents and youngest brother, the applicants have not given any other reasons why the children would be at risk of inhuman or degrading treatment if they were returned to their home country. The Court observes that these arguments are essentially the same as those brought forward by the applicants under Article 8 of the Convention. The Court does not find any appearance of a violation of Article 3 of the Convention.

65. It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

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

2. *Holds,* by four votes to three, that there has not been a violation of Article 8 of the Convention.

Done in English, and notified in writing on 30 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint dissenting opinion of Judges D. Jočienė and I. Karakaş and;

(b) Dissenting opinion of Judge A. Sajó.

G.R.A.
S.H.N.

DISSENTING OPINION OF JUDGES JOČIENĖ AND KARAKAŞ

1. We do not agree with the majority's conclusion that there would not be a violation of Article 8 of the Convention in respect of all three children in the event of enforcement of the Federal Supreme Court's judgment of 18 November 2011. We will analyse whether the reasons purporting to justify the actual measures adopted with regard to the applicants' enjoyment of their right to respect for family life were relevant and sufficient under Article 8 (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Kutzner v. Germany*, no. 46544/99, § 65, ECHR 2002-I).

2. Turning to the specific circumstances of the present case, we must first assess whether the applicants would face major obstacles if they returned to their home country. Similarly to, for example, the case of *Sen* (cited in the judgment, paragraph 54), the applicants are living where they are because of their conscious decision to settle in Switzerland rather than remain in their home country. After their marriage in 2007 the second applicant joined her husband, the first applicant, in Switzerland with the aim of establishing a family life there. However, the applicants were not prevented from maintaining the family life they had lived for many years. After the first applicant moved to Switzerland in 1997, he visited his family regularly and supported them financially. Furthermore, after the second applicant's departure to Switzerland, the grandmother cared for the children for more than two years. Nevertheless, we also note that the first applicant has now been living in Switzerland for more than fifteen years and that the second applicant, his wife, has lived there almost six years; they both hold permanent residence permits, and their fourth child was born there. They have thus clearly established a family life in the respondent State. We therefore find that a return to their home country would put major obstacles in their way. This aspect is very important when assessing the proportionality and necessity test as regards the expulsion of aliens, especially children. We note on this point that the Court's case-law requires clearly that the child's best interests and well-being be taken into account, and in particular the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural and family ties both with the host country and with the country of destination (see *Neulinger and Shuruk*, § 146; see also, *mutatis mutandis*, *Üner v. the Netherlands* [GC], no. 46410/99, § 57, ECHR 2006-XII).

3. Secondly, we turn to the question whether the ages of the children or any other additional aspect of their situation make them particularly dependent on their parents, the applicants. In view of the difference in age between L. and R. on the one hand and B. on the other, we consider it appropriate to assess the latter separately from her siblings.

4. In the case of B. we would stress that she was, and still is, of such a young age that she is heavily dependent on her parents' care and instruction. She was seven years old at the time of the application to the domestic authorities, and we do not find that the Government have proved that she would receive sufficient support from her grandmother or other relatives if she were sent back to Kosovo. Neither can it be expected that her siblings, L. and R., would take care of her. Although both are, or are soon to be, of majority age, they are nevertheless still young and need first to establish a life of their own. Furthermore, B. arrived in Switzerland at a very early age, and from the school certificates submitted it appears that she has integrated successfully and made remarkable progress in those three years. Unlike her older siblings she had not attended school for long in her home country before coming to Switzerland and presumably does not have such strong cultural, social and linguistic ties to her country of origin. Her return would therefore inevitably lead to a significant uprooting and major difficulties, which would be contrary to her best interests as a child. In addition, the application for family reunification in her case was made in time under domestic law, and the refusal of a residence permit for her on the ground of family reunification cannot be justified merely by the wrongful conduct of her parents, the applicants. The children cannot be held responsible or suffer for their parents' incorrect or even illegal behaviour. This would be against the best interests of the children, a principle which is very well developed and always stressed in the case-law of the European Court (see paragraph 51 of the judgment). We further note that B.'s teacher also expressed incomprehension regarding the proposed expulsion, stating that it would be against B.'s best interests (see paragraph 28 of the judgment). We therefore find that the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other. Accordingly, in the event of the enforcement of the Federal Supreme Court's judgment of 18 November 2011, there would be, in our opinion, a violation of Article 8 of the Convention with regard to the situation of B.

5. Turning now to the cases of the two oldest siblings, R. and L., who were fifteen and fourteen at the time of the application to the domestic authorities, we understand that both were already of an age where they were able (or at least partly able) to care for themselves, even more so now that R. has reached the age of majority and L. is seventeen years old. We have also taken into account the fact that both children spent most of their years of compulsory education in their country of origin and still have family ties there. After all, it remained uncontested that their grandmother, however elderly, was still living there. Even though we believe that they still have strong social, cultural and linguistic ties to their home country, we nevertheless note that they have now lived in Switzerland for more than three years and that they too are apparently well integrated. Furthermore, we

take the view that L.'s health, albeit improved, can also be taken as one more factor which must be considered when accessing the proportionality of the interference with the applicants' family life in the instant case. We also note that R. was and is still financially dependent on the applicants. Even bearing in mind the fact that the applicants, as well as their children, can travel freely between their home country and Switzerland (subject, of course, to visa requirements and immigration rules), we still believe that the family ties – and especially the effective and practical ties between all the siblings and their parents – can be maintained only in Switzerland. As the Convention should be interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI), we have come to the conclusion that the effective enjoyment of the family rights in this case can be fully realised only if all the family members are living in Switzerland. Furthermore, we think that the age of the children was a very important element to be taken into account when the domestic authorities were deciding the case. At the time of the application to the domestic authorities the two oldest siblings, R. and L., were fifteen and fourteen years old. Who can in reality prove the thesis relied on by the Swiss authorities in this case, to the effect that a child of fifteen or fourteen has less need of the parents' care than a child of seven? The Government simply cannot speculate on such matters. Furthermore, the seriousness of the difficulties which the children are likely to encounter in the country of destination, arriving there without their parents, were not analysed in depth by the Swiss courts.

We also note that L. is very well integrated in her Swiss school and that her high marks were such that she was expected to enter high school the following school year (see paragraph 28 of the judgment).

6. Even having regard to the fact that the applicants' conduct before the domestic authorities was not irreproachable, and that the request for family reunification for L. and R. was submitted out of time under domestic law, we are still of the opinion that the refusal of residence permits for R. and L. was a disproportionate measure under Article 8 of the Convention, one which was against the best interests of the children involved. It follows that the respondent State overstepped its margin of appreciation under Article 8 of the Convention in refusing to issue residence permits for R. and L.

7. We conclude that, in the event of the enforcement of the Federal Supreme Court's judgment of 18 November 2011, there would also be a violation of Article 8 of the Convention with regard to the situation of R. and L.

PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I am in agreement with my dissenting colleagues Judges Jočienė and Karakaş in respect of child B., for the reasons expressed in point 4 of their opinion.

As to child L., I find that the logic of *Neulinger* is applicable here and that the best interests of the child are to be considered at the time of application of the judgment of the Court, that is, in 2013 in the present case. I would have allowed her to finish high school in Switzerland.

With regard to child R. I follow the judgment, given the State's powers and duties to protect the public interest in matters of immigration.