



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

THIRD SECTION

CASE OF CVETKOVIĆ v. SERBIA

(Application no. 42707/10)

JUDGMENT

STRASBOURG

7 February 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

In the case of Cvetković v. Serbia,

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

Luis López Guerra, *President*,

Helena Jäderblom,

Helen Keller,

Branko Lubarda,

Pere Pastor Vilanova,

Alena Poláčková,

Georgios A. Serghides, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 17 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 42707/10) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Serbian national, Ms Suzana Cvetković (“the applicant”), on 21 July 2010.

2. The applicant was represented by Ms J. Spasić, a lawyer practising in Vlasotince, in the early stages of the proceedings. Subsequently, the applicant was, exceptionally, granted leave to represent himself (Rule 36 of the Rules of Court). The Serbian Government (“the Government”) were initially represented by Ms V. Rodić, their Agent at the time, and later by Ms N. Plavšić, the newly-appointed Agent.

3. The applicant alleged that the Supreme Court’s judgment of 28 May 2009, granting V.C. custody of A.C., and the Constitutional Court’s subsequent affirmation thereof, had both been arbitrary.

4. On 9 March 2015 the application was communicated to the Government.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE****A. Introduction**

5. The applicant was born in 1981 and lives in Niš.

6. On 2 February 1999 the applicant gave birth to a daughter, A.C. One year later, she married V.C. (“the respondent”), her daughter’s biological father.

7. On 1 February 2005 V.C. lodged a claim with the Niš Municipal Court, seeking dissolution of the marriage, custody of A.C. and child maintenance.

B. The applicant’s interim custody rights

8. On 16 May 2005 the Niš Social Care Centre granted the applicant interim care and custody of A.C. until the marriage was dissolved.

9. On 23 June 2005, while the applicant and A.C. were visiting a mental care institute where the child was undergoing treatment for her disturbed mental health as a result of her parents’ divorce, V.C. forcibly removed A.C. from the applicant’s custody and, in so doing, assaulted the latter physically, knocking her unconscious.

10. On 25 July 2005 the Niš Municipal Court issued an interim custody order requiring that V.C. surrender custody of A.C. to the applicant until the end of the marriage dissolution proceedings.

11. On 5 August 2005 a bailiff accompanied the applicant to the respondent’s home, requesting that the child be surrendered. The respondent’s father and A.C. were also present. The respondent stated that he would not prevent the mother from seeing her child but refused to hand her over, even if it meant paying a fine, claiming that the applicant could not provide suitable living conditions for A.C. and that A.C. preferred living with him.

12. Faced with the respondent’s failure to comply with the enforcement order, on 12 August 2005 the Niš Municipal Court ordered him to pay a fine in the amount of 10,000 Serbian dinars (RSD; approximately 120 euros (EUR)), within three days and to return the child to her mother by the same deadline.

13. On 18 August 2005 the bailiff again went to the respondent’s home, but there was no one there. On the same day the court contacted the Niš Social Care Centre asking for urgent action, since the applicant alleged that domestic violence was taking place there.

14. On 22 August 2005, the social care centre informed the court that it had advised the applicant and the respondent to visit a mental care institute in order to be provided with appropriate guidance in communicating with each other and in order for the child to resume the interrupted course of treatment. The court was informed that the Doljevac Social Care Centre had taken over responsibility for the case, since that was where the respondent’s residence was located.

15. On 12 September 2005 the Municipal Court ordered the respondent to pay a further fine in the amount of RSD 50,000 (approximately EUR 590) and to return A.C. to her mother.

16. On 15 September 2005 the respondent and his father contacted the court, declaring that the child did not want to go to her mother and refusing to pay the fine.

17. On 20 September 2005 a new attempt was made to enforce the interim order, this time in the presence of a psychologist from the Doljevac Social Care Centre, civilian police officers, the enforcement judge, a bailiff and the applicant. The child started to cry and refused to go with the applicant. The respondent stated that he had spoken with the child, encouraging her to go and live with her mother if she wanted, but the child had refused. The applicant was of the opinion that the child had been given instructions and put under pressure and was in fact strongly attached to her. She wanted to take the child immediately, regardless of her behaviour. The psychologist was against forcible transfer of the custody, claiming that it could have a negative influence on the child's mental health and lead to autism. The child had already showed some of those symptoms, but they stopped after she had moved into her father's home, where she had been living for five years. The psychologist proposed that mother and child start to meet under the supervision of the Centre on its premises. She also noted in the minutes that the parents should cease their manipulation of the child.

18. On 3 October 2005 the first meeting between mother and child was held on the premises of the Centre, but the applicant later told the court that it had not been successful because the child was allegedly subjected to pressure by her father.

19. At the next meeting, held on 14 October 2005, the child was constantly holding on to her father, crying and avoiding contact with her mother. The psychologist was not present during the meeting, being on sick leave at the time. After leaving the premises of the Niš Social Care Centre, the applicant and respondent and other persons present started to fight. The respondent's father allegedly physically attacked the applicant. The court informed the Doljevac Social Care Centre about the incident, seeking advice as to how to proceed further.

20. On 2 March 2006 the applicant asked the court to enforce the interim custody order in the presence of the police.

21. The enforcement of the interim order was to be attempted on 20 March 2006 on the premises of the Niš Social Care Centre in the presence of the judge, a psychologist and a teacher from the Centre, the applicant and the respondent's representative. The respondent and the child did not appear. The child was allegedly ill.

22. On 29 May 2006 the next enforcement attempt was made. The respondent again failed to appear. According to his representative, he had not been properly summoned. At the hearing, two psychologists were

present, one from the Niš Social Care Centre and the other from the Doljevac Social Care Centre. Both gave their opinion concerning the forced return of the child to her mother, the psychologist from Niš contending that it was the only option, since the father was not willing to hand over the child voluntarily, and the psychologist from Doljevac arguing against it, on the basis that it could have a negative influence on the child's further development.

23. The enforcement attempt scheduled for 13 June 2006 was also postponed due to the absence of the respondent and his representative.

24. On 29 June 2006 the respondent appeared without the child, because she was allegedly sick, but he did not submit any evidence in support of this allegation. Throughout the meeting he claimed that he was willing to hand over the child to the mother but that the child was refusing to cooperate.

25. On 27 July 2006 the court again ordered the respondent to pay a fine in the amount of RSD 20,000 and to return the child to her mother.

26. On 25 December 2006 the court asked the Niš Mental Care Institute to prepare an opinion concerning the enforcement of the interim custody order because of the difficulties encountered in the proceedings.

27. The Niš Mental Care Institute issued an experts' report on 28 June 2007. The report contained the opinions of a psychologist, a sociologist and a neuropsychiatrist, all of whom had conducted interviews with the child and both her parents. The experts found that the child's intellectual ability was on the low side and that her emotional and social maturity was underdeveloped as a result of the family situation. They also found that both parents were manipulating the child and not doing what was in her best interests. Their ultimate opinion was that the forcible removal of the child from her father and her current social environment without proper psychological preparation could at that stage provoke certain psychological disorders. The experts advised that the child should receive psychological and social counselling to help her overcome her resistance towards her mother, that the father and his family should be helped to change their attitude and stop influencing the child's opinion towards her mother, and that both parents should receive counselling on how to behave in the best interests of the child.

C. Civil proceedings (divorce, custody and child maintenance)

28. On 14 January 2008 the Municipal Court ruled in favour of the father. The marriage was thus dissolved, V.C. was granted custody of A.C., and the applicant was ordered to contribute towards her maintenance on a monthly basis. Lastly, the court held that the applicant was entitled to spend time with A.C. on the premises of the Doljevac Social Care Centre every Saturday between 10.00 a.m. and 12.00 a.m. until such time as a different access arrangement might be warranted.

29. On 12 June 2008 and 28 May 2009 the Niš District Court and the Supreme Court of Serbia upheld the Municipal Court's judgment at second and third instance, respectively.

30. All of the above-mentioned courts reasoned that, "notwithstanding her earlier forcible removal from ... [the applicant's custody] ...", it was in the best interests of A.C. to remain with her father since a separation could prove psychologically detrimental. In support of this conclusion, the courts referred to a separate opinion drafted by the Doljevac Social Care Centre, in addition to an expert's report, stating that it would indeed be advisable for A.C. to remain in the environment to which she had become accustomed, where she was surrounded by love and care, and where she had made social connections (see paragraph 27 above).

31. In addition, the Supreme Court found that there was no evidence that the respondent had committed acts of violence against the child or the applicant.

32. On 8 September 2008 the Municipal Court suspended the interim custody proceedings.

33. The applicant never sought enforcement of the judgment of 14 January 2008 as regards the weekly meetings with the child.

D. The constitutional complaint proceedings

34. On 16 March 2010 the applicant lodged an appeal with the Constitutional Court, alleging a breach of her parental and family rights, essentially complaining about the non-enforcement of the Municipal Court's interim custody order of 25 July 2005. She also argued that the Supreme Court's ultimate ruling on the issue of A.C.'s custody had failed to take into account the child's best interests and had instead retroactively endorsed V.C.'s violent and unlawful conduct and had permanently separated her from her child.

35. On 15 March 2012 the Constitutional Court dismissed the complaint regarding the interim custody order of 25 July 2005 for being out of time, having been lodged more than 30 days after the applicant had been served with the District Court's judgment of 12 June 2008. With respect to the applicant's complaint regarding the Supreme Court, the Constitutional Court rejected it on the merits, accepting the Supreme Court's reasoning entirely.

E. Other relevant facts

1. The criminal proceedings against the respondent

36. On 19 October 2007 the Niš Municipal Court found V.C. guilty of unlawfully removing A.C. from the applicant's custody and sentenced him

to six months' imprisonment, suspended for a period of two years. The respondent was ordered to return the child to the applicant within fifteen days of the date on which the judgment became final. This judgment was upheld by the Niš District Court on 8 April 2008.

37. On 18 August 2008, acting upon the applicant's initiative, the Niš municipal public prosecutor requested the revocation of the respondent's probation, but withdrew the request on 16 December 2008 because the respondent had in the meantime been granted custody of A.C. On 25 December 2008 the Municipal Court terminated the proceedings seeking revocation of the probation.

2. Review of the custody judgment of 14 January 2008

38. Following the applicant's claim for review of the judgment of 14 January 2008, on 12 October 2012 the Niš Municipal Court granted the applicant custody of A.C. and ordered V.C. to contribute towards her maintenance on a monthly basis. In its reasoning the court explained that A.C. had stated that she now wanted to live with the applicant and that V.C. himself no longer had any objections to this arrangement. This judgment became both final and enforceable on 10 November 2012 and A.C. moved to the applicant's flat shortly thereafter.

39. In July 2013 the Niš Public Prosecutor's Office received a criminal complaint that had been lodged against V.C. for failure to make maintenance payments.

3. Contact between the child and the applicant

40. It would appear that the applicant re-established contact with her daughter on 19 August 2012, that is to say after a period of seven years, and soon afterwards A.C. went to live with the applicant. However, it seems from the documents submitted by the Government that the mother-daughter relationship was not well re-established. A.C. kept returning to her father whenever she had a misunderstanding with her mother. She even gave a statement to the police to the effect that her mother was maltreating her.

41. On 27 August 2015 A.C. moved to her father's home and it appears that she is still living with him by choice. It would also appear that the respondent filed a claim for review of the judgment of 12 October 2012 on custody of A.C. and that those proceedings are still pending.

II. RELEVANT DOMESTIC LAW

42. Article 65 §§ 3 and 4 of the Family Act (*Porodični zakon* published in the Official Gazette of the Republic of Serbia - OG RS no. 18/2005) states that the opinion of a child must be given due consideration in respect of all matters and within proceedings which concern his or her rights, whilst

taking into account the child's age and maturity. A child who is ten years old may freely and directly express an opinion whenever his or her rights are at stake. Article 204 of this Act establishes that proceedings relating to family disputes which involve a child are deemed urgent. Article 230 provides for compulsory mediation and conciliation proceedings which must be conducted in parallel with divorce proceedings if the latter have not been initiated by the mutual agreement of the marital partners. It further provides that such mediation and conciliation are to be conducted with the expert assistance of the local social care centre. Article 270 provides that civil courts must obtain the opinions of the social care centre's experts when deciding the award or retraction of parental rights.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. Relying on various provisions of the Convention, as well as the Protocols thereto, the applicant essentially complained that for a period of more than seven years she had had no contact with her child due to the respondent State's failure to enforce its own rulings in this regard. She further complained that the Supreme Court's judgment of 28 May 2009 granting V.C. custody of A.C. and the Constitutional Court's subsequent affirmation thereof had both been arbitrary, effectively amounting to an endorsement of V.C.'s previous violent behaviour. The Court considers that these complaints fall to be examined under Article 8, which reads:

Article 8

- "1. Everyone has the right to respect for his [or her] private and family life ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Regarding the non-enforcement of the judgment of 14 January 2008 in the part concerning the applicant's access rights

44. The Government submitted that the complaint should be declared inadmissible because of the applicant's failure to exhaust effective domestic remedies. Specifically, the applicant had not raised this complaint before the

Constitutional Court. Moreover, the applicant had not first requested enforcement of that part of the judgment before the Niš Municipal Court.

45. The applicant did not comment on the Government's objection.

46. The Court observes that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances (see, among other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014). Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and Others*, cited above, § 72).

47. Turning to the present case, the Court notes that the applicant should have requested enforcement of the part of the judgment of 14 January 2008 concerning her access rights before the Niš Municipal Court and if necessary should have restated the complaint before the Constitutional Court if the enforcement was judged unsuccessful.

48. Accordingly, the Court upholds the Government's objection and rejects this complaint in accordance with Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. Regarding the Supreme Court's judgment of 28 May 2009 granting V.C. custody of A.C.

49. 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

50. The applicant maintained her complaint.

51. The Government submitted that the Supreme Court and the Constitutional Court had supported the lower-instance courts' assessments that the exercise of parental rights should remain with the father, in spite of the final criminal judgment, because it was the least problematic decision for the child, with fewer harmful consequences for her mental health and development. They further stated that the relationship between the parents was extremely complex and, since the child had an anxiety disorder, the courts had had to rely on expert opinion. Finally, the Government noted that the court had accepted the child's opinion once she reached the age to express it and had amended its decision accordingly.

2. *Relevant principles*

52. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (see among many other authorities *Diamante and Pelliccioni v. San Marino*, no. 32250/08, § 170, 27 September 2011, and *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290). Domestic measures hindering enjoyment of family life, such as a decision granting custody over children to a parent, constitutes an interference with the right to respect for family life (see *Diamante and Pelliccioni*, cited above, § 171, with further references). However, such interference will not constitute a violation of Article 8 if it is "in accordance with the law", pursues a legitimate aim and can be regarded as "necessary in a democratic society".

53. Although the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in an effective "respect" for family life. In both contexts, regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole; in both contexts the State enjoys a certain margin of appreciation (see *Dąbrowska v. Poland*, no. 34568/08, § 44, 2 February 2010).

54. Article 8 furthermore requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child. A parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII, with further references).

55. The Court's role is not to substitute itself for the competent domestic authorities in regulating custody issues, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretion and to determine whether the reasons purporting to justify rendered decisions were relevant and sufficient (see *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII and *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A).

3. *The Court's assessment*

56. It is undisputed that the domestic judgments granting V.C. custody of A.C. constituted an interference with the applicant's right to respect for family life under paragraph 1 of Article 8. The Court accepts that this interference was "in accordance with the law" and pursued the legitimate aim of protecting the rights of the child within the meaning of paragraph 2 of the Article 8. It remains to be ascertained whether such interference was necessary in a democratic society.

57. In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned judgments in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced by the domestic courts were relevant and sufficient (see *Diamante and Pelliccioni*, cited above, § 182, and *Olsson v. Sweden (no. 1)*, 24 March 1988, § 68, Series A no. 130).

58. In addition, there is a broad consensus – also 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).

59. The Court observes that the domestic courts consistently emphasised the best interests of the child. They based their decisions on a number of additional considerations, such as the relationship between the parents, the attitude and availability of the parents, and the specific environments involved. In each of their decisions they relied on detailed and complete reports from the children’s services.

60. Moreover, since the opinions of the two social care centres involved were contradictory, the first instance court engaged a mental care institute to prepare an expert opinion. The final conclusion of the institute (see paragraph 27 above) was based on separate opinions of different specialists who interviewed the child and both parents.

61. The domestic courts took into account the fact that the child was forcibly taken away from her mother, but found that at that moment it was not in her best interests to be removed from her father, from the family home to which she was attached, and from the whole environment in which she had been successfully integrated and surrounded by love and care.

62. In addition, the Supreme Court referred to the applicant’s allegations concerning the respondent’s violent behaviour and found that there was no evidence that the respondent had ever acted violently against the child or the applicant (see paragraph 31 above).

63. Finally, the Court reiterates that the competent national authorities are in principle better placed than an international judge to evaluate the evidence before them (see *Olsson v. Sweden (no. 2)*, 27 November 1992, § 90, Series A no. 250) and finds that the reasons adduced by the domestic courts were relevant and sufficient and that the authorities did not overstep their margin of appreciation in arriving at their decision (compare *Hokkanen*, cited above, § 64 and *Olsson (no. 2)*, cited above, § 91 and contrast *Olsson (no. 1)*, cited above, § 83).

64. Taking due account of all the circumstances of the case, the eventual decision to award custody to the father cannot be regarded as disproportionate to the legitimate aim of protecting the child’s best interests.

65. Accordingly, the Court considers that in the present case there has been no violation of Article 8 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicant also complained under various provisions of the Convention, as well as the Protocols thereto, about the non-enforcement of the Niš Municipal Court's interim custody order of 25 July 2005. Although the applicant raised this matter before the Constitutional Court, she did so only belatedly (see paragraph 35 above). The applicant did not comply with the procedural requirements of the domestic law and therefore failed to exhaust domestic remedies. Accordingly, this complaint must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the Supreme Court's judgment admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 7 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Luis López Guerra
President