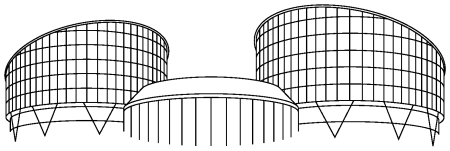

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KALOČAI SOBONJA v. SERBIA

(Application no. 19857/10)

JUDGMENT

STRASBOURG

4 July 2023

This judgment is final but it may be subject to editorial revision.

In the case of Kaločai Sobonja v. Serbia,

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

Faris Vehabović, *President*,
Iulia Antoanella Motoc,
Branko Lubarda, *judges*,
and Branimir Pleše, *Acting Deputy Section Registrar*,

Having regard to:

the application (no. 19857/10) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 29 March 2010 by a Serbian national, Ms Erika Kaločai Sobonja ("the applicant"), who was born in 1969, lives in Novi Sad and was represented by Ms D. Đapić, a lawyer practising in Sombor;

the decision to give notice of the complaints concerning the child custody dispute to the Serbian Government ("the Government"), represented by Ms V. Rodić, their Agent before the European Court of Human Rights at the relevant time, and subsequently by her successor in that office, Ms Z. Jadrijević Mladar, and to declare the remainder of the application inadmissible;

the parties' observations;

the Government not having objected to the examination of the application by a Committee;

Having deliberated in private on 13 June 2023,

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

SUBJECT MATTER OF THE CASE

I. CHILD CUSTODY PROCEEDINGS

1. On 8 July 1999 the applicant filed for dissolution of her marriage with K.T. and sole custody of their two children (a boy, M., born on 23 October 1996, and a girl, R., born on 7 July 1998). On 21 February 2001 the Sombor Municipal Court granted her claims. On 18 November 2002 and 8 October 2003 that judgment was upheld by the Sombor District Court and the Supreme Court respectively. The judgment was not enforced and M. continued to live with K.T.

2. On 19 February 2003 K.T. asked for revision of the judgment of 21 February 2001, seeking sole custody of M.

3. On 23 February 2004 the Municipal Court stayed the enforcement of the judgment of 21 February 2001 pending the outcome of the proceedings.

4. On 19 February 2008 the Municipal Court granted K.T.'s claims. The court awarded sole custody of M. to K.T. and granted contact rights to the applicant. The applicant appealed.

5. On 16 May 2008 the District Court quashed the judgment of 19 February 2008 in the part concerning the custody of M., noting, *inter alia*, that the Municipal Court had failed (i) to determine which party had better capacity to have custody of M. and (ii) to take into account where his best interests lay.

6. On 2 December 2008 the Municipal Court again granted sole custody of M. to K.T., referring to the former's wish to stay with his father and to the experts' opinion that granting custody to K.T. was in M.'s best interests. The subsequent appeals lodged by the applicant were to no avail. The final decision on the matter was taken by the Supreme Court on 2 September 2009.

7. On 11 June 2009 the Municipal Court discontinued the enforcement proceedings in respect of the judgment of 21 February 2001.

II. THE APPLICANT'S CONTACT WITH M.

8. According to the judgment of 2 December 2008, on several occasions prior to 10 March 2005, the applicant's contact with M. lasted no more than two to three hours. She could see her son several times a year. In addition to that, on 17 and 24 December 2005, between 26 and 31 December 2005, between 5 and 13 January 2006 and on 7 January 2008 M. stayed overnight in the applicant's house, having obtained K.T.'s consent. Thereafter, M. visited the applicant only once, in August 2009.

9. According to the Government, the applicant worked as a secretary at the school which M. attended and was able to see her son on a daily basis.

III. CRIMINAL PROCEEDINGS AGAINST K.T.

10. On 22 December 2005 the Municipal Court found K.T. guilty of child abduction in respect of M., as regards the period between 18 November 2002 and 22 December 2005, and sentenced him to six months' imprisonment, suspended for three years. His conviction became final on 28 March 2006.

IV. APPLICATION TO THE CONSTITUTIONAL COURT

11. On 6 November 2009 the applicant lodged an appeal with the Constitutional Court of Serbia. She sought redress for: (i) non-enforcement of the judgment of 2001; (ii) the excessive length of the two sets of custody proceedings; and (iii) the State's failure to ensure her contact with M. and enable her to exercise her parental rights between 1998 and 2009.

12. On 14 July 2011 the Constitutional Court dismissed the applicant's complaint about the length and fairness of the custody proceedings as being manifestly ill-founded and dismissed the complaint about the allegedly excessive length of the first set of custody proceedings, taken together with the ensuing enforcement proceedings, as out of time. It further summarily

dismissed the applicant's complaint of a violation of her parental rights, as "she had failed to submit constitutional reasons to claim a breach of those rights".

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

13. The applicant complained under Article 8 that the national authorities had failed (i) to ensure her contact with her son and (ii) to enforce the judgment of 21 February 2001 in her favour, which had ultimately led to the adoption of a new judgment awarding custody of her son to her ex-husband.

A. Admissibility

1. The parties' submissions

14. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of her complaints. In particular, before to the adoption of the judgment of 21 February 2001 in her favour, she should have asked for an interim measure to expedite and facilitate her contacts with M. The Government further noted that the applicant's appeal had been dismissed by the Constitutional Court.

15. The applicant argued that, by lodging a constitutional appeal, she had duly complied with the admissibility requirements set forth in the Convention.

2. The Court's assessment

(a) Compatibility *ratione temporis*

16. The Court observes that, in accordance with the generally accepted principles of international law, a Contracting Party is only bound by the Convention in respect of events occurring after its entry into force. It further notes that the Convention entered into force in respect of Serbia on 3 March 2004 and that some of the events referred to in the application in the present case did indeed take place before that date. The Court therefore has jurisdiction *ratione temporis* to examine the applicant's complaints only in so far as they concern events that occurred on or after 3 March 2004. It will nevertheless, for reasons of context and while examining the situation complained of as a whole, also take into account any and all relevant events prior to that date (see, for example, *Milanović v. Serbia*, no. 44614/07, § 78, 14 December 2010, with further references).

(b) The Government's objection of non-exhaustion of domestic remedies

17. The Court reiterates that, a constitutional appeal has, in principle, been considered by the Court as an effective remedy within the meaning of Article 35 § 1 in respect of all applications introduced against Serbia as of 7 August 2008 (see, among other authorities, *Negovanović and Others v. Serbia*, nos. 29907/16 and 3 others, § 67, 25 January 2022). It observes that in the constitutional proceedings the applicant sought, *inter alia*, redress for non-enforcement of the judgment awarding her custody of her son and for the State's failure to ensure her contact with him. The Court accordingly accepts that the applicant brought the substance of her complaints to the attention of the Constitutional Court, giving it an opportunity to prevent or to put right the alleged violations. Furthermore, the Constitutional Court itself did not reject the applicant's complaints on the grounds that she had not exhausted any other, prior, effective legal avenue. It would hence also be unduly formalistic for the Court to now hold otherwise (see paragraph 12 above; see also, *mutatis mutandis*, *Dragan Petrović v. Serbia*, no. 75229/10, §§ 55 and 57, 14 April 2020, and *Negovanović and Others*, cited above, § 67).

18. Regard being had to the above, the Court dismisses the Government's objection regarding the requirement to exhaust domestic remedies.

(c) Conclusion

19. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

20. The applicant maintained her complaints.

21. The Government did not discern any violation of the applicant's rights. In their opinion, the national courts had resolved the custody dispute in full compliance with the Convention standards, having based their decisions on the best interests of the child. The proceedings in question had been complex and of a sensitive nature. The courts had carefully assessed the situation. They had heard both parties and also experts and witnesses. The domestic authorities had made every effort to ensure the applicant's contact with the child.

2. The Court's assessment

22. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other

authorities, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 59, Series A no. 130, and *Zorica Jovanović v. Serbia*, no. 21794/08, § 68, ECHR 2013).

23. Even though the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, among other authorities, *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *Zorica Jovanović*, cited above, § 69). These include an obligation for the national authorities to take measures with a view to reuniting parents with their children and to facilitate such reunions (see, for example, *V.A.M. v. Serbia*, no. 39177/05, § 132, 13 March 2007). This also applies to cases where contact and custody disputes concerning children arise between parents and/or other members of the children's family (see *Gluhaković v. Croatia*, no. 21188/09, § 56, 12 April 2011).

24. The Court has already established that ineffective, and, in particular, delayed, conduct of custody and contact proceedings may give rise to a breach of the positive obligations under Article 8 (see *Eberhard and M. v. Slovenia*, nos. 8673/05 and 9733/05, § 127, 1 December 2009, and *S.I. v. Slovenia*, no. 45082/05, § 69, 13 October 2011). In cases concerning a person's relationship with his or her child, it is the duty of the judicial authorities to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. This duty, which is decisive in assessing whether a case has been heard within a reasonable time as required by Article 6 § 1 of the Convention, also forms part of the procedural requirements implicit in Article 8 (see, for example, *Süß v. Germany*, no. 40324/98, § 100, 10 November 2005, and *Strömblad v. Sweden*, no. 3684/07, § 80, 5 April 2012).

25. Having examined the parties' submissions on the matter, the Court is unable to accept that the decision-making process in the present case ensured due respect for the applicant's interests safeguarded by Article 8. In this connection, it refers to the length of the child custody proceedings. The judicial determination of the dispute lasted over ten years, of which five and a half years fall within the Court's competence *ratione temporis* (see paragraphs 1 and 6 above). In the absence of any evidence that the applicant contributed to any delay in the proceedings, the Court considers that the national judicial authorities failed to comply with their duty to act swiftly and to exercise exceptional diligence when examining her case. The protracted examination of the case resulted in a *de facto* determination of the matter and prevented the applicant from developing a meaningful relationship with her son.

26. During the period at issue the applicant was also unable to see her son on a regular basis, with most of their instances of contact lasting no more than two hours (see paragraph 8 above).

27. The Court is lastly mindful of the fact that the domestic authorities' task was made difficult by the strained relationship within the family.

However, a lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their obligations under Article 8 (see *Zawadka v. Poland*, no. 48542/99, § 67, 23 June 2005). For years, the domestic authorities failed to take sufficiently effective action in response to K.T.'s obstructive behaviour and to reconcile the conflicting interests of the parties concerned. While it is true that K.T. was convicted of child abduction in 2006 (see paragraph 10 above), such a measure on the part of the authorities, in the absence of any positive steps to ensure the applicant's access to her son, cannot be seen as an adequate response to the urgency of the situation.

28. Regard being had to the above, the Court concludes that the Serbian authorities failed to take all necessary steps that could reasonably be expected in the given circumstances to ensure effective enjoyment by the applicant of her parental rights or to otherwise facilitate her reunion with her son. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant also complained that the second set of custody proceedings had been in breach of the reasonable-time requirement set out in Article 6. Having regard to the facts of the case, the submissions of the parties and its findings above, the Court considers that it has examined the main legal question raised in the present application and that there is no need to give a separate ruling on the admissibility and merits of this complaint (see, *mutatis mutandis, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

31. The Government contested this claim.

32. The Court considers that the applicant has certainly suffered some non-pecuniary damage. Having regard to the nature of the violation found in the present case and making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 4,000 in this connection, plus any tax that may be chargeable on that amount.

33. The applicant also claimed 365,200 Serbian dinars (RSD) and RSD 107,500 for the costs and expenses incurred before the domestic courts and the Court respectively. She also sought reimbursement of EUR 840 in respect of translation costs.

34. The Government considered the amounts claimed in respect of the domestic proceedings excessive and unsubstantiated, leaving the remaining claims to the Court's discretion.

35. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and were reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500 covering costs under all heads.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 of the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to rule separately on the admissibility or the merits of the complaint under Article 6 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Branimir Pleše	Faris Vehabović
Acting Deputy Registrar	President