



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

SECOND SECTION

CASE OF KAROUSSIOTIS v. PORTUGAL

(Application no. 23205/08)

JUDGMENT
[Extracts]

STRASBOURG

1 February 2011

FINAL

01/05/2011

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Karoussiotis v. Portugal,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos,

Guido Raimondi, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 11 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 23205/08) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Ms Diana Karoussiotis (“the applicant”), on 14 May 2008.

2. The applicant was represented by Mr U. Völlings, a lawyer practising in Cologne (Germany). The Portuguese Government (“the Government”) were represented, until 23 February 2010, by their Agent, Mr J. Miguel, Deputy Attorney-General, and thereafter by Ms M.F. Carvalho, also Deputy Attorney-General.

3. Relying on Articles 6 § 1, 8 and 13 of the Convention, the applicant alleged that there had been a violation of her right to respect for family life and to obtain a judicial decision within a reasonable time.

4. On 21 December 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. The German Government, having been informed of their right to participate in the proceedings (Article 36 § 1 of the Convention), did not express their wish to exercise that right.

6. The respondent Government filed observations on the case. The applicant filed her observations and claim for just satisfaction after the time-limit. As the applicant’s counsel did not provide any explanation for the failure to meet the time-limit, on 8 July 2010 the Chamber decided, under Rules 38 § 1 and 60 of the Rules of Court, not to include those documents in the case file.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1980 and lives in Krefeld (Germany).

8. On 25 August 2001 she gave birth to a child in Germany whose father, A., is a Portuguese national.

9. In October 2001 the child's father was sentenced by the court of Krefeld to five years' imprisonment for drug trafficking. His exclusion from Germany having been ordered, he was deported to Portugal in November 2004.

10. The applicant and the child's father separated while he was in prison.

11. In January 2005, accompanied by a paternal uncle, the child went to Portugal to visit his father.

12. On 14 January 2005 the applicant travelled to Portugal to collect her child. She returned alone to Germany on 22 February 2005.

A. The civil proceedings for the child's return

13. In March 2005 the applicant lodged, with the Federal Attorney-General, a request for the child's return to Germany in accordance with the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ("the Hague Convention").

14. On 27 October 2005 the German public prosecution service sent a request to the Portuguese authorities to obtain the child's return, alleging that the child had been wrongfully removed from Portugal in breach of Article 3 of the Hague Convention.

15. The request was served on the child's father, who opposed the return. A. denied, in particular, that the child's removal had been wrongful and stated that the decision for the child's trip had been taken by both parents. He explained that the child's movement had been decided by both parents because the child's mother had envisaged settling in Portugal.

16. On 24 January 2006 the Braga Family Court gave a judgment to the effect that the child should not be returned to Germany, finding that the child's retention in Portugal was not wrongful within the meaning of Article 3 of the Hague Convention or of Article 11 of Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Council Regulation no. 2201/2003").

17. On 2 February 2006 the applicant appealed against the judgment before the Guimarães Court of Appeal arguing, among other things, that she had not been heard by the Braga Family Court.

18. In a judgment of 21 June 2006, the Guimarães Court of Appeal granted the applicant's request. Annuling the judgment of the Braga Family Court, the Court of Appeal referred the case back to it, directing in particular that it should hear the child's mother.

19. The child's father appealed against the judgment of the Guimarães Court of Appeal before the Supreme Court, which dismissed his appeal on 7 November 2006.

20. On 15 August 2007, pursuant to an international letter of request from the Braga Family Court dated 14 February 2007, the mother was heard by the Krefeld court.

21. On 13 September 2007 the Krefeld court reported back to the Braga Family Court, sending the record of the hearing.

22. In a judgment of 21 May 2008, the Braga Family Court again rejected the request for the child's return, finding that the child's removal had not been wrongful as it had been agreed between the two parents.

23. On 12 June 2008 the applicant lodged an appeal before the Guimarães Court of Appeal. Her appeal was dismissed by a judgment of 9 January 2009.

24. In its judgment, the Court of Appeal stated:

"... it must be concluded that from the time when the mother of L. returned to Germany without her son, he began to be wrongfully retained in Portugal. Her return request showed, categorically, that she did not wish her son to remain in Portugal."

25. Even though the Court of Appeal recognised that the case concerned a situation of wrongful retention of a child, under the terms of Council Regulation no. 2201/2003, it found it preferable for the child to remain in Portugal for the following reasons:

"The facts of the case show that the child, who has been looked after by his great-grandmother since March 2008, has a particular emotional attachment to her, seeing in her a mother figure, to the point of almost forgetting the image of his mother. His great-grandmother is the person who takes care of him day-to-day, with tenderness ... The mother very rarely calls her child, and when she does so, the child does not consider it very important. The child sees his great-grandmother, at the current stage of his development, as a figure of authority who brings him security and tranquillity, as shown in his behaviour at school and in his relationships with others. He is content in the environment in which he lives and has been very successful at school. Accordingly, to change his environment and take him away from the person to whom he relates would risk causing him psychological harm ...

All the conditions are thus met for the respondent State to prevent the child's return, in the light of the child's best interests, which must take precedence over the free movement of children – even if this is done safely – in accordance with Article 13 (b) of the Hague Convention [on the Civil Aspects of International Child Abduction] of 1980. Taking the view that a return to Germany would be harmful for the child, the respondent State has acted in accordance with Article 13 of the Hague Convention."

B. The proceedings in respect of parental responsibilities

26. On 2 March 2005 the public prosecutor at the Braga court opened proceedings in respect of parental responsibilities (*regulação do poder paternal*) *vis-à-vis* the child. Custody was provisionally awarded to the father.

27. On 3 October 2005 the Braga Family Court held its first conciliation hearing. As they failed to reach an agreement, the parents were requested to submit pleadings.

28. On 19 October 2005 the applicant filed her pleadings. Submitting that the child's retention in Portugal was wrongful, the applicant argued that the Braga Family Court lacked territorial jurisdiction, as in her view the German courts had jurisdiction in accordance with Council Regulation no. 2201/2003.

29. The child's father, in his pleadings of 21 October 2005, requested the court to award him custody.

30. On 27 October 2005 the public prosecutor at the Braga Family Court submitted that the decision should be deferred until the completion of the proceedings before the German courts concerning the child's return.

31. In a decision of 31 July 2006, the Braga Family Court amended the provisional allocation of parental authority in respect of the child, transferring it to the child's great-grandmother.

32. On 4 January 2008 the applicant (represented by her lawyer) and the child's father jointly requested the Braga Family Court to award custody of the child to the applicant.

33. On 30 January 2008 the applicant requested the court to speed up the proceedings.

34. On 27 February 2008 the child's father was remanded in custody in connection with an investigation into false imprisonment, extortion, drug trafficking, unlawful carrying of a weapon and theft.

35. On 10 March 2008 the applicant reiterated her request to the Braga Family Court to obtain parental authority of the child. In a decision of 4 April 2008, the court dismissed the applicant's request, indicating that the proceedings had been stayed.

36. On 15 May 2008 the child's great-grandmother requested the court to grant her permanent custody of the child.

37. Following the judgment of the Guimarães Court of Appeal of 9 January 2009, the Braga Family Court decided on 3 May 2009 that the proceedings in respect of parental responsibilities should be resumed.

38. On 26 January and 15 May 2009 the applicant requested the Braga Family Court to award her custody of the child, invoking her agreement with the child's father.

39. By an international letter of request, the court sought information from the German social services about the applicant's social and financial circumstances.

40. On 12 October 2009 the Braga Family Court received the reports that had been requested from the German authorities. On 20 October 2009 it received a report from the Portuguese social services showing the child's general situation of well-being in Portugal.

41. To date, the proceedings are still pending before the Braga Family Court.

C. The application for infringement proceedings before the European Commission

42. On 2 April 2008 the applicant filed a complaint with the European Commission alleging an infringement of Council Regulation no. 2201/2003. She complained about the excessive length of the proceedings before the Braga Family Court, relying on Article 11 of the Regulation.

43. On 15 September 2008 the applicant sent various documents in support of her application to the European Commission.

44. On 7 May 2009 the Commission's Directorate-General for Justice, Freedom and Security asked the applicant for additional information concerning the proceedings for the return of the child on grounds of wrongful removal and retention. On 15 June 2009 the applicant sent that information to the Directorate-General, submitting a copy of the Guimarães Court of Appeal's judgment of 9 January 2009.

45. According to the most recent information from the applicant, dating from 2 July 2010, the proceedings thus initiated before the European Commission were still pending.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

...

B. Relevant European Union law

...

2. Filing of a complaint with the European Commission

48. The relevant part of Article 17 of the Treaty on European Union provides as follows:

"1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application

of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements."

49. Article 258 of the Treaty on the Functioning of the European Union (formerly Article 226 of the Treaty establishing the European Community) provides as follows:

"If the Commission considers that a member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

50. In addition, the relevant part of Article 260 of the Treaty on the Functioning of the European Union (formerly Article 228 of the Treaty establishing the European Community) provides as follows:

"3. ... If the Court [of Justice of the European Union] finds that there is an infringement it may impose a lump sum or penalty payment on the member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment."

51. The explanatory note accompanying the complaint form¹ to be addressed to the European Commission for non-compliance with European Union law explains as follows:

"Anyone may lodge a complaint with the Commission against a member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a member State. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

...

1. See http://ec.europa.eu/community_law/your_rights/your_rights_forms_en.htm

A. Admissibility

...

2. Objection relating to admissibility under Article 35 § 2 (b) of the Convention

59. The Government raised a further objection to the admissibility of the application under Article 35 § 2 (b) of the Convention, arguing that the applicant had submitted the same application to the European Commission.

60. The Court observes that the applicant, on 2 April 2008, filed a complaint with the European Commission in respect of the same facts.

61. The relevant parts of Article 35 § 2 (b) of the Convention read as follows:

“2. The Court shall not deal with any application submitted under Article 34 that

...

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

62. The Court reiterates that Article 35 § 2 (b) seeks to avoid a plurality of international proceedings relating to the same cases (see *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, Commission decision of 6 July 1992, Decisions and Reports (DR) 73, p. 220; *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006; and *Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002). Under the Convention, the Court cannot therefore deal with any application which has already been investigated or is being investigated by an international body (see *Celniku v. Greece*, no. 21449/04, § 39, 5 July 2007). The term “another procedure” refers to judicial or quasi-judicial proceedings similar to those set up by the Convention (see *Lukanov v. Bulgaria*, no. 21915/93, Commission decision of 12 January 1995, DR 80-A, p. 108). The Court must therefore determine whether the nature of the supervisory body, the procedure followed thereby and the effects of its decisions are such that Article 35 § 2 (b) precludes the Court’s jurisdiction (see, in respect of the “1503 procedure” before the United Nations Commission on Human Rights, *Mikolenko v. Estonia* (dec.), no. 16944/03, 5 January 2006, and *Celniku*, cited above, §§ 39-41; for other United Nations bodies see the decisions in *Folgerø and Others*, cited above; *Smirnova*, cited above; and *Malsagova and Others v. Russia* (dec.), no. 27244/03, 6 March 2008; for a complaint before the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, see *Zagaria v. Italy* (dec.), no. 24408/03, 3 June 2008, and *De Pace v. Italy*, no. 22728/03, §§ 25-27, 17 July 2008).

63. The Court must therefore determine whether, in the present case, the application is “substantially the same” as the matter submitted to the European Commission. An application is considered “substantially the same” where it concerns the same persons, facts and complaints (see *Pauger v. Austria*, no. 24872/94, Commission decision of 9 January 1995, DR 80-A, p. 170, and contrast *Folgerø and Others*, decision cited above).

64. In the present case, there is no doubt that the applicant has submitted the same facts and complaints to both the Court and the European Commission.

65. It should now be determined whether the procedure before the European Commission is similar, in its procedural aspects and potential effects, to the individual applications provided for in Article 34 of the Convention.

66. The European Commission, the executive organ of the European Union, also “ensure[s] the application of the Treaties, and of measures adopted by the institutions pursuant to them”, as provided by Article 17 of the Treaty on European Union.

67. Anyone may lodge a complaint with the European Commission against a member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of European Union law. The complaint may be submitted by ordinary letter or using the form accessible on the European Union’s Internet server¹.

68. To be admissible, a complaint has to relate to an infringement of Community law by a member State. According to the settled case-law of the Court of Justice of the European Union, the European Commission has the discretion to decide whether or not infringement proceedings should be opened and then whether or not to refer the case to the Court of Justice of the European Union in accordance with Article 258 of the Treaty on the Functioning of the European Union (formerly Article 226 of the Treaty establishing the European Community), which provides that “[i]f the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”.

69. As was stated by the Court of First Instance of the European Communities² in the judgment *Syndicat Départemental de Défense du Droit des Agriculteurs (SDDDA) v. Commission of the European Communities*, “[t]he Commission is not bound to initiate an infringement procedure against a member State; on the contrary, it has a discretionary power of assessment, which rules out any right for individuals to require it to adopt a

1. See: http://ec.europa.eu/community_law/your_rights/your_rights_forms_en.htm

2. Known as the “General Court” since the entry into force of the Treaty of Lisbon.

particular position” (Case T-47/96 [1996] European Court Reports II-1559, § 42 (12 November 1996)).

70. The sole purpose of the “infringement proceedings” or “pre-litigation phase” is to enable the member State to conform voluntarily with the requirements of European Union law.

71. There are several formal stages in the infringement procedure. The Commission may first have to carry out some investigation, as is the case when infringement procedures are launched further to a complaint. The letter of formal notice represents the first stage in the pre-litigation procedure, during which the Commission requests a member State to submit its observations on an identified problem regarding the application of European Union law within a given time-limit. The purpose of the reasoned opinion is to set out the Commission’s position on the infringement and to determine the subject matter of any action, requesting the member State to comply within a given time-limit. The reasoned opinion must give a coherent and detailed statement of the reasons that have led the Commission to conclude that the member State concerned has failed to fulfil one or more of its obligations under the Treaties.

72. Where a case is referred to the Court of Justice of the European Union, Article 260 of the Treaty on the Functioning of the European Union provides that if an infringement is found the court “may impose a lump sum or penalty payment on the member State concerned not exceeding the amount specified by the Commission”, in order to compel the State to comply with European Union law.

73. The explanatory note accompanying the complaint form to be addressed to the European Commission (see paragraph 51 above) indicates that “any finding of an infringement by the Court of Justice [of the European Union] has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts”. For that reason the note adds: “[c]omplainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of.”

74. While the Court of Justice of the European Union adjudicates upon costs (Article 38 of its Statute), it cannot award individual reparation, and individual actions for damages must therefore be brought before the national courts (see the judgment of the Court of Justice of the European Union in *Brasserie du Pêcheur SA v. Federal Republic of Germany* and *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, Joined Cases C-46/93 and C-48/93 (5 March 1996)).

75. Having regard to the foregoing, the Court takes the view that the applicant’s European Commission procedure is not similar, in either its

procedural aspects or its potential effects, to the individual application provided for in Article 34 of the European Convention on Human Rights.

76. The Court thus concludes that where the European Commission decides, as in the present case, on a complaint by a private individual, this does not constitute a “procedure of international investigation or settlement”, within the meaning of Article 35 § 2 (b) of the Convention. The objection raised by the Government must therefore be dismissed.

77. Lastly, the Court finds that the complaints raised by the applicant are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and no other ground for declaring them inadmissible has been established. They should therefore be declared admissible.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

2. *Declares* the application admissible;

...

Done in French, and notified in writing on 1 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President