



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

FIRST SECTION

CASE OF KHANAMIROVA v. RUSSIA

(Application no. 21353/10)

JUDGMENT

STRASBOURG

14 June 2011

FINAL

14/09/2011

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

In the case of Khanamirova v. Russia,

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

Nina Vajić, *President*,

Anatoly Kovler,

Peer Lorenzen,

Elisabeth Steiner,

Khanlar Hajiyeu,

George Nicolaou,

Mirjana Lazarova Trajkovska, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 24 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 21353/10) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Diana Guseynbekovna Khanamirova (“the applicant”), on 11 March 2010.

2. The applicant was represented by Ms M. Mamedova, a lawyer practising in the town of Makhachkala, the Republic of Dagestan. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that the continuous failure of the authorities to enforce the domestic judgment granting her custody of her son breached her rights under the Convention.

4. On 11 June 2010 the President of the First 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1987 and lives in the village of Gereykanova, the Republic of Dagestan.

6. In November 2006 the applicant got married to F.Kh. In September 2007 she gave birth to their son, A. The applicant, her son and husband lived at his parents' house in the village of Stepnoy near the town of Makhachkala.

7. In February 2008 the family's relationship deteriorated and the applicant left the house. According to her, her husband and his parents forced her to leave and did not let her take her son, then aged some five months.

A. Court proceedings concerning the applicant's request for divorce and custody of her son

8. Thereafter the applicant applied to a court, seeking to divorce her husband and asking for alimony payments and custody of her son.

9. On 12 August 2008 the Leninskiy District Court of Makhachkala examined the applicant's case. The court essentially granted the applicant's claims, having pronounced the divorce, awarded the applicant alimony payments and custody of her son.

10. On 14 November 2008 the Supreme Court of the Republic of Dagestan (the Supreme Court) upheld the judgment of 12 August 2008.

B. Enforcement proceedings of the judgment of 12 August 2008

1. First round of the enforcement proceedings

(a) Writ of execution and the bailiffs' attempts to locate the applicant's former husband

11. On 5 December 2008 the Leninskiy District Court of Makhachkala issued a writ of execution, which quoted the ruling of the judgment of 12 August 2008 as follows:

“[The court decided that] the place of residence of child Khanamirov Anrid Faridovich, born on 20 September 2007, should be with [the applicant].”

The writ specified that the applicant's former husband's resided in the village of Stepnoy, near Makhachkala.

12. The applicant applied for enforcement within a few days and in December 2008 the bailiffs of the Leninskiy District of Makhachkala of the Department of the Federal Court Bailiffs Service of the Republic of Dagestan opened enforcement proceedings in this connection.

13. Having learned that in the meantime the applicant's former husband had moved to another house belonging to his family and identified the actual place of his residence in the village of Magaramkent, on 18 February 2009 the bailiffs closed the enforcement proceedings and transferred the

case to the Magaramkentskiy District Department of the Federal Service of Court Bailiffs of the Republic of Dagestan.

(b) First attempt to enforce the judgment of 12 August 2008

14. On 5 March 2009 the competent local bailiffs opened the enforcement proceedings.

15. On an unspecified date the bailiffs informed the applicant's former husband of his duty to hand the child over to the applicant and set a five-day time-limit for for him to comply with the request voluntarily. It appears that the applicant's former husband did not comply with the bailiffs' request and refused to transfer the child to the applicant voluntarily.

16. On 3 April 2009 a bailiff, along with the applicant, paid a visit to the home of the applicant's former husband and his parents. In the presence of a paediatrician, a psychologist, a representative of the local child welfare service and two attesting witnesses the bailiff physically removed the applicant's son from his father and handed him over to the applicant. The child was seriously stressed during the procedure and resisted.

17. According to the bailiff's report of 3 April 2009, the applicant had "refused to take her son and to enforce the judgment of 12 August 2008". The applicant, along with her former husband, the paediatrician, the psychologist, the representative of the local child welfare service and two attesting witnesses, signed the bailiff's report and left the house.

18. It appears that the applicant still wanted to enforce the judgment but objected to the manner in which the bailiff had acted on 3 April 2009.

(c) Examination of the bailiffs' request to terminate the enforcement proceedings in the applicant's case

19. The bailiffs decided that the applicant did not want to pursue the enforcement proceedings and on 6 April 2009 they applied to the Magaramkentskiy District Court of the Republic of Dagestan (the Magaramkentskiy District Court) to have the enforcement proceedings terminated.

20. On 16 October 2009 the Magaramkentskiy District Court examined the bailiffs' request. At the hearing the applicant continued to insist on the transfer of the child to her and asked the court to reject the bailiffs' request. The court noted the applicant's apparent waiver of her rights under the judgment of 12 August 2008 had been manifested by her refusal to take her son on 3 April 2009 and terminated the enforcement proceedings on the basis of the provisions of the relevant domestic law concerning the enforcement of monetary debts and debts in kind (Article 439 § 1 of the Code of Civil Procedure, see the relevant domestic law section below). It does not appear that the domestic law provided for special rules as regards the enforcement of custody claims.

21. On the applicant's appeal on 18 November 2009 the Supreme Court upheld the decision of 16 October 2009.

(d) The applicant's attempt to challenge the bailiff's report of 3 April 2009

22. In a parallel set of proceedings the applicant challenged the actions of the bailiffs and the report of 3 April 2009, alleging that the bailiff who had attempted to carry out the enforcement had deceived her into signing it. According to the applicant, the bailiff had only shown her the second page of the report and had told her that she had been required to sign it in order to be allowed to take her son. Once she had signed the report, the bailiff had allegedly refused to enforce the judgment of 12 August 2008.

23. On 9 June 2009 the Magaremkentskiy District Court rejected the applicant's complaint. The court questioned the bailiff, the paediatrician, the psychologist, the representative of the local child welfare service and two attesting witnesses, who all gave an essentially similar description of the events of 3 April 2009. The witnesses stated that the bailiff had taken the child from his father and had given him to the applicant, but the child had resisted, cried, pushed himself away from the applicant and run to his father. The applicant had stated that the child would be better off living with his father and had refused to take him. The witnesses also testified that the applicant had read all the pages of the report before signing it. The court checked and disproved the applicant's allegations that she had been deceived by the bailiff. It then concluded that both the report of 3 April 2009 and the bailiff's actions had been lawful.

24. On 26 August 2009 the Supreme Court upheld the judgment of 9 June 2009.

(e) Supervisory review proceedings in respect of the decision to terminate the enforcement proceedings

25. On an unspecified date the applicant filed a request with the Supreme Court to review the decisions of 16 October 2009 and 18 November 2009 by way of supervisory review.

26. On 26 March 2010 a judge of the Supreme Court granted the applicant's request and reopened the proceedings.

27. On 10 June 2010 the Presidium of the Supreme Court quashed the decisions of 16 October 2009 and 18 November 2009. The Court considered that under the domestic law the bailiffs had had no right to request the court to terminate the enforcement proceedings and that such a request could only have been lodged by the applicant herself. It further stated that under Article 439 of the Code of Civil Procedure the applicant would have had to explicitly waive her claims in court. The court noted that these two conditions had not been met and remitted the bailiffs' request to terminate the enforcement proceedings for a fresh examination at first instance.

28. On 14 September 2010 the Magaramkentskiy District Court examined and rejected in full the bailiffs' request to terminate the enforcement of the judgment of 12 August 2008, reiterating the conclusions reached by the Presidium of the Supreme Court.

2. Second round of the enforcement proceedings

29. On 7 October 2010 the bailiffs opened the enforcement proceedings with regard to the judgment of 12 August 2008. The applicant's former husband's place of residence was located in the village of Magaramkent, the Republic of Dagestan. The latter informed the bailiffs that the child was staying with his parents.

30. On 9 December 2010 the bailiffs requested the Leninskiy District Court of Makhachkala to clarify the manner in which the judgment of 12 August 2008 should be enforced. The bailiffs claimed that the terms of the writ of execution were too vague.

31. On 25 January 2011 the Leninskiy District Court of Makhachkala issued a decision specifying that the judgment should be enforced by taking the applicant's child from his father and any third persons and by handing him over to his mother.

32. On 28 January 2011, the date on which the Government filed its latest set of observations, the judgment of 12 August 2008 was still unenforced.

II. RELEVANT DOMESTIC LAW

33. The Federal Law "On Enforcement Proceedings" of 2 October 2007 provides that the bailiff must issue a decision to open enforcement proceedings or to refuse to do so within three days of the receipt of the writ of execution (section 30).

34. The creditor, the debtor and the bailiff can request the court which issued the writ of execution to clarify its provisions and the manner of its enforcement (section 32 (1)).

35. The court shall terminate enforcement proceedings in the event of: (a) the death of the creditor or the debtor in the enforcement proceedings; (b) the loss of an opportunity to enforce the writ of execution obliging the debtor to take certain measures (or refrain from taking them); (c) the creditor's refusal to take the object retrieved from the debtor with a view to enforcing the writ of execution, requesting the transfer of the object to the creditor; and (d) in other cases provided for by law (section 43).

36. On termination of the enforcement proceedings the writ of execution is to be kept in the case file and cannot be submitted for execution again (section 44 (5)).

37. If the debtor fails to fulfil the obligations contained in the writ of execution within the time-limit established for doing so voluntarily the

bailiff shall recover an execution fee from the debtor and set up a new time-limit for the execution of those obligations (section 105 (1)). If the debtor does not fulfil the obligations within the newly established time-limit, the bailiff shall impose a fine on the debtor (section 105 (2)).

38. The court must examine complaints about the decisions, actions or inaction of bailiffs within a ten-day time-limit (section 128(4)).

39. The Code of Civil Procedure of 14 November 2002, in force from 1 February 2003, provides that enforcement proceedings can be terminated by the court in the circumstances envisaged by the Federal Law “On Enforcement Proceedings” (Article 439 § 1). If the creditor renounces the debt or the parties reach a friendly settlement, the parties’ statements to that effect must be included in the minutes of the hearing and signed by the parties. When the renouncement of the debt or a friendly settlement are made in writing those documents must be attached to the case file (Article 173 § 1). The court must inform the parties about the consequences of the renouncement of the debt and the conclusion of the friendly settlement agreement (Article 173 § 2).

40. The court should examine a complaint challenging the decision, action or inaction of a state official within a ten-day period (Article 257 § 1).

41. Once terminated, enforcement proceedings cannot be reopened (Article 439 § 3).

42. The court should resolve issues of suspension and termination of enforcement proceedings within ten days (Article 440 § 1).

43. The Order of the Judicial Department of the Supreme Court of Russia of 29 April 2003 no.36 “On the Adoption of the Instruction on Court Proceedings in a District Court” provides that a court should issue a writ of execution of a court decision no later than one working day following the entry into force of that decision (section 9.3.2).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant complained that the authorities had failed to enforce the judgment granting her custody of her son. The Court will examine this grievance under Article 8 of the Convention, which reads, in so far as relevant, as follows:

“1. Everyone has the right to respect for his 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 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.”

A. The parties’ submissions

45. The Government submitted that the enforcement of the judgment of 12 August 2008 had been terminated due to the applicant’s refusal to take her son. They argued that the writ of execution of the judgment of 12 August 2008 contained no reference to the object of the enforcement, making it impossible to apply any compulsory enforcement measures to the applicant’s former husband or to hold him responsible for non-enforcement of the judgment. They also stressed the fact that decisions terminating the enforcement proceedings had been quashed and the enforcement of the judgment of 12 August 2008 has been resumed. The Government also referred to the practical difficulties involved in the enforcement because of the need to minimize any possible negative psychological effects on the child as a result of his separation from the family of his father. In their additional observations the Government referred to the best interests of the child and argued that the transfer of the child to the applicant could not take place immediately and could require the taking of preparatory measures. The Government submitted that the applicant’s complaint was premature.

46. The applicant disagreed with the Government and stated that the unjustified delay in the enforcement of the judgment of 12 August 2008 had already resulted in a situation in which the actual transfer of the child would cause intense psychological suffering both to her and the child.

B. The Court’s assessment

1. Admissibility

47. The Court notes that the application 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.

2. Merits

(a) General principles

48. The Court reiterates that the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the

public authorities. There may be in addition positive obligations inherent in an effective “respect” for family life (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). In cases where contact and residence disputes concerning children arise between parents and/or other members of the children’s family (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Zawadka v. Poland*, no. 48542/99, § 55, 23 June 2005), the Court’s case-law has consistently held that this Convention provision includes, among other things, a right for a parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such measures.

49. At the same time, the national authorities’ obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. Whilst the national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, as should, more particularly, the best interests of the child and his or her rights under Article 8 of the Convention (see *P.P. v. Poland*, no. 8677/03, § 82, 8 January 2008; *Hokkanen*, cited above, § 53; and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 96, ECHR 2000-I). The adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent (see *P.P. v. Poland*, cited above, § 83).

(b) Application in the present case

50. The Court notes, firstly, that it was common ground between the parties that the tie between the applicant and her son constituted “family life” for the purposes of that provision. The Court next notes that the judgment of the Leninskiy District Court of Makhachkala of 12 August 2008 giving custody of A., then aged only one year and two months, to the applicant remained unenforced at least until 28 January 2011 (see paragraph 32). Accordingly, it has to be determined whether the national authorities took all the necessary steps to facilitate the enforcement they can reasonably have been expected to take in the special circumstances of the case.

51. In this connection, the Court notes that the lack of action on the part of the competent authorities resulted in serious unjustified delays in the proceedings. Thus, instead of issuing the applicant with the writ of execution within one day (see paragraph 43), it took the first-instance court almost two weeks to do so (see paragraph 11). Further, despite the fact that

the applicant applied to the bailiffs for assistance with the enforcement of the judgment within a few days, it took them almost two months to locate the applicant's former husband and her son, even though they had made no attempts to hide themselves, living openly in one of the houses belonging to the family, (see paragraphs 12 and 13) and a further two weeks to transfer the case to the competent bailiffs (see paragraphs 13 and 14). The Court finds that in the circumstances of the case the task of finding the applicant's child was rather simple and should not have taken so much time.

52. Next, as regards the period from 6 April 2009, when the bailiffs asked the first-instance court to terminate the enforcement proceedings, to 14 September 2010, when the courts again decided to go on with the enforcement, the Court finds that the resulting delay was in its entirety attributable to the authorities. In this respect, the Court cannot accept the Government's reference to the applicant's refusal to take the child on 3 April 2009 as an excuse for the actions of the bailiffs and the courts. It takes into account the fact that the removal of the child had taken place in the house of the applicant's former husband's parents, that for almost one year before the events of 3 April 2009 the applicant's child had hardly seen her at all (see paragraphs 15 and 16) and that the child had an openly negative reaction to his mother. In these circumstances, the Court cannot place the responsibility for the failed attempt of enforcement of 3 April 2009 on the applicant.

53. Turning to the proceedings brought by the bailiffs on 6 April 2009, the Court notes that instead of enforcing the judgment, however problematic such enforcement may have been, the bailiffs and the domestic courts appeared to have tried to reverse its effects by implying that the applicant had waived her claims and thus rendering the initial judgment in the applicant's favour nugatory (see paragraphs 20-21). The Court considers that the reasoning employed by the bailiffs and the lower courts was unacceptable in the circumstances of the case, as the applicant not only consistently manifested her wish to have the judgment enforced (see paragraphs 18, 22-24 and 25), but also brought separate parallel proceedings which were meant to undermine the intentions of the bailiffs. The Court notes that despite the difficulties with which the applicant and the authorities were faced on 3 April 2009 and the potential threat to the emotional well-being and health of the child, the authorities apparently have not considered a more gradual and flexible approach towards the enforcement of the judgment.

54. In addition to the finding that the request for termination lodged by the bailiffs on 6 April 2009 was erroneous, the Court would also note that the proceedings initiated upon this request were themselves seriously protracted. It took the first-instance court six months to examine the bailiffs' request (see paragraphs 19 and 20) and some five months and three weeks between March and September 2010 for a supervisory-instance court to

review and quash the erroneous decision of 16 October 2009 (see paragraphs 26-28).

55. Thirdly, the Court notes that during the period between 14 September 2010, when the decision to terminate the proceedings was quashed (see paragraph 28), and 28 January 2011, the date of the last factual update submitted by the respondent Government (see paragraph 32), there appear to have been no further developments in the case. The Court takes note of the Government's submission that due to the nature of the dispute the process of enforcement may have required transitional measures and could not be completed within a short period of time. It observes, however, that during the period at issue, the bailiffs neither enforced the judgment, nor came up with any other plan or set of measures which would make the transition period smoother for the child (see paragraphs 29-32). In this connection, the Court is unable to accept the proceedings for clarification, brought by the bailiffs, as the writ of execution was clear and unequivocal. In fact, the decision of 25 January 2011 made this obvious, as it simply repeated the ruling of the custody judgment and described what the bailiffs had already attempted to do earlier.

56. Overall, without losing sight of the practical difficulties encountered by the authorities in this case, the Court retains the impression that throughout the enforcement proceedings the bailiffs and the courts failed to display due diligence in handling the applicant's call for assistance. The bailiffs appeared unprepared to face the task and had no clear idea or plan of action as to what could and should be done, whilst the courts handled the case without the urgency that it deserved. The resulting lapse of time was to a large extent caused by the authorities' own handling of the case.

57. Having regard to the foregoing, the Court concludes that the Russian authorities failed to take, without delay, all the measures that they could reasonably have been expected to take to enforce the judgment concerning the applicant's custody of her son and thereby breached the applicant's right to respect for her family life, as guaranteed by Article 8.

There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

59. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage sustained as a result of the events at issue.

60. The Government argued that the sum claimed by the applicant was excessive and unjustified.

61. As to non-pecuniary damage, the Court sees no reason to doubt that the applicant suffered distress as a result of the non-enforcement of the return order and that sufficient just satisfaction would not be provided solely by the finding of a violation. Making an assessment on an equitable basis as required by Article 41, the Court awards the applicant EUR 10,000.

62. In reaching this amount, the Court has taken note of the Government’s assurances that following the Leninskiy District Court’s judgment of 25 January 2011 (see paragraph 31 above) the enforcement of the judgment delivered in the applicant’s favour is “under the strict control of the competent authorities” and that the enforcement thereof “will take place at the earliest possible date”.

B. Costs and expenses

63. The applicant also claimed 40,000 Russian roubles (RUB) for the costs and expenses incurred before the domestic courts and the Court.

64. The Government argued that the agreement between the applicant and her lawyer was not sufficiently specific regarding the breakdown of the costs of the domestic proceedings and those before this Court and that in addition there was no evidence that the applicant had already paid her lawyer.

65. 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 have been actually and necessarily incurred and are reasonable as to 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 950 covering costs under all heads.

C. Default interest

66. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), in respect of non-pecuniary damage, and EUR 950 (nine hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on both amounts, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (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.

Done in English, and notified in writing on 14 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President