



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

FIFTH SECTION

CASE OF BABAYEVA v. AZERBAIJAN

(Application no. 57724/11)

JUDGMENT

Art 8 • Respect for family life • Children residence order issued in favour of father mainly on the ground of mother's alleged extra-marital affair • Courts' failure to assess entire family situation and all relevant factors

STRASBOURG

30 January 2020

FINAL

30/05/2020

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

In the case of Babayeva v. Azerbaijan,

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

Angelika Nußberger, *President*,

Gabriele Kucsko-Stadlmayer,

André Potocki,

Yonko Grozev,

Mārtiņš Mits,

Lətif Hüseynov,

Lado Chanturia, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 3 December 2019,

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

PROCEDURE

1. The case originated in an application (no. 57724/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Ms Laman Feruz gizi Babayeva (*Ləman Feruz qızı Babayeva* - “the applicant”), on 7 September 2011.

2. The applicant was represented by Mr Z. Guliyev, a lawyer based in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Əsgərov.

3. The applicant alleged, in particular, that the refusal to issue a residence order in her favour in respect of her children had violated her right to respect for her family life.

4. On 8 July 2014 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

6. The applicant and S. married on 3 February 2002. They had two children, a son (F.) born on 21 December 2002 and a daughter (E.) born on 18 August 2007.

7. On 22 May 2009 S.'s nephew (B.) suspected that the applicant was having an affair. He went to her flat, where he met J. and killed him, suspecting he was the applicant's lover.

8. In May 2009 the applicant and S. separated and the applicant moved with her children to her parents' house, where they lived from then onwards.

9. On 26 November 2009 B. was convicted of murder and sentenced to eight years' imprisonment.

10. According to the applicant, S. was having an affair with another woman so she decided to apply for divorce. On 12 January 2010 while applying for divorce, the applicant also requested the division of their matrimonial property (a car and flat) and child maintenance. S. lodged a counterclaim, asking for divorce and an order that the children reside with him (custody).

11. The Nizami District Court of Ganja City requested the Custody and Guardianship Commission of the Nizami District Executive Authority (*Nizami rayon İcra Hakimiyyəti Başçısı Aparatı yanında Qəyyumluq və Himayəçilik Komissiyası* - "the Commission") to provide an expert opinion. The first opinion, dated 1 March 2010, stated that both the father and mother's current homes were suitable environments for raising the children and that the Commission would not object to the court awarding custody of the children to their mother until they reached the age of ten, in accordance with Article 52 of the Family Code (which concerns seeking a child's opinion in matters affecting his or her interests).

12. Later the District Court requested further expert opinions from the Commission. In their subsequent two opinions, dated 2 April and 5 July 2010, the Commission stated that the living conditions in both homes were adequate for bringing up the children, but left the decision on custody to the discretion of the court.

13. On 30 July 2010 the District Court pronounced the divorce, divided the flat equally between the applicant and S., and awarded custody of the children to S. The court dismissed the applicant's claim for maintenance. The relevant part of the decision, which also referred to the domestic court's findings in the criminal proceedings, reads as follows:

"The evidence examined during the court hearing shows the existence of numerous facts proving [that] L. Bayramova's actions [were] incompatible with moral standards, including transcripts of telephone conversations which indicate that a long-term relationship existed between her and J.M., who was murdered ... [by B.]

All this shows that Laman Feruz gizi Bayramova (Babayeva) led an unstable lifestyle. Taking into account that this will affect the children's being brought up in a morally healthy environment, the court considers that custody of the children should be awarded to the father."

14. The applicant lodged an appeal, arguing that the judgment of 30 July 2010 was unsubstantiated. In particular, she argued that the court had unlawfully disregarded the Commission's first opinion and failed to

properly assess the subsequent two opinions confirming it. She further claimed that the court's acceptance as evidence of telephone transcripts and findings based thereon had breached her private life.

15. On 14 October 2010 the Ganja Court of Appeal upheld the District Court's judgment of 30 July 2010, reiterating the first-instance court's reasoning. It appears from the transcripts of the court hearings held before the Court of Appeal that a representative of the Commission expressed the view that the children should reside with their father in the light of the fact that "the applicant [had] cheated on her husband" and that the father had a stable financial situation, living conditions and lifestyle for bringing up the children.

16. The applicant appealed, claiming that the courts had failed to ask for the children's opinion in accordance with the domestic law. She argued that the real reason S. had sought custody was to avoid paying maintenance, and that he had not provided for them financially since they had separated. She also maintained in her submissions that since the separation the children had been in her sole care and she had taken good care of them, sufficiently providing for their well-being. Taking them away from her care and placing them in a different environment would cause great harm to their healthy development. She further argued that even if she had had an affair with J., this should not be grounds for limiting her custodial rights.

17. On 10 March 2011 the Supreme Court upheld the appellate court's judgment, reiterating its reasoning.

II. RELEVANT DOMESTIC LAW

18. The Family Code provides that, when parents separate, a child's residence arrangements are to be determined by an agreement between them. If no such agreement can be reached, the child's residence arrangements are to be determined by a court order, having regard to the child's best interests, his or her opinion on the matter and other relevant factors. These include the child's attachment to siblings and each parent, the parents' moral and other personal qualities, the child's age, and ensuring proper conditions for the child's upbringing and development (Article 60.4).

19. The parent not living with the child is entitled to maintain contact with him or her and be involved in his or her upbringing and education. The parent living with the child may not hinder his or her contact with the other parent, unless it harms the child's physical or psychological health or moral development. The parents may reach a written agreement on the manner in which the parent not living with the child is to exercise his or her parental authority. If the parents are unable to come to an agreement, any dispute between them is to be decided by a court following an application by one or both parents, with the participation of the childcare authorities. If a parent does not comply with the court decision, measures provided for by

civil-procedure law may be taken against him or her. If that parent deliberately refuses to comply with the court decision, a court may, following an application by the parent not living with the child, allow that parent residence, taking into account the child's interests and his or her opinion (Article 61).

20. A child is entitled to express his or her opinion on all family matters concerning him or her, including in the course of any judicial proceedings. The opinion of a child over ten years old must be taken into account, except where it is contrary to his or her interests (Article 52).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

21. Relying on Articles 6 and 8 of the Convention, the applicant complained that the issuing of a residence order in respect of her children in favour of their father had violated her right to respect for her family life. The Court considers that this complaint falls to be examined solely under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

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

B. Merits

1. *The parties' submissions*

(a) **The applicant**

23. The applicant submitted that the decision to issue the residence order in favour of the children's father had amounted to an interference with her right to respect for her family life. The interference had not been “necessary

in a democratic society”, as it had not corresponded to a pressing social need and had not been proportionate to the legitimate aim pursued.

24. The applicant further submitted that the courts had failed to hear the children’s opinion. She also maintained that since separating from her husband the children had been in her sole care and she had taken good care of them, sufficiently providing for their well-being. In her view, taking the children away from her would significantly harm their development.

25. The applicant also submitted that her alleged affair with J. should not be grounds for limiting her custodial rights.

(b) The Government

26. The Government did not dispute that the decision to issue the residence order in favour of the children’s father had amounted to an interference with the applicant’s right to respect for her family life. However, they submitted that the interference in question had been lawful and proportionate to the legitimate aims pursued.

27. The Government submitted that the domestic courts had adduced relevant reasons to justify their decision to issue the residence order in favour of the father, taking into account the applicant’s behaviour and the fact that she had prevented him from seeing his children, and that the decision-making process, seen as a whole, had provided her with the requisite protection of her interests.

28. The Government conceded that children had not been heard by the courts and that the Commission had failed to obtain their opinion, despite specific instructions by the domestic courts. They noted, however, that the representative of the Commission had been heard at a later stage and had expressed the view that the children should reside with their father.

29. The Government also submitted that extra-marital affairs were frowned upon by families and society in Azerbaijan. They maintained that, in the present case, the domestic courts had attached particular weight to the importance of family values and moral character of the parent as the most significant part of the children’s upbringing.

2. The Court’s assessment

(a) General principles

30. 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 *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290). Family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and upbringing of minor children. The care and upbringing of children normally and necessarily require that the parents (or a single parent) decide where the child should reside. Family life in this sense, and especially the rights of

parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by Article 8 (see *Nielsen v. Denmark*, 28 November 1988, § 61, Series A no. 144, and *Gruzdeva v. Russia* (dec.), no. 13553/09, § 60, 8 July 2014).

31. Domestic measures hindering enjoyment of family life such as a decision granting a residence order in respect of children to a parent constitutes an interference with the right to respect for family life (see, for example, *Hoffmann v. Austria*, 23 June 1993, § 29, Series A no. 255-C, and *Palau-Martinez v. France*, no. 64927/01, § 30, ECHR 2003-XII).

32. Any such interference constitutes a violation of this Article unless it is “in accordance with the law”, pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as “necessary in a democratic society”. Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *W. v. the United Kingdom*, 8 July 1987, § 60, Series A no. 121).

33. The margin of appreciation to be afforded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental contact rights, and as regards any legal safeguards designed to secure effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents are effectively curtailed (see *Sahin v. Germany* [GC], no. 30943/96, § 65, ECHR 2003-VIII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 63, ECHR 2003-VIII (extracts)).

34. It is not the Court’s task to take the place of the domestic authorities in deciding in whose favour a residence order should be given in respect of a child of divorced parents. However, in this sphere, the Court’s review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith; it must determine whether the reasons adduced by the domestic courts in the related child residence proceedings were relevant and sufficient (see *Gruzdeva*, cited above § 71).

35. Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. To that end, the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and a whole series of factors, in particular factors of a factual, emotional, psychological, material and medical nature, and made a

balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child (see *Antonyuk v. Russia*, no. 47721/10, § 134, 1 August 2013). Failure to conduct such examination will amount to a violation of Article 8 (see *ibid*, § 146). By contrast, if the domestic courts examined the question at issue with care and in line with the principles laid down by the Court's case-law, the Court would require very strong reasons to substitute its own assessment for that of the domestic courts (see *Elita Magomadova*, no. 77546/14, § 63, 10 April 2018).

36. Article 8 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, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see *Sahin*, § 66, and *Sommerfeld*, § 64, both cited above).

37. Lastly, the Court cannot satisfactorily assess whether the reasons advanced by the domestic courts were "sufficient" for the purposes of Article 8 § 2 without at the same time determining whether the decision-making process, seen as a whole, was fair (see *Sahin*, § 68, and *Sommerfeld*, § 66, both cited above). While Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect for the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, an applicant has been involved in the decision-making process to a degree sufficient to provide him or her with the requisite protection of his interests (see *Z.J. v. Lithuania*, no. 60092/12, § 100, 29 April 2014, with further references).

(b) Application to the present case

38. The Court considers that the decision to issue a residence order in favour of the father amounted to an interference with the applicant's right to respect for her family life (see *Antonyuk*, cited above, § 119, and *G.B. v. Lithuania*, no. 36137/13, § 87, 19 January 2016).

39. The Court observes that the interference had a basis in national law. Article 60.4 of the Family Code provided that, if no agreement could be reached between parents, the child's residence arrangements were to be determined by a court order on the basis of relevant criteria under this provision.

40. The Court is ready to accept that the interference pursued the legitimate aim of protecting the rights of others, namely those of the

children. It remains to be examined whether the interference was “necessary in a democratic society”.

41. Before turning to the analysis of the reasons advanced by the domestic courts, the Court considers it necessary to note that, in the present case, the scope of the residence order was limited to determining where the children would live; it did not affect their legal relationship with the applicant, nor did it take away her parental authority. It is also significant that it was open to the applicant to apply for contact rights (see *Elita Magomadova*, cited above, § 61).

42. The Court accepts that, in reaching decisions on childcare measures, national authorities and courts are often faced with an extremely difficult task. It does not lose sight of the fact that the national authorities had no other choice but to issue a residence order in favour of one of the separated parents, as the relevant domestic law did not provide for the possibility of a shared residence order (compare *Antonyuk*, cited above, § 121).

43. In line with the general principles and case-law outlined above, the Court will therefore examine whether the domestic authorities in the present case conducted an in-depth examination of the entire family situation and of all relevant factors.

44. The Court observes that in the present case the Commission submitted three opinions at the request of the first-instance court. The first opinion stated that the living conditions in both homes were suitable for the children. The opinion went on to say that the Commission would not object to the children living with their mother until they reached the age of ten. The subsequent two opinions reiterated the finding regarding the living conditions in both homes. However, in these reports the Commission did not give an opinion about which parent the children should stay with, leaving it to the domestic courts’ discretion (see paragraphs 11-12 above).

45. The Court firstly notes that it is unclear why the domestic courts considered the first opinion of the Commission insufficient and requested subsequent opinions. Even though the Government submitted that the first-instance court had specifically instructed the Commission to obtain the children’s opinion, the Court observes from the documents submitted by them that no such specific instruction was given in those requests.

46. The Court further observes that all three opinions were limited to the examination of the living conditions at each parent’s home and the Commission failed to examine any other factors that might have been relevant for determining the best interests of the children as required by the domestic law. Moreover, no expert or other specialist assessment was conducted to establish the parenting abilities of each parent and the children’s attachment to each of them. The domestic authorities also failed to assess how long the children had lived with their mother since their parents’ separation and whether they had a stable environment and routine.

47. The Court further observes that the domestic courts attached decisive importance to the applicant's alleged extra-marital affair, a fact which was contested by her. In doing so they referred to the judgment of 26 November 2009 concerning B.'s conviction and telephone transcripts, concluding that the applicant "led an unstable lifestyle" and that to ensure that the children were brought up in a morally healthy environment they should reside with their father.

48. The Court reiterates that national courts enjoy a wide margin of appreciation, in particular when deciding on child residence matters. Notwithstanding this margin of appreciation, the Court finds it problematic that when deciding on the residence of the children, the domestic courts relied mainly on the applicant's affair. Even assuming that this might be relevant in certain circumstances, no assessment of other relevant factors for the best interests of the children was conducted. In particular, in the absence of any direct, concrete evidence demonstrating the impact of the applicant's past affair on her two children's upbringing and daily life, the Court finds that the domestic courts adopted their decision on the basis of general considerations (compare *Palau-Martinez*, cited above, § 42).

49. As regards the Government's argument that the representative of the Commission expressed the view in the domestic proceedings that the children should reside with their father, the Court observes that that view was based mainly on the fact that "the applicant [had] cheated on her husband" and that the father had a stable financial situation, living conditions and lifestyle for bringing up the children, without any further assessment of the family situation.

50. As to the Government's submission that when deciding custody the courts took into account the fact that the applicant had prevented the father from seeing his children, the Court notes that this argument is not supported by the domestic courts' decisions.

51. Whilst basing their decisions mainly on the applicant's affair, the domestic authorities failed to assess the entire family situation and all relevant factors.

52. In these circumstances, the Court concludes that the domestic courts' examination of the case was not relevant and sufficient. It follows that the decision-making process was deficient and did not therefore allow the best interests of the child to be established. The Court accordingly finds that the domestic authorities did not adduce relevant and sufficient reasons for their decision to make a residence order in favour of the children's father. Notwithstanding the domestic authorities' margin of appreciation, the interference was therefore not proportionate to the legitimate aim pursued.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 45,000 euros (EUR) in respect of non-pecuniary damage.

56. The Government submitted that the claim was unsubstantiated and unreasonable.

57. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 8 of the Convention. Ruling on an equitable basis, the Court awards her the sum of EUR 4,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

58. The applicant also claimed EUR 1,600 for the costs and expenses incurred before the Court.

59. The Government submitted that the applicant had not submitted any relevant supporting documents proving that she had actually incurred any costs and expenses and that therefore no award should be made.

60. 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. Under Rule 60 of the Rules of Court, all claims for just satisfaction must be itemised and submitted in writing together with any relevant supporting documents, failing which the Chamber may reject the claim in whole or in part. In the present case, the claim was neither itemised nor supported by any documentary evidence. The Court therefore rejects the claim in respect of costs and expenses (compare *Malik Babayev v. Azerbaijan*, no. 30500/11, § 97, 1 June 2017).

C. Default interest

61. The Court considers it appropriate that the default interest rate 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, the following amount, to be converted into the currency of the respondent State, at the rate applicable at the date of settlement EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President