



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

THIRD SECTION

CASE OF BUCHBERGER v. AUSTRIA

(Application no. 32899/96)

JUDGMENT

STRASBOURG

20 December 2001

FINAL

20/03/2002

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

In the case of Buchberger v. Austria,

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

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr R. TÜRMEYER,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 6 December 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 32899/96) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Waltraud Buchberger (“the applicant”), on 16 July 1996.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr J. Minichmayr, of Hintermayr, Krüger, Haunschmidt and Minichmayr, a partnership of lawyers practising in Linz (Austria). The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged that the decision given in proceedings for the transfer of custody of her sons T. and A. to the Youth Welfare Office violated her right to respect for her family life and that the proceedings leading thereto had been unfair.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 23 January 2001 the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

8. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is the mother of two children: T., born on 8 April 1993, and A., born on 17 December 1994.

10. On 31 March 1995 the Youth Welfare Office (*Jugendwohlfahrtsträger*) at the Linz-Land District Administrative Authority (*Bezirkshauptmannschaft*), pursuant to section 215 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), took T. and A. provisionally into their care. It noted that on the morning of that day, the applicant, who delivers newspapers, had come back late from work and her children had been at home without supervision for approximately 45 minutes. The applicant's neighbour, who had seen T. alone in the garden at around 8.30 a.m., had contacted the District Administrative Authority. The Youth Welfare Office placed the children with a socio-pedagogical facility in Salzburg for an evaluation of their development.

11. On 4 April 1995 the Youth Welfare Office requested the formal transfer of the custody of the children to it before the Enns District Court (*Bezirksgericht*). The Youth Welfare Office, relying on section 215 of the Civil Code, claimed that the living conditions of the children were chaotic. It did not submit a formal statement of reasons, but promised to do so later.

12. On 24 April 1995 the applicant, assisted by counsel, requested the District Court to order the Youth Welfare Office to return T. and A. to her.

13. On 10 May 1995 the District Court rejected the Youth Welfare Office's request and ordered that T. and A. be promptly returned to their mother's custody. The District Court found that the removal of the children from their mother was unlawful, as the Youth Welfare Office had failed to submit a formal statement of reasons giving arguments in support of the children's removal and the transfer of their custody. The court observed that, without such a statement, it could not take the evidence necessary to verify whether the Youth Welfare Office's request was well-founded. Consequently, the court was not in a position to decide on the merits.

14. On 11 May 1995 the Youth Welfare Office appealed and refused to give T. and A. back to their mother. On 16 May 1995 it supplemented its

appeal arguing that the applicant was incapable of bringing up T. and A. It submitted that on the early morning of 31 March 1995 the children had been at home alone. T. was wandering about in the garden alone at 0°C, wearing only pyjamas. In support of its arguments, the Youth Welfare Office filed, *inter alia*, a fax of the Enns rural police (*Gendarmerieposten*) of 31 March 1995, certificates of 5 April 1995 concerning the children's condition of health issued by a medical officer (*Amtsarzt*), and the transcripts of the statements of the applicant's neighbour before the District Administrative Authority.

15. On 6 June 1995 the Steyr Regional Court (*Landesgericht*) quashed the District Court's decision and remitted the case back to the District Court, instructing the latter to take a new decision after having supplemented its proceedings (*Verfahrensergänzung*). The Regional Court found that, taking the *ex officio* character of the custody proceedings (*Pflegschaftsverfahren*) into account, it had been for the District Court to investigate the facts sufficiently in order to reach a decision. In particular the Youth Welfare Office should have been given the opportunity to correct its procedural mistake by submitting a formal statement of reasons.

16. On 27 June 1995 the Salzburg socio-pedagogical centre (*Sozialpädagogisches Zentrum*) submitted a report to the Enns District Court.

17. On 28 June 1995 the applicant was heard with regard to the events of 31 March 1995. She submitted that on the morning of that day, she had suffered from a migraine attack and therefore had been unable to return home in time. Normally she returned before her seventeen-year old son, H., who also lived with her, left for work. That day she had unsuccessfully tried to contact a friend of hers to look after her children.

18. On 30 June 1995 the District Court heard the father of T. and A., who did not live with them. He was opposed to the transfer of custody to the Youth Welfare Office as he considered that the applicant took care of the children satisfactorily. He himself was not in a position to take care of them.

19. On 31 July 1995 the District Court again dismissed the Youth Welfare Office's request for the transfer of custody but ordered the applicant to undergo family therapy together with her children and their father. It instructed the Youth Welfare Office to ensure that the applicant complied with this condition. In refusing the transfer of custody, the District Court relied, *inter alia*, on the public health officer's certificates according to which A. had been in a good physical and psychological state, as well as T., although the medical officer had also found a retardation in the latter's linguistic skills and striking deficiencies in his social behaviour. The applicant's approach to her children was positive in general. According to the District Court, there existed no danger that the incident of 31 March 1995 could recur, because two persons, Mr K. and Ms L., had

accepted to look after A. and T. in case the applicant should come home late from work.

20. The District Court found that, under sections 176 a and 178 a of the Civil Code, the right of custody may only be withdrawn if the child's well-being was endangered and if this was substantiated by compelling arguments. The court noted that the living conditions at the applicant's place were below average. Nevertheless the children's well-being was not in danger. The incident which led to the taking away of T. and A. was a unique one and the applicant cared sufficiently for her children, having regard both to their psychological and physical well-being. Moreover the applicant still breast-fed A. The court concluded that the requested transfer of custody was not justified.

21. On 31 July 1995 the Youth Welfare Office appealed. The Office argued, *inter alia*, that Mr K., a former life-companion of the applicant, was unsuitable to look after the children and that Ms L. had informed the District Administrative Authority that she had never promised the applicant to look after the children nor was she prepared to do so.

22. In the course of the appeal proceedings, the Youth Welfare Office submitted further evidence, namely a report dated 16 August 1995 with several annexes. Furthermore, the Regional Court obtained several court files all concerning the applicant: one file concerning custody proceedings relating to her son R., one concerning criminal proceedings against P.F. and the applicant for ill treatment of her son R., and one concerning eviction proceedings against the applicant. This evidence was not communicated to the applicant.

23. On 16 August 1995 the Steyr Regional Court granted the appeal and transferred custody of the applicant's children to the Youth Welfare Office, pursuant to section 176 a of the Civil Code. The Regional Court found that the taking of evidence by the court of first instance had been incomplete. Since the courts had the obligation to safeguard the well-being of the children, it was necessary to decide not merely on the basis of the evidence which existed at first instance but to take into account all subsequent developments and, if necessary, to re-assess the evidence or to supplement the investigations.

24. On the basis of the evidence meanwhile obtained, the Regional Court found that the well-being of T. and A. would not be safeguarded if they were to stay with their mother. The children's living conditions were desolate and chaotic; the applicant was apparently not willing to co-operate with the Youth Welfare Office and she did not make any efforts to undergo therapy, together with the children, as had been ordered by the District Court in its decision of 31 July 1995. Moreover, T. and A. no longer stayed with the applicant but with her "ex-companion", as the applicant was due to be evicted from her apartment on 31 August 1995. As from 1 August 1995 the applicant had rented a house in Lambach. According to information

obtained from the owner, the house was extremely desolate and hardly fit for habitation. On a visit to Lambach by a staff member of the Youth Welfare Office on 16 August 1995, the applicant had not permitted the official to enter her home on the grounds of desolate living conditions and the decrepit state of the building. She did not disclose the identity of the friend with whom she had placed the two children T. and A. in Linz.

25. The Regional Court also noted that the applicant's elder sons, R. and H., had been placed in a children's home from September 1989 to July 1991 as the applicant had not taken adequate care of them. After returning to the applicant, R. had been subject to systematic and repeated abuse by P.F., the applicant's then companion, who had almost daily beaten R. and had treated him in a degrading manner. In 1993 R. had been committed to hospital because of injuries inflicted on him by P.F. Thereupon criminal proceedings against the applicant and P.F. for abuse of minors had been instituted. In November 1994 P.F. had been convicted of this offence and sentenced to six months' imprisonment. The applicant had been acquitted. At the same time, custody of R. had been transferred to the Youth Welfare Office. He was no longer living with the applicant. In the Regional Court's view these events, even though the applicant had been acquitted of the criminal charges, showed that she was incapable of effectively caring for her children. Having regard to the abuse and suffering of R., it was implausible that she had not noticed anything.

26. The Regional Court also considered that, having regard to the retardation in T.'s development and the deficiencies in his social behaviour, there was no guarantee that either he or his brother A. would develop normally if they were to remain with their mother.

27. On 9 November 1995, the Supreme Court (*Oberster Gerichtshof*) rejected the applicant's extraordinary appeal on points of law (*außerordentlicher Revisionsrekurs*) on the ground that the case did not involve questions of law of fundamental importance.

II. RELEVANT DOMESTIC LAW

28. Under section 215 § 1 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), the competent Youth Welfare Office shall apply for court orders regarding questions of custody which are necessary in order to ensure a child's well-being. In case of imminent danger, the Youth Welfare Office shall also make the necessary provisional arrangements concerning care and custody until the competent court has decided.

29. Under section 176 a of the Civil Code, the competent court shall transfer custody to the Youth Welfare Office, even against the wish of the parents, if the well-being of a child is at risk and it is necessary to remove the child from his or her habitual environment, unless the child can be placed with a relative or other qualified persons close to the child.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. The applicant complained that the decision of the Regional Court transferring the custody of her sons T. and A. to the Youth Welfare Office amounted to a breach of Article 8 of the Convention, the relevant part of which provides:

“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. The parties' submissions

31. The applicant submits that there has been a violation of Article 8 of the Convention as, in the circumstances of the case, the decision of the Regional Court was disproportionate. The Regional Court should have resorted to a less drastic measure, such as helping her with the children's education. Meanwhile she has given birth to two more children, a daughter born in December 1996 and a son born in July 1998. She was and is taking adequate care of these children and the competent Youth Welfare Office, a different one, has found no reason to intervene. The applicant also submits that the Regional Court relied on fresh evidence of which she had not been informed and, thus, had no opportunity to react thereto.

32. The Government accept that there has been an interference with the applicant's right to respect for her family life as guaranteed by Article 8 § 1 of the Convention. However, the measure was justified under Article 8 § 2, being in accordance with the law - Section 176 of the Civil Code - and having pursued the legitimate aims of the protection of health or morals and the protection of the rights and freedoms of others. The Government further contend that the measure was necessary in a democratic society within the meaning of Article 8 § 2 and that the Austrian authorities have not overstepped their margin of appreciation.

33. As regards the necessity test, the Government submit that the measure of transferring custody to the Youth Welfare Office corresponded to the urgent social need to improve the educational and developmental situation of the children A. and T. According to the findings of the Regional Court, the situation of the children had been serious: their living

conditions were desolate and unhygienic, and the applicant had failed to exercise adequate care and had shown herself to be incapable of doing so. In respect of the child T., this situation had already led to a slowing down of his personal, particularly linguistic, development and to behavioural disturbances. In August 1995 the applicant had not had the children with her at all but had placed them in the custody of a former companion whose identity had not been disclosed to the Youth Welfare Office. Less intrusive measures such as educational support for parents (*Erziehungshilfe*) could not have been used as the applicant refused to co-operate with the Youth Welfare Office. It had also not been possible to transfer custody of the children to a close relative as no such person was available. Even though custody was removed from the applicant, she maintained certain minimum rights, such as visiting them and being heard before important decisions on educational issues were taken, which had the purpose of maintaining family links and to make possible the family's later reunification.

34. The Government acknowledged that Article 8 also implies certain procedural requirements, namely that parents must be sufficiently involved in the whole decision-making process. In their view this had been the case. The District Court and the Regional Court had dealt with the transfer of custody in non-contentious proceedings which guarantee that parents are sufficiently involved. In non-contentious proceedings the courts have the duty to investigate all important elements of the case *ex officio* and to establish the true facts beyond the mere submissions of the parties. They must take account of all new relevant circumstances even at the appeal stage.

B. The Court's assessment

1. Whether there was an interference with the applicant's right to respect for her family life

35. As is well established in the Court's case-law, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, amongst others, the *Johansen v. Norway* judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, § 52). The impugned measure, as was not disputed, evidently amounted to an interference with the applicant's right to respect for her family life as guaranteed by paragraph 1 of Article 8 of the Convention. 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".

2. *Whether the interference was justified*

a. “In accordance with the law”

36. It was undisputed before the Court that the relevant decisions had a basis in national law, namely, Section 176 of the Civil Code.

b. Legitimate aim

37. In the Court’s view the court decisions of which the applicant complained were aimed at protecting the “health or morals” and the “rights and freedoms” of the children. Accordingly they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

c. “Necessary in a democratic society”

38. In determining whether the impugned measure was “necessary in a democratic society”, the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what lies in the best interest 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. It follows from these considerations that the Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see *Hokkanen v. Finland* judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and *Elsholz v. Germany* [GC], no. 25735/94, § 48, ECHR 2000-VIII).

39. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. The Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care, while a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an 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 the parents and a young child would be effectively curtailed (see *Elsholz v. Germany*, § 49).

40. The Court further recalls that a fair balance must be struck between the interests of the child and those of the parent and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the

Convention to have such measures taken as would harm the child's health and development (see *Elsholz v. Germany*, § 50; *T.P. and K.M. v. the United Kingdom*, no. 28945/95, § 71, 10.5.2001).

41. In the present case the Regional Court, albeit relying on additional information which had not been obtained at first instance, carefully examined the applicant's situation in a detailed decision and had particular regard to her previous conduct.

42. Having regard to these findings of the Regional Court the Court does not doubt that these reasons were relevant. However, it must determine whether, considering the particular circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her with the requisite protection of her interests (see the *W. v. the United Kingdom* judgment of 8 July 1987, Series A no. 121, p. 29, § 64; *Elsholz v. Germany*, § 52; *T.P. and K.M. v. the United Kingdom*, § 72).

43. In this respect the Court observes that the Regional Court, in finding against the applicant, relied on fresh evidence, which consisted *inter alia* of a report by the Youth Welfare Office of the applicant's situation after the proceedings at first instance had ended, court files relating to criminal proceedings against the applicant and child care proceedings regarding the applicant's elder son R. It is not in dispute that this additional evidence has not been brought to the applicant's attention. However, in the circumstances of the case the Regional Court should not have decided without having given the applicant an opportunity to react thereto. The additional evidence was of particular importance to the proceedings as the Regional Court considered it sufficiently strong to overturn the first instance decision. The Regional Court did not merely rely on the outcome of previous court proceedings but considered the further contents of the case-file. Moreover, it relied on a recent report by the Youth Welfare Office, a document which the applicant had never seen.

44. In the Court's opinion, the failure of the Regional Court to inform the applicant of the additional evidence obtained during the appeal proceedings which deprived her of the possibility to react thereto reveals an insufficient involvement of her in the decision-making process.

45. Having regard to all circumstances, the Court concludes that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

46. The applicant further complains that the appeal proceedings were unfair because the Regional Court relied on fresh evidence of which she had not been informed and, thus, had no opportunity to react thereto. She relies

on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

47. The Government submit that the proceedings at issue complied with Article 6 § 1 of the Convention. Decisions on the transfer of custody, as with other proceedings in family law matters, are conducted on a non-contentious basis and are less formal since measures in this field have to be taken swiftly and are not governed by formal rules on the taking of evidence. The courts have to examine all relevant issues *ex officio* as it is considered important that decisions are taken in full knowledge of all the relevant facts and the latest developments of them.

48. In the present case all the fresh evidence on which the Regional Court relied had been familiar to the applicant because it related to court proceedings to which she had been a party and where she had been able to present her point of view. As regards the report by the Youth Welfare Office, it related to a meeting with the applicant and therefore she knew the facts mentioned therein. Since the Regional Court did not rely on evidence which was new to the applicant, her rights under Article 6 § 1 have not been violated.

49. The Court recalls that the difference between the purpose pursued by the respective safeguards afforded by Article 6 § 1 and Article 8 may justify the examination of the same set of facts under both Articles (*McMichael v. the United Kingdom* judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91).

50. The Court recalls further that the principle of equality of arms - one of the elements of the broader concept of fair trial - requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (*Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, p. 19, § 33; *Ankerl v. Switzerland* judgment of 23 October 1996, Reports 1996-V, pp. 1567-68, § 38). Each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (*Ruiz Mateos v. Spain* judgment of 24 June 1993, Series A no. 262, p. 25, § 63; *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, Reports 1997-I, p. 108, § 24; *Beer v. Austria*, no. 30428/96, § 17, 6.2.2001).

51. Having regard to the considerations under Article 8, the Court finds that there has also been a violation of Article 6 § 1 in the present case in that the Regional Court relied on evidence of which the applicant had not been informed.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed pecuniary damages in the amount of 463,200 Austrian schillings (ATS). She submitted that this amount corresponded to her expenses for visits to T. and A. at the foster-home where they are living. Further, the applicant claimed non-pecuniary damage in the amount of ATS 1,800,000.

54. The Government submitted that the applicant had not sufficiently substantiated her claims which are, in any event, excessive.

55. The Court finds no causal link between the violations of the Convention found and the alleged claim for pecuniary damage. It accordingly dismisses the claim under this head (see, *inter alia*, the *Demir and Others v. Turkey* judgment of 23 September 1998, Reports 1998-VI, p. 2660, § 63).

56. As regards the applicants' claim for non-pecuniary damage the Court finds that the amount claimed by the applicant is excessive. Taking into account the obvious frustration caused to the applicants by the breach of their right to their family life, the Court, making its evaluation on an equitable basis, awards the applicants ATS 80,000 as just satisfaction for her non-pecuniary damage.

B. Costs and expenses

57. The applicant claimed ATS 57,122.32 for costs and expenses incurred in the domestic proceedings. This claim is disputed by the Government.

58. The Court finds that compensation for costs incurred in the domestic proceedings may only be granted insofar as they were necessary in trying to prevent the violation found (*König v. Germany* judgment of 10 March 1980 (Article 50), Series A no. 36, p. 17, § 20). In the present case it does not appear from the applicant's submissions that any specific costs were incurred in any attempt to prevent the breaches of the Convention found. This part of the claim must therefore be rejected.

C. Default interest

59. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that there has been a violation of Article 6 § 1 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 according to Article 44 § 2 of the Convention, ATS 80,000 (eighty-thousand Austrian schillings) in respect of non-pecuniary damage;
 - (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 December 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President