



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

FIRST SECTION

CASE OF KAPLAN v. AUSTRIA

(Application no. 45983/99)

JUDGMENT

STRASBOURG

18 January 2007

FINAL

18/04/2007

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 Kaplan v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 12 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 45983/99) 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 two Turkish nationals, Mrs Fadime Kaplan ("the applicant") and Mr Mehmet Kaplan ("the M."), on 29 October 1998.

2. The applicants were represented by Mr H. Pochieser, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant complained, in particular, that due to the District Court's inactivity her former husband could bring her child F. to Turkey before a substantive decision on custody was taken.

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. By a decision of 14 February 2006, the Court declared the application partly admissible. It declared the M.'s complaints inadmissible.

6. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

7. The Turkish Government did not make use of their right to intervene under Article 36 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, born in 1968, lived at the time of the events with her family in Absdorf.

9. Following difficulties in the relationship with her husband, the applicant left the common household in March 1991. On 29 March 1991 the applicant's husband instituted divorce proceedings with the Kirchberg/Wagram District Court (*Bezirksgericht*). The court subsequently, on 15 May 1991, suspended the divorce proceedings as the applicant had meanwhile returned to the common household and had reconciled herself with her husband.

10. On 28 May 1991 the applicant, following a violent assault by her husband and his family, left the common household again.

11. On 11 July 1991 she filed an action with the Kirchberg/Wagram District Court (*Bezirksgericht*) for sole custody of the two children from the marriage, F., born in November 1988, and the M., born in 1990, who stayed at their father's. On 26 July 1991 the District Court granted her provisional custody of the M., at that time a nursling. Subsequently, on 2 August 1991, the M. was taken away from the applicant's husband by compulsory means. On 5 August 1991 the applicant requested the provisional custody of F. and further that the District Court withdraw, as an interim measure, F.'s name from her husband's passport. She submitted that she feared that her husband would bring F. to Turkey.

12. On 20 August 1991 the applicant's husband requested that the divorce proceedings be resumed. However, in a further hearing before the District Court on 7 November 1991, the parties agreed to suspend the divorce proceedings until the outcome of criminal proceedings instituted against the applicant's husband concerning his violent assaults against her.

13. In February 1992 the District Court informed the applicant and her husband that at the moment it would not take any further official measures concerning the custody of their children. It referred in this regard to a report by the Tulln Administrative Authority (*Bezirkshauptmannschaft*) stating that despite the efforts of its social workers and the parties' repeated questioning by the Youth Office no solution could be reached. Both parents claimed custody, objected to visit arrangements in neutral surroundings and were uncertain whether they wished divorce or not. The District Court in particular referred to the Administrative Authority's statement that there were no reasons to change the present situation of separation of the two children.

14. On 23 April 1992 the applicant reiterated, in the context of submissions made in another matter with the court, her request of July 1991 for sole custody of F.

15. In June 1994, after the criminal proceedings against him had been terminated, the applicant's husband requested that divorce proceedings be resumed. On 25 November 1994 the District Court pronounced the divorce. With final decision of 28 September 1995 the Supreme Court (*Oberster Gerichtshof*) confirmed the District Court's findings. No decision was taken on the custody of the children.

16. On 12 June 1996 the applicant again requested that sole custody of F. be granted to her and that the court issue an injunction prohibiting the father from bringing F. to Turkey. She submitted that her former husband did not sufficiently care for F. and planned to place F. with his relatives in Turkey at the end of the school year. This would adversely affect the child's well-being.

17. On 14 June 1996 the District Court, without holding a formal hearing, dismissed the latter request. It noted that a possible transfer would not adversely affect the well-being of F., who and whose family, including the applicant, were still more closely related to Turkey than to Austria.

18. The applicant appealed and complained *inter alia* that the District Court had not taken sufficient evidence and had not taken account of the fact that F.'s transfer to Turkey would in perpetuity frustrate her right to visit which would adversely affect F.'s well-being.

19. In his submissions of 24 July 1996 the applicant's former husband contested to have any intention to bring F. to Turkey and requested that custody of F. be granted to him.

20. On 26 July 1996, the Krems Regional Court (*Landesgericht*) quashed the District Court's decision and remitted the case back to the District Court to take further evidence as to the concrete danger of F.'s transfer to Turkey and, eventually, his well-being there.

21. The District Court subsequently, on 6 August 1996, requested the Tulln District Administrative Authority for further investigations. On 8 November 1996 the Administrative Authority submitted its report in which it expressed itself in favour of F.'s stay at his father's. The District Court, on the same day, requested the Vienna Youth Welfare Office (*Amt für Jugend und Familie*) for further information.

22. In March 1997 the applicant informed the District Court that F. had moved to Turkey and that she had now no contact with the child.

23. On 9 June 1997 the District Court rejected all pending requests and declared the custody proceedings null and void. It noted that The Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants of 6 October 1961 was applicable to the proceedings at issue. Article 1 of this convention provides that the judicial or administrative authorities of the State of the habitual residence of an

"infant" have power to take measures directed to the protection of his or her person or property. In so doing they apply their own law. The District Court found that, having regard to the fact that F. was staying since nearly six months, namely Christmas 1996, with his grandparents in Turkey, had signed off residence and school in Austria and was attending school in Turkey, this country had to be regarded as his habitual residence. Therefore, the case had ceased to be within the scope of Austrian jurisdiction.

24. The applicant appealed and, at the same time, lodged a motion of bias against the competent judge H. at the District Court. In the latter regard she submitted *inter alia* that H.'s inactivity had brought about the facts on the ground of which the Austrian jurisdiction had ceased.

25. On 15 July 1997 the Krems Regional Court rejected the motion of bias. On 9 October 1997 it dismissed the applicant's appeal without holding a hearing. It noted that neither the European Convention on Recognition and Enforcement of decisions concerning the custody of children and on restoration of custody of children, nor The 1980 Hague Convention on the Civil Aspects of International Child Abduction were applicable to the present case as until now no decision on the custody of F. had been taken and the applicant's former husband had exercised factual custody over F. since May 1991. The applicant had not actually exercised her custody right at the time of F.'s removal from Austria to Turkey, which, therefore had not been "wrongful" within the meaning of the latter convention.

26. On 6 November 1997 the applicant lodged an extraordinary appeal on points of law (*außerordentlicher Revisionsrekurs*) with the Supreme Court. She submitted *inter alia* that she had not voluntarily renounced to the exercise of F.'s custody. Her former husband and his family had hindered her access to F. so that she had only been able to see him in secret when he was attending school. F.'s transfer to Turkey entirely cut off her contact to him. She invoked Articles 8, 13, 14 and Article 5 of Protocol no. 7 of the Convention. She further complained that throughout the proceedings no public hearing had been held and that the decisions had not been pronounced publicly.

27. On 16 April 1998 the Supreme Court rejected the extraordinary appeal on points of law. It noted with reference to Austria's reservation to Article 6 of the Convention that custody proceedings would not necessarily require a public hearing, and that the parties' right to present their case was duly complied with by submitting written statements, which the applicant had been able to do. The decision of the District Court to annul the proceedings, resulting in a shift of jurisdiction from Austria to Turkey, was lawful. The 1980 Hague Convention expressly referred to the actual exercise of custody as a condition for its application. The applicant's submissions that she had been hindered in the actual exercise of her custody were not relevant as the 1980 Hague Convention served the child's and not the parents' interest and the same applied as regards the 1961 The Hague

Convention. Under this aspect, an interference with the applicant's rights under Article 8 of the Convention was justified. The decision was served on 29 April 1998.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant complained under Article 6, 8, 13 and Article 5 of Protocol No. 7 of the Convention that the District Court's inactivity enabled her former husband to bring F. to Turkey before a substantive decision on custody was taken. Thus jurisdiction moved to Turkey, which brought about a *de facto* determination of the custody issue.

The Court considers that this complaint should be examined under Article 8 of the Convention.

Article 8 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.”

29. The Government accepted that the custody proceedings at issue constituted an interference with the applicant's rights under Article 8 of the Convention. They argued, however, that the obligation of national authorities to take measures to facilitate contact by a non-custodial parent with children pending, or after divorce, was not absolute. In the present case, the Austrian courts were not to be blamed for their inactivity as initially, under the Turkish legislation applicable to the proceedings at issue, no decision on the custody could be taken since such decision had to be taken in the framework of divorce proceedings which were at the time still pending. After the applicant's new request for custody of F. in June 1996, the courts acted without delay. The Government further pointed out that a transfer of F.'s custody from his father to the applicant could at no time be considered as granted. The procedural steps taken in the proceedings at issue exclusively served the best interest of the children.

30. The applicant did not submit any further observations on that point.

31. The Court finds it undisputed that the relationship between the applicant and her son F. amounted to “family life” within the meaning of Article 8 of the Convention. That being so, it must be determined whether

there has been a failure to respect the applicant's family life. The Court notes that the applicant lost factual custody of F. when leaving the common household with her husband at the end of May 1991. Shortly afterwards, in July and August 1991 respectively, she requested that custody or provisional custody of F. be granted to her. No decision was made upon these requests until June 1997 when the District Court declined its jurisdiction as F. had meanwhile moved to Turkey.

32. The Court notes that it is not for it to say how the domestic courts should have decided on the applicant's requests. The case hinges, however, on the question whether the Austrian courts were under a duty to decide on the custody of F. before he moved to Turkey. For this reason the Court will view the case as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention. In this connection, the Court recalls that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. However, there may in addition be positive obligations inherent in effective "respect" for family life which may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals (see, amongst other authorities, *Kosmopoulou v. Greece*, no. 60457/00, § 43-46, 5 February 2004, with further references). Furthermore, the Court has repeatedly found that in cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. This duty is decisive in assessing whether a case concerning access to children had been heard within a reasonable time as required by Article 6 § 1 of the Convention and also forms part of the procedural requirements implicit in Article 8, *Hoppe v. Germany*, no. 28422/95, § 54, 5 December 2002 (see, *inter alia*, *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII).

33. The Court notes that in the present case custody proceedings in Austria were cancelled due to the fact that F. moved to Turkey and jurisdiction changed to this country. This event, in itself, does not reveal anything about the outcome of the custody dispute between the applicant and her former husband and, in any event, cannot be imputed to the Austrian authorities. The Court observes, however, that before jurisdiction moved to Turkey the proceedings at issue were pending for more than five years and five months before the first instance court in Austria, namely the Kirchberg/Wagram District Court. The Court notes that the applicant had a considerable interest in the outcome of these proceedings. Furthermore, the passage of time certainly did not play at her advantage as F. had been left at a very young age in the factual custody of his father. However, the proceedings before the District Court were, above all, characterised by its inactivity. The Court notes in this regard that the applicant filed her request for custody of F. in July 1991. Seven months later, in February 1992, the

District Court informed her that for the time being it would not take any measures in this regard. It did not react upon the applicant's further requests for custody of F., made in April 1992 and June 1996 respectively, until June 1997 when it found that it had no longer jurisdiction to deal with the case.

34. The Government argued the District Court could not be blamed for inactivity as no decision upon custody could be made if not in the framework of divorce proceedings. The Court notes, however, that these proceedings were resumed in June 1994 and were terminated with the District Court's decision of 25 November 1994 which was confirmed by the Supreme Court's decision of 28 September 1995.

35. The Court finally notes that the applicant feared, since the very beginning of the proceedings, further alienation between F. and her in that she suspected her husband having plans to bring F. to Turkey. She, therefore, requested to withdraw F.'s name from his passport in August 1991. However, this request remained unconsidered by the District Court until June 1996 when the applicant reiterated her request to hinder her former husband to bring F. to Turkey. After a first negative decision was quashed in July 1996, this request was pending for another five months before the District Court until F. in fact moved to Turkey.

36. In these circumstances, the Court cannot find that the domestic courts complied with their duty under Article 8 to deal diligently with the applicant's request to grant her custody of her son. The Court, therefore, finds that the procedural requirements implicit in this Article were not complied with.

37. Accordingly, there has been a violation of Article 8 of the Convention. In the light of this finding the Court does not find it necessary to examine the applicant's complaint separately under Articles 6, 13 and Article 5 of Protocol No. 7 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed 82,000 euros (EUR) in respect of non-pecuniary damage for the pain suffered by her and the M. as a result of her being alienated from F.

40. The Government considered the claim excessive.

41. The Court considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety which cannot be compensated solely by the finding of a violation. Making an assessment on an equitable basis, as required by Article 41, the Court, therefore, awards the applicant 8,000 EUR in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicant requested the reimbursement of EUR 2,763.48, inclusive of VAT, for costs incurred in the domestic proceedings and of EUR 2,974.33, inclusive of VAT, for costs incurred in the Convention proceedings.

43. The Government commented that the costs claimed for the domestic proceedings comprised all procedural costs incurred from 1991 until 1997 in custody proceedings while the subject matter before the Court was only the alleged inactivity of the District Court. As regards the costs before the Court, they pointed out that account has to be taken to the fact that the application was only declared partially admissible.

44. The Court reiterates that costs incurred in the domestic proceedings may only be reimbursed as far as they were necessary in order to prevent or redress the violation found (see, for instance, *Buchberger v. Austria*, no. 32899/96, § 58, 20 December 2001). In the present case only the costs for the applicant's repeated custody requests and requests for an interim measure of 23 April 1992 and 12 June 1996 respectively, the costs of the information note to the District Court as to F's move to Turkey and the applicant's costs in the appeal proceedings against the District Court's decision of 9 June 1997 to discontinue the proceedings, fulfil this condition. These costs amount to 1,626.8 EUR including VAT.

45. As to the Convention proceedings, the Court notes that the applicant did not have the benefit of legal aid. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases, the Court finds the amount claimed reasonable and therefore awards it in total, namely 2,974.33, inclusive of VAT.

46. Consequently a total amount of 4,601.13 EUR, inclusive of VAT, is awarded under the head of costs and expenses.

C. Default interest

47. 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. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that it is unnecessary to examine the applicant's complaint under Articles 6, 13 and Article 5 of Protocol no. 7 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 amounts:
 - (i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 4,601.13 EUR (four thousand six hundred one euros and thirteen cents) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 January 2007 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President