



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

FOURTH SECTION

CASE OF KAJARI v. FINLAND

(Application no. 65040/01)

JUDGMENT

STRASBOURG

23 October 2007

FINAL

23/01/2008

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 Kajari v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr G. BONELLO,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 2 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 65040/01) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Jenn Aimar Kajari (“the applicant”), on 4 December 2000.

2. The applicant was represented by Mr H. Vallikivi and Mr J. Kortteinen, lawyers practising in Tallinn and Helsinki respectively. The Finnish Government (“the Government”) were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, a violation of his right to respect for family life.

4. By a decision of 14 February 2006, the Court declared the application partly admissible. On 14 March 2006 the Estonian Government indicated that they did not wish to exercise their right to intervene (Article 36 § 1 of the Convention).

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the Government replied in writing to the applicant's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1944 and lives in Tallinn. He and another Estonian national have a daughter born out of wedlock in 1992. On 31 July 1994 mother and daughter arrived in Finland. On 17 February 1995 their residence there was officially registered. In 1994-1998 the daughter lived both with her father in Estonia and with her mother in Finland in accordance with an agreement between the parents.

7. According to the Government, on 18 January 1995 the applicant gave his written consent to the child's temporary stay in Finland and on 5 February 1995 he gave his consent that she stay permanently in Finland, presupposing that his visiting rights would not be affected.

8. According to the applicant, he and the mother agreed in writing on 3 February 1995 that they would participate equally in the care of their daughter and that she would spend an equal amount of time, about one month at a time, with each parent.

9. On 8 December 1995 the applicant and the mother agreed that neither of them would pay the other maintenance in respect of their daughter. On 19 December 1995 the agreement was confirmed by the Social Welfare Board (*sosiaalilautakunta, socialnämnden*) of Harjavalta, Finland.

10. On 17 August 1998 the mother removed the child from day care in Tallinn and brought her to Finland.

A. The custody proceedings

11. On 12 November 1998 the mother instituted custody proceedings in the District Court (*käräjäoikeus, tingsrätten*) of Kokemäki, Finland, following which the court made an interim order awarding her sole custody.

12. The court received the Social Welfare Board's of Harjavalta and the Social Welfare and Health Care Department's (*Sotsiaal- ja Tervishoiuamet*) of Tallinn written opinions on the assessment of the parents and their living conditions. The Finnish authority had interviewed the mother, the child and her brother, the mother's partner and the child's day care teacher. It did not interview the applicant nor did its Estonian counterpart interview anyone other than the applicant. It appears that the authorities did not contact each other before submitting their opinions.

13. The District Court held two hearings, on 17 May and 4 June 1999, during which the parents with counsel were present. It received evidence from the parties and several witnesses. In its decision of 9 June 1999 the court found that the Finnish courts had jurisdiction and that Finnish law was applicable to the case. The court held that as the parents were unable to

agree on matters relating to custody, custody should be awarded to the mother alone. The court reached its decision having had regard to all the circumstances and evidence submitted to it and having assessed the case also in the light of the written opinions of the relevant social welfare authorities.

14. On 10 December 1999 the Turku Court of Appeal (*hovioikeus, hovrätten*), having held a hearing, rejected the applicant's appeal. It held that the Finnish courts had jurisdiction because the child resided in Finland and had a close connection with the country. It also agreed with the lower court that Finnish law was applicable. As the parents' agreement of February 1995 had not been confirmed by the Social Welfare Board, the custody had not been settled prior to the proceedings in question. Further, the court found that the child's living conditions with the mother were balanced and solid. As the parents were unable to make decisions together relating to their daughter's custody, the court saw no reason to amend the lower court's decision.

15. On 12 June 2000 the Supreme Court (*korkein oikeus, högsta domstolen*) refused leave to appeal.

In 2002 the applicant lodged an application with the Finnish Ministry of Justice (*oikeusministeriö, justitieministeriet*) in order to have the child returned to Estonia under the Hague Convention on the Civil Aspects of International Child Abduction. The application was rejected, since it had already been confirmed by the above-mentioned courts that the child's habitual residence was in Finland. Thus, the Hague Convention did not operate.

16. Meanwhile, on 28 August 1998 the applicant instituted custody proceedings before the Tallinn City Court (*Tallinna Linnakohus*). In June 1999 the proceedings were suspended "until clarification of the issue of proper forum".

B. The access proceedings

17. On 26 January 2000 the applicant instituted access proceedings before the District Court of Kokemäki. He requested that the child be allowed to visit him once a month from Friday evening until Sunday evening and during some of the holidays.

18. On 9 June the court received a written opinion from the Social Welfare Board of Harjavalta, which had interviewed the mother and her partner on several occasions. Also the daughter had been interviewed at her home. The applicant had been interviewed over the telephone and he had submitted some documents in support of his access claim.

19. On 6 July 2000 the court held a hearing during which the parents with their counsel were present. It received written and oral evidence.

20. On 14 July 2000 the court ordered that the child should have the right to meet with the applicant every other Friday from 12 noon to 6 p.m. under the supervision of a social worker at the child's domicile. The mother was to assume responsibility for transporting their daughter to these meetings and for bearing the transportation costs. The court considered that the visits should be supervised owing to the fact that the applicant and the child had not met regularly for two years. One of the factors that contributed to this conclusion was that the applicant had allegedly tried to abduct the child. Further, as to the view of the Social Welfare Board that access should be granted twice a month for three hours at a time, the court found that three hours was too short a period in order to develop a trusting relationship between the applicant and his daughter and accordingly, it ordered that the visits should last six hours at a time. Lastly, the court emphasised that the access arrangements could be altered in the future, if need be.

21. On 9 March 2001 the Turku Court of Appeal rejected the applicant's appeal without an oral hearing. As to the allegedly unfair District Court proceedings, it found that the applicant had been able to submit evidence, which fact transpired from the decision. In its decision the District Court had stated what evidence had been submitted to it. As to the merits, the Court of Appeal found no reason to amend the lower court's decision.

22. On 30 July 2001 the Supreme Court refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Custody and right of access

23. Custody and right of access may be organised either by an agreement that is confirmed by the Social Welfare Board or by a court decision. The parents can have joint custody, custody can be awarded to one of the parents or to some one else who has consented thereto. The child has the right to maintain contact and meet with the parent with whom he or she no longer resides (sections 7, 8 (186/1994) and 9) of the Child Custody and Right of Access Act (*laki lasten huollosta ja tapaamisoikeudesta, lag angående vårdnad om barn och umgängesrätt*; 361/1983). When making a decision relating to custody and right of access, the best interests and the wishes of the child must be taken into account (sections 10 and 11).

Recognition and enforcement of a foreign custody agreement

24. When a child has domicile in Finland at the time of conclusion of an agreement on his or her custody, the agreement has to be made in accordance with Finnish law, even if all the parties are of a foreign nationality. In order for the agreement to be valid, it has to be confirmed by the Social Welfare Board (section 8). Alternatively, the question of custody

may be decided by a court. An agreement concluded without the confirmation of an authority may upon request be recognised and enforced in Finland as a decision given in a foreign State, if the measure is legally valid and enforceable in the State where the child had habitual residence at the time of conclusion of the agreement (section 23).

25. In order to have an agreement enforced in Finland it must first be recognised by the Helsinki Court of Appeal (section 25; 186/1994).

Changing an agreement or review of a court order

26. A parent may at any time institute proceedings in a case relating to custody or right of access (section 14). An agreement or a court order may be amended if the circumstances have changed (section 12).

Report by the Social Welfare Board

27. In order to decide on a case relating to child custody or right of access, the court must, unless unnecessary, request the Social Welfare Board to prepare a report on the circumstances of the case. The court is not bound by the report, which states the circumstances as the social welfare authorities see them and the Social Welfare Board's opinion on how custody or rights of access could be arranged (section 16; 186/1994).

Discretion of the court

28. In cases where the parents are unable to reach an agreement on custody or rights of access, the case will be decided by the court. The guiding principle is the best interests of the child. Special attention shall be paid to the manner in which custody or right of access may best be realised (section 10).

Ascertaining the child's wishes and views

29. The child's wishes and views must be ascertained as far as possible in view of the child's age and stage of development. The views of the child shall be ascertained tactfully, taking his or her stage of development into account, and in a manner not detrimental to the relationships between the child and the parents (section 11).

30. In normal circumstances a twelve-year-old is considered mature enough to express his or her views. The interview of a child is usually conducted by the social welfare authorities and at the child's home. However, the court may decide to hear the child in person, if there are important reasons for doing so, the child does not object to it and it causes no harm to the child (section 15).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. The applicant complained that his right to access to his child had been overly restricted by the courts' decisions and fixed in a manner that made it effectively impossible for him to develop or to even maintain his relationship with his child: the daughter attends school on weekdays and due to the long journey between Estonia and her home it is impossible for the applicant to arrive at noon and to stay until six o'clock in the evening. The daughter should have been heard before the courts to find out her opinion, or at least to verify the reasons she had, according to the Social Welfare Board, expressed for her reservations as to meeting the applicant alone. The decisions did not strike a fair balance between the applicant's rights and other interests involved, and moreover, they were not even properly reasoned.

Article 8 reads:

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

32. The applicant questioned whether there had been a legitimate aim for the restricted access. The proceedings and their outcome had been one-sided. The Social Welfare Board and the courts had based their view on the fact that the parents were in dispute about their daughter's custody. Not only did the Finnish authorities and the courts lack a proactive approach but they had closed their eyes to the applicant's attempts to re-establish a normal relationship with his daughter. The access order had ignored the fact that his daughter attended school on Friday mornings. The supervised visits were to take place at a distance of 25 kilometres from the school and in order to be there at noon, the mother had to remove the child from school before her classes ended. Thus, the arrangement did not serve the best interests of the child.

33. The applicant submitted that he and his daughter had met in accordance with the access fixed by the courts on three occasions in 2000. All the meetings had been shorter than scheduled because of the applicant's travel arrangements since he had arrived only at 1.30 or 2 p.m. and he had

had to leave again at around 4.15 p.m. in order to catch the last ferry to Tallinn. The conditions under which they had met had been humiliating and had not helped to re-establish a close relationship. The meetings had been held behind locked doors and no friends from Estonia had been allowed to take part in the meetings. In mutual agreement with the mother the meetings as granted by the courts had soon been replaced by meetings and joint activities at the daughter's home and in other places in Finland, subsequently also in Estonia. The applicant was not aware of any attempts by the Finnish authorities to review the access order although the authorities were obliged to act in the best interests of the child. The applicant did not comment on the Government's argument that he had not requested the District Court to reconsider the arrangements.

34. The Government contested the allegation. They acknowledged that there was family life between the applicant and his daughter and that the impugned measure had constituted an interference with the right to respect for family life. However, it had been in accordance with the law and pursued the legitimate aims of protecting the health or morals and the rights and freedoms of the child. There was no indication that the law had been applied for any other purpose than to provide the child with safe and stable living conditions and to ensure a secure environment for her development. The measure had a basis in national law, according to which in case of dispute it was for the court to define the extent and the manner for the visits having regard to the best interests of the child. In the present case, the courts had received the Social Welfare Board's written opinion and evidence submitted by the parties. The courts had given relevant reasons. At the time of the proceedings, the girl had already been living with her mother in Finland for over five years. She had taken the view that she would like to see her father on her own when she grew older. If the parents agreed, nothing prevented the applicant and his daughter from meeting more often, as the visiting rights ordered by the courts were only a minimum.

35. The Government submitted that although the visits as ordered by the courts could be considered somewhat unsuitable, the length and the frequency of the visits had still been at the courts' discretion, bearing in mind the best interests of the child. As to the fact that the child had not been heard before the courts, the Government pointed out that children were in principle not heard in court. The decision-making process had provided the applicant with the requisite protection of his interests. The Government noted that the applicant could have requested the District Court to reconsider the access arrangements due to changed circumstances, namely the age of the child and the positively developed relationship between him and the child.

36. The Government also submitted that the applicant had met his daughter only three times for 2-3 hours at a time in accordance with the impugned decision, namely in July, August and November 2000. Five

organised visits had been unsuccessful as neither of the parents had appeared. Nor had they informed the social welfare authorities of any cancellation. On 3 November 2000 the parents had agreed that there would be no more scheduled visits until further notice. No such notice has been given to the authorities. The applicant visited his daughter four times in 2001 in her home for 1-4 hours at a time. Accordingly, the parents have been able to agree on the contacts themselves and it appears that the applicant and his daughter have seen each other regularly. According to the mother's reply to the social welfare authorities' inquiry, since 2002 many visits have taken place even in Estonia and the applicant and his daughter have spent many holidays together and also kept contact by telephone.

B. The Court's assessment

37. The parties agree that there was family life between the applicant and his daughter and that the access decision amounted to an interference with his right to respect for his family life, as guaranteed by Article 8 § 1. The Court sees no reason to differ. Any such interference will constitute a violation of this provision unless it is “in accordance with the law”, pursues an aim or aims that are legitimate under Article 8 § 1 and can be regarded as “necessary in a democratic society”.

38. The Court observes that the decision in issue had a basis in national law and it was aimed at protecting the best interests of the child, which is a legitimate aim within the meaning of Article 8 § 2.

39. In determining whether it 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 Article 8 § 2. 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. 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 *Sahin v. Germany* [GC], no. 30943/96, § 64, ECHR 2003-VIII).

40. The authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards 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 a young child and one or both

parents would be effectively curtailed (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII; and *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I).

41. In the present case, the District Court reached its decision having had regard to all the circumstances and evidence submitted to it and having examined the case also in the light of the written opinion of the Social Welfare Board of Harjavalta. Insofar as the applicant has expressed his misgivings with the opinion, the Court notes that the District Court made its own assessment of the case and granted longer visits than proposed in the opinion. The District Court placed emphasis on the fact that the applicant and his seven-year old daughter had not met regularly for about two years and that the girl had a reserved attitude towards her father. Against that background, the Court considers that the decision to grant only supervised visits may be regarded as supported by relevant and sufficient reasons.

42. As to the effects of the access order, the Court recalls that contact visits did take place during 2000 following which the parents agreed that there would be no more scheduled visits until further notice and that they subsequently failed to give the authorities such notice but arranged the visits by mutual agreement (see paragraphs 33 and 36 above). The Court acknowledges that arrangements such as those fixed by the courts in this case may require great efforts on the part of the parent with whom the child no longer lives. However, it recalls that in a balancing exercise like the present the best interests of the child may override those of the parent. The Court also observes that the applicant could at any time have made an application to have the access order amended if he found it too difficult to be put into effect (see paragraph 26 above). This was also emphasised in the District Court's decision (see paragraph 20 above).

43. As to the procedural requirements implicit in Article 8 (for which see *Sahin v. Germany* [GC], cited above, §§ 70-72), the Court finds no indication that the decision-making process did not provide the applicant with the requisite protection of his interests. As to the applicant's grievance that the domestic courts did not hear evidence from his daughter, it is to be noted that her views were recorded in the report submitted by the Social Welfare Board and considered by the domestic courts.

44. The Court finds therefore that there is no indication that the courts failed to respect the applicant's right to respect for family life as regards the issue of access to his child. It follows that there has been no violation of Article 8 in that regard.

II. ALLEGED VIOLATION OF ARTICLE 8 IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

45. The applicant alleged discrimination in relation to the alleged breach of the right to respect for family life. The Social Welfare Board had not taken into account his right to develop ties to his daughter.

Article 14 reads:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A. The parties' submissions

46. The Government contested the allegation as the allegedly discriminatory opinion of the Social Welfare Board had been examined by the courts. The courts had taken note of all the circumstances and all the evidence before issuing its decision.

47. The applicant submitted that although he had been able to present his arguments before the courts, they clearly placed substantial weight on the arguments of his ex-partner, whereas they did not explain why they disagreed with the arguments put forward by him.

B. The Court's assessment

48. The Court considers that the applicant's complaint is in reality a restatement of his complaints under Article 8 regarding the manner in which the domestic courts balanced the interests involved and therefore gives rise to no separate issue.

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

49. The applicant complained, under Article 6, that he had been denied fair proceedings by impartial tribunals in that the District Court had stated that “the question concerns only the child's right to meet with her father and not the father's right too see his child”, and the higher courts had not corrected that statement. The decisions were not properly reasoned, either.

Article 6 § 1 reads in relevant part:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

50. The Court notes that the Finnish Child Custody and Right of Access Act emphasises that a decision on access must be in accordance with the best

interests of the child and that the right in question is a right granted to the child to maintain contact and meet with the parent with whom he or she no longer resides (see paragraph 23 above). In such circumstances, the impugned statement does not disclose any partiality on the part of the District Court or the higher tribunals.

51. As to the reasoning provided by the domestic courts, the Court reiterates that whilst Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Nor is the Court called upon to examine whether arguments are adequately met (see *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 19-20, § 59-61). Making a general assessment, the Court does not find that the decisions in question are insufficiently reasoned.

52. There has therefore been no violation of Article 6 § 1 in the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 8 of the Convention;
2. *Holds* that no separate issue arises under Article 8 taken together with Article 14 of the Convention;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 23 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President