



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

SECOND SECTION

CASE OF JUCIUS AND JUCIUVIENĖ v. LITHUANIA

(Application no. 14414/03)

JUDGMENT

STRASBOURG

25 November 2008

FINAL

25/02/2009

This judgment may be subject to editorial revision.

In the case of Jucius and Juciuvienė v. Lithuania,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 4 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 14414/03) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Lithuanian nationals Mr Marijus Jucius and Mrs Gertrūda Juciuvienė (“the applicants”), on 7 April 2003.

2. The applicants were represented by Mr A. Jokšas, a lawyer practising in Tryškiai. The Lithuanian Government (“the Government”) were represented by their Agent, Ms E. Baltutytė.

3. The applicants alleged, *inter alia*, a violation of their right to family life as the domestic courts originally granted permanent custody of their two orphaned nieces to grandparents. They also complained about certain aspects of the appeal procedures in the case.

4. On 1 July 2005 the Court decided to give notice to the Government of the applicants’ complaints under Articles 6 and 8 of the Convention. On the same date, it decided to apply Article 29 § 3 of the Convention and to examine the merits of the complaints at the same time as their admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The first applicant is a Lithuanian national who was born in 1966. The second applicant, his wife, is a Lithuanian national who was born in 1967. They live together in Mažeikiai and have two children.

6. In April 1999 the first applicant's sister, SJ, and her partner, DŠ (senior), died, and the applicants were appointed as temporary custodians of the deceased couple's daughters - RŠ, aged four, and DŠ, aged six months.

7. On an unspecified date in 1999 the paternal grandparents, SŠ and VŠ, applied to a court to adopt RŠ and DŠ. The applicants submitted a counter-claim for the adoption. On 22 December 1999 the Mažeikiai District Court accepted the grandparents' claim, recognising RŠ and DŠ as their adopted children. On 27 March 2000 the Šiauliai Regional Court upheld that decision. On 14 June 2000 the Supreme Court quashed the lower decisions, remitting the case for a fresh examination at first instance.

8. On 17 July 2001 the Mažeikiai District Court partly granted the claim of SŠ and VŠ, by recognising DŠ (then two years) as their adopted daughter. However, it recognised RŠ (then six years old) as the adopted daughter of the applicants. The applicants and the grandparents were ordered by the court to ensure that there were no obstacles that would prevent RŠ and DŠ from communicating with the applicants as well as with their grandparents.

9. On 8 March 2002 the Šiauliai Regional Court quashed the decision, dismissing both adoption applications. The court considered that the dispute between the two couples could be resolved without an adoption, but by a grant of permanent custody.

10. On 28 August 2002 the Mažeikiai District Court appointed SŠ and VŠ as the permanent custodians of the two girls. The court reached this decision on account of the better financial and living conditions of the grandparents compared to the applicants, as well as the fact that SŠ and VŠ were closer blood relatives to the girls. Noting RŠ's young age (then seven years old) and her "emotional instability" when expressing herself in front of officials, the court rejected her express wish to live with her "mother" and "father" (the applicants). The Mažeikiai District Court observed that a child's wish does not necessarily coincide with its future interests; therefore the court was not bound by RŠ's opinion. The court took note of the request of the Child Rights Protection Institution to give custody of the girls to the applicants, whom the girls recognised as their "natural family" and who had cared for them since their parents' death. However, it concluded that the girls were of a young, adaptable age. As RŠ had lived with the applicants for a few years, without any memory of her grandparents' family, she was unable to understand where she would be better off.

11. The applicants and the Child Rights Protection Institution appealed. On 4 November 2002 the Šiauliai Regional Court confirmed the first-instance reasoning and decision after a written procedure, without an oral hearing of the parties.

12. The applicants and the Child Rights Protection Institution lodged cassation appeals. On 8 November 2002 the President of the Supreme Court suspended the execution of the Mažeikiai District Court's decision until the

cassation appeal could be examined. On 12 February 2003 the Supreme Court held that it had no jurisdiction in child custody cases and dismissed the cassation application.

13. On 21 March 2003, when the bailiff attempted to execute the courts' decision, RŠ refused to leave the applicants' home to live with her grandparents. DŠ was taken to the grandparents.

14. On an unspecified date the Prosecutor General, defending the public interest, filed a request to reopen the proceedings. The Telšiai District Court reopened the civil proceedings and, on 8 October 2004, overruled the Mažeikiai District Court's decision of 28 August 2002. The court granted permanent custody of RŠ to the applicants, who lived in Mažeikiai, and permanent custody of DŠ to the grandparents, who lived in Klaipėda. When deciding to separate the sisters, the court noted the wish of RŠ to stay with the applicants and the wish of DŠ to stay with her grandparents. The court also observed that, since March 2003, the girls had lived separately and were used to their current environments.

15. The grandparents appealed to the Šiauliai Regional Court, which on 22 November 2004 upheld the lower court's decision. The appellate court was of the opinion that it had been reasonable for the first-instance court to take into consideration the interests of each child and not to consider them as an inseparable unit. The court noted that the children should be provided with the most suitable and best conditions to meet their personal interests in the most advantageous way. Therefore the court found that the principle of not separating siblings had been justifiably overruled. It also held that the principle of placing children within the family had not been violated. The court pointed out that it was not only blood ties which mattered when choosing placements, but also the individuals to whom the child felt closest.

16. On 6 June 2005 the Supreme Court gave a final ruling and upheld the decision of the Šiauliai Regional Court. Agreeing with the reasoning of the lower courts, it observed that during the initial proceedings the Mažeikiai District Court had made a mistake by not giving primary consideration to the wishes of RŠ. The Supreme Court also noted that the evidence in the case showed the existence of a conflict between the two guardianship families. It noted that proper conditions should be created so that the girls could communicate with each other, giving the primary importance of the children's interests over those of their guardians. This was an obligation for the State authorities to fulfil.

II. RELEVANT DOMESTIC LAW

17. The questions related to child custody are regulated by the Civil Code (*Civilinis kodeksas*), the relevant articles of which read as follows:

Article 3.164. Involvement of a minor in the assurance of his or her rights

“1. In considering any question related to a child, the child, if capable of formulating its views, must be heard directly or, where that is impossible, through a representative. Any decisions on such a question must be taken with regard to the child’s wishes unless they are contrary to the child’s interests. In making a decision on the appointment of a child’s guardian/curator or on a child’s adoption, the child’s wishes shall be given paramount consideration ...”

Article 3.248. The purpose and objectives of child custody/curatorship

“1. The purpose of child custody/curatorship is to ensure the child’s upbringing and care in an environment which would facilitate the child’s growing up, development and progress.

2. Objectives of child custody/curatorship:

1) to appoint for the child a guardian whose duty it will be to take care of the child, bring it up, to represent the child and protect its rights and legitimate interests;

2) to provide the child with living conditions which would be adequate for its age, state of health and development level;

3) to prepare the child for independent life in a family and in society.”

Article 3.249. Principles of establishing child custody/curatorship

“1. The establishment of child custody/curatorship shall be governed by the following principles:

1) first consideration must be given to the interests of the child;

2) priority in becoming the child’s guardians (curators) must be accorded to its close relatives, provided this is in the child’s best interests;

3) the child’s custody/curatorship in a family;

4) non-separation of siblings, except when this is contrary to the child’s interests. ...

3. When child custody/curatorship is established or ended, or a guardian is appointed to a child capable of expressing its views, the child shall be provided an opportunity to be heard and to influence the decision making.”

Article 3.257. Placing a child under permanent custody/curatorship

“A child shall be put under permanent custody (curatorship) when:

1) both parents or the single parent of the child are dead...”

Article 3.268. The procedure for the selection of the custodian/curator for a child

“1. A child’s guardian/curator shall be selected by taking into consideration his or her personal qualities, state of health, abilities to function as a guardian/curator, relations with the child deprived of parental care, and the interests of the child...”

18. The Law on the Fundamental Protection of the Rights of the Child (*Vaiko teisių apsaugos pagrindų įstatymas*), insofar as relevant to this case, provides as follows:

Article 4. General Provisions in Defence of the Rights of the Child

“Parents, other legal representatives of the child, the State, municipal government, public institutions and other natural and legal persons must abide by the following provisions and principles:

- 1) the legal interests of the child must always and everywhere be given priority ...
- 5) no child must be left without a home, minimum funds for subsistence and care or custody...”

Article 23. Right of the Child to Live with Parents or Persons Representing Them

“1. A child shall have the right to live with its parents or other legal representatives.

2. To separate a child from its parents or its other legal representatives against the will of the child, as well as that of its parents (legal representatives), shall be permitted only in exceptional circumstances, provided for by laws and according to the established procedure, based upon a court decision and when such a separation becomes necessary for the child (striving to avoid danger to the life and health of the child, or it becomes necessary to take measures in relation to its care and upbringing or to protect other important interests of the child).”

19. Under Articles 312²² and 312²³ of the Code of Civil Procedure, as in force at the material time, in child custody cases a court was to hold a hearing during which a child could express his or her opinion. Under Article 347 of the Code the parties could bring a separate appeal (*atskirąjį skundą*) against a decision of a first instance court. Article 349 stipulated that the appellate court would determine such appeals by way of a written procedure. According to Articles 334 and 350¹ of the Code, the appellate court, when examining a separate appeal, had a right to examine *de novo* evidence, as well as evidence which had already been examined by the first instance court. Therefore the appellate court could decide both questions of law and fact.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The applicants alleged an infringement of the right to respect for their family life, in that the courts originally awarded custodianship of their two orphaned nieces, with whom they had lived for three years, to the children's paternal grandparents. They also claimed that the custody proceedings before the domestic courts had lasted almost four years, thereby breaching the "reasonable time" requirement of Article 6 § 1 of the Convention. They further submitted that there had been a violation of Article 2 § 1 of Protocol No. 4 to the Convention claiming, that the girls had initially not been able to choose their place of residence.

21. The Court considers that all these complaints are in essence related to an alleged violation of the right to respect for family life guaranteed by Article 8 of the Convention, on which the Court will concentrate its examination in this case and which reads insofar as relevant as follows:

"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 ... for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

22. The Government first contended that, taking into account the young age of the girls when they were placed with the applicants' family, it was not possible to state unambiguously that the ties between the girls and the applicants were strong enough to be qualified as "family life" within the meaning of Article 8 of the Convention. Therefore, in the original award of permanent custody of both children to SŠ and VŠ, the State had not interfered with the applicants' rights.

23. The Government further submitted that the complaint was inadmissible as being manifestly ill-founded. They argued that, since the applicants had lodged the application with the Court, the circumstances of the case had significantly changed, with separate custody arrangements being made for the two girls in the reopened proceedings, in line with the girls' wishes, and an obligation on the part of the authorities to ensure that the sisters could continue to communicate with each other properly. In these

circumstances, the Government concluded that the State had not violated the applicants' right to respect for their family life.

2. *The applicants*

24. The applicants maintained that the domestic courts' original decision to award custody of RŠ and DŠ to the paternal grandparents had been without reason. They argued that the courts had reached their conclusions regardless of the fact that RŠ and DŠ had lived with them for most of their lives, and that the girls had come to know them as their natural parents and the applicants' own children as their natural brother and sister. The applicants contended that, during the hearing at the Mažeikiai District Court, RŠ, whose ability to comprehend objectively the situation had been confirmed by the Child Rights Protection Institution, had expressed her clear wish to stay with the applicants. Therefore the court could have foreseen the future problems regarding the execution of such a decision. However, the court ignored her wishes as well as the domestic legislation which provides that, in custody proceedings, particular attention should be paid to the wishes of the child and to the principle of the non-separation of siblings.

25. The applicants further observed that the Šiauliai Regional Court on 4 November 2002 determined their appeal by way of a written procedure, without hearing the parties, even though it was deciding not only legal but also factual matters. This decision of the Šiauliai Regional Court was decisive in the case as, on 12 February 2003, the Supreme Court rejected the cassation appeal. The applicants claimed that the decision of the Šiauliai Regional Court regarding the grant of custody of RŠ to her grandparents had proved impossible to execute and this had been the major reason why the domestic courts had reopened the proceedings and had amended the original judgment. Thus, the custody questions were first solved *de facto*, and the courts only later formalised the situation.

26. The applicants argued that their complaints should only be determined by the Court in the light of the original domestic decisions, prior to the introduction of their application to the Court. They observed that, after the reopening of the case, the courts had only partly found in their favour. The applicants nonetheless noted that they had never appealed, nor would they ever appeal, against the final court decisions in the reopened proceedings to separate the sisters because of the moral damage which the proceedings had already caused to RŠ.

B. Admissibility

27. The Court recalls that, in accordance with its case-law, the existence of "family life" is essentially a question of fact depending upon the genuineness of close personal ties (see, *K. and T. v. Finland* [GC],

no. 25702/94, § 150, ECHR 2001-VII). In the present case, the applicants had lived with RŠ and DŠ since their parents' death in April 1999 until February 2003, when the grandparents were granted permanent custody of both girls. The Court notes that, during this period, the applicants had initially been appointed as temporary custodians and later took legal steps to adopt the girls. A clear intention of continuing their life together can thus be deduced. The Court also takes into account the fact that RŠ refused to leave the applicants' home when the authorities attempted to execute the court decision to send her to her grandparents (see paragraph 13 above). In these circumstances, the Court cannot but find that, at the time of the authorities' intervention, there existed between the applicants and the girls a genuine "family life" within the meaning of Article 8 § 1 of the Convention.

The Court will take into account the reopened proceedings only for the purpose of assessing whether there was a violation of Article 8 in the initial civil proceedings, complained of by the applicants.

28. In the light of the parties' submissions, the Court finds that the application is not manifestly ill-founded. As there are no other grounds warranting the rejection of the application, the Court concludes that it must be declared admissible.

C. The merits

29. There is no doubt that the Mažeikiai District Court's decision of 28 August 2002 and the Šiauliai Regional Court's decision of 4 November 2002, which led to the placement of DŠ with her grandparents and, subsequently, the applicants' exclusion from her upbringing, disrupted the relationship between the applicants and DŠ. Moreover, until the ruling of the Supreme Court of 6 June 2005, their relationship with RŠ must have been perturbed by uncertainty.

In the Court's view this situation amounted to an interference with the applicants' right to respect for family life guaranteed by Article 8 § 1 of the Convention.

30. The Court recalls that, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process leading to such an interference must be fair and such as to afford due respect for the interests safeguarded by Article 8 (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, § 87). Consequently, the Court must first determine whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the applicants were sufficiently involved in the decision-making process, seen as a whole, in order to ensure the requisite protection of their interests. If they have not, there will have been a failure to respect their family life, because the interference could not be regarded as having been "necessary" within the meaning of Article 8 (see, *mutatis mutandis*, *W. v.*

the United Kingdom, judgment of 8 July 1987, Series A no. 121, p. 29, § 64).

31. As regards the instant case, the Court notes that the Šiauliai Regional Court determined the applicants' appeal by way of a written procedure. The Court has recognised that, provided a public hearing has been held at first instance, the absence of a second hearing on appeal may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 (paragraph 34 below), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see *Helmerts v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, § 36). However, the Court observes that the Šiauliai Regional Court essentially had to determine a factual question, namely, whether the applicants or the grandparents should be granted permanent custody of the orphaned girls (see, *a contrario*, *Valová, Slezák and Slezák v. Slovakia*, no. 44925/98, 1 June 2004, §§ 61-69). Thus the proceedings were of crucial importance for the applicants and involved the assessment of their character as well as the motives and wishes of the girls. In the Court's view, this was a question of fact which could not be adequately resolved on the basis of the case file. In such circumstances, where evaluations of this kind played such a significant role and where their outcome could be of major detriment to the applicants, it was essential to the fairness of the proceedings that the appellate court hold a hearing and afford the applicants and the girls an opportunity to be heard and fully participate in order to ensure the best interests of the orphaned children in the future.

32. The Court also recalls that effective respect for family life requires that future relations between parent and child should not be determined by the mere effluxion of time (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 65). However this is what happened in the present case. It was RŠ' continued resistance to the enforcement of the decisions of the Mažeikiai District Court and the Šiauliai Regional Court that she should be in the permanent custody of SŠ and VŠ which led to the reopening of the proceedings. Thereby, the courts were prompted to amend those decisions and to rule partly in favour of the applicants by granting them the custody of RŠ (see paragraphs 15-17 above). Moreover, the Supreme Court acknowledged the mistake which the lower courts had made when applying the domestic law (see paragraph 16 above). Finally, the Court notes the position of the Supreme Court that proper conditions should be created so that the two girls could communicate with each other. This remains an obligation for the State authorities to fulfil.

33. In the light of the foregoing considerations, the Court concludes that the initial decision-making process which fixed the custody and access arrangements in relation to RŠ and DŠ did not afford the requisite

protection of the applicants' interests as safeguarded by Article 8. There has accordingly been a violation of this provision.

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

34. The applicants also complained under Article 6 § 1 of the Convention of the written nature of the appeal proceedings before the Šiauliai Regional Court. This provision, in its relevant part, reads as follows:

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

35. The Government submitted that the complaint was manifestly ill-founded.

36. The Court notes that this complaint is closely linked to that made under Article 8 of the Convention. It must therefore likewise be declared admissible. However, the essence of the merits of this element has been examined in detail above and a violation of the right to respect for family life has been established (paragraphs 30-33). Consequently, the Court finds it unnecessary to consider the matter separately under Article 6 § 1.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

37. Lastly, again relying on Article 6 § 1 of the Convention the applicants complained that the Šiauliai Regional Court had been biased. They also complained that they had not had an effective domestic remedy, within the meaning of Article 13 of the Convention, as the courts had ignored their request for an expert report to determine certain factual questions in the case.

38. The Court has examined the remainder of the applicants' complaints as submitted by them. However, having regard to all the material in its possession, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicants claimed 100,000 Lithuanian litai (LTL) (approximately 28,962 euros (EUR)) in respect of non-pecuniary damage.

41. The Government contested these claims as being unsubstantiated and excessive.

42. The Court considers that the applicants may be considered to have suffered some non-pecuniary damage as a result of the breach of their rights which cannot be compensated by the Court’s finding of a violation alone. Nevertheless, the amount claimed is excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicants, jointly, the sum of EUR 5,000.

B. Costs and expenses

43. The applicants also claimed LTL 1,000 (approximately EUR 289) for the costs and expenses incurred before the domestic courts. However, they had not kept any documents which would prove their disbursements.

44. The Government opposed the claim as being unsubstantiated.

45. In the absence of supporting documentation, the Court rejects the applicant’s claim.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the right to respect for family life and the written nature of the appeal procedure admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that it is unnecessary to make a separate examination of the written nature of the appeal procedure under Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, which sum is to be converted into the currency of the responded State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President