



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

FOURTH SECTION

CASE OF KALETA v. POLAND

(Application no. 11375/02)

JUDGMENT

STRASBOURG

16 December 2008

FINAL

06/04/2009

This judgment may be subject to editorial revision.

In the case of Kaleta v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 25 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 11375/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Anton Kaleta (“the applicant”), on 1 June 2001.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs. The German Government did not make use of their right to intervene (Article 36 § 1 of the Convention).

3. The applicant alleged that the Polish authorities had failed to take effective steps to enforce his right of contact with his daughter, which had violated his rights under Article 8 of the Convention.

4. On 12 July 2006 the President of the Fourth Section decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

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

5. The applicant was born in 1948 and lives in Taufkirchen, Germany.

6. The applicant and W.K. had a daughter M., born on 11 June 1989. The couple married in August 1989. The applicant and his wife separated on 1 August 1992.

7. On 3 September 1992 W.K. lodged a divorce petition with the Katowice Regional Court (*Sąd Wojewódzki*). On 9 February 1993 the proceedings were discontinued as she had withdrawn her petition.

8. In 1993 W.K. again lodged a petition for divorce, this time with the Family Court in Munich.

9. Between 23 February 1994 and 3 August 1994 W.K. was detained on charges of child abduction and theft. On 3 August 1994 she was acquitted by the Munich Court.

10. On 27 February 1995 the Munich District Court awarded custody rights to W.K. The court considered that the mother took great care of the child and that the child had very good living conditions at her mother's place.

11. On 15 June 1994 the applicant lodged an application with the Będzin District Court for sole custody of his daughter.

12. On 22 June 1995 the District Court in Będzin, Poland, gave a decision. The court awarded parental rights to W.K. and limited the applicant's rights to visiting rights. The court did not specify the access arrangements. The court also restricted W.K.'s parental rights by appointing a guardian to supervise her in the exercise of her rights.

13. Meanwhile, on 9 December 1994 the applicant asked the court to specify the access arrangements.

14. On 5 October 1995 the Będzin District Court gave a decision pursuant to the provisions of the Hague Convention. It allowed the applicant to visit the child on the first Friday of each month between 10 a.m. and 5 p.m. The meeting was to take place on the premises of the Będzin Family Centre (*Ośrodek pomocy dziecku i rodzinie w Będzinie*). In addition, W.K. and a court guardian were to be present during the meeting.

15. On 14 November 1996 the Będzin Family Centre confirmed that between October 1995 and 14 November 1996 the applicant failed to report for visits. On the other hand, the child and the mother were present at every meeting.

16. On 20 November 1996 the applicant applied to the Będzin District Court to change the access arrangements. He wished to see his daughter during ten days of the winter holidays and two weeks in summer. On 27 November 1997 the Będzin District Court dismissed his request.

17. On 25 November 1996 the applicant lodged an application with the Munich District Court challenging his paternity with respect to M.K. However, a DNA test confirmed his paternity.

18. On 15 August 1997 the Family Court in Munich dissolved the applicant's marriage and awarded parental rights to W.K.

19. On 5 January 1998 W.K. instituted proceedings before the Będzin District Court in which she requested that the applicant be divested of his parental rights on the ground that he had been aggressive towards her. She further requested that the court prohibit the applicant from having contact with his daughter.

20. On 20 October 1998 the applicant asked the court to dismiss W.K.'s request. He also requested that it grant him parental authority and limit W.K.'s parental authority to a right to have contact with the child. He submitted that W.K. was incapable of bringing up a child and had a history of criminal convictions for theft. In addition, criminal proceedings against her were pending (for assault on the applicant).

21. On 9 March 2000 the Będzin District Court gave a decision and dismissed both the applicant's and his ex-wife's requests. It also varied the contact arrangement of 1995. The court allowed the applicant to visit his daughter three times a year, on the first Friday of every fourth month between 1 p.m. and 5 p.m. The court held that the meeting was to take place on the premises of the Będzin Family Centre and W.K. and a court guardian were to be present during the meetings.

22. The applicant appealed. On 7 June 2000 the Katowice Regional Court dismissed his appeal. The court repeated the reasons given by the District Court.

23. On 20 June 2000 the Katowice District Court convicted W.K. of assault on the applicant.

24. A further cassation appeal by the applicant was dismissed by the Supreme Court (*Sąd Najwyższy*) on 12 December 2000. The court referred to the child's best interest.

25. In 2000 and 2001 W.K. failed to report with the child to the Będzin Family Centre for visits. In particular, on 7 January, 5 May, and 1 September 2000, and 5 January and 4 May 2001 the applicant was present at the Będzin Family Centre. On all these occasions the mother did not bring the child.

26. The applicant met his daughter on 7 September 2001, 4 January, 4 May and 10 May 2002.

27. On October 2001 the applicant made a request for modification of his contact arrangements. He asked to see his daughter without the presence of the mother and the guardian. On 22 May 2002 the Będzin District Court gave a decision. On the basis of an expert's report the court considered that contact with the applicant had been very stressful for the child. For these reasons and in view of the well-being of the child the court dismissed the applicant's request.

28. On 11 October 2001 the applicant made a request to the Family Division of the Będzin District Court under Article 1050 of the Code, asking the court to fine W.K. for failure to comply with the order of 9 March 2000. On 5 June 2002 the court dismissed his request.

29. On 20 October 2003 the applicant met his daughter in the Będzin Family Centre.

30. In August 2004 the applicant's daughter (then fifteen years old) sent a letter to her father stating that she did not wish to see him.

31. On 3 September 2004 the mother again failed to bring M. for a visit.

32. On 15 December 2004 the applicant made a request to the Family Division of the Będzin District Court under Article 1050 of the Code, asking the court to fine W.K. for failure to comply with the order of 9 March 2000. He also asked the court to vary the contact arrangements and to allow him to visit his daughter three times a year, on the first Friday of every fourth month between 10 a.m. and 8 p.m.

33. On an unknown date the request to impose a fine on W.K. was transferred to the Civil Division of the Będzin District Court. On 20 October 2005 she was fined (1,000 Polish zlotys (PLN)) for failing to appear at meetings. Her appeal against his decision was dismissed on 15 February 2006.

34. On 7 January 2005 the Będzin District Court gave a decision and dismissed the applicant's request for modification of the contact arrangements. The court heard the sixteen-year-old M., who stated that she did not wish to have any contact with the applicant. The court held that it was not in the child's best interest to vary the visiting arrangements.

II. RELEVANT DOMESTIC LAW AND PRACTICE

35. The relevant domestic law concerning the enforcement of a parent's visiting rights is set out in the Court's judgment in the case *P.P. v. Poland* no. 8677/03, §§ 69-74, 8 January 2008.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained that the Polish authorities had failed to take effective steps to enforce his right of contact with his daughter, M. He alleged a violation of Article 8 of the Convention, 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.”

37. The Government contested that argument.

A. Admissibility

38. The Government submitted a preliminary objection that the applicant had failed to exhaust the required domestic remedies. They stressed that the applicant had failed to appeal against the decisions of 5 October 1995, 27 November 1997 and 7 January 2005.

39. The applicant replied that he had made use of all available remedies in respect of his complaints.

40. The Court notes, that in the present case the applicant did not object to the contact arrangements as specified in the decisions of 5 October 1995, 27 November 1997 and 7 January 2005. He only maintained that the Polish authorities had failed to take effective steps to enforce his right of contact with his daughter.

41. In this respect the Court observes that it is true that the applicant did not appeal against the decisions referred to by the Government. However, he appealed against other decisions given in his case (see paragraphs 21, 24). He further initiated enforcement proceedings and asked the domestic courts to fine W.K. for failure to comply with the access arrangements (see paragraphs 28 and 32).

42. Against this background, the Court concludes that the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress. The Court accordingly dismisses the Government’s objections.

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

B. Merits

1. The parties’ submissions

44. The applicant claimed that there had been a continuing violation of his right to respect for family life. On many occasions he had asked to be allowed to see his daughter without the presence of his former wife and the court-appointed guardian, however to no avail. He had repeatedly instituted several sets of proceedings aimed at providing him with the opportunity to

have regular contacts with M. He further claimed that the child's mother had a negative influence on M. As a result, emotional ties between them loosened and he became in fact excluded from the process of bringing up his child. He concluded that there had been a violation of Article 8 in this respect.

45. The Government stressed that the applicant was himself responsible for not achieving a deeper emotional contact with his daughter. Between October 1995 and October 1996 he had not participated in any meetings with his daughter. When the meetings finally took place he had insulted the child's mother.

46. The Government pointed to the experts' opinion given in the domestic proceedings, according to which the applicant had a negative influence on his daughter. They stressed that the experts recommended limitation or suspension of the applicant's contacts with M. They submitted that despite the fact that the child had expressly stated that she did not wish to see her father, the public authorities maintained the applicant's right to continue to have contact with his child.

47. They further stressed that when the mother had failed to comply with the court's decision of 9 March 2000 the Bedzin District Court had imposed a significant fine on her. Therefore, the steps taken by the courts to protect the applicant's rights were quick and efficient. The Government concluded that the authorities had done everything they could to protect the applicant's rights to respect his family life.

48. They concluded that there was no violation of the applicant's right to family life.

2. The Court's assessment

49. The relationship between the applicant and his daughter amounted to "family life" within the meaning of Article 8 § 1 of the Convention. This has not been disputed.

50. The essential object of Article 8 is to protect an individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55).

51. Where the measures in issue concern parental disputes over their children, however, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact questions, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. In so doing, it must determine whether the reasons purporting to justify any measures taken with regard to

an applicant's enjoyment of his right to respect for family life are relevant and sufficient (see, amongst other authorities, *Olsson v. Sweden*, judgment of 24 March 1988, Series A no. 130, p. 32, § 68).

52. The obligation of the national authorities to take measures to facilitate contact by a non-custodial parent with children after divorce is not, however, absolute (see, *mutatis mutandis*, *Hokkanen*, cited above, § 58). The key consideration is whether those authorities have taken all necessary steps to facilitate contact such as can reasonably be demanded in the special circumstances of each case (see, *mutatis mutandis*, *Hokkanen*, cited above, § 58).

53. In examining whether non-enforcement of the access arrangements ordered by the domestic court amounted to a lack of respect for the applicant's family life the Court must strike a balance between the various interests involved, namely the interests of the applicant's daughter and her mother, those of the applicant himself and the general interest in ensuring respect for the rule of law.

54. In the light of the above principles, what is decisive in this case is whether the Polish authorities took all the necessary adequate steps to facilitate the enforcement of the contact arrangements as specified on 5 October 1995 and 9 March 2000. According to the access orders the applicant was firstly authorised to meet M. every first Friday of the month for seven hours; subsequently he was authorised to meet M. three times a year for two hours.

55. The difficulties in arranging contact were admittedly in large measure due to the animosity between the applicant's former wife and the applicant.

56. The Court notes that between October 1995 and November 1996 the applicant failed to report at any meeting in the Będzin Family Centre. On the other hand, M. and W.K. were present at every meeting (see paragraph 15). It is true that in 2000 and 2001 it was W.K. who had failed to bring her daughter to the family centre for several visits (see paragraph 25).

57. The Court considers that the domestic authorities had an obligation to ensure enforcement of contact arrangements, since it is they who exercise public authority and have the means at their disposal to overcome problems in the way of execution. In this respect the Court notes that the applicant's enforcement request eventually led to the imposition of a fine (PLN 1,000) on W.K. on 20 October 2005.

58. The Court observes that the conflict between the applicant and W.K. made it particularly difficult for the domestic authorities to act in order to enforce the applicant's visiting rights. Moreover, for some time the applicant himself failed to undertake effective steps in order to improve his contact with M. As time went by, M. matured and was able to take her own decisions in respect of her contacts with her father. The Court notes that the domestic authorities were also aware of the fact that the nature of the

applicant's contact with M. became dependent not only on the attitude of her mother, but also on the child's own wishes (see paragraphs 27 and 34 above). In this respect the Court reiterates that it is not seeking to substitute itself for the domestic authorities in the exercise of their responsibilities as regards parental authority, but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation (see *Olsson*, cited above, § 68)

59. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 16 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President