



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF ABDUVALIEVA v. GERMANY

(Application no. 54215/08)

JUDGMENT

STRASBOURG

26 November 2009

FINAL

26/02/2010

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 Abduvalieva v. Germany,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 3 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 54215/08) against the Federal Republic of Germany 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, Ms Rahima Musaevna Abduvalieva (“the applicant”), on 6 November 2008.

2. The applicant was represented by Mr I.-J. Tegebauer, a lawyer practising in Trier. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. On 16 February 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to give priority to the application and to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**A. Background to the case**

4. The applicant was born in 1957 and lives in Frankfurt.

5. The facts of the case, as submitted by the parties, may be summarised as follows.

6. The applicant is the mother of a child born on 23 January 1996. In 2004, after having obtained an expert opinion, a court transferred custody to her and at the same time determined the father's access rights.

7. On 17 August 2007, following a three-week stay with her father, the child refused to go back to her mother, and, on account of this, was taken into care.

B. Proceedings before the Frankfurt/Main District Court

8. On 20 August 2007 the applicant requested the court to return the child to her custody.

9. On 21 August 2007 the Frankfurt/Main District Court (the “District Court”), by means of an interlocutory decision, made at the request of the Frankfurt/Main Youth Office, transferred the right to determine the child's residence and other essential aspects of custody to the Frankfurt/Main Youth Office.

10. In a letter of 24 August 2007 the applicant requested the District Court to quash this decision. The court then set the parties a time-limit of four weeks to submit further submissions.

11. On 11 September 2007 the District Court formally appointed a guardian *ad litem* (*Verfahrenspfleger*) for the child. On 20 September 2007 the Youth Office submitted a report. On 27 September 2007 the District Court heard the child.

12. On 26 October 2007, on account of the competent judge being ill, the District Court cancelled the hearing scheduled for 30 November 2007.

13. On 1 January 2008 the case was assigned to another judge. On 5 February 2008 that judge scheduled the hearing for 18 March 2008.

14. On 11 February 2008 the applicant's newly-appointed lawyer requested access to the files. This was refused on the ground that he had not yet submitted a power of attorney. By letters dated 12 and 15 February 2008 the new lawyer requested that the hearing be scheduled for another day.

15. On 20 February 2008 the new lawyer submitted a power of attorney (possibly for the second time). On 27 February 2008 the District Court refused to reschedule the hearing, *inter alia*, on the ground that the applicant still appeared to be represented by her former lawyer, who had not yet informed the court that his mandate had been terminated.

16. On 3 March 2008 the applicant's new lawyer provided the District Court with satisfactory proof of the termination of the previous lawyer's mandate and again requested access to the files. This request was granted on 4 March 2008.

17. On 7 March 2008 the applicant challenged the judge on the ground of bias. On 13 March 2008 the hearing was cancelled. The applicant's lawyer was not informed about it. On 17 March 2008 the judge ruled against the allegation of bias.

18. On 20 March 2008 the applicant also challenged the appointment of the child's guardian *ad litem*. On 14 April 2008 the District Court

transmitted the files to the Frankfurt/Main Court of Appeal. On 17 April 2008 that court rejected her appeal.

19. On 25 April 2008 and again on 26 June 2008 the District Court also rejected the applicant's motion for bias. The latter decision was served upon the applicant on 18 July 2008. On 30 July 2008 the Frankfurt/Main Court of Appeal quashed the decision and found that the judge was biased as she had known that the applicant would not be represented at the scheduled hearing and, moreover, as she had not informed the applicant's lawyer that she had cancelled the hearing.

20. In letters of 15 and 29 August 2008 the applicant requested the District Court to schedule a hearing.

21. On 1 September 2008 the case was assigned to another judge. On 9 September 2008 that judge informed the applicant that she intended to appoint an expert.

22. By a letter dated 11 September 2008, the applicant lodged a constitutional complaint on the basis of the District Court's inactivity. On 16 October 2008, without giving further reasons, the Federal Constitutional Court refused to admit this complaint.

23. On 27 October 2008 the District Court decided that an expert opinion should be obtained on a number of questions and an expert was subsequently appointed. On 13 December 2008, on the court's request, the expert informed the District Court that he would submit a report by 1 March 2009. On 24 February 2009 the expert submitted his report.

24. At a hearing on 15 April 2009 the court heard the parties and the child.

25. On 20 May 2009 the Frankfurt/Main District Court rejected the applicant's claim. On that day it also decided, firstly, on a claim by the child's father, introduced on 19 November 2007, aimed at seeking custody of the child and, secondly, on proceedings on the right to determine the child's residence initiated by the court of its own motion.

26. On 18 June 2009 the applicant lodged an appeal with the Frankfurt/Main Court of Appeal.

THE LAW

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

27. The applicant complained that the length of the proceedings before the Frankfurt/Main District Court had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which reads as follows:

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

28. The Government contested that argument.

29. The Court notes that the proceedings before the Frankfurt/Main District Court started with the applicant's request to return the child to her custody on 20 August 2007; the proceedings ended with the District Court's decision of 20 May 2009. They thus lasted for one year and nine months.

A. Admissibility

30. 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

31. The applicant maintained that, even though the case was of a certain complexity, the overall duration of the proceedings was in breach of the “reasonable time” requirement laid down in Article 6 § 1 of the Convention. In her opinion, delays caused by the first judge's illness and also by the second judge's bias were clearly attributable to the State. The applicant also submitted that the District Court delayed the notification of the decision on the judge's bias, the transmission of files to the Court of Appeal, the transmission of the expert opinion and the assignment of the third judge. Moreover, she stressed that the decision to obtain an expert opinion was only taken after one year and two months. Finally, she pointed out that the proceedings were of particular importance to her.

32. The Government submitted that, at the relevant time, two further sets of proceedings which were closely connected with the proceedings at issue, and which therefore were decided upon on the same day, had been pending before the District Court – one, initiated *proprio motu*, on the right to determine the child's residence and another, initiated by the child's father, who sought to be granted parental authority. The Government also stressed that the proceedings had been of a highly sensitive nature, had involved complex issues and had not only required hearing evidence from the parents, the child and the Youth Office, but had also involved the appointment of a guardian *ad litem* for the child and the commissioning of an expert opinion.

33. As regards the judge's illness, the District Court, in the Government's view, adequately responded to this unforeseeable situation by assigning the

case to a new judge who, within a reasonable time, scheduled a new hearing. They also submitted that, even though the applicant's motion for bias had ultimately been successful, delays caused on account of this were not attributable to the State, since the grounds for bias had not been obvious or grave and since, moreover, the period of four months for three different decisions could not be regarded as being unreasonably long. In their opinion only three weeks, resulting from the delayed notification of one decision, had been attributable to the State. They finally emphasised that, although the proceedings had no doubt been of importance to the applicant, as of January 2008, she could have had regular access to the child.

2. The Court's assessment

34. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

35. The Court observes at the outset that the proceedings concerned the question whether the child should return to her mother's household and were linked to two further sets of proceedings on the right to custody and the right to determine the child's residence. It notes that the case was sensitive in nature and therefore required careful evaluation involving not only hearing evidence from all the parties but also the commissioning of an expert opinion. The Court therefore agrees with the parties that the case was of a certain complexity.

36. As regards the applicant's own conduct, the Court notes that, having appointed a new lawyer in February 2008, it took a further month before she provided the court with satisfactory proof of the termination of her previous lawyer's mandate. Moreover, her newly appointed lawyer insisted that the court schedule the hearing for another day and, although it was within the applicant's rights and although the motion was ultimately successful, she challenged the judge on the ground of bias. Further delays of about one month were caused by the fact that in March 2008 she also challenged the appointment of the child's guardian *ad litem*.

37. Turning to the conduct of the domestic authorities, the Court observes that the first hearing, scheduled for November 2008, had to be cancelled on account of the judge's illness. It was a further two months before the case was assigned to a new judge. Also, after the Court of Appeal's decision on the second judge's bias, more than one month elapsed before that judge was replaced. The Court further notes that it took one year and two months from the introduction of the claim before an expert was commissioned. Further delays were mainly caused in connection with the

decisions taken with regard to the motion for bias – in particular, the District Court delayed the notification of its respective decision for about one month.

38. The Court also observes that the situation in the present case was exceptional in that, during the whole of the proceedings, the child remained in care, while both parents had been willing to take care of her. The Court further accepts that the case was of particular importance to the applicant and also, on this ground, should have been dealt with expeditiously.

39. Having examined all the material submitted to it, the Court considers that, even though the case was of a certain complexity and was linked to two further sets of proceedings, in view of the exceptional situation and the fact that a number of delays are attributable to the authorities, the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

40. There has accordingly been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 4,625 euros (EUR) in respect of non-pecuniary damage – comprising an additional EUR 2,000 on account of the particular importance of the case to her.

43. The Government contested this claim. They submitted in particular that there was no general rule by which compensation could be increased by EUR 2,000 if the proceedings were of particular importance.

44. The Court, ruling on an equitable basis, finds that in the present case the finding of a violation of Article 6 § 1 of the Convention is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant. It therefore dismisses this claim.

B. Costs and expenses

45. The applicant also claimed EUR 2,380, corresponding to her lawyer's fees in the proceedings before the Federal Constitutional Court, and another EUR 2,380 for costs incurred before the Court. She submitted the

respective bills. She also sought EUR 500 for additional costs caused by the length of the proceedings before the Frankfurt/Main District Court. No evidence has been submitted in respect of this claim.

46. The Government contested these claims. They submitted that the applicant had failed to indicate the number of actual hours spent on the case or the hourly rate charged, which made it impossible to judge whether the amount claimed was reasonable. They also submitted that costs for the proceedings before the Federal Constitutional Court could not be claimed, as the Court, in its judgment of *Sürmeli v. Germany*, had found that a constitutional complaint was not an effective remedy against proceedings that lasted too long.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

48. 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 complaint concerning the excessive length of the proceedings admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that the finding of a violation of Article 6 § 1 of the Convention is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;
4. *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, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, 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 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 November 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President