



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

FOURTH SECTION

**CASE OF DAŁBROWSKA v. POLAND**

*(Application no. 34568/08)*

JUDGMENT

STRASBOURG

2 February 2010

**FINAL**

*02/05/2010*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of** Dąbrowska v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 12 January 2010,

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

## PROCEDURE

1. The case originated in an application (no. 34568/08) 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 Polish national, Ms Joanna Maria Dąbrowska (“the applicant”), on 8 July 2008.

2. The applicant was represented by Ms M. Gaşiorowska, a lawyer practising in Warsaw. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołaszewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the Polish authorities had failed to take effective steps to enforce the decisions granting her custody of her son J.

4. On 17 November 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was 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 lives in Białystok.

6. In 1991 the applicant married Mr S.D. On 21 December 1998 their son J. was born.

7. In February 2006 the applicant's husband took their son for a winter holiday but afterwards failed to return with him to the family's flat.

The applicant's husband rented a new flat and started hindering the applicant's contact with her son.

8. In February 2006 the applicant filed for divorce.

9. On 24 May 2006 the Białystok District Court (*Sąd Okręgowy*) gave an interim order which stipulated that, during the divorce proceedings, the child's place of residence would be with the applicant. The court ordered the applicant's husband to pay child maintenance and granted him access to J. on Thursdays and every other Saturday and Sunday. The interim order became final and enforceable on 25 May 2006.

10. On 5 July 2006 the District Court ordered the court-appointed guardians to enforce the decision of 24 May 2006 and to remove the child from his father's care.

11. On 14 July 2006 one of the guardians made a first attempt to enforce the court's order, which failed owing to the attitude of the father who refused to hand J. over to his mother. The guardian refused to call for police assistance or to inform the public prosecutor about the events.

12. The applicant informed the prosecutor that her child had been kidnapped by her husband. However, on 25 July 2006 the Kolno District Prosecutor refused to institute criminal proceedings, finding that no offence had been committed. This decision was upheld by the Białystok District Court on an unspecified later date.

13. The applicant was unable to assist the same guardian in her next attempt to remove the child from his father's care, which had been scheduled for 11 August 2006. Consequently, it had to be cancelled.

14. Given the subsequent inactivity of the guardians, the applicant lodged a complaint with the District Court on 6 December 2006.

15. In reply, she was informed by the President of the Łomża District Court that the guardians had received an instruction from a family court judge to cease their attempts to remove the child.

16. Following her second complaint about the court-appointed guardians, on 16 and 17 January and 5 February 2007, the President of the Białystok Regional Court (*Prezes Sądu Okręgowego*) wrote to the applicant informing her that he agreed that there had been shortcomings in the guardians' attempts to remove the child from his father's care and that new measures would shortly be taken. He noted, in particular, that before ordering a forced removal of the child, the applicant's husband should have been invited to voluntarily hand J. over. This had resulted in the unsuccessful enforcement of the court's order.

17. On 12 February 2007 the guardians made another attempt to remove the child. However, the applicant's husband had gone with the child to the adjacent flat. Both the guardians and the police refused to enter that flat.

18. On 20 February 2007 the Białystok District Court ordered the applicant's husband to hand over the child voluntarily to his mother within three days.

19. Since the father had failed to comply with this order, on 19 March 2007 the Białystok District Court gave a decision in which it authorised the court-appointed guardians to forcibly remove the child.

20. At a hearing held on 30 March 2007, in the course of the divorce proceedings, the court heard experts who had prepared an expert opinion requested by the court. They testified that the child's father had been manipulating the child with the aim of alienating him from his mother. The father had also made it difficult for the child to rebuild his relationship with his mother by ensuring that there was no private contact between her and the child. During visits the father was always present. In the best interest of the child, the experts recommended that custody be given to the applicant.

21. On 30 March 2007 the guardians made a fourth attempt to remove the child while he was at school. However, it was unsuccessful because the father had been notified by one of the guardians about the plan and thus did not bring the child to school on that day.

22. The guardians scheduled the next attempt to remove the child for sometime between 6 and 26 April 2007; however, it did not take place as the applicant did not receive formal notification until 28 April 2007. On 19 July 2007 the Białystok Regional Court considered that the late notification given to the applicant had been in violation of the domestic law.

23. On 27 August 2007 one of the guardians again attempted to remove the child; however, the child's father refused to open the door to the applicant and the guardian.

24. In August 2007 the applicant's former husband went into hiding with the child, so the guardians could not notify him of the next planned action. Even so, they did not inform the Kolno District Prosecutor about this fact until 29 November 2007. Subsequently, the Białystok District Court ordered that the applicant's former husband be heard by the Łomża District Court; for an unknown reason this order has never been carried out.

25. On 10 September 2007 the Białystok Regional Court dissolved the applicant's marriage. The court also decided to award the applicant full parental rights over J. It further found that the best interests of J. required that his place of residence be with his mother. The parental rights of the applicant's former husband were limited to decisions regarding the child's health and education. He was ordered to pay child maintenance and authorised to visit J. according to the arrangements set out in the judgment. The court considered that the applicant's former husband had been manipulating the child and alienating J. from his mother and other members of his family.

26. The applicant's husband lodged an appeal against the judgment.

27. Since September 2007 the applicant's child has not been attending school. On 5 December 2007 the applicant was fined for not fulfilling J.'s educational obligations. It appears that the decision was later quashed.

28. On 15 October 2007 the applicant received a reply from the President of the Białystok Regional Court to another of her complaints about the guardians' inefficiency. The President considered that some delays had been caused by the father's obstructive attitude but also by a lack of co-operation between the applicant and the guardians. Nevertheless, the last action by one of the guardians, which had taken place on 30 August 2007, had shown a lack of diligence, and the guardian had been instructed to make better use of the provisions of the Code of Civil Procedure (Article 598<sup>11</sup>).

29. On 28 February 2008 the Białystok Court of Appeal (*Sąd Apelacyjny*) upheld the divorce judgment and dismissed the applicant's husband's appeal as manifestly ill-founded. The judgment is final.

30. On 14 April 2008 the Białystok District Court decided to discontinue the proceedings concerning the enforcement of the court's order of 24 May 2006. It found that the enforcement proceedings had lost their legal basis in the light of the final judgment pronouncing the applicant's divorce. On 17 June 2008 the Białystok Regional Court quashed that decision. The court considered that the enforcement proceedings should be continued since parental rights had been awarded to the applicant and she wished the proceedings aiming at the enforcement of the court's decisions to be continued. Moreover, the child remained in the care of an unauthorised person.

31. On 14 August 2008 the President of the Białystok Regional Court again replied to the applicant's complaints that the enforcement proceedings were taking too long. The President informed the applicant that he would be personally overseeing the enforcement proceedings. He also stated that “the enforcement is still not effective and incorrect procedural decisions have again been taken, which have led to the proceedings being unnecessarily protracted”.

32. On an unspecified later date the applicant's former husband applied to be granted custody of J and to change the decision limiting his parental rights.

33. On 2 April 2009 the Białystok District Court, sitting in camera, gave a temporary order in which it decided that, until the matter of custody was re-examined on the merits, the child's place of residence should be with his father. The court pointed to the fact that the child had been living with his father prior to the divorce proceedings and had very few ties with his mother. The court took into consideration that the child, who was eleven years old, had expressed his preference to live with his father. Moreover, the court considered that J. had been having contact with the applicant and that remaining temporarily with his father would be in his best interest.

34. The applicant appealed against the decision, complaining that she had not been informed of the proceedings to change the custody order instituted by her former husband and that the decision had been issued without holding a hearing. She maintained that the child's father had not been properly caring for J. and had not fulfilled the court's orders.

35. On 13 May 2009 the Białystok Regional Court upheld the decision and dismissed the applicant's appeal. The court held that it had been necessary to legalise the existing status quo as J. had been in the care of his father since 2006.

36. To date J. has not been removed from his father's care. Prior to 2 April 2009, that had been in breach of the interim order of 24 May 2006 and the final divorce judgment of 10 September 2007. During that time, the applicant had only had infrequent contact with J., always in public places and in the presence of the child's father.

## II. RELEVANT DOMESTIC LAW

37. Article 598<sup>6</sup> of the 1964 Code of Civil Procedure (*Kodeks Postępowania Cywilnego*) provides that if a person who is ordered to return a child does not comply with the court's order, the court will instruct the guardian to forcibly remove the persons concerned (*przymusowe odebranie osoby*).

Under Article 598<sup>10</sup>,

“Upon a request of a court-appointed guardian, the police are obliged to help him or her to carry out the forcible removal of [a minor].”

Article 598<sup>11</sup> § 1 provides as follows:

“If forcible removal of [a minor] is hindered because that person is in hiding or because other action is taken with the aim of stopping the enforcement of the order, the court-appointed guardian shall inform a prosecutor.”

Pursuant to 598<sup>12</sup>,

“§ 1 The court-appointed guardian, in carrying out the removal of [a minor], shall be especially careful and shall do everything to ensure that the well-being of the child is not damaged and that [he or she] does not sustain physical or moral harm. If necessary, the guardian shall request the assistance of the social services or another institution tasked with this function.

§ 2 If the well-being of [a minor] would be placed at risk as a result of the removal, the guardian shall stop the enforcement of the order until the risk is over, unless by stopping the enforcement, the person would be placed at greater risk.”

38. Article 211 of the 1997 Criminal Code (*Kodeks Karny*) provides as follows:

“Whoever, contrary to the will of the person having care or supervision, abducts or detains a minor under fifteen years of age or a person who is helpless by reason of his mental or physical condition, shall be liable to a custodial penalty of up to three years.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

39. The applicant complained that her right to respect for private and family life, as protected by Article 8 of the Convention, had been breached. That Article 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.”

40. The Government did not comment on the application.

#### **A. Admissibility**

41. 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**

42. The applicant complained that the authorities had continually failed to enforce the court's decisions ordering that J.'s place of residence should be with her. She submitted that the State had a positive obligation to take effective measures aimed at securing her right to respect for her private and family life. She also stated that the court-appointed guardians had not acted with due diligence. The applicant had unsuccessfully complained to the supervisory authorities in relation to the guardians' actions.

As a consequence of the authorities' failure to enforce their own decisions the custody rights granted to the applicant had turned out to be illusory. She had been forced to agree to meet her son in conditions imposed by her former husband - only in public places and in his presence. The emotional ties between her and her son had been permanently affected.

43. As mentioned above, the Government did not submit any comment regarding this case.

44. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by 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 *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

45. The Court's case-law has consistently held that Article 8 includes a right for a parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures (see, *inter alia*, *Olsson v. Sweden* (no. 2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90), but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and *Zawadka v. Poland*, no. 48542/99, § 55, 23 June 2005).

46. 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. The key consideration is whether those authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 96, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII; and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003).

47. Other important factors in proceedings concerning children are that time takes on a particular significance as there is always a danger that any procedural delay will result in the *de facto* determination of the issue before the court and that the decision-making procedure provides requisite protection of parental interests (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, §§ 62-64).

48. The Court firstly observes that the present case does not concern a situation where the authorities were unable to effectively enforce the access rights of one divorced parent because of the conflict between the parties (see *D. v Poland* (dec). no. 8215/02, 14 March 2006). The applicant in the case under consideration was granted sole custody over her son J. by the final decisions issued by the domestic courts on 24 May 2006 and 10 September 2007. Nevertheless, these decisions were not enforced by the authorities and the applicant's son has been living with his father since February 2006.

Finally, in 2 April 2009 the authorities decided to legalise the status quo and granted the applicant's former husband temporary custody of J.

49. The interim order became enforceable on 25 May 2006 and immediately after that date the applicant applied to the court-appointed guardians to remove the child from the care of an unauthorised person. However, the first attempt was not made until 14 July 2006 (see paragraph 11 above). Subsequently, the guardians acted either slowly or ineffectively. For example, the Court notes a long period of inactivity between the first attempt to enforce the order and the second one, which took place seven months later (see paragraphs 13 and 17 above). The shortcomings were acknowledged by the President of the Białystok Regional Court on three occasions in 2007 and on at least one occasion in 2008 (see paragraphs 16 and 31 above). Nevertheless, there is no evidence that any action was taken to eliminate these shortcomings and to assure diligence by the guardians.

50. Nor is there any appearance that the authorities took a firmer stand after the judgment of 10 September 2007 became final, by virtue of which the applicant's former husband's parental rights were limited and the child's place of residence was again ordered to be with his mother. This judgment included a critical assessment of the father's parental skills based on the opinion of the expert, who considered that he had been manipulating his son and alienating him from the applicant (see paragraphs 20 and 25 above). Nevertheless, the courts attempted to formally discontinue the enforcement proceedings and apparently ceased to take any actions with the aim of changing the child's place of residence (see paragraph 30 above).

51. The Court acknowledges that some of the difficulty of the present case resulted from the fact that the applicant's former husband had refused to hand over the child to the court-appointed guardians. While the use of coercive measures against the child is not desirable, the Court reiterates that the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the child lives (see *H.N. v. Poland*, no. 77710/01, § 74, 13 September 2005, and *P.P. v. Poland*, no. 8677/03, § 92, 8 January 2008). In this connection the Court observes that, while there was no doubt that J. had been removed by the applicant's former husband in March 2006 and that the latter had been avoiding enforcement of a final decision granting the applicant custody of J., the domestic authorities nevertheless discontinued the investigation into the allegation of abduction and hiding of J. finding that no offence had been committed (see paragraph 12 above).

52. Without overlooking the difficulties created by the resistance by J.'s father, the Court thus finds that the lapse of time and the ineffectiveness of the enforcement of the binding domestic decisions were, to a large extent, caused by the authorities' own handling of the case. In this connection, the Court reiterates 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 *P.P.*, cited above, § 93, and *Sylvester*, cited above, § 69). Moreover, it cannot be said that the responsibility for failure of the

relevant decisions or measures can be attributed to the applicant who actively sought their enforcement (see *Hokkanen*, cited above, § 60).

53. In addition, the Court observes that no explanation has been put forward by the Government to justify the delays in the enforcement proceedings. Similarly, the Government have failed to provide any explanation as to whether the domestic authorities facilitated the enforcement of the final domestic decisions (see paragraphs 40 and 43 above, and *Pawlik v. Poland*, no. 11638/02, § 52, 19 June 2007).

54. Having regard to the foregoing, the Court concludes that the Polish authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the decisions ordering that the place of residence of the applicant's child be with her and thereby breached the applicant's right to respect for her family life, as guaranteed by Article 8.

There has accordingly been a violation of Article 8 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

57. The Government did not submit comments regarding the applicant's claim.

58. The Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

### B. Costs and expenses

59. The applicant, who was represented by a lawyer, also claimed 5,600 Polish zlotys (PLN), which amounted to EUR 1,250 at the time the claims were submitted, for costs and expenses.

60. The Government did not submit comments regarding the applicant's claim.

61. 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 were reasonable as to quantum. In the present case, the Court notes that the applicant's lawyer failed to specify the exact amount sought in respect of the costs and

expenses incurred in the domestic proceedings and in the proceedings before the Court. Nor did she submit any invoices or other evidence substantiating that the costs had been actually and necessarily incurred. Regard being had to the above the Court dismisses the claim for costs and expenses.

### **C. Default interest**

62. 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 application admissible;
2. *Holds* that there has been a violation of Article 8 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, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Nicolas Bratza  
President