



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

SECOND SECTION

CASE OF KRIVOŠEJ v. SERBIA

(Application no. 42559/08)

JUDGMENT

STRASBOURG

13 April 2010

FINAL

13/07/2010

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

In the case of Krivošej v. Serbia,

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,

András Sajó,

Nona Tsotsoria, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 23 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 42559/08) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Serbian national of Russian origin, Ms Ana Krivošej (“the applicant”), on 4 August 2008.

2. The applicant was represented by Ms A. Stojanović, a lawyer practising in Niš. The Serbian Government (“the Government”) were represented by their Agent, Mr S. Carić.

3. The President of the Chamber gave priority to the application in accordance with Rule 41 of the Rules of Court.

4. The applicant complained about the non-enforcement of a final access order in a pressing child-related matter.

5. On 20 March 2009 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was also decided that the merits of the application would be examined together with its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1969 and lives in Niš, Serbia.

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

A. Introduction

8. On 23 May 1993 the applicant married N.C. and on 1 February 1994 their son O.C. was born.

9. The applicant and N.C., at some point thereafter, started having marital problems.

10. In August 1999 the applicant moved out, but O.C. apparently remained with N.C.

B. The civil proceedings

11. In 2000 the applicant filed a claim with the Municipal Court (*Opštinski sud*) in Niš, seeking the dissolution of the marriage, the custody of O.C. and a contribution to his maintenance.

12. On 7 October 2002 the Municipal Court: (i) dissolved the marriage; (ii) granted custody of O.C. to N.C.; (iii) ordered the applicant to pay monthly child maintenance; and (iv) ruled that the applicant could spend every first and third weekend of each month with O.C., as well as a part of his winter and summer holidays, respectively. This judgment became final on 18 November 2002.

C. The judicial enforcement proceedings and the proceedings before the Social Care Centre

13. Having been refused access to O.C., on 5 February 2003 the applicant filed an enforcement request with the Municipal Court.

14. On 10 February 2003 the Municipal Court issued an enforcement order.

15. On 30 July 2003 the Municipal Court fined N.C. in the amount of 5,000 Serbian dinars (RSD) for failing to comply therewith.

16. On 21 May 2003 the Social Care Centre (*Centar za socijalni rad*) in Niš modified the applicant's rights, granting her access to O.C. every other Saturday between 9 a.m. and 2 p.m. At the same time, however, it placed N.C. under formal supervision (*nadzor nad vršenjem roditeljskog prava*) for refusing to comply with the applicant's access rights.

17. On 28 August 2003 this decision was confirmed on appeal.

18. On 17 November 2003 the Municipal Court repealed its decisions of 10 February 2003 and 30 July 2003.

19. On 5 April 2004 the Social Care Centre informed the Municipal Court of its decision adopted on 21 May 2003 and observed that, despite her keen interest, the applicant had only been able to see her child briefly at the centre's own premises.

20. On 16 April 2004 the Municipal Court ordered the enforcement of the judgment rendered on 7 October 2002, as amended by the decision of

the Social Care Centre of 21 May 2003. In so doing, it held that, should N.C. fail to respect the applicant's access rights, he would be fined in the amount of RSD 5,000 and, further, that forcible enforcement might itself ultimately be called for.

21. On 28 October 2004 the Municipal Court confirmed its decision of 16 April 2004.

22. Following N.C.'s two brief appearances before the Municipal Court on 23 September 2005 and 5 October 2006, on an unspecified date the court informed the applicant that her case file could not be found.

23. On 13 March 2008 the applicant therefore requested the reconstruction of the case file and on 5 June 2008 the Municipal Court accepted this request.

24. On 2 October 2008, however, the Municipal Court repealed its own decision, noting that the case file had been found in the meantime. Simultaneously, the court ordered the enforcement of the fine imposed previously and stated that a new fine in the amount of RSD 10,000 would be imposed should N.C. fail to comply with the order of 16 April 2004 within an additional period of three days. Lastly, the court stated that should repeated fines fail to secure the needed compliance, the applicant's access rights would have to be executed forcibly.

25. On 2 December 2008 the Social Care Centre informed the Municipal Court that the applicant had had no contact with O.C. since September 2007, which is when N.C. and O.C. had moved from Niš to Belgrade without informing the applicant of their new address.

26. On 30 April 2009 the police informed the Municipal Court that N.C. had registered his residence in Belgrade, and on 5 June 2009 they provided the court with his new address.

27. On 4 June 2009 the applicant's case file was forwarded to the Fourth Municipal Court (*Četvrti opštinski sud*) in Belgrade.

28. On 30 July 2009 the Fourth Municipal Court confirmed that N.C. had never moved to the address in question.

29. On 1 October 2009 N.C. informed the Fourth Municipal Court about his current address in Belgrade.

30. On the same date the Fourth Municipal Court ordered that the decision of 2 October 2008 be served on N.C. and carried out.

31. Throughout the proceedings the applicant repeatedly complained about the domestic courts' inability to effectively enforce her access rights.

D. Other relevant facts

32. On 25 July 2007 the Municipal Court in Niš terminated the employment of its bailiff in charge of the applicant's case, and on 20 May 2008 discovered the applicant's missing case file under his desk.

II. RELEVANT DOMESTIC LAW

A. Enforcement procedure legislation

33. Article 209 of the Enforcement Procedure Act of 2000 (*Zakon o izvršnom postupku*; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 28/00, 73/00 and 71/01), while placing special emphasis on the best interests of the child, states that there shall be an initial period of three days for voluntary compliance with a child custody and/or access order. Beyond that, however, fines shall be imposed and, ultimately, if necessary, the child taken forcibly, in co-operation with the Social Care Centre.

34. The Enforcement Procedure Act of 2004 (*Zakon o izvršnom postupku*; published in the Official Gazette of the Republic of Serbia - OG RS - no. 125/04) entered into force in February 2005, thereby repealing the Enforcement Procedure Act of 2000. In accordance with Article 304 of this Act, however, all enforcement proceedings instituted prior to 23 February 2005 are to be concluded pursuant to the Enforcement Procedure Act of 2000.

B. Other relevant legislation

35. Other relevant provisions are set out in the case of *Vinčić and Others v. Serbia* (nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, §§ 24-35, 1 December 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 8 OF THE CONVENTION

36. The applicant complained about the non-enforcement of the final access order adopted on 7 October 2002, as modified on 21 May 2003.

37. Being the master of the characterisation to be given in law to the facts of any case before it, the Court considers that the above complaint falls to be examined under Articles 6 § 1 and 8 of the Convention (see *Akdeniz v.*

Turkey, no. 25165/94, § 88, 31 May 2005, and *Felbab v. Serbia*, no. 14011/07, 14 April 2009).

38. The relevant provisions of the said Articles read as follows:

Article 6 § 1

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

Article 8

“1. Everyone has the right to respect for his [or her] private and 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 health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

39. The Government invited the Court to reject the application for non-exhaustion of domestic remedies. In particular, they submitted that the applicant had failed to lodge an appeal with the Constitutional Court under Article 170 of the new Serbian Constitution.

40. The applicant maintained that she had complied with the exhaustion requirement.

41. The Court has already held that the constitutional remedy in question should, in principle, be deemed effective within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced as of 7 August 2008 (see *Vinčić and Others v. Serbia*, cited above, § 51). Since the application in the present case was brought before that date, on 4 August 2008, and given that it finds no reason to depart from its conclusion in *Vinčić*, the Court considers that the Government's objection must be dismissed.

42. The Court further notes that the applicant's complaint, considered under Articles 6 and 8 of the Convention, is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. *As regards the applicant's complaint considered under Article 6 § 1 of the Convention*

43. The Government maintained that there had been no violation of Article 6 § 1 of the Convention. The impugned delay was partly attributable to the court's bailiff who was ultimately sanctioned for his malfeasance, and the Social Care Centre did its utmost to enforce the final judgment in question. Lastly, the Government emphasised that the applicant has not been deprived of all contacts with her child and pointed out that her former husband's new address was only established in October 2009.

44. The applicant reaffirmed her complaint.

45. The Court recalls its settled case-law to the effect that Article 6 § 1 of the Convention, *inter alia*, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among many other authorities, *Felbab v. Serbia*, cited above, § 61).

46. Further, the Court notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps to execute a final court judgment as well as to, in so doing, ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6 § 1 (see, *mutatis mutandis*, in the child custody context, *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 174-189, ECHR 2004-V, and *Felbab v. Serbia*, cited above, § 62).

47. Turning to the present case, the Court firstly observes that the final access order of 7 October 2002, as modified on 21 May 2003, has remained unenforced to date. Secondly, having adopted the enforcement order, the domestic courts were under an obligation to proceed *ex officio*. Thirdly, Serbia ratified the Convention on 3 March 2004, meaning that the proceedings in question have been within the Court's competence *ratione temporis* for a period of almost five years. Fourthly, during this time, the domestic courts fined N.C. only once, without ever having collected this fine, misplaced the case file, and, most strikingly, took no substantive steps between 28 October 2004 and 2 October 2008. Fifthly, the bailiff in question was employed by the Municipal Court in Niš, which is why his inaction is attributable to the respondent State irrespective of whether his employment was subsequently terminated. Sixthly, it took the Serbian authorities more than two years to ascertain N.C.'s new address in Belgrade, the applicant herself having apparently been afforded no contact with her child since September 2007. Lastly, it is noted that throughout the proceedings the applicant has done everything in her power to have the final

access order enforced, whilst the domestic authorities have failed to make use of any coercive measures in spite of the clearly uncooperative attitude expressed by the other party, including N.C.'s apparent attempt to conceal his new place of residence between September 2007 and October 2009. Notwithstanding the sensitivity of the impugned proceedings, as well as the fact that the applicant was able to see her child occasionally prior to September 2007, the Court concludes that the Serbian authorities did not act diligently or take sufficient steps to execute the final access order of 7 October 2002, as modified on 21 May 2003. There has, consequently, been a violation of Article 6 § 1 of the Convention.

2. As regards the applicant's complaint considered under Article 8 of the Convention

48. The Government relied on their arguments outlined at paragraph 43 above.

49. The applicant reaffirmed her complaint.

50. The Court notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

51. Article 8 further includes for parents a right that steps be taken to reunite them with their children and an obligation on the national authorities to facilitate such reunions (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR 2003-V).

52. What is decisive, therefore, is whether the national authorities have taken all necessary steps to facilitate the execution of a child-related court decision as can reasonably be demanded in the specific circumstances of each case (see, *mutatis mutandis*, *Hokkanen v. Finland*, cited above, § 58; *Ignaccolo-Zenide*, cited above, § 96; *Nuutinen v. Finland*, cited above, § 128; *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003). In this context, the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit (see *Ignaccolo-Zenide*, cited above, § 102).

53. The Court lastly recalls that, although coercive measures are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live (see *Ignaccolo-Zenide*, cited above, § 106).

54. Turning to the matter at hand, in view of the above-cited jurisprudence, the specific facts of the applicant's case, and the parties' own submissions already considered under Article 6 (see paragraph 47 above),

the Court finds that the Serbian authorities have failed to do everything in their power which could reasonably have been expected of them. In particular, although the applicant had sporadic contact with her child until September 2007, and seemingly none thereafter, her access rights as specified in the final access order of 7 October 2002 and modified on 21 May 2003, were never properly enforced. The legitimate interest of the applicant to develop and sustain a bond with her child and his own long-term interest to the same effect were thus not duly considered (see, *mutatis mutandis*, *Görgülü v. Germany*, no. 74969/01, § 46, 26 February 2004). Consequently, the Court concludes that the applicant has suffered a separate breach of the right to respect for her family life as guaranteed by Article 8 (see, *mutatis mutandis*, *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, § 91; see also *Felbab v. Serbia*, no. 14011/07, § 69, 14 April 2009).

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

55. Under Article 13 of the Convention, the applicant complained that she has had no effective domestic remedy to secure her access rights.

56. The Government contested that argument.

57. Having regard to its findings in respect of Articles 6 and 8 of the Convention, the Court declares this complaint admissible but considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 13 (see, *mutatis mutandis*, *Ilić v. Serbia*, no. 30132/04, §§ 96 and 106, 9 October 2007).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

58. Finally, under Article 14 of the Convention, the applicant complained about being discriminated against by the Serbian authorities on the bases of her Russian origin and her indigence.

59. The Government contested the applicant's submissions.

60. In view of the facts of the instant case, the Court finds that the available evidence is insufficient for it to conclude that the applicant has indeed been discriminated against on any of the grounds prohibited by Article 14. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

63. The Government contested that claim.

64. The Court sees no reason to doubt that the applicant suffered distress as a result of the non-enforcement of her access rights, which is why a finding of a violation alone would not constitute sufficient just satisfaction within the meaning of Article 41.

65. Having regard to the above and on the basis of equity, as required by Article 41, the Court awards the applicant EUR 7,300 under this head.

66. Lastly, the Court considers that the Government should, with particular diligence and by appropriate means, secure the effective and speedy enforcement of the final access order of 7 October 2002, as modified on 21 May 2003 (see, *mutatis mutandis*, *Jevremović v. Serbia*, no. 3150/05, § 135, 17 July 2007).

B. Costs and expenses

67. The applicant did not specify her claim in this respect. Accordingly, the Court makes no award under this head.

C. Default interest

68. 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 considered under Articles 6 § 1, 8 and 13 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Articles 6 § 1 and 8 of the of the Convention;
3. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;
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 7,300 (seven thousand three hundred euros), plus any tax that may be chargeable, in respect of the non-pecuniary damage suffered, to be converted into Serbian Dinars 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President