



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

THIRD SECTION

CASE OF FUȘCĂ v. ROMANIA

(Application no. 34630/07)

JUDGMENT

STRASBOURG

13 July 2010

FINAL

13/10/2010

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

In the case of Fușcă v. Romania,

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

Josep Casadevall, *President*,

Elisabet Fura,

Corneliu Bîrsan,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 22 June 2010,

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

PROCEDURE

1. The case originated in an application (no. 34630/07) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Marius Fușcă (“the applicant”), on 2 August 2007.

2. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu, from the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, the passivity of the public authorities in enforcing a judicial decision defining his rights of contact with his child.

4. On 3rd July 2008, the President of the Third Section decided to communicate the complaint concerning the non-enforcement of contact arrangements to the Government. It was also decided to examine the merits of the part of the application that was communicated at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Câmpulung Muscel.

6. On 16 January 1999, the applicant married O.L.F. The couple had one son, born on 31 July 1999. In March 2005, O.L.F left the couple's home, taking her son with her, and since then both of them have been living with the maternal grandparents.

7. By a judgment of 17 November 2005, the Câmpulung District Court granted the couple's divorce and awarded the mother custody of the child. This judgment was upheld by a decision of the Argeș County Court of 10 April 2006 and by a final decision of the Pitești Court of Appeal of 28 February 2007. A social investigation conducted in the framework of the divorce proceedings indicated that O.L.F. was not working and was receiving a monthly unemployment allowance of approximately 62 euros a month.

A. Proceedings initiated by the applicant for contact rights

8. On 22 April 2005 the applicant brought an action for the establishment of his rights of contact with the child. The Câmpulung District Court, by a judgment of 9 June 2005, granted the applicant visiting rights for the first two Sundays of each month between certain hours, one week during the summer holidays and three days during the winter holidays. Allowing the applicant's appeal against that judgment, the Argeș County Court, by a decision of 30 September 2005, extended his visiting rights as follows: the first two weeks of each month from 4 p.m. on Friday until 2 p.m. on Sunday, during the summer holidays between 1st and 31st July, and during the winter holidays between 19th and 28th December. By a final decision of the Pitești Court of Appeal of 19 January 2006, following the mother's appeal on points of law, the applicant's visiting rights were limited during the summer holidays to the period from 1st to 15th July and during the winter holidays to the period from 19th to 24th December and remained unchanged in respect of the weekends.

B. Attempts to enforce contact rights

9. Faced with his ex-wife refusal to allow him to visit the child during the prescribed periods, on 8 December 2005 the applicant lodged an application with the bailiff for enforcement of the judgement of 9 June 2005. On the same date the bailiff sent a request to the Câmpulung District Court to issue an interlocutory order to have the said judgement declared enforceable. On 14 December 2005, the district court allowed the request.

10. Subsequently, the bailiff initiated the enforcement actions, by issuing a first summons to O.L.F. on 21 December 2005. Official records drawn up by the bailiff during the period from January to July 2006 record attempts to enforce the contact rights defined by the judgement of 9 June 2005 and modified by the final decision of 19 January 2006.

11. On 6 January 2006 the mother and the child were not present at their home and the bailiff issued a new summons for 13 January 2006. On that date the mother allowed the applicant to see the child at her home and refused to let the child leave the house, declaring that an appeal against the decision of 30 September 2005 was pending.

12. On 3 and 10 February and 3 March 2006, the mother was not at home and the grandparents refused to hand over the child, claiming that they had not received a copy of the final decision. On these occasions the bailiff issued a summons to the mother to comply with the judgment granting the applicant visiting rights.

13. Meanwhile, on 17 February 2006, the applicant lodged a new request for enforcement of the final decision of 19 January 2006. On 24 February 2006, the district court allowed the request and declared the said decision enforceable.

14. A new summons was therefore issued on 2 March 2006, inviting O.L.F. to comply with the final decision granting the applicant visiting rights. On 10 March 2006, the bailiff took note that the mother initially refused to hand over the child, stating that he did not want to join his father. She was asked by the bailiff to bring the child to the gate and persuade him to join his father. The child was taken outside into the courtyard and the mother invited the applicant to enter the courtyard and take the child. The applicant requested that the child be brought to the gate, but then the child went back into the house when he heard his mother crying. Then the mother started to reproach the applicant and the bailiff for causing distress to the child.

15. On 10 April 2006, the applicant took the child from kindergarten to his home. O.L.F. lodged a civil action to have the child returned to her. By a decision of 13 April 2006 of the Câmpulung District Court the applicant was ordered to return the child. On 17 April 2006 the same bailiff, accompanied by the mother, summoned the applicant to return the child. The applicant complied but he also requested that O.L.F. respect his right to maintain personal links with the child. On that occasion, the mother undertook to respect his visiting rights.

16. On 12 May and 2 June 2006, the grandparents refused to hand over the child, on the first occasion because he was sick and on the second occasion because he was not at home. The father handed over clothes, toys and fruit for the child. The bailiff gave notice of the fact that a summons would be issued for 9 June 2006 and he reminded the family of the obligation to allow the child to join his father during the period from 1st to 15th July.

17. On 9 June 2006, the mother refused to hand over the child, claiming that he was sick and refusing to bring him outside to talk to his father and to receive the fruit that the applicant had brought for him.

18. On 5 July 2006, the bailiff noted that the grandparents refused to hand over the child, as O.L.F. was not at home and the child refused to join his father. The bailiff took note that the applicant did not insist on taking the child against his will.

19. On 12 July 2006, the bailiff reported that the mother wanted to hand over the child but the latter refused to join his father. The child was brought to the gate, but as he was crying and refused to join his father he was taken

back into the house. The applicant did not insist on forcing the child to go with him and asked the bailiff to take note of the fact that the mother had not made any effort to persuade the child to join him.

20. On 4 August 2006, the next date for the enforcement of the visiting rights, the bailiff drew up a report which stated that the applicant did not present himself for the appointment and did not contact the bailiff beforehand, leading the latter to assume that the parties had reached an agreement. The bailiff, also taking into account the applicant's refusal to force the child to join him against his will, decided not to pursue the enforcement further until a new enforcement request was made by the applicant.

21. The applicant maintained that he had subsequently made further attempts to visit his child, but in the presence of witnesses, as the bailiff refused to accompany him any more due to the allegedly aggressive attitude of the mother and the grandparents. He also maintained that the procedure with the bailiff had become financially burdensome, especially taking into account the fact that no practical result could be achieved.

22. The applicant further submitted that subsequently he wanted to get information about the school results of the child, but that O.L.F. prevented him from being around the child or his school teacher. He maintains that he tried to meet the child at school or at his house, he brought gifts to him on his birthday on 31 July 2008 and for Christmas, but he was not allowed to see the child and the presents were refused. No supporting documents were submitted to the case file in this respect.

C. Criminal complaints against O.L.F.

23 Faced with the constant refusal of the mother to comply with the decisions granting him visiting rights, on 15 December 2005 the applicant lodged a first criminal complaint against O.L.F. for non-compliance with measures regarding child custody and visiting rights.

24. On 27 February 2006 criminal investigations were initiated in respect of O.L.F. By a decision of 10 April 2006, the Prosecution Office attached to the Câmpulung District Court terminated the criminal proceedings and imposed on O.L.F. an administrative fine of 300 Romanian lei (RON). This decision was based on the reasoning that during the investigations O.L.F. had acknowledged that she had prevented the applicant from meeting his child, but had done so because the judgment awarding him contact rights was not final, since appeal proceedings were still ongoing. The fact that the child did not want to go with his father was also taken into consideration.

25. According to the applicant, a second criminal complaint was lodged on 6 June 2006 and criminal investigations were initiated on 3 July 2006. Following the investigations, on 10 October 2006 the Prosecutor's Office attached to the Câmpulung District Court terminated the criminal

proceedings against O.L.F. and imposed on her an administrative fine of RON 400. The prosecutor noted that O.L.F. admitted that the applicant could not see the child, but she submitted that this was mainly due to the child's reluctance. Moreover, O.L.F. did not have a criminal record and the two parents were in a conflict situation. All these elements led the prosecutor to consider that the attitude of O.L.F. did not present the danger to society that a crime would present. This decision was upheld by a resolution of the first prosecutor of 6 November 2006 and by a final decision of the Argeș County Court of 14 May 2007.

26. A third criminal complaint lodged by the applicant on 20 December 2006 was dismissed on 7 February 2007 by a decision of the prosecutor, taking into account that the matters invoked by the applicant had already been examined during the two previous criminal proceedings. From the information available in the case file, it does not appear that the applicant lodged a judicial complaint against the prosecutor's decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. The relevant provisions of the Code of Family and of the Code of Civil Proceedings are stated in the Court's judgement in the case *Lafargue v. Romania*, (no. 37284/02, §§ 65 and 68-70, 13 July 2006). The role and responsibilities of the local public authorities for social assistance and child protection as well as the relevant provisions of the Law no 272/2004 on child protection are described in the judgement *Amanalachioai v. Romania*, (no. 4023/04, § 56 and 59, 26 May 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant submitted that the public authorities had failed to assist him effectively to enforce his right to have contact with his son. 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.”

A. The Government's preliminary objection

29. The Government raised an exception of inadmissibility for non exhaustion of domestic remedies. They submitted that the applicant had failed to exhaust domestic remedies in so far as he had several remedies available in the event that he was unsatisfied with the outcome of the forced execution proceedings. Thus, he could have lodged a contestation against the forced execution measures on the basis of Article 399 § 1 of the CCP within fifteen days of the date when he became aware of the contested enforcement act or of the refusal to take a certain enforcement measure. Further he could have lodged a complaint against the bailiff's refusal to take the necessary enforcement measures on the basis of Law no. 188/2000 regulating the activities of the bailiffs. On the basis of the same law, an action in disciplinary liability could have been lodged against the bailiff. Another legal remedy available which the applicant failed to avail himself of was a civil action against O.L.F. for payment of civil penalties for non-compliance with a final decision. The Government further considers that the applicant had an obligation to pursue the enforcement proceedings and to make use of all available remedies set up by the domestic law.

30. The Court notes that all the remedies put forward by the Government are of an indirect nature and they cannot be regarded as sufficient for the applicant's claim. Moreover, the alleged lack of action on the part of the applicant cannot lift the responsibilities incumbent on the public authorities, as the depository of public force, for the enforcement of judicial decisions (*Ignaccolo-Zenide v. Romania*, no. 31679/96, § 108, ECHR 2000-I).

31. The Court observes further that the applicant instituted the enforcement proceedings, as required by the procedural rules and thus did everything that could reasonably be expected of him to exhaust the national channels of redress.

The Court accordingly dismisses the Government's objections.

B. Merits

1. Relevant principles

32. 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).

33. Further, even though the primary 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 to be struck between the competing interests of the individual and of the community as a whole;

in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290).

34. In relation to the State's obligation to implement positive measures, the Court has held that Article 8 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*, cited above, § 94; *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII, and *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR 2003-V). 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)*, 27 November 1992, § 90, Series A no. 250), but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299).

35. 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 establishment of contact may not be able to take place immediately and may require preparatory or phased measures. The co-operation and understanding of all concerned will always be an important ingredient. While national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention (see *Hokkanen*, cited above, § 58; *Olsson (no. 2)*, cited above, § 90).

36. What is decisive is whether the national authorities have taken all necessary steps to facilitate the execution that can reasonably be demanded in the specific circumstances of each case (see, *mutatis mutandis*, *Hokkanen*, cited above, § 58; *Ignaccolo-Zenide*, cited above, § 96; *Nuutinen*, cited above, § 128, and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 59, 24 April 2003).

37. 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 does not live with the child (see *Ignaccolo-Zenide*, cited above, § 102).

38. The Court further recalls the conclusion it reached in *Glaser v. the United Kingdom*, (no. 32346/96, § 70, 19 September 2000) that active parental participation in the proceedings concerning children is required under Article 8 of the Convention in order to ensure the protection of their interests and that when an applicant, as in that case, applies for enforcement of a court order, his conduct as well as that of the courts is a relevant factor to be considered.

2. *The Court's assessment*

39. The Court notes that it is common ground that the tie between the applicant and his child falls within the scope of “family life” within the meaning of Article 8 of the Convention.

40. As regards the background of the present case, the Court notes that the applicant was granted by way of judicial decisions a right of regular access to his son who stayed with the mother. It appears that the problems concerning the implementation of these contact rights arose immediately after they had been defined by the domestic courts and the applicant had to request the services of a bailiff to enforce the execution of his visiting rights.

41. In this respect, the domestic courts allowed the applicant's requests for enforcement without undue delay; his request lodged on 8 December 2005 was allowed on 14 December 2005, while the request lodged on 17 February 2006 was allowed on 24 February 2006. The bailiff took immediate action to enforce the decisions, by issuing summons and accompanying the applicant to the child's home on the dates set for his visits.

42. While it is true that the enforcement attempts were not successful, the Court notes that the attitude of the mother, even though significantly contributing to preventing the child from seeing his father, was not the only reason for the failed visits. The reports prepared by the bailiff indicate that the failure of the last attempts was also at least partly due to the child's reluctance to join his father. The bailiff also respected the applicant's wish not to remove the child against his will.

43. In such a delicate situation, the Court finds it very difficult to believe that the focus on the ordinary civil enforcement proceedings could have improved the situation. It considers that the factual situation indicated clearly that a softer and more sensitive approach towards the child was needed for the successful enforcement of the visiting rights.

44. In this respect, the Court reiterates its conclusions in *Lafargue* (cited above, § 97) that the respondent State had available the necessary means to facilitate contact between parent and child as was proven by the meetings organised by the social services between the applicant in that case and the child, in the presence of psychologists.

45. The Court recalls that it is usually in the best interests of a child to maintain family ties with both his parents (*Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX). Looking at the facts of the instant case, the Court believes that it would have been important to explore all available avenues to facilitate the maintenance of such ties, whether by way of involvement of the social services or otherwise. Given the young age of the child, the Court considers that assistance in counselling or psychological support services might, usefully, be pursued in order to ensure that opportunities for maintaining the child's relationship with the applicant are

not lost into the future. This conclusion is also supported by the Court's view that the national authorities, by having the benefit of direct contact with all persons concerned, are better placed to judge what is in the best interests of the child and to take the necessary measures in this respect. The applicant may not have tried to make use of such services to improve his contacts with the child (see, *mutatis mutandis*, *D. v. Poland* (dec.), no. 8215/02), by requesting the assistance of the social services.

46. In respect of the ordinary civil enforcement proceedings, it would appear that the applicant gave up the assistance of the bailiff without any prior discussion with the latter about the reasons for not presenting himself to the next appointment or discussing what other options were available for enforcement. The Court understands the feeling of frustration generated by the unsuccessful enforcement proceedings, which also started to become financially as well as otherwise burdensome for the applicant. Nevertheless, the obligation that had to be executed was such that it required the presence of the father during the enforcement attempts. The bailiff, a person unknown to the child, could not have been expected to go alone to the child's home, take the child away and then hand him over the applicant's home. As stated numerous times, the obligation of the national authorities to take measures to facilitate contact is not absolute.

47. The Court further notes that it does not have any further factual information about the enforcement attempts made after 4 August 2006, besides the applicant's statements about his unsuccessful visits to the child's home. On the latter date, the bailiff, in the absence of any communication from the applicant, put the file on hold. Meanwhile, from the applicant's statements it does not appear that the authorities have been made aware in any way whatsoever of the continued difficulties in enforcing his visiting rights. Stressing the fact that public authorities have positive obligations in securing enforcement of visiting rights and protecting thus the applicant's right to family life, the Court, at the same time, appreciates that re-establishing contact with a child in such delicate circumstances, requires long term efforts for all concerned persons, including the applicant.

48. Moreover, the Court takes into consideration the fact that the prosecutor imposed two fines on the mother for her failure to comply with the applicant's access rights. Even though the amount of the fines in the two cases was not significant in real terms, the Court finds that the imposed fines could not be considered unreasonably low, regard being had to her income and the fact that large fines might have threatened the well-being of the child (see *D. v. Poland* (dec.), cited above). Moreover, the said complaints were processed by the prosecutor reasonably promptly.

49. In view of the above, while sympathising with the applicant's predicament, the Court cannot but conclude that in this particular case the authorities did not fail in their responsibilities to protect the applicant's right to respect for family life. Accordingly there has in the circumstances of this case been no violation of Article 8 of the Convention.

II. OTHER COMPLAINTS

50. The applicant alleges further a violation of Article 6 § 1 of the Convention in respect of the criminal proceedings initiated against the mother and that the same facts as constituted the alleged violation of Article 8 of the Convention, also gave rise to a breach of Article 5 of Protocol No. 7.

51. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

52. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the alleged failure to protect the applicant's right to respect for family admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention.

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

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Ziemele is annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE ZIEMELE

1. I could not join the majority in its finding of no violation of Article 8 in this case. In my view the main question was whether the Romanian State has established an appropriate and effective system of institutions and procedures for the protection of the right to family life. I have serious doubts as to the existence of such a system.

2. I agree with the majority that the positive obligation under Article 8 in cases about implementing the visiting rights of one of the parents is not one of result but one of means. This does not, however, mean that the Court should not examine the effectiveness of the relevant institutions and available procedures. On the contrary, the underlying principle of the Convention that human rights should be respected not only in theory but also in practice requires the Court to examine these procedures and to see whether they form a coherent system able to provide protection not only in theory but also in practice.

3. It is quite obvious on the facts of the case that the execution of a judgment granting the applicant visiting rights through a common enforcement procedure via the bailiff did not work. On the contrary, it turned out to take time, which in cases involving a child usually plays against the interests of the child and the estranged parent. It was also costly for the applicant. I note that the bailiff can only act at the applicant's request and that he submitted such a request several times. The fact that none of the applicant's attempts to see the child in the presence of the bailiff materialised shows that such a procedure, at least if applied alone, is ill-suited for the complex matters surrounding family problems.

4. The majority reproached the applicant for not using the assistance of the social services and for giving up using the bailiff's services. The Court has held in its case-law concerning the obligation to return a child that "the understanding and cooperation of all concerned are always an important ingredient" (*Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I). "In addition, when difficulties appear, mainly as a result of a refusal by the parent with whom the child lives to comply with the decision [...], the appropriate authorities should then impose adequate sanctions in respect of this lack of cooperation and, whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives" (*Maumousseau and Washington v. France*, no. 39388/05, § 83, ECHR 2007-XIII). These principles are equally applicable where the enforcement of a judgment granting visiting rights is concerned.

5. I note that in similar cases against Romania it has been established that the social services have not been particularly effective in facilitating the execution of a judgment either (*Amanalachioai v. Romania*, no. 4023/04,

§ 95, 26 May 2009). It seems that what is missing is indeed a certain co-operation between the various institutions with the aim of achieving the execution of a court's judgment in Article 8 cases. The lack of a coherent system of institutions and procedures is not the fault of the applicant. I could agree with the majority that in the absence of relevant attempts on the part of the applicant to involve these services in dealing with his problem, the Court is placed in a difficult position, since it has to engage in a degree of speculation as to whether the ineffectiveness and lack of diligence it has established on other occasions can be said to apply in the case before it here. But even then, I would see more a problem of exhaustion of domestic remedies than a clear case of non-violation of Article 8.