



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

THIRD SECTION

DECISION

Application no. 20660/10
Dumitru CÂRSTOIU
against Romania

The European Court of Human Rights (Third Section), sitting on 7 May 2013 as a Chamber composed of:

Josep Casadevall, *President*,

Alvina Gyulumyan,

Luis López Guerra,

Nona Tsotsoria,

Kristina Pardalos,

Johannes Silvis,

Valeriu Grițco, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 6 April 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the decision taken by the President of the Chamber to appoint Mrs Kristina Pardalos to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court), as Mr Corneliu Bîrsan, the judge elected in respect of Romania, had withdrawn from the case (Rule 28 of the Rules of Court),

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Dumitru Cârstoiu, is a Romanian national who was born in 1962 and lives in Bucharest. He was represented before the Court by Mr Ioan Stoicana, a lawyer practising in Bucharest.

2. The Romanian Government (“the Government”) were represented by their Agent, Mrs Catrinel Brumar, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

1. The divorce and first contact rights proceedings

4. The applicant and his wife, A.A.C., had a child, A., born on 1 April 2005. On 24 November 2006 the Bucharest District Court granted the couple’s divorce and the mother was granted custody of the child. The applicant was ordered to pay child support and was granted the right to have personal relations with the child and contact rights, as follows: at the child’s home on Sundays from 4 p.m. to 7 p.m. and at the applicant’s home on the first and third Saturday of the month from 10 a.m. to 4 p.m.

5. Relations between the parties continued to deteriorate, and the contacts between the applicant and his former wife became increasingly turbulent, even in the presence of the child. It therefore became difficult for the applicant to see A. without a conflict occurring between the adults involved.

2. The second contact rights proceedings

6. On 28 May 2008 the applicant brought an action for custody of his child, asking, alternatively, for an extension of his contact rights. He pointed out that he had not seen his son for one and a half years, as his former wife and her family had forbidden all contact. The Bucharest District Court gave judgment on 5 November 2008. It noted that the relations between the parents had deteriorated and that the mother was obstructing all contact between the father and his son, being inflexible and omitting to communicate important information about the child to the applicant.

It considered nevertheless that those aspects were not enough to warrant a change in the custody measures, in particular given the fact that the circumstances of the case remained unchanged from the date when custody was first decided upon. For the same reason it dismissed the applicant’s request for modification of the visiting times. It ruled:

“Dismisses the plaintiff’s requests for modification of the right to personal relations with the child, namely to accommodate the minor in [the plaintiff’s] home.”

The court ordered A.A.C. to communicate with the applicant about the child and to allow them to speak on the telephone.

7. The applicant appealed, pointing out that not only had the court dismissed his claims, but it had also restricted his contact rights by no longer allowing him to take his son to his home.

8. On 14 May 2009 the Social Services and Child Protection Directorate of the Bucharest local council (“the Child Protection Authority”), acting at the County Court’s request, visited the applicant’s home, interviewed him, and concluded that he was in terms of his psychological and material situation a fit and proper person to take care of his child.

9. On 25 May 2009 the Bucharest County Court upheld the previous judgment, on the ground that the best interests of the child required that he remain resident with his mother; it gave no answer to the applicant’s representation about the restriction on his contact rights.

10. The applicant appealed on points of law, seeking mainly to be granted custody of the child. He did not expressly complain about the restriction of contact rights perceived by him. The Bucharest Court of Appeal dismissed his claims in a final decision of 11 November 2009.

11. On 19 November 2009 the applicant sought revision of the previous decision, on the ground that by limiting his visiting rights the courts had decided *ultra petita*, to his disadvantage. On 29 March 2010 the Bucharest County Court dismissed his request as out of time. The applicant did not appeal against that decision.

12. According to the applicant, his subsequent attempts to see the child remained unsuccessful, as, encouraged by the decision of 5 November 2008, the mother refused to allow him to enter her home or to take the child away with him.

3. *The third contact rights proceedings*

13. On 7 September 2009 A.A.C. lodged a request for modification of the contact schedule. On 19 September 2012 the Bucharest District Court set contact hours for the applicant, every other weekend, on Saturdays and Sundays from 5 p.m. to 8 p.m. at the child’s home. Appeal proceedings are currently pending with the Bucharest County Court.

(a) **First request for interim measures**

14. During the new custody proceedings, on 3 August 2010 the applicant requested by means of an urgent procedure (*ordonanță președințială*) a residence order in his favour, but on 7 October 2010 the Bucharest District Court dismissed that request, on the ground that a change in residence required serious consideration, which could not be done in an expeditious procedure.

The decision was upheld by the Bucharest County Court in a final decision of 27 January 2011.

(b) Second request for interim measures

15. On 14 July 2011 the applicant lodged a new request for interim measures, seeking modification of the contact schedule. In particular, he complained that relying on the judgment of 5 November 2008, A.A.C. had since refused to allow him to take the child to his home.

16. The Bucharest District Court gave its ruling on 28 November 2011. It examined the previous decisions rendered in the matter of residence and contact rights between the parties, and evidence of the recent deterioration of the former spouses' personal relations, as well as the written answers given by A.A.C. to the questionnaire addressed to her by the applicant through the intermediary of the court, on the manner in which she was allegedly obstructing the exercise of his contact rights. The court also took note that the applicant refused to answer the questions addressed to him by A.A.C. through the court on the manner in which he was exercising his contact rights.

17. On the basis of the evidence in the file, the court noted that custody and contact rights had been established by the decision of 24 November 2006, and that on 5 November 2008 additional requests by the applicant had been dismissed, apart from the right to obtain information about the child and to speak with him on the telephone. The court further observed that on several occasions the applicant had breached the contact schedule by trying to take the child outside the times set in the court order or by not returning the child on time to the mother's home, and that the mother had been forced to seek help from the authorities (bailiffs and police) to get her child back. It also noted that the applicant had exhibited violent behaviour towards the mother in the presence of the child, and that on several occasions he had tried to take the child from A.A.C. by force.

Relying both on Article 8 of the Convention and on the provisions of the new Civil Code, the court stated that the right to maintain personal relations with the child could not be exercised to the detriment of the child's best interest. The court reiterated that its role was to decide on a temporary agreement, as the merits of the residence rights were being examined by a different court. It noted the tense situation between the parents, and considered that it was not in the child's best interest for them to have joint custody or for the applicant's visiting rights to be extended.

It therefore dismissed the applicant's request.

18. In a final decision of 18 April 2012 the Bucharest County Court dismissed as out of time the appeal lodged by the applicant against the decision rendered by the District Court on 28 November 2011.

4. Enforcement attempts

19. From 2008 on, the applicant and A.A.C. lodged several criminal complaints against each other, the applicant accusing his former wife of

breaching his right to maintain personal relations with his child by not allowing him contact with his son, by denigrating him in front of the child, and by repeatedly changing the child's place of residence, while A.A.C. accused the applicant of causing a public breach of the peace when trying to visit A. in her home, and of keeping the child longer than allowed by the court order. They were both fined for their behaviour, the prosecutor and criminal courts acknowledging the bad relations between the parents and finding that both of them had tried, after the divorce, to cut the other parent off from the child, thus failing on several occasions to respect the contact schedule.

In addition, by a prosecutor's decision of 20 July 2009 the applicant was fined for hitting O.G., who had tried to stop him from forcibly taking the child from A.A.C.'s arms on the way to his kindergarten.

20. In August 2007 the applicant sought the assistance of the Child Protection Authority to persuade the mother to comply with the court decisions granting him contact rights. A social worker visited A.A.C.'s home, assessed it as a suitable home for the child, advised the mother on the importance of allowing the child to maintain normal relations with both parents, and explained to her that the conflicts between her and her former spouse were jeopardising the child's development.

21. In March 2008 the applicant made a new similar request. A social worker visited A.A.C. and the child in their new home and discussed the situation with the mother, drawing her attention to the child's right to maintain relations with his father and the extended family, but also to the importance of protecting the child from any form of abuse or neglect. A.A.C. informed the Child Protection Authority that at that moment the applicant was exercising his contact rights at the child's school, as each visit to her home ended in open conflict between the adults.

22. A.A.C. also sought the Child Protection Authority's assistance in June 2008, when the applicant refused to return the child to her home after a visit.

23. The applicant and his former spouse continued to complain to the Child Protection Authority about various obstructions to their rights over the child. As a consequence, in April 2009 the experts of the Authority met with the parents to seek a workable solution for the exercise of their respective rights. A further meeting was held in August 2009. On both occasions the parents failed to reach a satisfactory compromise.

24. In various reports on the applicant's case, the Child Protection Authority found that the child was developing well and that the mother was providing an excellent environment for his upbringing.

25. The former spouses sent each other several notifications, through bailiffs' offices (on 16 May and 29 October 2008 on behalf of the applicant and on 15 September 2008 on behalf of A.A.C.), asking for the contact schedule established by court orders to be adhered to.

B. Relevant domestic law

26. The relevant domestic legal provisions are set out in *Lafargue v. Romania*, no. 37284/02, §§ 64-69, 13 July 2006, and *Costreie v. Romania*, no. 31703/05, §§ 55-58, 13 October 2009.

COMPLAINT

27. The applicant complained under Article 8 of the Convention that by issuing and upholding the decision of 5 November 2008 the domestic courts had limited his contact rights and thus prohibited him from developing normal father-son relations with his child. He considered that this limitation had been excessive, disproportionate and unwarranted, and had allowed his former wife to persist in her wrongful behaviour, which was aimed at preventing him from having any relationship with his child. He argued that the authorities' passivity in his case had resulted in the deterioration of his personal relationship with his son, as it was impossible for him to maintain contact with the child.

THE LAW

28. The applicant complained both about the scope of his contact rights and the manner in which the State authorities had dealt with him in the exercise of that right. He relied on Article 8, which 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.”

A. The parties' arguments

29. The Government argued that the applicant could not pretend to be a victim of a violation of his right to have contact with the child, as he had suffered no negative consequences as a result of the decision of 5 November 2008. In their view, the courts did nothing more than maintain the initial contact schedule established by the decision adopted on 24 November 2006.

30. They further contended that the applicant had failed to exhaust the domestic remedies on both counts of his complaint. Concerning the alleged restriction of his contact rights, they argued, on the one hand, that he had not raised that argument in his appeal on points of law against the decision of 5 November 2008, and on the other that he had not lodged the request for revision on time, thus failing to use an effective remedy designed precisely for dealing with *ultra petita* decisions taken by the courts.

As regards the exercise of his contact rights, the Government averred that the applicant had failed to initiate enforcement proceedings through a bailiff.

31. The Government considered that the manner in which the courts had established the contact schedule did not interfere with the applicant's rights. Moreover, the decisions were taken in accordance with the law and the courts had in mind the best interest of the child. Furthermore, the authorities involved by the applicant in the enforcement process, namely the Prosecutor's Office and the Child Protection Authority, had acted promptly and diligently. In particular, the Prosecutor's Office had fined the mother for not allowing the applicant to have contact visits with the child, and the Child Protection Authority had assessed the situation and advised the parties on how to find ways to cooperate to serve the child's best interests. It therefore appears that the fault as regards the non-enforcement lay exclusively with the applicant and his former wife.

32. The applicant contested the arguments put forward by the Government. He reiterated that by its decision of 5 November 2008 the domestic court had unjustly restricted his contact rights. Nor had the interference thus suffered been remedied in the appeals lodged against that decision, or in the subsequent procedure lodged on 14 July 2011 (see paragraph 15 and following paragraphs above).

He considered that he had exhausted all remedies available, and pointed out that for six years he had been trying by various means to obtain the State's support for the exercise of his contact rights, but his attempts remained fruitless.

He further reiterated that it was the mother who used every possible means to prevent contact between him and the child.

B. The Court's assessment

33. At the outset the Court notes that it is common ground between the parties that the relations between the applicant and his son constitute "family life", thus falling within the sphere of applicability of Article 8.

1. Relevant principles

34. The Court reiterates that, 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. 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 *Fușcă v. Romania*, no. 34630/07, § 33, 13 July 2010).

35. 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, as well as an obligation on the national authorities to facilitate such reunions. This also applies 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, and *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII).

36. 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 cooperation and understanding of all concerned will always be an important ingredient. While national authorities must do their utmost to facilitate such cooperation, 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*, § 58, and *Fușcă*, § 38, judgments cited above).

37. What is decisive in any assessment of the national authorities’ conduct is whether they have taken all necessary steps to facilitate the execution that can reasonably be demanded in the specific circumstances of each case. 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 a child and the parent who does not live with him (see, among many others, *Hokkanen*, § 58, and *Nuutinen*, § 128, judgments cited above, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, §§ 96 and 102, ECHR 2000-I).

38. As regards the applicants, active parental participation in proceedings concerning children is required under Article 8 of the Convention in order to ensure the protection of their interests, and when an applicant applies for enforcement of a court order, his conduct as well as that of the courts is a relevant factor to be considered (see *Fușcă*, cited above, § 38, and *Cristescu v. Romania*, no. 13589/07, § 59, 10 January 2012).

39. Lastly, the Court reiterates 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 (see, among many others, *Dobrescu v. Romania* (dec.), no. 10520/09, § 42, 31 August 2010).

2. *Application of those principles to the case*

(a) **On the scope of the contact rights**

40. Turning to the facts of the present case, the Court notes at the outset that it is not possible to assess to what extent A.A.C. used the decision of 5 November 2008 in order to restrict the applicant's contact with his son. What is certain is that both the court examining the appeal against that decision and those which examined the new complaint lodged by the applicant against it on 14 July 2011 consistently ruled that the only amendment to the contact schedule established by the said decision was the additional right for the father to contact the child by telephone (see paragraph 15 and following paragraphs above).

41. In line with the principle of subsidiarity the Court has no reason to contradict the conclusions reached by the domestic authorities in the matter (see *Nistor v. Romania*, no. 14565/05, § 75, 2 November 2010, and paragraph 39 above).

It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(b) **On the enforcement of the contact rights**

42. The Court notes that after the couple's divorce, on 24 November 2006, the relations between the former spouses continued to deteriorate, the child being caught in the middle. The authorities became aware of this situation and appropriately assessed it and its implications, on the basis of the evidence at their disposal. In particular, the prosecutor fined both parties when their behaviour called for a punitive measure (see paragraph 19 above). The courts dealing with the requests for contact rights took this situation into account when discerning the best interest of the child (see paragraphs 6 and 16 above). Lastly, the Child Protection Authority offered counselling to the applicant and his former wife, and mediated their conflict (see paragraphs 20 and following paragraphs, above).

The Court is therefore satisfied that the authorities made a prompt and efficient response, commensurate with their jurisdiction, in the applicant's case (see paragraph 37 above). While their efforts remained fruitless, the Court reiterates that the obligation which lies on the authorities to assist the parents is not absolute (see paragraph 36 above).

43. As regards the parents' conduct, the Court observes that despite the Child Protection Authority's interventions, they failed to reach a compromise that would allow both of them to put the child's interest above

their own. In his submissions to the Court, the applicant blamed A.A.C. for obstructing him. However, it is not for the Court to assess the parties' guilt, but rather the actions taken by the applicant, in context.

44. On this point, the Court observes that the Child Protection Authority offered active assistance to the applicant in his attempts to be reunited with his child. The applicant's choice to involve the Authority was therefore laudable. However, the Authority was not the only State agent capable of assisting with the enforcement, and where the Child Protection Authority's jurisdiction could not reach, that of a bailiff could (see *Mereuță v. Romania* (dec.), § 24, 10 April 2012). In particular, given the alleged lack of cooperation and the bitter opposition of A.A.C., the applicant could have made effective use of the services of a bailiff for enforcement proceedings. The fact that he used a bailiff to send notifications to his former spouse stands as evidence that he was aware of the possibility of having the assistance of a bailiff in the proceedings. Moreover, it would have been in his interest to try any possible legal means to bring about a swift implementation of his contact rights.

45. The Court cannot ignore that at the same time he also used avenues within the criminal law and renewed requests for readjustment of the contact schedule. While these actions were certainly designed to help the applicant towards reaching his ultimate goal, that of spending time with his child, they neither had a direct impact on the enforcement of the rights he already had, nor were they expeditious by their nature.

46. For these reasons, the Court concludes that, within the mandate given to them by the applicant himself, the national authorities have taken all necessary steps to facilitate the execution that can reasonably be expected in the specific circumstances of the case.

It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President