



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

THIRD SECTION

DECISION

Application no. 22731/11
Francisco José FERNÁNDEZ CABANILLAS
against Spain

The European Court of Human Rights (Third Section), sitting on 18 February 2014 as a Committee composed of:

Dragoljub Popović, *President*,

Luis López Guerra,

Valeriu Grițco, *judges*,

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above application lodged on 24 March 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Francisco José Fernández Cabanillas, is a Spanish national who was born in Dos Torres (Córdoba) and lives in Ciudad Real.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On 10 April 2000, the applicant and his wife signed a separation agreement. The guardianship and custody of their three daughters (M., N., and S.) was awarded to the mother. The family home was granted to the mother and the applicant was required to pay child support. A contact schedule was set up in favour of the applicant.

4. Very soon afterwards the contact schedule was suspended. This suspension was lifted and subsequently imposed again as a result of the children's refusal to meet their father following a seemingly distressing holiday with him.

5. On 4 December 2001 the applicant and his wife were legally divorced. Guardianship and custody of the children was awarded to the mother. The applicant's right to have contact with his children was acknowledged by the judge dealing with the divorce. However, the putting into effect of this right was postponed in view of the children's reluctance to have contact with the applicant. The judge ordered psychological therapy for all the members of the family, with a view to a father-child contact schedule being set up at the subsequent stage of enforcement proceedings. At the time M. was 14, N. was 10 and S. was 7 years old.

6. On 25 September 2002 the Segovia first-instance judge no. 4 set up a basic contact schedule for the applicant on the basis of an expert report. The applicant would be able to see his children every other Saturday for three hours at a family centre run by a registered association. The judge imposed upon the applicant's former wife an obligation to bring the children to the centre.

7. On 31 January 2003 the judge made a new ruling in the case as his decision of 25 September 2002 had been ignored by the applicant's former wife. The judge maintained the contact schedule set up on 25 September 2002, but only in relation to N. and S.: this was due to the bad influence that M. exercised upon the former, and imposed upon the mother the obligation to provide, if required, support to the children during the interviews with his father, so that the psychologists would be able to assess whether her actions were carried out in bad or good faith. The judge also appointed a psychological expert to make an assessment of all the members of the family with a view to improving their relationship.

8. On 22 January 2003 the children stated before the judge that they did not want to have contact with their father.

9. On 4 April 2003 the judge decided to send the file to the public prosecutor for investigation and for consideration of the imposition of penalties on the applicant's former wife for failure to comply with orders, the mother having failed to abide by the decision of 31 January 2003. The applicant has not provided further evidence of any criminal proceedings against his former wife.

10. On 28 May 2003 the mother and children did not appear for the assessment. On 12 June 2003 the mother appeared without the children. On 20 October 2003 the mother and children again failed to appear for the assessment.

11. On 1 September 2003 the Segovia *Audiencia Provincial*, acting on the basis of multiple psychological reports, suspended the contact schedule until the children had undergone psychological therapy.

12. On 12 November 2003 the children again failed to attend their meeting with the psychologist. On 23 December 2003 the psychologist reported to the judge that the mother and children had failed to appear without prior notice, despite an official summons.

13. On 7 January 2004 a fine of 1,000 euros (EUR) was imposed on the mother for failure to comply.

14. On 16 March 2004 the mother finally brought the children for a psychological examination, the psychologist delivering his report on 25 March 2004. The report stated that the children were imitating their mother's behaviour, and that their negative attitude towards their father would get worse if they continued to have no contact with him. The psychologist prescribed therapy to prepare them for contact with their father. He warned against father-child contact in the meantime.

15. On 24 May 2004 the judge confirmed the suspension of the father-child contact schedule and ordered psychological therapy for the children with a view to normalising the father-child relationship.

16. That decision was appealed against by the applicant and his former wife before the Segovia *Audiencia Provincial*. The appeal did not have suspensive effect.

17. On 12 July 2004, the judge appointed a psychologist to conduct the children's therapy.

18. On 20 October 2004 the psychologist informed the judge that psychological treatment was not feasible because of the reluctance of the applicant's former wife to bring the children to the sessions and to the reluctance of the children themselves.

19. On 11 November 2004 the court clerk personally visited the mother and warned her on behalf of the judge to take her children to the psychologist so as to avoid proceedings for failure to comply. The mother replied that she would abide by the judge's decision and that she would inform the judge as soon as possible about the date on which she would take the children to the psychologist.

20. On 24 January 2005 the judge threatened the mother with sending the police to take the children from school to the psychologist. On 27 January 2005 the children went to the psychologist, the psychologist setting up weekly sessions that were completely ignored by the mother. In fact, the children never went back to the medical centre. The psychologist reported this to the judge on 4 February 2005.

21. On 10 June 2005 the Segovia *Audiencia Provincial* ruled with express citation of some Court case-law (*Elsholz v. Germany* [GC], no. 25735/94, ECHR 2000-VIII; *Sommerfeld v. Germany* [GC], no. 31871/96, ECHR 2003-VIII (extracts); and particularly *Volesky v. the Czech Republic*, 29 June 2004) that the first-instance judge had adopted all the necessary measures, and that the therapy prescribed by the psychologist was necessary in order to determine the existence of "Parent Alienation Syndrome", so no violation of a right to a fair hearing could be found in the first-instance decision. In fact, the court praised the task of mediation performed by the first-instance judge and his judicial work in so difficult a case. It stressed that the judge had made a great many attempts to improve

the family situation and facilitate contacts between the applicant and his children.

22. On 1 September 2005 the judge approved the therapy schedule by a decision imposing upon the applicant and his former wife the payment of EUR 600 in expert fees.

23. This decision was appealed against by both parents.

24. On 13 October 2005 the appeals were rejected and a fine of EUR 1,500 was imposed upon each parent.

25. On 13 October 2005 the judge excluded M. from the enforcement proceedings as she had reached adulthood.

26. On 11 November 2005 the Segovia first-instance judge no. 4 ruled on the guardianship and custody of N. and S. The judge deprived the applicant's former wife of their guardianship and custody and awarded them to the regional social services. The judge reasoned that the mother's conduct was making impossible any reconciliation of her children with their father, in breach of the judicial decisions, and that she was thus not performing her parental duties correctly. Also on 11 November 2005, the judge ruled against the father in guardianship and custody proceedings. The minors' reluctance to have contact with their father would make it impossible for him to carry out the duties of guardianship and custody of his children.

27. On 3 May 2006 the Segovia *Audiencia Provincial* reversed the decision of 11 November 2005 on the grounds that the first-instance judge had failed to hear the children.

28. On 19 June 2006 S. was heard by the judge. She was 12 years old at the time and stated that she did not want to have contact with her father. She further stated that she did not understand why her custody and guardianship should be awarded to the regional social services. She was happy living with her mother.

29. On 16 November 2006 the judge decided to request a report from the appointed psychologist regarding contact between the applicant and his children and measures that should be taken.

30. On 11 December 2006 the psychologist submitted her expert report, which stated that the mother's conduct was prompted by firm determination on her part and that it was negatively affecting the relationship between the applicant and his children. She referred to "Parent Alienation Syndrome". However, she advised against depriving the children of their mother's custody and guardianship.

31. On 7 March 2007, after a hearing was held, the judge authorised contact between the applicant and N. and S. by means of e-mail and videoconference. The judge noted that the contact schedule that had been set up initially in favour of the applicant had remained suspended since the Segovia *Audiencia Provincial*'s decision of 1 September 2003, and that it had been impossible to restore it despite multiple efforts on the judge's part.

32. On 9 July 2008 the judge ordered that contact should take place by means of videoconference between the courthouses in Segovia, the place of residence of the children, and Ciudad Real, where the applicant had his residence, for fifteen minutes every Tuesday. On 15 July 2008 a videoconference took place, of which a transcript was made by the registrar. A second videoconference took place on 22 July 2008. In both cases the outcome was unsuccessful, both children refusing to talk or listen to the father.

33. On 21 October 2008 and in the light of the unsuccessful results of the contact, partly because the children had failed to appear on numerous occasions and partly because when they had appeared they had refused to communicate, the contact schedule was suspended by the judge, who also transmitted the file to the public prosecutor with a view to measures being taken against the mother. The applicant has not supplied documents giving indication of any criminal proceedings against his former wife.

34. On 17 March 2009 S. was heard again by the first-instance judge. She insisted that she did not want to have contact with her father.

35. On 28 May 2009 the judge decided on whether the enforcement proceedings concerning the contact schedule set up in favour of the applicant should be declared expired. The judge referred to the obstructionist attitude of the applicant's former wife, which had prevented the enforcement of the said contact schedule despite the numerous efforts made to that end. Subsequently, the judge declared the enforcement proceedings terminated in respect of M. and N. They had reached adulthood and were now free to decide whether to have contact with their father or not. In respect of S., who was 14 years old, the judge declared the enforcement proceedings expired, given her psychological maturity and her constant refusal to have contact with her father. The judge stressed that even if measures could be taken to force contact between child and father this option was not advisable in the circumstances of the case. It would be contrary to the child's well-being and might provoke her into secondary victimisation.

36. The applicant appealed against this decision before the Segovia *Audiencia Provincial*.

37. On 29 December 2009 the Segovia *Audiencia Provincial* upheld the first-instance decision. The *Audiencia Provincial* mainly relied on the Court's case-law in the case of *Sommerfeld*, cited above.

38. The applicant lodged an application for the annulment of the proceedings; this application was rejected on 22 February 2010.

39. The applicant lodged an *amparo* appeal with the Constitutional Court, citing Article 24 of the Constitution in conjunction with Articles 6 §§ 1 and 8 of the European Convention on Human Rights. He complained that the contact schedule set up in his favour had never been effectively

enforced and that this violated his right to a fair hearing without undue delay.

40. By a decision served on 2 November 2010 the Constitutional Court declared his *amparo* appeal inadmissible as devoid of any special constitutional significance.

B. Relevant domestic law

41. Article 24 of the Constitution provides:

Article 24

“1. Every person has the right to the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may he or she go undefended.

2. Likewise, every person has the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against him or her; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to his or her defence; to refrain from self-incriminating statements; not to declare himself or herself guilty; and to be presumed innocent ...”

COMPLAINTS

42. The applicant complained under Article 8 of the Convention that the domestic courts had failed to enforce effectively the contact schedule set up in his favour as part of the enforcement proceedings of the divorce decree delivered in his case. He argued that the domestic courts had not taken all necessary measures to reunite him with his three children, in breach of the Court’s case-law on the matter.

43. Under Article 8 of the Convention in conjunction with Article 14; Article 6 § 1 of the Convention; Article 13 of the Convention in conjunction with Article 14 of the Convention; and Article 5 of Protocol no. 7 to the Convention the applicant also complained of discrimination on account of his sex and of a violation of his right to a fair hearing within a reasonable time.

THE LAW

A. Complaint under Article 8 of the Convention regarding the measures taken by the domestic courts with a view to reuniting the applicant and his children

1. General principles applicable to the present case

44. The Court reiterates at the outset 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, amongst other authorities, *Saleck Bardi v. Spain*, no. 66167/09, § 50, 24 May 2011, and *R.M.S. v. Spain*, no. 28775/12, § 68, 18 June 2013).

45. The Court further reiterates that although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. Regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community as a whole, including other concerned third parties; in both the negative and positive contexts the State enjoys a certain margin of appreciation (see *Saleck Bardi*, loc. cit.; *R.M.S. v. Spain*, cited above, § 69; and *K.A.B. v. Spain*, no. 59819/08, § 95, 10 April 2012).

46. In relation to the State's obligation to implement positive measures, the Court has held that Article 8 includes for parents a right to have steps 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-A, and *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII).

47. 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, and *Cârstoiu v. Romania* (dec.), no. 20660/10, § 42, 7 May 2013); moreover, it is an obligation of means, and not one of result (see *Cristescu v. Romania*, no. 13589/07, § 69, 10 January 2012). 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 the 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*, cited above, § 58, and *Fuşcă*

v. Romania, no. 34630/07, § 38, 13 July 2010). Where contact with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see, amongst others, *Ignaccolo-Zenide v. Romania*, no. 31679/96, §94, ECHR 2000-I, and *Voleský*, cited above, § 118).

48. 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; *Nuutinen*, § 128; and *Ignaccolo-Zenide*, §§ 96 and 102, judgments cited above).

49. As regards 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*, cited above, § 59).

50. 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). Where the measures in issue concern parental disputes over their children, it is not for the Court to substitute itself for the competent domestic authorities in regulating contact and residence disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their discretion. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance (see *Diamante and Pelliccioni v. San Marino*, no. 32250/08, §§ 173-177, 27 September 2011; *Zawadka v. Poland*, no. 48542/99, § 54, 23 June 2005; and *Hokkanen*, cited above, § 55). Moreover, lack of cooperation between separated parents is not a circumstance which can of itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures to reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child (see *Zawadka*, cited above, § 67), which, depending on their nature and seriousness, may override those of the parent (see *Hoppe v. Germany*, no. 28422/95, § 49, 5 December 2002).

51. In cases concerning the right of a parent to contact with his children, the Court has paid attention to the children's continued reluctance to have contact with their non-custodial parent when assessing whether the domestic authorities have correctly fulfilled their positive obligations under Article 8

of the Convention (see, amongst others, *Cristescu*, cited above, § 66; *Voleský*, cited above, § 121; and *C. v. Finland*, no. 18249/02, § 61, 9 May 2006). Likewise, the Court has also considered that the views of a child who is sufficiently mature are relevant when assessing the domestic authorities' performance in view of their positive obligations under Article 8 of the Convention (see *Sommerfeld*, cited above, § 72, and *Hokkanen*, cited above, § 61).

2. Application of the above principles to the present case

52. The Court notes at the outset that the relationship between the applicant and his daughters amounts to "family life" within the meaning of Article 8 § 1 of the Convention, and that therefore the domestic proceedings at issue clearly concern the applicant's "family life" within the meaning of that provision.

53. The Court's task in the present case is to consider whether, in the light of the relevant principles in its case-law, the measures taken by the Spanish courts were as adequate and effective as could reasonably have been demanded in the circumstances of the case for the facilitation of reunion between the applicant and his children. The Court must examine whether a fair balance was struck between the various interests involved, namely the interests of the children, of their mother and of the applicant himself.

54. As regards the background of the present case, the Court first observes that the applicant's children were persistently reluctant to have contact with the applicant. The Court further observes in this regard that the decisions taken by the domestic courts to suspend contact between the applicant and his children were based on the children's statements and on expert reports which, having regard to the children's determined hostility to their father, and to the children's well-being, advised against any contact until psychological therapy with the children had taken place. However, this therapy could not take place, since the applicant's former wife obstinately failed to obey the domestic courts' orders in this regard. The attitude and conduct of the applicant's former wife made it particularly difficult for the domestic courts to act to facilitate contact.

55. The Court notes however that the domestic courts and, in particular, the first-instance judge dealing with the case, did not remain inactive. They made numerous efforts to obtain the cooperation of the applicant's former wife and to reunite the applicant with his children, which included some coercive measures. The Court would like to issue a reminder in this connection that the judge dealing with the case commissioned the court clerk to warn the applicant's former wife to take her children to the psychologist so as to avoid proceedings for failure to comply, in view of her reluctance to abide by the judicial order to that purpose (see paragraph 19 above). It would also reiterate that the judge further threatened the

applicant's former wife with sending the police to take the children to the psychologist if she insisted in ignoring that judicial decision (see paragraph 20 above). The Court further observes that the judge performed a mediation task between the parties, which the appellate court praised, having regard to the sensitiveness of the case (see paragraph 21 above), and that the applicant's former wife was fined EUR 1,000 for failure to comply with an order, as she had repeatedly failed to bring her children to meetings with the psychologist (see paragraph 13 above). The Court would also point out that at one time the judge even deprived the mother of her children's guardianship and custody, owing to her obstructive conduct which prevented any reconciliation of her children with their father (see paragraph 26 above) and that on two occasions the file was sent to the public prosecutor with a view to the institution of criminal proceedings against the mother for failure to comply with judicial orders (see paragraphs 9 and 33 above). Lastly, the Court observes that when it became evident that physical contact between the children and their father would be impossible, the judge ordered that contact should take place by video link in a last-ditch attempt to reunite them (see paragraph 32 above). While their efforts remained fruitless, the Court reiterates that the obligation which lies on the authorities to assist the parents is not absolute. It is an obligation of means, and not one of result (see paragraph 47 above).

56. The Court also notes that the children's reluctance to see the applicant was a constant element through the years. This attitude could not be ignored by the domestic courts, which ultimately considered it inappropriate, having regard to the children's psychological maturity and age, to force them to have contact with their father against their will.

57. In the light of the foregoing, the Court considers that in the particular circumstances of the case the domestic authorities did not fail to fulfil their positive obligations under Article 8 of the Convention. On the contrary, the national courts took all necessary steps to facilitate reunion between the applicant and his children that could reasonably have been expected in the light of the delicate family situation presented by the instant case.

58. Accordingly, this part of the application should be declared inadmissible as manifestly ill-founded within the meaning of Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaints under other Articles of the Convention

59. The applicant cited Article 8 of the Convention alone and in conjunction with Article 14; Article 6 § 1 of the Convention; Article 13 of the Convention in conjunction with Article 14 of the Convention; and Article 5 of Protocol no. 7 to the Convention to complain of discrimination on account of his sex and of a violation of his right to a fair hearing within a reasonable time.

60. The Court has examined these complaints as submitted by the applicant. However, having regard to all the material in its possession, and in so far as they fall within its jurisdiction, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli
Deputy Registrar

Dragoljub Popović
President