

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

FOURTH SECTION

CASE OF BABAYAN v. ARMENIA

(Application no. 70491/13)

JUDGMENT

STRASBOURG

21 June 2022

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Babayan v. Armenia,

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

Jolien Schukking, *President,*
Armen Harutyunyan,
Ana Maria Guerra Martins, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 70491/13) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Vahe Babayan ("the applicant"), on 4 November 2013;

the decision to give notice to the Armenian Government ("the Government") of the complaints concerning the length of the civil proceedings and the right to respect for family life under Articles 6 § 1 and 8 of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 31 May 2022,

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

INTRODUCTION

1. The case concerns the duration and outcome of court proceedings to establish a schedule of contact between the applicant and his daughter following his separation from her mother, and contact during the proceedings. The applicant relies on Articles 6 and 8 of the Convention.

THE FACTS

2. The applicant was born in 1969 and lives in Yerevan. He was represented before the Court by Mr H. Harutyunyan, a lawyer practising in Yerevan.

3. The Government were represented by their Agent, Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters.

I. THE BACKGROUND FACTS

4. In February 2011, the applicant started living apart from his wife and their daughter, A.B., who was two years old at the time. He agreed with his wife that he would have contact with A.B. from 4.30 p.m. to 10 p.m. on Mondays, Wednesdays and Fridays, and from Saturday noon to Sunday noon.

It appears that contact took place in accordance with this agreement until around November 2011.

II. RELEVANT DOMESTIC PROCEEDINGS

A. The claim before the District Court

5. On 13 December 2011, the applicant initiated proceedings against his wife before the Kentron and Nork-Marash District Court of Yerevan seeking a divorce, a schedule of contact with their child, and access to their common apartment. The applicant explained that his wife was preventing his contact with A.B. and asked the court to agree the schedule that had been in place since February 2011, as the child had become accustomed to it. His wife lodged a counter-claim, seeking alimony.

6. On 2 February 2012, the Department of Guardianship and Custody of the Kentron District of Yerevan ("the Department") recommended that the applicant have contact with A.B. on Wednesdays from 6 to 9 p.m. and on Sundays from 4 to 6 p.m. in the presence of the child's mother.

7. On 14 August 2012, the applicant asked the District Court for an interim measure ordering his wife to enable contact between him and his daughter. He argued that preventing contact was likely to entail irreparable harm by creating distance and psychological barriers between him and his daughter, thereby making it more difficult or even impossible to enforce a future judgment on the merits. According to the applicant, his request was rejected.

8. On 26 November 2012, the District Court delivered judgment. It held that the Department's recommendation of 2 February 2012 was not in the best interests of the child as it unduly restricted the rights of the applicant, who enjoyed an equal right to bring up his child. It found that the requirement to meet the child only in the presence of her mother was not in line with family legislation and was against the interests of the child. The court continued:

> "Exclusively on the basis of the interests of the child and the specific circumstances of the present case, the court concludes that minor A.B. would benefit more from maternal care and affection, and needs special assistance and help. As the child has been living with the mother, she has become accustomed to the regular course of life. The [applicant] is not deprived of the opportunity to enjoy his parental rights, including by communicating with the child at her place of residence. However, considering the existing schedule of the child's visits to kindergarten and 'Aquatek' complex, granting the requested four days of communication would entail negative consequences on the conditions necessary for the child's physical, mental, and spiritual development.
>
> Emphasising the child's connection with her father, that parents enjoy equal rights in bringing up their child, that both parents are employed and the child currently lives with her mother, the court finds that the following arrangement must be approved: from 6 to 9 p.m. on Mondays and Wednesdays and from Saturday noon to Sunday noon.

> During the proceedings, the Department of Guardianship and Custody of the Kentron District of Yerevan failed to substantiate its conclusion as to why contact with the child should take place only in the presence of her mother.
>
> Therefore, the court finds it substantiated that due to tension between [the applicant] and his wife, meetings with his child in the absence of his wife best suit the well-being of the child."

9. The District Court also granted the divorce and parts of the applicant's ancillary claims and partly granted the alimony claim of the applicant's wife.

B. The first appeal proceedings

10. On 24 December 2012, the applicant appealed. He objected in particular to the District Court's findings as regards aspects of his ancillary claims and alimony. He emphasised his right to a trial within a reasonable time and the fact that his relationship with his child was at stake, and requested that the court resolve the case speedily. The applicant's wife appealed the schedule of contact and the alimony award.

11. On 11 April 2013, the Civil Court of Appeal ordered a new examination of the applicant's contact hours with his daughter, the division of movable property and alimony. It held that the District Court had failed adequately to examine and address the arguments of the child's mother in respect of contact hours.

12. On 7 May 2013, the applicant lodged an appeal on points of law. In addition to arguments for upholding the contact arrangements approved by the District Court, he again stressed the importance of the speedy resolution of the case. He submitted that the new examination ordered by the Civil Court of Appeal could not ensure a trial within a reasonable time. On 12 June 2013, the Court of Cassation declared the appeal on points of law inadmissible for lack of merit.

C. The re-hearing before the District Court

13. On 12 July 2013, the District Court decided to admit the case for a new examination.

14. On 23 September 2013, the applicant requested an interim measure on similar grounds to those submitted on 14 August 2012 (see paragraph 8 above). He asked for contact rights with his daughter in accordance with the District Court's judgment of 26 November 2012 (see paragraph 8 above). It appears that the court did not rule on the request.

15. On 3 March 2014, the applicant lodged another request with the District Court seeking a similar interim measure. On 6 March 2014 the District Court dismissed the request, reasoning that the requested interim measure constituted the object of the dispute in the case.

16. On 17 July 2014 the applicant lodged a further request with the District Court seeking a similar interim measure. On 21 July 2014 the court dismissed the request for the reasons indicated on 6 March 2014. The applicant appealed, but his appeal was rejected on 7 August 2014 on the basis that decisions on requests for interim measures were not subject to appeal.

17. On 7 August 2014 the District Court delivered judgment. It ordered contact in accordance with the conclusion of the Department on 2 February 2012 (see paragraph 6 above). The text of the decision containing the court's reasoning was identical to the text of its decision of 26 November 2012 (see paragraph 8 above), up to the part of the decision containing the final contact schedule approved, which stated:

> "... the court finds that the following arrangement must be approved: from 6 to 9 p.m. on Wednesdays and from 4 to 6 p.m. on Sundays in the presence of the child's mother."

18. The court also partly granted the counter-claim by the applicant's former wife as regards the movable property and the alimony.

D. The second appeal proceedings

19. On 29 August 2014 the applicant lodged an appeal. As regards contact with his daughter, he argued that the grant of five hours of weekly contact with his child, while the mother of the child had the remaining 163 hours of the week, was in breach of the principle of marital equality in the child's upbringing and unfairly restricted his parental rights. He further stressed that the requirement of the presence of the child's mother during the meetings was unjustified and potentially harmful to the child, considering the possibility of arguments between him and his former wife in the child's presence. Finally, he argued that at the time when the Department issued its recommendation on the schedule of contact with his child, she had been only three years old, while at the time of lodging the appeal she was almost six years old.

20. On 24 March 2015 the Civil Court of Appeal upheld the District Court judgment of 7 August 2014 in so far as it restricted contact to five hours per week but removed the requirement that the child's mother be present during those meetings on the ground that the Department and the District Court had failed to justify that requirement.

21. On 21 April 2015 the applicant lodged an appeal on points of law.

22. On 20 May 2015 the Court of Cassation declared the appeal on points of law inadmissible for lack of merit.

RELEVANT LEGAL FRAMEWORK

23. The following relevant provisions of the Code of Civil Procedure (the CCP") were in force at the material time.

24. According to Article 89 § 3, the court had the power to divide several claims into separate proceedings.

25. Article 28 § 4 provided that those participating in the case had the right to bring motions before the court. Pursuant to Article 123, the court was required to take a decision on applications and motions brought.

26. According to Article 97 § 1, the court, upon request or on its own motion, could make interim measures if not doing so might render the execution of the judgment impossible or difficult. A request for an interim measure could be made at any stage of the proceedings.

27. Article 97 § 2 provided that a request for an interim measure had to be examined and decided on the day of receipt of that request. Articles 140.1 § 2 and 207 § 4 provided that an appeal against interim judicial acts not resolving the complaint on merits could be filed only in cases prescribed by CCP or other laws. However, there was no provision of the CCP or other law that allowed any such appeal to be filed.

28. The new Code of Civil Procedure, which entered into force in April 2018, expressly provided for the possibility of granting a request for an interim measure even if the request concerned the subject matter of the dispute.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that the authorities had failed to ensure his contact rights with his child during the court proceedings and that the five hours of contact with his child per week ultimately granted by the domestic courts disproportionately restricted his parental rights. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his ... 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 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. Admissibility

30. The Government indicated, without explaining why, that their observations addressed only the applicant's first complaint under this head, regarding the failure of the authorities to ensure his contact rights during the proceedings. They argued in their initial observations that the applicant had failed to exhaust domestic remedies since he had not pursued an appeal against the District Court's refusal to order interim measures. They referred in broad terms to "recent practice" where in similar cases interim orders regarding contact had been made. However, they provided no details of the

particular cases which they claimed demonstrated that this remedy offered reasonable prospects of success. In their subsequent further observations, they accepted that the applicant had in fact appealed the District Court's 21 July 2014 refusal to award interim measures and that his appeal had been rejected (see paragraph 16 above). They maintained, however, that he had still failed to exhaust remedies on the basis that he had not lodged an appeal on points of law with the Court of Cassation.

31. The applicant indicated that he had submitted four requests for interim measures, all of which had been rejected. Contrary to legal advice, he had tried to appeal the 21 July 2014 decision but the Civil Court of Appeal had refused to examine his appeal because, it said, the decision on interim measures was not subject to appeal.

32. The Court observes that the applicant made a total of four requests to the District Court for interim measures to enable contact with his daughter (see paragraphs 7 and 14-16 above). The first two of these requests, in August 2012 and September 2013, went unanswered. Following the refusal of his fourth request in July 2014, the applicant attempted to lodge an appeal, but that appeal was rejected on the basis that it was not possible to appeal against a decision on interim measures (see paragraph 16 above).

33. The Government have argued that the applicant ought to have appealed that rejection on points of law to the Court of Cassation. However, given the reasons for the rejection of the appeal and the absence of any formal legal basis for an appeal (see paragraph 27 above) the Government have failed to show that such a further appeal would have had reasonable prospects of success. They have neither explained whether this remedy has been successfully exercised in the past nor provided details of relevant cases in this respect.

34. The Court therefore finds that the applicant has satisfied the requirements of Article 35 § 1 in respect of his complaints.

35. The Court further notes that the applicant's complaints under Article 8 are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

36. The applicant complained that his four requests for interim measures seeking contact hours with his child during the proceedings had been rejected. He argued that the remittal of his claim from the Court of Appeal following the first appeal as well as postponements by the trial court of the hearings had led to unjustified delays in his case.

37. He also submitted that the final schedule of contact did not ensure the equal participation of both parents in the upbringing of their child. He claimed

that two of the five hours per week during which he was allowed contact with his daughter were spent on transportation. He further pointed out that his daughter was much younger at the time the recommendation of the Department had been issued, compared to the time when the Court of Appeal decision establishing the final contact schedule had been delivered.

38. The Government made no submissions on the merits of the applicant's Article 8 complaints.

2. The Court's assessment

(a) The general principles

39. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000 VIII; and *Kosmopoulou v. Greece*, no. 60457/00, § 47, 5 February 2004).

40. There are also positive obligations inherent in effective respect for family life. Thus the authorities are under an obligation to take measures with a view to reuniting parents and their children in cases concerning contact disputes (see *Ribić v. Croatia*, no. 27148/12, § 89, 2 April 2015; and *Suur v. Estonia*, no. 41736/18, §§ 74-75, 20 October 2020). This obligation is not one of result but of means: the key consideration is whether the authorities have taken all necessary steps to facilitate contact as could reasonably be demanded in the circumstances of the case (see *Ribić*, cited above, §§ 94 and 96; *Suur*, cited above, § 77).

41. Article 8 requires that the domestic authorities strike a fair balance between the interests of the child and those of the parents. In the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents (see *Sommerfeld v. Germany* [GC], no. 31871/96, § 64, ECHR 2003 VIII (extracts); and *Širvinskas v. Lithuania*, no. 21243/17, § 95, 23 July 2019). The margin of appreciation to be accorded to the competent national authorities in striking the balance will vary in accordance with the nature of the issues and the importance of the interests at stake. The wide margin of appreciation applicable in principle to custody decisions is narrowed in respect of further limitations, such as restrictions placed on parents' contact rights (*Sommerfeld*, cited above, § 63; and *Širvinskas*, cited above, § 94).

42. The Court's task is not to substitute itself for the domestic authorities, which have had the benefit of direct contact with all the persons concerned. Rather, the Court must review, in the light of the Convention, the decisions taken by them in the exercise of their margin of appreciation. This requires the Court to focus on whether, taking into consideration the case as a whole and having regard to the crucial importance of the child's best interests, the

reasons adduced to justify the measure were relevant and sufficient for the purposes of Article 8 § 2 of the Convention (*Sommerfeld*, cited above, § 62; and *Širvinskas*, cited above, § 93).

43. The decision-making process must moreover be fair and such as to ensure due respect for the interests safeguarded by Article 8. The Court must therefore determine whether the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his or her interests (see *W. v. the United Kingdom*, 8 July 1987, § 64, Series A no. 121; and *Širvinskas*, cited above, § 96). In this context, it may have regard to the length of the local authority's decision-making process and of any related judicial proceedings since procedural delay may result in the *de facto* determination of the very issue at stake in the proceedings (see *W. v. the United Kingdom*, cited above, § 65; and *Širvinskas*, cited above, § 97). There is, therefore, a positive duty on the authorities inherent in the procedural obligations of Article 8 to exercise exceptional diligence in proceedings concerning parental contact (see *Ribić*, cited above, § 92; and *A.V. v. Slovenia*, no. 878/13, § 74, 9 April 2019).

(b) Contact during the proceedings

44. The Court will examine first the complaint concerning the failure of the respondent State to comply with its positive obligations in respect of contact between the applicant and his daughter for the period of the domestic proceedings.

45. The Court reiterates that the applicant requested interim measures ordering contact on multiple occasions. These requests were either ignored or refused (see paragraph 32 above). The only reason given for refusal was that the interim measure requested concerned the object of dispute in the case (see paragraph 15 above). The Court finds this reason to be neither relevant nor sufficient for the refusal to award some degree of provisional contact during the proceedings. The fact that the long-term arrangements for contact to be afforded to the applicant and his daughter were the subject of the proceedings should not have prevented the court from putting in place a temporary arrangement pending that final determination. It is noteworthy that the new CCP appears to address this issue directly by expressly providing for the possibility of granting interim measures even where the request concerns the subject matter of the dispute (see paragraph 28 above). The refusal to entertain the requests in the applicant's case was all the more unreasonable given that it does not appear to have been envisaged at any point in these proceedings that the applicant might ultimately be denied any contact rights.

46. It is noteworthy that the proceedings lasted for over three years and five months. Throughout this lengthy period, it appears that the applicant enjoyed no contact rights in respect of his daughter. Requests during the proceedings to expedite matters given what was at stake received no direct response from the courts (see paragraphs 10 and 12 above). The Court

underlines the positive duty on the authorities to exercise exceptional diligence in proceedings concerning parental contact. This duty is all the more pressing where, as in the present case, requests for interim contact have been refused.

47. As a result of the failures of the domestic courts, the applicant was denied the right to have contact with his daughter for a period of almost three and a half years. The Court finds that the domestic authorities did not take the necessary steps that could reasonably have been expected of them to facilitate reunion between the applicant and his daughter and did not exercise the exceptional diligence required of them under Article 8 in the circumstances of the case. There has accordingly been a violation of Article 8 in this respect.

(c) The final contact arrangement

48. The applicant argued that the five hours of contact with A.B. per week granted by the domestic courts disproportionately restricted his parental rights. The Court is satisfied that the decision amounted to an interference with his right to respect for his family life, as guaranteed by Article 8 § 1.

49. The applicant does not contest that the measure was in accordance with the law and pursued a legitimate aim. The sole question is therefore whether the restrictions on contact were "necessary in a democratic society".

50. In 2012, the Department recommended that the applicant be allowed contact with A.B. for three hours on a Wednesday evening, and for two hours on Sunday afternoons, in the presence of the child's mother (see paragraph 6 above). The District Court in its first judgment delivered later that year chose not to follow the limited hours of contact proposed in that recommendation, on the basis that it was "not in the best interests of the child". Instead, it approved an arrangement whereby the applicant could see his daughter for three hours on two evenings during the week and for a whole day, including an overnight stay, at the weekend. It moreover rejected the recommendation that contact be in the presence of the child's mother since tension between her and the applicant meant that contact outside her presence would best suit A.B.'s wellbeing (see paragraph 8 above).

51. After the case had been remitted to the District Court by the Civil Court of Appeal, the District Court in 2014 simply endorsed the 2012 recommendation of the Department (see paragraph 17 above). There was no acknowledgement of the time that had passed since that recommendation had been made or of the impact the passage of time might have had on the appropriate contact arrangements. The reasoning in the court's 2014 judgment was in identical terms to that of its 2012 judgment; only the conclusions as to the contact arrangements differed. The court did not explain why it had chosen to depart from the contact schedule ordered in 2012 and did not refer to any new elements which it had taken into account which might explain why a different conclusion had been reached. In particular, although the case had been remitted on the basis that District Court had failed to

examine and address the mother's arguments (see paragraph 11 above), the new judgment did not refer to any such arguments or explain whether they had been upheld. It similarly provided no reasons for introducing the requirement that contact be in the presence of the mother, despite the fact that the previous judgment had clearly explained why such a requirement was not in the interests of A.B. While the Civil Court of Appeal later removed this latter requirement, it maintained the more limited contact arrangements of the 2014 judgment, simply quoting the reasoning in that judgment (see paragraph 20 above).

52. The Court reiterates that the authorities' margin of appreciation in cases concerning contact with children is not a wide one (see paragraph 41 above). In these circumstances, and in particular given the absence of any explanation in the judgments of the District Court and the Civil Court of Appeal for the departure from the contact arrangements ordered in the 2012 judgment, it cannot be said that the reasons provided to justify the schedule of contact finally imposed were relevant and sufficient such as to allow the Court to conclude that a fair balance was struck between the various interests at stake in the present case.

53. There has therefore also been a violation of Article 8 of the Convention in respect of this complaint.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

54. The applicant complained under Article 6 of the Convention of the length of the civil proceedings in his case. Article 6 reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

55. Having regard to its findings under Articles 8 of the Convention (see in particular paragraph 47 above), the Court considers that it is not necessary to examine the admissibility and merits of this complaint.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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."

57. The applicant claimed six thousand euros (EUR) in respect of non-pecuniary damage. He left it to the Court's discretion whether to award costs and expenses; he provided no evidence of any costs or expenses actually incurred.

58. The Government submitted that the applicant's claim for non-pecuniary damage was unsubstantiated and exaggerated given the nature

of the alleged violations and the established case-law of the Court in similar case (referring to *Stasik v. Poland*, no. 21823/12, 6 October 2015). They therefore invited the Court to award a lesser sum than that claimed.

59. The Court considers it reasonable to award the applicant EUR 5,900 in respect of non-pecuniary damage, plus any tax that may be chargeable on this sum. Since he has provided no evidence in respect of costs incurred, no award is made under this head.

60. The Court considers it appropriate that the default interest rate 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 under Article 8 admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention as regards the failure of the authorities to ensure the applicant's contact rights with his daughter during the court proceedings and as regards the final schedule of contact ordered by the domestic courts;

3. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the sum of EUR 5,900 (five thousand and nine hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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 21 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Jolien Schukking President