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

THIRD SECTION

DECISION

Application no. 59651/13
Lucian DORCA
against Romania

The European Court of Human Rights (Third Section), sitting on 15 April 2014 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 12 September 2013,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Lucian Dorca, is a Romanian national born in 1979 and living in Sibiu. He was represented before the Court by Ms M.M. Ţuca, a lawyer practising in Sibiu.

A. The circumstances of the case

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

3. On an unspecified date the applicant, who was assisted by a legal representative of his own choosing, brought divorce and custody proceedings against his wife seeking, *inter alia*, to be granted joint custody of their two-year-old daughter.

4. On 21 November 2011 the Sibiu District Court dismissed the applicant's action in part, on the basis of testimonial evidence and social inquiry reports, including the report of an inquiry conducted by the Spanish authorities at the child's mother's home. The mother was granted sole custody, on the grounds that the child had been born in Spain and had lived there since birth. Furthermore, her mother was in permanent employment there. Given the child's young age, her hygiene, dietary and medical needs required particular attention, and she could suddenly develop the symptoms of a very serious medical condition. In the circumstances, it would be imperative for the parent to recognise such symptoms and the immediate steps that needed to be taken. It was uncontested by the parties that the child had been left in her mother's care and that the mother had attended very closely to her needs. According to the testimonial evidence available, the mother was a good cook and was very careful about her health. In addition, separating the child from her current environment, in which she was integrated and which promoted her normal development, was not recommended considering the constant need to maintain her well-being. While it was true that the applicant had optimal living conditions for raising his daughter, these were insufficient given her young age and the particular attention that she required. Consequently, taking into account both moral and material criteria, it was considered that the mother was better placed to raise and educate the child. She had health problems and had been repeatedly hospitalised and kept under medical supervision for bronchitis while in her mother's care. In addition, she was enrolled in a Spanish preschool, according to whom there was a strong emotional bond between the child and her mother, who attended school meetings and activities, had a good relationship with preschool staff and ensured that her daughter was clean and ate correctly.

5. The applicant appealed against the judgment and argued that the court's belief that he was unable to raise and educate the child in the same way as his wife amounted to discriminatory treatment. In addition, there was no evidence to suggest that under the relevant provisions of the Romanian Civil Code custody of a child could not be assigned to both parents. Moreover, under the relevant domestic and international legislation, parental authority could not be divided and had to be exercised jointly by both parents. The alleged criminal offences he had been accused of by his wife had simply been allegations, which was clear from the fact that he had no criminal record. Furthermore, his daughter did not have any serious health problems or problems that were unusual for a child of her age.

6. On 2 November 2012 the Sibiu County Court dismissed the applicant's appeal. It held that the social inquiry report produced by the Spanish authorities confirmed that the mother was able to raise and educate the child in a stable way. In addition, the mother had taken good care of the child, who had health problems and had been repeatedly hospitalised and

kept under medical supervision for bronchitis. The child was enrolled and had integrated well in the Spanish schooling system, and her mother had a good relationship with the teachers and was in permanent employment in Spain. In determining who would have custody of the child, the court could not ignore the fact that the applicant had taken his daughter out of Spain without her mother's consent. Subsequently, the mother had brought criminal proceedings against the applicant for child abduction. Although she withdrew her criminal complaint and the applicant was never convicted, it was uncontested that he had left the marital home in Spain together with his young daughter without his wife's consent. Consequently, there was a risk that the applicant could repeat his actions if he was awarded joint custody of his daughter. The court could not wait for that risk to occur and considered that it was in the best interests of the child, taking into account her age and health, to enjoy the stability afforded by the mother. The social inquiry report produced by the Spanish authorities contained a recommendation for specialist professionals to monitor the relationship between the applicant and his daughter on account of his prior actions. The best interests of the child were at the heart of the domestic and international legislation referred to by the applicant. Consequently, given his previous behaviour, the decision of the first-instance court to grant sole custody of the child to the mother had been justified.

7. The applicant lodged an appeal on points of law (*recurs*). He argued that under the relevant domestic and international legislation, joint custody of children served the best interests of the child and was the rule even if parents were divorced. In addition, the consent of the other parent was presumed when parents enjoyed joint custody. Moreover, the first and second-instance courts had wrongfully assessed the evidence put before them and there was nothing to suggest that if he had been granted joint custody of his daughter, he would have attempted to abduct her. Furthermore, the Spanish authorities had cleared him of any charges and their recommendation relied on by the second-instance court would only have been of relevance had he committed an offence. Lastly, there was no evidence to suggest that he had endangered his daughter's physical and moral development, and there were therefore no well-founded reasons for the courts to award the mother sole custody of their daughter.

8. By a final judgment of 12 March 2013, the Alba-Iulia Court of Appeal dismissed the applicant's appeal on points of law. It held that under the relevant domestic legislation, parents enjoyed joint custody of children even after divorce, because it was presumed that such a situation served the best interests of the child. However, the same domestic legislation allowed for a departure from that rule, if there were well-grounded reasons to suggest that the best interests of the child would be better served if custody was awarded to only one of the parents. In the instant case, without denying the applicant's attachment to his daughter, it was relevant that the child's

parents lived in different countries. That would make it difficult for the applicant to enjoy his right to joint custody effectively. Moreover, there was a risk that in certain situations, the absence of the parents' agreement or a delay in the applicant's consent might have a negative impact on the child's development, given that she was so young. A systemic approach to the dynamics of the parties' interactions should show a relationship that would facilitate the exercise of joint custody. In the absence of such interactions, joint custody of the child may be a source of continuous conflict that would be incompatible with the best interests of the child. In the parties' case, there was clear proof of an unstable and inharmonious relationship and of serious disagreements concerning the child's situation. In this context, it was relevant that the applicant, in the absence of a clear agreement with his wife, had travelled with the child to Romania and that in the past few years the parties had been involved in numerous sets of court proceedings. The court therefore considered that there were well-grounded reasons to award sole custody of the child to the mother, and that such a measure would be in the better interests of the child.

B. Relevant domestic law

9. Articles 397 and 398 of the Romanian Civil Code provide that after divorce, parents are to exercise joint parental authority over their children unless the court decides otherwise. If there are well-grounded reasons, taking the best interests of the child into account, the court may decide for parental authority to be exercised by only one of the parents. The remaining parent reserves his or her right to monitor the way the child is raised and educated, and his or her right to consent to the child's adoption.

COMPLAINTS

10. Relying on Articles 6 and 8 of the Convention, Article 5 of Protocol No. 7 and Article 1 of Protocol No. 12 to the Convention, the applicant complained that the domestic courts had ignored the best interests of the child, had favoured one parent over the other, had wrongfully assessed the evidence put before them and had misinterpreted the applicable legislation. As a result, he had been deprived of the joint custody he had enjoyed in respect of his daughter, which had made it difficult for him and his family to have contact with her.

THE LAW

A. Complaint under Article 8 of the Convention

11. The applicant complained under Article 8 of the Convention that by awarding sole custody of his daughter to her mother, the domestic courts had ignored the best interests of the child, had favoured one parent over the other, had wrongfully assessed the evidence put before them, had misinterpreted the applicable legislation and had made it difficult for him and his family to have contact with her. The relevant provision reads as follows:

Article 8

"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."

12. The Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, amongst other authorities, *Johansen v. Norway*, 7 August 1996, § 52, *Reports of Judgments and Decisions* 1996-III, and *Bronda v. Italy*, 9 June 1998, § 51, *Reports* 1998-IV).

13. The Court notes that prior to his and his wife's divorce, the applicant appears to have had frequent contact with his daughter and that they had lived together. In addition, prior to the final judgment of 12 March 2013 he had enjoyed joint custody of his daughter with his wife, and had attempted to obtain sole custody.

14. In the circumstances, the Court considers that the impugned measure, the Romanian courts' decision to award sole parental custody to the mother, amounted to an interference with the applicant's right to respect for his family life as guaranteed by Article 8 § 1 of the Convention.

15. Such an interference constitutes a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under Article 8 § 2 and can be regarded as "necessary in a democratic society".

16. The Court notes that the domestic courts' decision had a basis in domestic law, namely Article 397 and 398 of the Romanian Civil Code.

17. In the Court's view, the court decisions about which the applicant complained were clearly aimed at protecting the "rights and freedoms" of the child. Accordingly, they pursued legitimate aims within the meaning of Article 8 § 2.

18. In determining whether the refusal to grant custody was "necessary in a democratic society", the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of Article 8 § 2. Undoubtedly, consideration of what is in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the domestic authorities have the benefit of direct contact with all parties concerned. It follows that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their margin of appreciation (see, *inter alia*, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; *Elsholz v. Germany* [GC], no. 25735/94, § 48, ECHR 2000-VIII; and *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII).

19. The Court further observes that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The Court cannot satisfactorily assess whether the reasons adduced by the national courts to justify these measures were "sufficient" for the purposes of Article 8 § 2, without at the same time determining whether the parent was involved in the decision-making process, seen as a whole, to such a degree as to provide him with the requisite protection of his interests (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V; *Hoppe v. Germany*, no. 28422/95, § 52, 5 December 2002; and *Sommerfeld*, cited above, § 66).

20. The Court further observes that a fair balance must be struck between the interests of the child and those of the parent (see, for example, *Olsson v. Sweden* (no. 2), 27 November 1992, § 90, Series A no. 250), and that in so doing, particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (see *Johansen v. Norway*, no. 17383/90, 7 August 1996, § 78, *Reports* 1996-III; *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007; and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 134, 6 July 2010).

21. In reviewing whether in the exercise of their margin of appreciation the domestic courts based their decisions on relevant grounds, the Court

observes that according to the Romanian courts, awarding joint custody of the child to the parents would not have been beneficial for her. They took into account the child's young age, the fact that she had been primarily looked after by her mother, the strong emotional bond between the child and her mother, and the fact that the parents lived in separate countries. They also considered that an award of joint custody had the potential to unsettle the child and have a negative impact on her in terms of future development. Moreover, the domestic courts, in particular the court of final instance, expressly assessed whether the criteria examined by it amounted to well-grounded reasons that were sufficient to refuse the applicant joint custody. In view of this, the Court is satisfied that the domestic courts' decisions can be seen as having been made in the child's best interests, which, because of its serious nature, must override the applicant's own interests. The domestic courts therefore gave relevant and sufficient reasons to justify their decision to refuse the applicant joint custody of his daughter.

22. In assessing whether those reasons were also sufficient for the purposes of Article 8 § 2, the Court will notably have to determine whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests.

23. The Court observes in this regard that during the proceedings, the applicant was represented by a legal representative of his own choosing, and was therefore in a position to put forward all his arguments and to present evidence in support of his application for joint custody of the child. He had the opportunity to present both written and oral submissions and documentary evidence, and to call witnesses and examine witnesses against him. In addition, the court of final instance touched on all the appeal arguments raised by the applicant but dismissed them, taking into account the actual situation of the parties and the best interests of the child.

24. In this connection, the Court reiterates that it is the domestic courts which are best placed to assess the relevance of evidence to the issues in a case (see, amongst many authorities, *Vidal v. Belgium*, 22 April 1992, § 32, Series A no. 235-B, and *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B). In the circumstances of the present case, the Court is satisfied that the domestic courts examined the applicant's arguments and gave reasons for dismissing them, which, in the Court's view, were not tainted by arbitrariness or aimed at favouring the mother.

25. Lastly, the Court notes that the applicant complained that both he and his family had encountered difficulties in having contact with his daughter. However, there is no evidence of the applicant having brought proceedings against the mother seeking to be granted a right to contact, and it does not appear that he would have been unable to do so.

26. Having regard to the foregoing, and to the respondent State's margin of appreciation, the Court is satisfied that the Romanian courts' procedural

approach was reasonable in the circumstances and provided sufficient grounds to reach a reasoned decision on the issue of joint custody.

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

B. Complaints under Articles 6 of the Convention, 5 of Protocol No. 7 and 1 of Protocol No. 12 to the Convention

27. Relying on Article 6 of the Convention, Article 5 of Protocol No. 7 and Article 1 of Protocol No. 12, the applicant reiterated the complaint he had raised under Article 8 of the Convention.

28. The Court notes that these complaints are closely linked to the complaint examined under Article 8 and do not warrant a separate examination. It follows that this part of the application must likewise be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli Deputy Registrar	Josep Casadevall President