CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 31697/96
by E. E.
against Austria

The European Court of Human Rights (Third Section) sitting on 7 September 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 22 November 1995 by E. E. against Austria and registered on 3 June 1996 under file no. 31697/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian national, living in Grünbach (Austria). She is the maternal grandmother of the child Andreas, who was born out of wedlock on 18 May 1993.

The applicant is represented before the Court by Mr H. Blum, a lawyer practising in Linz.

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

A. Particular circumstances of the case

On 11 November 1994, the Freistadt District Authority (*Bezirkshauptmannschaft*) petitioned the Freistadt District Court (*Bezirksgericht*) that the custody of the applicant's grandchild, Andreas, be withdrawn from the applicant's daughter and transferred to the District Authority's Youth Welfare Office. The authority submitted that Andreas' mother did not care for her child, but left it entirely to her son's grandmother, the applicant, to care for and raise him.

On 26 January 1995, the Freistadt District Court heard the applicant on the question raised by the Authority. She did not object to the withdrawal of her daughter's parental rights, confirming that her daughter failed to take care of Andreas. The applicant explained that she, herself, would like to continue to take care of her grandchild.

On 15 March 1995, the Freistadt District Court approved of the District Authority's petition pursuant to sections 176 and 176a of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) on the ground that Andreas' well-being was endangered by his mother's conduct. On 20 March 1995, the District Court served its decision on, *inter alia,* the applicant. Andreas was placed with foster-parents on 28 April 1995.

On 9 May 1995, the applicant requested the Freistadt District Court to transfer custody of Andreas to her. She alleged shortcomings in the care by the foster-parents and requested that a child-psychologist's expert opinion be prepared to prove that Andreas' well-being was better ensured by her than by foster-parents.

In its decision of 8 September 1995, the Freistadt District Court rejected both requests. It relied on the Vöcklabruck Youth Welfare Office's report according to which Andreas had adapted well to his foster-parents who took care of his well-being, and that there had been big improvements in his development. The applicant and Andreas' mother were entitled to visit him. The District Court observed that the transfer of custody of Andreas to the District Authority was *res judicata* and could only be amended in the case of new relevant developments. However, the applicant had failed to prove that the foster-parents' care negatively affected her grandchild's well-being.

On 10 October 1995, the Linz Regional Court (*Landgericht*) declared the applicant's appeal inadmissible to the extent that it concerned the District Court's decision of 15 March 1995, on the ground that this decision had become final. It dismissed the remainder as she had failed to submit any new relevant circumstances.

In these and the following proceedings, the applicant was represented by counsel.

On 19 April 1996, the applicant applied anew to the Freistadt District Court for the custody of her grandchild to be transferred to her. She submitted that in the course of her visits she had gained the impression that Andreas was not well at the foster-parent's place, although she could not specify reasons therefor. She once again asked for an expert opinion to be prepared in order to prove that both Andreas' psychological and physical condition had deteriorated since he had been living with his foster-parents.

In its decision of 10 December 1996, the Freistadt District Court dismissed the applicant's request on the ground that the care and custody of the grandchild could only be changed if this were in the child's interest. The District Court observed, first, that the foster-parents had been frequently checked as a result of the applicant's continuous complaints, but that there had never been any basis found for the applicant's charges. According to information provided by a psychologist, Andreas was well established with his foster-parents. The Court further noted that the child's physical development did not demonstrate any anomaly or sign of under-nourishment. Therefore, it did not consider it necessary to obtain a medical expert opinion. The Court also noted that Andreas' mother, who lives in a little house together with the applicant and her infant daughter, did not connect to Andreas at all when he had visited her.

On 30 January 1997, the Linz Regional Court dismissed the applicant's appeal on the ground that, in the absence of any new relevant information, the applicant's request was barred because of the binding effect of the judicial ruling of 15 March 1995. As regards the procedural complaints that the District Court did not obtain a medical and child-psychologist's expert opinion, the Regional Court referred both to the Freistadt District Authority's report of 30 September 1996 and the report of the Vöcklabruck District Authority's psychologist of 16 September 1996, as well as the statements made by Andreas' foster-parents. From all three sources, it followed that Andreas had developed well at his foster-parents' place. For this reason, the Regional Court held that the absence of an expert opinion did not constitute a procedural defect. The Court finally observed that, even if the situation at the foster-parents' place had not been satisfactory, this would not have led to the transfer of custody to Andreas' mother or grandmother, but only to a change of foster-parents.

As regards the alleged lack of information about the results of the District Court's investigation, the Regional Court recalled that the right to be heard, pursuant to Article 6 § 1 of the European Convention on Human Rights, was not violated if the parties concerned had had an opportunity to comment in appeal proceedings. The Regional Court observed that the applicant did indeed make use of this possibility.

On 26 March 1997, the Supreme Court (*Oberster Gerichtshof*) dismissed the applicant's special appeal on points of law (*außerordentlicher Revisionsrekurs*). The Supreme Court noted that the circumstances had not changed since the final judgment of 15 March 1995.

B. Relevant domestic law and practice - the Austrian Civil Code

Section 176 (1) of the Austrian Civil Code provides, as far as relevant, that in cases in which an infant child's well-being is endangered by its parents' conduct, the competent court shall, on whosoever's request, order the necessary measures to secure the child's well-being. Pursuant to this section, the court is competent to withdraw custody of the child from the parents.

According to section 176a, the competent court has to transfer custody to the responsible Youth Welfare Office if the child cannot be placed with relatives or other qualified persons near to the child. The provision allows for the responsible Youth Welfare Office to transfer the exercise of its custody rights to another person.

Section 176b provides that any court order passed pursuant to sections 176 and 176a shall limit the custody measure to the extent necessary to ensure the child's well-being.

Pursuant to section 145 (1), the competent court shall decide whether custody is to be transferred to the child's grandparent(s) in case neither parent is able to care for the child.

COMPLAINTS

The applicant complains under Articles 6 and 8 of the Convention that the Freistadt District Court's decision of 15 March 1995 violated both her right to a fair hearing, in particular her right to have access to a tribunal with regard to her right to obtain custody of her grandchild, and her right to respect for private and family life. The applicant submits that the District Court's decision to award custody of her grandchild to the Youth Welfare Office was unlawful. In her view, the District Court did not examine her submissions that she could care better for her grandchild than the foster-parents and based its decision only on the District Administrative Authority's report without having obtained a medical or child-psychologist's expert opinion. Moreover, the applicant complains that in the decision of 15 March 1995 she was not informed about the remedies available to her. She also submits that in the second set of proceedings the judge did not advise her to submit precise arguments.

THE LAW

1. The Court has first examined the applicant's complaints, in respect of the Austrian court decisions on the right to custody of her grandchild, under Article 8 of the Convention.

Article 8, so far as relevant, provides as follows:

> " 1. Everyone has the right to respect for his private and 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. As regards the applicability of Article 8, the Court recalls that “family life”, within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life (see the Marckx v. Belgium judgment of 13 March 1978, Series A no. 31, p. 21, § 45).

The applicant is the maternal grandmother of the infant child Andreas. She took *de facto* care of her grandchild. These links are sufficient to establish “family life” within the meaning of Article 8, which is thus applicable.

b. The Court observes at the outset that it is not required to decide whether the District Court's decision of 15 March 1995 discloses any appearance of a violation of Article 8 of the Convention. Even assuming exhaustion of domestic remedies, the Court finds that the impugned custody decision was given more than six months before the date on which the application was submitted. The Court recalls in this context that ignorance of the law does not constitute a special circumstance which might have interrupted or suspended the running of the six months period. It follows that the application on this matter must be rejected under Article 35 §§ 1 and 4 of the Convention.

c. As regards the applicant's ensuing requests for transfer of custody over her grandchild, the Court notes that, prior to the withdrawal of the mother's custody and its transfer to the District Authority, the applicant had taken *de facto* care of Andreas. In these circumstances, the Court starts on the assumption that the Austrian courts' decisions refusing to change the custody decision of 15 March 1995, or to award custody to her, interfered with the applicant's right to respect for her family life under Article 8 § 1. The Court, therefore, has to examine whether this interference was justified under Article 8 § 2 of the Convention.

The Court finds that the decisions in question were taken in accordance with Sections 145, 176, 176a and 176b of the Austrian Civil Code. The interference at issue was, therefore, in accordance with the law within the meaning of Article 8 § 2 of the Convention.

The Court further considers that the impugned decisions had a legitimate aim under paragraph 2 of Article 8 for the protection of the rights of others, namely the child, Andreas.

As regards the question whether the interference complained of was “necessary in a democratic society”, the Court recalls that the Contracting States enjoy a certain margin of appreciation in assessing whether the need to interfere exists, but it goes hand in hand with European supervision (see, *inter alia*, the Berrehab judgment of 21 June 1988, Series A no. 138, p. 15, § 28, and the Funke v. France judgment of 25 February 1993, Series A no. 256-A, p. 24, § 55).

The issue before the Austrian courts was whether the Freistadt District Court's initial decision to grant the Administrative Authority's Youth Welfare Office custody of Andreas was to be amended and custody awarded to the applicant.

The Court notes the findings of the Austrian courts that it was in the best interests of the child concerned to leave custody with the Youth Welfare Office. The courts considered that the applicant's submissions did not contain sufficient elements to reverse the initial and meanwhile binding decision which had entailed the child's placement with foster-parents. Therefore, the courts considered that no expert opinion was necessary.

Against this background, the Court finds that the reasons for the impugned decisions were both relevant and sufficient.

As regards the applicant's complaint that the Austrian courts did not deal sufficiently with her arguments, the Court recalls that certain procedural requirements are implicit in Article 8 (see *mutatis mutandis*, the Olsson judgment of 24 March 1988, Series A no. 130, p. 33, § 71, referring to the W. v. UK judgement of 8 July 1987, Series A no. 121, p. 28 - 29, §§ 64 - 65). The Court finds, however, that in the court proceedings as a whole the applicant, represented by counsel, was given sufficient opportunity to make her views known to the court and that they had been duly taken into account.

In sum, the applicant's submissions do not disclose any appearance of a breach of her right to respect for private and family life.

This aspect of the application is therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicant complains of unfairness in the various proceedings. She invokes Article 6 of the Convention which guarantees, *inter alia*, the right to a fair hearing by an impartial tribunal in the determination of civil rights. However, the Court refers to its above reasoning regarding the procedural requirements implicit in Article 8. The Court finds nothing to indicate that the court proceedings in the present case were in breach of Article 6 § 1.

This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 35 § 3.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

N. Bratza
President