

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

FIRST SECTION

DECISION

Application no. 55848/12
X. and Others
against Croatia

The European Court of Human Rights (First Section), sitting on 23 September 2014 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 20 August 2012,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms X. ("the first applicant") who lodged the application on her own behalf and on behalf of her two underage children, her daughter Y. ("the second applicant") and her son Z. ("the third applicant"), are Croatian nationals who were born in 1974, 2000 and 2002 respectively, and live in Croatia. They were represented before the Court by Ms I. Bojić, an advocate practising in Zagreb.

2. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

4. On 10 April 1999 the first applicant married S.

5. In 2000 she gave birth to the second applicant, and in 2002 to the third applicant.

6. The first applicant and S. separated in November 2004 when he moved out of the matrimonial home.

1. Divorce and custody proceedings

(a) Principal proceedings

7. On 11 January 2005 the first applicant instituted civil proceedings against S. in the relevant municipal court, seeking a divorce and the right to have the second and third applicants living with her (hereinafter "custody").

8. On 9 March 2005 the local social welfare centre, which participated in the proceedings as an independent intervener *sui generis* with a view to protecting the children's interests, submitted its opinion and report.

9. By a judgment of 25 March 2005 the Municipal Court granted the divorce, awarded the first applicant custody of the second and third applicants, and granted S. access (contact) rights.

10. Following an appeal by S., on 23 November 2005 the relevant county court quashed the first-instance judgment, except for the part granting the divorce, and remitted the case to the first-instance court.

11. In the resumed proceedings, the Municipal Court held hearings on 25 May and 12 December 2006, 20 February, 4 October and 14 December 2007 and on 11 June, 19 February and 18 July 2008. On 3 October 2006 it obtained a combined expert opinion from court experts in psychology and psychiatry, and on 1 April 2008 a fresh opinion and report from the local social welfare centre.

12. According to the combined expert opinion from experts in psychology and psychiatry the first applicant was mentally unstable and had demonstrated signs of a personality disorder, whereas her former husband, S., had shown no such signs and was sufficiently emotionally stable to take care of the children. In particular, the experts established that the first applicant lacked self-critical awareness and was unable to recognise and respond to the emotional needs of her children. They therefore recommended that custody of the second and third applicants be awarded to their father. Having regard to the importance of the role of a mother in the development of a child, and the fact that both children were very emotionally attached to her, the experts also suggested granting the first applicant extensive access rights, provided that she agree to seek psychiatric treatment.

13. In reply, the first applicant submitted an opinion by a psychiatrist who had been treating her since June 2005. The opinion, dated 29 November 2006, stated that she had been systematically abused by her former husband and, although mentally fragile, was not suffering from any mental illness, much less a personality disorder.

14. On 28 May 2007 the local social welfare centre, acting partly upon the opinion and court experts' recommendations and partly of their own motion, instructed the first applicant to commence psychiatric treatment and to take the second and third applicants for psychotherapy. It also imposed various supervision measures in order to monitor the exercise of parental authority by her and S.

15. By a judgment of 18 July 2008 the Municipal Court awarded the first applicant custody of the second and third applicants, and granted S. access (contact) rights. Following an appeal by S., on 18 June 2009 the County Court quashed the first-instance judgment and remitted the case.

16. On 10 January 2010 the Polyclinic for the Protection of Children – where the second and third applicants had been receiving psychiatric treatment – informed the local social welfare centre that it suspected the second and third applicants' mental health was being neglected and that they were being emotionally abused by the first applicant.

17. According to a fresh expert opinion obtained by the Municipal Court in the resumed proceedings in November 2010 from two different court experts (a psychologist and psychiatrist), both the second and third applicants were very traumatised as a result of their parents' – especially their mother's – behaviour, and were in urgent need of psychotherapy. The experts also established that, although both parents were responsible for the situation, the first applicant, whose behaviour they regarded as "emotional abuse", was more responsible. The inefficiency of the authorities had also contributed to the situation, by making it possible for the mother to manipulate the children. The experts further found that both parents had limited parenting capacities, but that the first applicant's capacity was more limited. They initially could not recommend which parent should be awarded custody – handing the children to their father would worsen their mental state, whereas keeping them in their mother's custody would intensify their hostility to their father and her influence over them. Thus, they first suggested that both parents undergo counselling to try to improve their own relationship and their relationship with their children, later proposing to award custody of the children to their mother for a period of six months and grant the father extensive access rights.

18. On that basis, on 27 December 2010 the court made an interim order whereby it awarded the first applicant custody of the children on a temporary basis and granted S. access rights, allowing him contact with the second and third applicants three times a week for two hours, every other weekend and for half of the school holidays.

19. It would appear that for the following six months, the father was unable to exercise his access rights because each time he went to collect the children they refused to go with him, a behaviour which the first applicant allegedly encouraged.

20. The last expert opinion obtained by the court in September 2011, which was prepared by the same psychologist and psychiatrist who had prepared the opinion of November 2010, recommended placing the second and third applicants into care. The experts suggested that the children be removed from their mother because she was harming their emotional development. Even though their father had better parenting capacity, for the time being he could not take over custody as the children, because of their mother's influence, had a very negative attitude towards him, so any forced situation would have a negative impact. The experts therefore recommended placing the children into foster care, attending psychotherapy in a designated clinic, and granting each parent supervised access once a week. It was proposed that the measures would last for one year.

21. On 8 December 2011 the local social welfare centre lodged a motion seeking that the second and third applicants be temporarily removed from the first applicant for a period of one year, the child protection measure laid down in section 111 of the Family Act (see paragraph 56 below). On the same day it appointed one of its employees to act as their guardian *ad litem* and represent their interests in the proceedings, as required by section 121 of the Family Act (see paragraph 56 below).

22. On 21 December 2011 the Municipal Court adopted a judgment depriving the first applicant and S. of custody of the second and third applicants for a period of one year and awarding custody to a children's home run by the Catholic church. S. and the first applicant were granted access (contact) rights, to be exercised on the premises of the children's home in the presence of one of its employees. S. was entitled to see the children every Saturday from 10 a.m. to 12 noon and the first applicant every Sunday from 3 to 5 p.m. The court also decided that the judgment would be immediately enforceable, accordingly ordering the first applicant to entrust the second and third applicants to the children's home immediately following service.

23. In making its decision the court, apart from relying on the above-mentioned expert opinions, also took into account the fact that the first applicant had refused to act upon the instruction of the local social welfare centre to seek psychiatric treatment (see paragraph 14 above), had taken the children for treatment at the designated clinic only once, and had been obstructing execution of the supervision measures imposed by the centre, by refusing to cooperate with the social worker assigned to her case.

24. In particular, the court found that the mother's refusal to seek psychiatric treatment (which was a precondition for the successful psychotherapy of her children), her and S.'s fixation on their mutual

problems and their lack of communication and unwillingness to adapt and change, were making them insensitive to the emotional needs of their children. That was harmful for the physical and mental development of the children, who had been traumatised and manipulated by their parents' attitude and behaviour. The parents had thus significantly neglected their duty to raise and educate them, as they had not taken sufficient care of their health within the meaning of section 111(1) and (2) of the Family Act (see paragraph 56 below).

25. The court therefore concluded that the first applicant and her former husband could not properly take care of their children and that temporarily depriving them both of custody was warranted.

26. The first applicant appealed against the court's decision, arguing that she had been undergoing psychiatric treatment, albeit in a different clinic from the one recommended by the court experts. The reason she had refused to undergo counselling with her husband, as recommended by the court experts, was because he had been convicted of domestic violence against her (see paragraphs 46-49 below). Furthermore, she had taken her children for psychotherapy but in a different clinic from the one recommended by the experts and endorsed by the local social welfare centre.

27. On 21 March 2012 the County Court dismissed the first applicant's appeal and upheld the first-instance judgment.

28. By a decision of 13 June 2012 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed a constitutional complaint lodged by the applicants.

29. As the period of one year set forth in the judgment of 21 December 2011 was about to expire, on 17 December 2012 the Municipal Court adopted a decision containing the same custody and access arrangements as those in that judgment. The court found that the fact that the judgment had remained unenforced (see paragraphs 38-41 below) suggested that the circumstances that had warranted the imposition of the child protection measure ordered therein still existed. It thus refused to take (into account) any new evidence. The decision was immediately enforceable.

30. By a decision of 13 February 2013 the County Court dismissed an appeal lodged by the first applicant and upheld the first-instance decision.

31. The applicants did not lodge a constitutional complaint against this decision.

32. On 17 December 2013, a day before the period of one year fixed in its decision of 17 December 2012 was due to expire (see paragraph 29 above), the Municipal Court adopted identical decision with similar reasoning. It again refused to take any evidence. This decision was also immediately enforceable.

33. By a decision of 12 March 2014, the County Court dismissed an appeal lodged by the first applicant and upheld the first-instance decision.

34. The applicants then lodged a constitutional complaint, alleging violations of their constitutional rights to a fair hearing and to respect for their family life. In so doing, they relied on Article 29 paragraph 1 and Article 35 of the Croatian Constitution (see paragraph 55 below) and Articles 6 § 1 and 8 of the Convention.

35. On 17 June 2014 the Constitutional Court found a violation of the applicants' rights to a fair hearing and to respect for their family life, quashed the second-instance decision of 12 March 2014 and first-instance decision of 17 December 2013 (see paragraphs 32 and 33 above) and remitted the case to the Municipal Court.

36. In particular, the Constitutional Court found a violation of the procedural aspect of the right to respect for family life and a breach of the principle of equality of arms in that (a) the first-instance court, without giving valid reasons, had not held a hearing or taken any evidence before reaching its decision; (b) the ordinary courts had paid no heed to the first applicant's argument that one of the court experts was her former husband's therapist; (c) the first-instance court had not heard the children, even though their age and maturity permitted that they be heard; and (d) an employee of the local social welfare centre (the public authority that proposed the contested child protection measure, see paragraph 21 above), who had assumed a rather passive role in the proceedings and had not even contacted the children, had been appointed as the second and third applicants' guardian *ad litem*, thus creating a conflict of loyalty between her employer and her wards (children under her care).

37. The Constitutional Court explained that taking new evidence had been particularly warranted in the circumstances, as children grew quickly and thus it could not have been assumed, as the first-instance court had done, that there had been no relevant developments in the two years that had passed between the first-instance judgment of 21 December 2011 and the decision of 17 December 2013. The best interests of the children required that evidence be taken to establish the current situation as regards the second and third applicants, which had been crucial for deciding whether to maintain or lift the impugned child protection measure of their temporary placement into care.

(b) Enforcement proceedings

38. Meanwhile, as the first applicant refused to entrust the second and third applicants to the children's home, on 10 February 2012 the local social welfare centre applied to the Municipal Court to have the judgment of 21 December 2011 (see paragraph 22 above) enforced.

39. On 14 February 2012 the Municipal Court issued a writ of execution (*rješenje o ovrsi*) ordering the first applicant to entrust the second and third applicants to the children's home within eight days of service, or face a fine of 5,000 Croatian kunas (HRK).

40. On 18 July 2012 the Municipal Court fined the first applicant HRK 5,000 for disobeying the court order to entrust the second and third applicants to the children's home, and ordered her to do so within eight days of service, or face an additional fine of HRK 6,000.

41. Since fining the first applicant with a view to forcing her to comply with the above judgment and entrust the children to the children's home had no effect, on 18 November 2012 the Municipal Court, following an application by the local social welfare centre, issued a new writ of execution. This time it ordered an enforcement officer, with the assistance of the police, to physically remove the second and third applicants from the first applicant or a third party and place them in the care of the children's home.

42. On 21 March 2013 at 1.30 p.m. the enforcement officer and five policemen attempted to remove the second and third applicants from their mother. The children resisted by screaming, crying and shouting that they did not want to go to a home and wanted to remain living with their mother. Given the children's reactions, the enforcement officer eventually decided to adjourn the intervention. Immediately afterwards the first applicant took the second and third applicants to a doctor, who referred them to a psychiatrist. The psychiatrist who examined them that day found that they were suffering from shock.

43. On 19 April 2013, during a meeting held at the local social welfare centre, the first applicant promised to cooperate with the relevant authorities and undergo counselling with a view to improving her relationship with her former husband.

44. Following a motion by the centre, on 13 May 2013 the Municipal Court postponed enforcement until 29 July 2013.

45. On 25 July 2013 the centre lodged another motion to postpone enforcement, which the Municipal Court granted on 2 September 2013 by postponing enforcement until 25 October 2013.

46. On 21 October 2013 the centre lodged a third motion to postpone enforcement. This time the Municipal Court, on 30 October 2013, dismissed the motion, because under the domestic law it was not possible to postpone enforcement for more than six months at the request of the party seeking enforcement. Furthermore, since the centre as the party seeking enforcement had not applied for a continuation of enforcement in those six months, as was required by law, the court discontinued the enforcement proceedings.

2. Other relevant proceedings

(a) Minor offences proceedings against the first applicant's former husband

47. Meanwhile, on 18 January 2005 the relevant minor offences court found S. guilty of domestic violence, after an incident against the first

applicant on 29 November 2004. He was given a thirty-day suspended sentence, with a probation period of three years.

(b) Criminal proceedings against the first applicant's former husband

48. On 22 August 2006 the relevant State Attorney's office indicted S. on two counts of domestic violence, a criminal offence punishable under Article 215a of the Criminal Code (see paragraph 57 below), relating to the incident of 29 November 2004 and a separate incident on 14 November 2004.

49. On 29 February 2008 the Municipal Court found S. guilty as charged and imposed a ten-month suspended sentence with a probation period of one year.

50. On 2 February 2009 the County Court dismissed an appeal lodged by S. and upheld the first-instance judgment, which thereby became final.

(c) Criminal proceedings against the first applicant

51. On 26 August 2011 the relevant State Attorney's office indicted the first applicant before the relevant municipal court for obstructing the execution of measures ordered to protect a child or minor, a criminal offence punishable under Article 215 of the Criminal Code (see paragraph 57 below).

52. On 6 June 2013 the Municipal Court found the first applicant guilty as charged and imposed a six-month suspended sentence with a probation period of two years.

53. The first applicant appealed, and it would appear that the proceedings are currently pending before the relevant county court as the second-instance court.

(d) Proceedings before the Gender Equality Ombudsman

54. Following a petition by the first applicant, on 8 May 2012 the Gender Equality Ombudsman (*Pravobraniteljica za ravnopravnost spolova*) advised the local social welfare centre that in instructing her to undergo various treatment and expert assessments, it had failed to take into account the fact that she was a victim of domestic violence. In particular, the Ombudsman noted that, by insisting that the first applicant attend counselling with her former husband, who had been convicted of domestic violence against her, the centre had treated the victim and the perpetrator equally. That constituted secondary victimisation and amounted to discrimination against her as a victim of domestic violence. The Ombudsman therefore suggested that the centre reformulate its recommendation to the court in the proceedings regarding custody and access rights, basing it on a fresh expert opinion from a different expert and bearing in mind the fact that the first applicant was a victim of domestic violence.

B. Relevant domestic law

1. The Constitution

55. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette of the Republic of Croatia, no. 56/90 with subsequent amendments) read as follows:

Article 29(1)

"In the determination of his rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

Article 35

"Everyone shall be guaranteed respect for, and the legal protection of, his personal and family life ..."

2. Family Act

56. The relevant provisions of the Family Act (*Obiteljski zakon*, Official Gazette nos. 163/03, 17/04, 136/04, 107/07, 57/11, 61/11) read as follows:

3. Measures to protect the rights and welfare of the child

Section 111(1) and (2)

"(1) The court shall, in non-contentious proceedings, deprive a parent of the right to live with and raise his or her child and shall entrust the child to another individual, an institution or another legal entity providing social services, if [that parent] significantly neglects [his or her duty] to raise and educate [the child], or if there is a risk to [him or her] being properly raised.

(2) It is deemed that a parent is significantly neglecting the raising, upbringing and education of [his or her child] if the parent, for example, does not take sufficient care of the child's diet, hygiene, clothing, health or regular school attendance, or does not deter the child from bad company, staying out late at night and breaking [night-time] curfews, or from vagrancy, begging or stealing."

Section 113

"(3) The measures referred to in sections 111 and 112 of this Act shall last up to one year.

(4) The proceedings for imposing the measures referred to in sections 111 and 112 of this Act shall be instituted [by the court] of its own motion or following an application by a social welfare centre or the child.

(5) Imposition of the measures referred to in sections 111 and 112 of this Act does not terminate the other rights and duties of the parent toward [his or her] child.

(6) Before the expiry of the time-limit referred to in paragraph 3 of this section, the court shall examine all the circumstances of the case and shall, for the welfare of the child, by a new decision impose the same measure again, or other measures to protect the child.

(7) An appeal lodged against decisions adopted on the basis of sections 110 to 112 of this Act does not suspend their enforcement."

Section 121

"To protect the rights and welfare of the child, the social welfare centre shall appoint a special guardian in cases falling under section 111, 112 and 114 of this Act."

3. Criminal Code

57. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/97 with subsequent amendments), in force from 1 January 1998 to 31 December 2012, reads as follows:

CHAPTER SIXTEEN (XVI)

CRIMINAL OFFENCES AGAINST MARRIAGE, FAMILY AND THE YOUNG

Obstruction and non-execution of measures for the protection of a child or minor

Article 215

"(1) Anyone who obstructs the execution of educational or other measures ordered by the court, social welfare centre or [other] State authorities, or fails to discharge its statutory duties to protect a child or minor in due time, shall be punished by a fine or imprisonment of up to one year."

Domestic violence

Article 215a

"A family member, who by violence, abuse or particularly insolent behaviour, subjects another member of the family to degrading treatment, shall be punished by imprisonment of six months to five years."

COMPLAINTS

58. The applicants complained under Article 8 of the Convention that the decisions of the domestic courts placing the second and third applicants into temporary care had been in breach of their right to respect for their family life.

59. The first applicant also complained under Article 6 § 1 of the Convention about the domestic courts' assessment of the evidence in the proceedings that had resulted in three successive decisions ordering the placement of her children into care.

60. Lastly, she complained under Article 14 of the Convention that she had been discriminated against by the domestic authorities, who had treated

her – a victim of domestic violence – in the same way as her former husband, who had been convicted of that very offence against her.

THE LAW

A. Alleged violation of Article 8 of the Convention

61. The applicants complained that the decisions of the domestic courts to temporarily deprive the first applicant of custody and place the second and third applicants into care had violated their right to respect for family life. They relied on Article 8 of the Convention, the relevant part of 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."

62. The Government disputed the admissibility of this complaint, arguing that it was manifestly ill-founded.

63. The Court does not find it necessary to examine their arguments in support of this claim or the applicants' arguments to the contrary, because this complaint is in any event inadmissible for the reasons given below.

64. The Court notes that the last of the three consecutive judicial decisions ordering the second and third applicants' temporary placement into care for a period of one year, namely that of 17 December 2013 (see paragraph 32 above), was eventually quashed by the Constitutional Court on 17 June 2014 and that the case was remitted for a fresh decision (see paragraph 35 above). It also notes that the two previous judicial decisions to the same effect, namely those of 21 December 2011 and 17 December 2012 (see paragraphs 22 and 29 above), remained unenforced (see paragraphs 38-46 above) and can no longer be enforced.

65. It follows that the applicants' complaint under Article 8 of the Convention is inadmissible under Article 35 §§ 1 and 3 (a) as premature and manifestly ill-founded, and must be rejected pursuant to Article 35 § 4 thereof.

B. Other alleged violations of the Convention

66. The first applicant further complained under Article 6 § 1 of the Convention about the way in which the domestic courts had assessed the evidence in the above-mentioned civil proceedings. Relying on the findings

of the Gender Equality Ombudsman (see paragraph 54 above), she also complained under Article 14 of the Convention, taken in conjunction with Article 6 § 1 and Article 8 thereof, that as a victim of domestic violence, she had been discriminated against by the fact that the domestic authorities had treated her in the same way as her former husband, who had been convicted of that very offence against her.

67. The Court refers to its above findings under Article 8 of the Convention, which apply with equal force in the context of the first applicant's remaining complaints.

68. It follows that this part of the application is also inadmissible under Article 35 §§ 1 and 3 (a) as premature and manifestly ill-founded, and must be rejected pursuant to Article 35 § 4 thereof.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President