



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

Communicated on 19 March 2014

FIRST SECTION

Application no. 60393/13
Michael MCILWRATH against Russia
lodged on 11 September 2013

STATEMENT OF FACTS

The applicant, Mr Michael McIlwrath, is a United States of America national, who was born in 1962 and lives in Sesto Fiorentino, Italy. He is represented before the Court by Mr A. Khazov, a lawyer practising in St Petersburg.

A. The circumstances of the case

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

1. Background information

In 1997 in New York the applicant married G. who held joint USA and Russian nationality. The same year they gave birth to a son.

In 1998 the family moved to Italy where three more children were born: a son in 2000, a daughter in 2002 and a son 2006.

All four children hold joint US and Russian nationality.

In 2009 the applicant applied for divorce.

2. Decisions concerning child custody and residence arrangements pending divorce proceedings in Italy

By decisions of 19 December 2009 and 14 July 2010 the Florence District Court fixed custody and residence arrangements in respect of the four children pending the divorce proceedings. The applicant did not submit copies of those decisions.

On 6 December 2010 the Florence District Court amended the custody and residence arrangements. Relying on an expert report by Dr C. and noting G.'s continued lack of any income, it ordered that the applicant should have sole custody of the four children and that the children should reside with the applicant. It further ordered that the three youngest children

were to spend weekends with their mother in the following manner: from Friday after school to Sunday afternoon, and every second weekend from Friday after school to Sunday evening. The eldest son was to go to a daycentre for children with special needs after school and then he was free to choose with whom of the two parents he wanted to stay at night. The court also ordered that during the approaching Christmas holidays the children were to spend a week with their father and the following week with their mother.

On 29 June 2011 the Florence District Court found that G. had not respected the previous court orders. In particular, it found that the eldest son had lived with his mother during the previous months. As he had refused to see his father, she had been the only parent who had had effective access to the child. She had however refused to bring him to the meetings with social services for monitoring or to ensure his attendance of the daycentre for children with special needs, as ordered by the court. She had moreover sent the child to Venice in April without his father's permission and without notifying the social services. Given that G. had not respected the arrangements fixed by the court, it was necessary to modify them. The court accordingly confirmed the previous custody, residence and visiting arrangements in respect of the younger children. It further confirmed the applicant's sole custody over the eldest son, as well as the eldest son's residence with the applicant. The eldest son was no longer given the choice whether to stay with his father or mother over the night. The court further confirmed the order for the eldest son's attendance of a daycentre for children with special needs and noted that if G. continued her non-compliance with that order, the matter would be reported to the Juvenile Court for the adoption of measures of limiting parental rights and power. It also held that the children were not allowed to leave Italy without the consent of both parents. Finally, it fixed the manner in which the children should spend the approaching summer holidays. It ordered, in particular, that from 25 August to 1 September 2011 the four children were to stay with G.

On 27 August 2011 G. and the children left Italy for Russia where they have lived ever since.

3. Proceedings for enforcement of the decision of 6 December 2010 in Russia

The applicant applied to the St Petersburg City Court for the enforcement of the Florence District Court's decision of 6 December 2010. He relied on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and on the 1979 Bilateral Convention on legal assistance in civil cases between Italy and the Soviet Union (hereafter "the Bilateral Convention").

On 19 January 2012 the St Petersburg Town Court rejected the applicant's request. It found that the decision of 6 December 2010 was a provisional intermediate decision pending a final decision in divorce proceedings. It could be at any time modified by the judge who had made it, as it had been indeed modified on 29 June 2011, and could not be appealed against. That decision was not therefore a decision rendered in civil matters within the meaning of Article 409 of the Code of Civil Procedure and was

accordingly not enforceable in Russia. The court further held that enforcement of the decision of 6 December 2010 should be refused by reference to Article 412 of the Code of Civil Procedure and to Article 13 of the Bilateral Convention. It found that the decision of 6 December 2010 was manifestly incompatible with Russian public order because it ordered that the father should have sole custody of the children. Russian law did not provide for sole custody by one parent unless the other parent had been formally deprived of parental authority. Given that G. had not been deprived of parental authority, the decision to award sole custody to the applicant had been incompatible with Russian law.

4. Divorce judgment

On 18 September 2012 the Florence District Court pronounced the divorce of the applicant and G. and ordered that the applicant should pay alimony to G. As regards custody and residence arrangements in respect of the children, the court noted that G. had brought the children to Russia in breach of a court order and had thereby deprived the father of any possibility to see the children for more than a year. G.'s sole custody over the children, as requested by her, was therefore excluded. The court ordered that the applicant and G. should have joint custody over the children and that the children should reside with their father. After the children's return to Italy, G.'s visiting rights would be fixed by the social services so that to exclude their being wrested once again from the environment in which they had used to live. The court finally ordered that the applicant should bear all financial expenses in respect of the children, except medical expenses not covered by medical insurance, which should be divided between the parents. The court noted that the judgment was subject to immediate enforcement.

On 2 October 2012 the Florence District Court issued, at the request of the applicant, a ruling explaining that the judgment of 18 September 2012 was final and enforceable. Even if one of the parties lodged an appeal, it would remain enforceable pending the appeal proceedings.

It appears that G. did not appeal.

5. Proceedings for enforcement of the divorce judgment in Russia

On 13 November 2013 the applicant applied to the St Petersburg City Court for the enforcement of the Florence District Court's judgment of 18 September 2012. He relied on the Bilateral Convention.

On 25 January 2013 the St Petersburg City Court rejected the applicant's request by reference to Article 412 of the Code of Civil Procedure and to Article 13 of the Bilateral Convention. It found that the judgment of 18 September 2012 was incompatible with the basic principles of Russian law and with Russian public order. In particular, under Russian law parental rights and obligations were to be determined in accordance with the law of the child's country of nationality. As regards alimony payments and other aspects of parental relationships, it was possible to apply the law of the child's country of residence. By 18 September 2012, the date when the judgment at issue was adopted, the children had been permanently residing in Russia for more than a year. They were Russian nationals and had no Italian nationality. The court noted in this connection that proceedings

concerning residence arrangements, alimony payments and parental authority over the children were pending before the Dzerzhinskiy District Court of St Petersburg (see below). The court further found that the Florence District Court had not taken account of the fact that the children had been living in Russia for more than a year and that during that time their attitudes towards their parents and their wishes in respect of residence arrangements could have changed. Given that the judgment of 18 September 2012 did not give due weight to the children's wishes, it was contrary to Article 12 of the United Nations Convention on the Rights of the Child. Finally, the court noted that the enforcement of the judgment of 18 September 2012 would mean the children's return to Italy. Russian law however prohibited expulsion of Russian nationals. To sum it all up, the court found that the judgment of 18 September 2012 could not be recognised and enforced in Russia because it was incompatible with the basic principles of Russian law and with Russian public order.

The applicant appealed. Referring to Article 15 of the Constitution and to Article 6 of the Family Code the applicant submitted that international treaties took precedence over the national law. Under Article 24 of the Bilateral Convention the Italian courts had jurisdiction over the case because at the time when the proceedings had been instituted the applicant, G. and the children had been all permanently living in Italy. The fact that G. had then abducted the children and brought them to Russia had no bearing on the jurisdiction of the Italian courts to proceed with the case. Further, referring to decisions by the Supreme Court (see below), the applicant argued that the City Court had not indicated what basic principles of economic, social and legal organisation of Russian society had been infringed by the judgment of 18 September 2012. Russian courts had moreover no competence to verify whether that judgment was lawful and justified. The applicant also submitted that the Florence District Court had taken into account the children's wishes, the proof of which had been produced before the City Court. The applicant further argued that the prohibition of deportation of Russian nationals was irrelevant to the present case because the children were not to be deported or extradited from Russia. They were to be handed over to their legal guardian and would enjoy freedom of movement, including freedom to leave Russia. Finally, the applicant complained under Article 8 of the Convention that the refusal to enforce the judgment of 18 September 2012 violated the right to respect for his family life.

On 12 March 2013 the Appellate Panel of the St Petersburg City Court held an appeal hearing. In accordance with Article 333 § 2 of the Code of Civil Procedure (as in force at the material time), the parties had not been notified about the date of the appeal hearing and were therefore absent. On the same day the court upheld the decision of 25 January 2013 on appeal, finding that it had been lawful, well-reasoned and justified. It found, in particular, that the judgment of 18 September 2012 by the Florence District Court was incompatible with Russian public order because it was in conflict with Russian family law provisions and unacceptable for Russian sense of justice.

The applicant lodged a cassation appeal with the Presidium of the St Petersburg City Court, repeating the argument set out in his appeal submissions.

On 8 May 2013 a judge of St Petersburg City Court refused to refer the case for consideration by the Presidium of that court, finding no significant violations of substantive or procedural law which could influence the outcome of the proceedings. The first instance and appeal judgments had correctly applied domestic law.

6. Proceedings concerning parental authority, residence arrangements and alimony payments in Russia

On an unspecified date in the beginning of 2012 G. applied to the Dzerzhinskiy District Court of St Petersburg. Claiming domestic violence and lack of care and financial support and referring to the children's wish to live with her, she asked for an order depriving the applicant of parental authority over the children and determining the children's residence with her. She also asked for alimony payments.

The applicant counterclaimed, asking for an order that the children should reside with him. He submitted that G. had unlawfully abducted the children despite the decisions by the Italian courts that the children should reside with him. Their residence with G. was detrimental to the children's psychological health. In particular, by falsely accusing him of domestic violence, G. had impressed on the children the fear of their father. She had moreover prevented him and his relatives from seeing the children or from supporting them financially. She had not taken proper care of the eldest son who suffered from a mental disorder and needed specialised care.

On 12 April 2012 the Dzerzhinskiy District Court of St Petersburg declared G's claims inadmissible. It noted that proceedings concerning the children's residence arrangements and alimony payments were pending before the Florence District Court. Given that the proceedings in Italy had been initiated before the present proceedings, it was the Italian courts that had jurisdiction over the case in accordance with Article 25 of the Bilateral Convention. The Russian courts had accordingly no competence to examine the case between the same parties, based on the same facts and having the same purpose. As regards the claim of depriving the applicant of parental authority, that claim was not part of the proceedings before the Italian courts. However, given that the applicant was a United States of America national permanently living in Italy, Russian courts had no competence to examine the claims against him. G. was therefore to submit her claims to the court having territorial jurisdiction over the applicant's place of residence.

On 6 June 2012 the St Petersburg City Court quashed the decision of 12 April 2012 and remitted the case for a new consideration before the District Court. It found that the present proceedings were not identical to the proceedings pending in Italy. In particular, the claim of depriving the applicant of parental authority had been made in the present proceedings only. G. was entitled to lodge her claim with a court having territorial jurisdiction over her place residence. Given that she lived in the Dzerzhinskiy District of St Petersburg, the Dzerzhinskiy District Court had competence to examine the case.

On 23 July 2013 the Dzerzhinskiy District Court rejected both G.'s and the applicant's claims in full. It found no evidence of domestic violence in respect of G. or the children. It further found it established that despite the applicant's wish to take care of the children and to support them financially, he was prevented from doing so by G. There were therefore no reasons for depriving the applicant of parental authority over the children. As regards residence arrangements, the court noted that the Florence District Court had already examined similar claims and had ordered that the children were to live with the applicant. That judgment was final and enforceable and the procedure for its enforcement in Russia was established by the Bilateral Convention and Article 409 of the Code of Civil Procedure. All the arguments raised by the parties in the present proceedings had been already examined by the Florence District Court. The parties had not produced any new evidence that could warrant the change in the residence arrangements as determined by the Florence District Court. Moreover, the court had been hampered in its examination of the issue by G.'s refusal to have the children examined by court-appointed experts. In the absence of a psychological expert report it was impossible to ascertain effectively the children's attachment to each of the parents, the parents' moral and other relevant qualities and the relationships between the children and each of the parents. Finally, the court rejected G.'s claim for alimony payments.

It appears that appeal proceedings are pending.

7. Defamation proceedings

Between June and October 2011 a number of internet news sites published G.'s account of her relationship with the applicant, of their divorce and of their dispute over the children. In particular, the news sites reproduced G.'s accusations against the applicant, describing his alleged acts of violence against G. and the children.

The applicant sued the news sites and G. for defamation.

On 13 August 2012 the Petrogradskiy District Court St Petersburg allowed the applicant's claims against one of the news sites. On 20 August 2012 the Dzerzhinskiy District Court of St Petersburg allowed his claims against G. On 30 May 2013 the Golovinskiy District Court of Moscow allowed the claims against another news site. All District Courts found that G. and the news sites had not proved the truth of their allegations against the applicant. They noted that Italian authorities had conducted an inquiry into G.'s allegations against the applicant and had found no evidence of domestic violence. The St Petersburg police had also conducted an inquiry that had not revealed any evidence of violent acts by the applicant against G. or the children. No such evidence had been produced in the present proceedings either.

B. Relevant international and domestic law

1. Relevant international law

Article 12 of the United Nations Convention on the Rights of the Child of 20 November 1998 provides as follows:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The 1979 Bilateral Convention on legal assistance in civil cases between Italy and the Soviet Union (still in force) provides that each Contracting Party recognises final judicial decisions on civil and family matters rendered on the territory of the other Contracting Party by a court considered to have jurisdiction within the meaning of this Convention. Each Contracting Party also recognises decisions on paternity, child custody and adoption rendered by the competent authorities of the other Contracting Party (Article 19).

Judicial decisions rendered by the courts of one Contracting Party and recognised by the other Contracting Party are enforceable on the territory of that latter Party if they are enforceable on the territory of the Contracting Party of origin (Article 22).

The procedure for the recognition and enforcement of judicial decision is governed by the law of the Contracting Party addressed so far as this Convention does not provide otherwise (Article 23).

The court of the Contracting Party of origin shall be considered to have jurisdiction for the purposes of this Convention if the defendant had, at the time when the proceedings were instituted, his habitual residence in the Contracting Party of origin; or, if the action had as its object the determination of alimony payments, the plaintiff had, at the time when the proceedings were instituted, his habitual residence in the Contracting Party of origin (Article 24 § 1).

Recognition of a judicial decision may nevertheless be refused in any of the following cases: (1) if the defendant party did not participate in the proceedings because it had not been duly notified of the institution of the proceedings and of the date of the hearing; (2) if there is a final decision by the courts of the Contracting Party addressed in the proceedings between the same parties, based on the same facts and having the same purpose; (3) if the proceedings between the same parties, based on the same facts and having the same purpose are pending before the courts of the Contracting Party addressed, provided that these proceedings were the first to be instituted; or (4) if, in accordance with international treaties ratified by both Contracting Parties, the courts of the Contracting Party addressed have an exclusive jurisdiction over the case (Article 25 § 1). Recognition of a judicial decision may also be refused if enforcement of that decision may be detrimental to the sovereignty or national security of the Contracting Party addressed or if it is manifestly incompatible with the basic principles of law of the Contracting Party addressed (Article 13).

2. Relevant domestic law

The Constitution provides that the commonly recognised principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international

treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply (Article 15 § 4). A similar provision is contained in Article 6 of the Family Code.

The Code of Civil Procedure provides that decisions of foreign courts rendered in civil matters are recognised and enforced in Russia if it is required by an international treaty. The proceedings for recognition or enforcement must be instituted within three years after the decision of a foreign court has become final. If that time limit has been missed for good reason, it may be extended by a Russian court (Article 409).

Enforcement of a decision may nevertheless be refused in any of the following cases: (1) if the decision is not final or enforceable in accordance with domestic law of the State in which it has been adopted; (2) if the defendant party was deprived of an opportunity to participate in the proceedings because it had not been duly notified of the time and place of the hearing; (3) if Russian courts have exclusive jurisdiction over the case; (4) if there is a final decision by Russian courts in the proceedings between the same parties, based on the same facts and having the same purpose, or if the proceedings between the same parties, based on the same facts and having the same purpose are pending before Russian courts, provided that the proceedings before Russian courts were the first to be instituted; (5) if enforcement of the decision may be detrimental to Russian sovereignty or national security or if it is manifestly incompatible with Russian public order; (6) the time-limit for applying for enforcement has expired and has not been extended by a Russian court at the plaintiff's request (Article 412).

In its decision no. 91-Г08-6 of 19 August 2008 the Supreme Court held that “public order” within the meaning of Article 412 of the Code of Civil Procedure could not be equated to national law. The notion of “public order” meant basic principles of economic, social and legal organisation of Russian society stipulated by the Constitution and federal laws. The mere fact that Russian family law provisions were different from foreign family law provisions could not serve as a ground for refusing enforcement of a foreign judicial decision.

In its decision no. 59-Г09-14 of 25 August 2009 the Supreme Court held that when examining a request for enforcement of a foreign judicial decision Russian courts had no competence to verify whether that decision was lawful and justified.

COMPLAINTS

1. The applicant complains under Articles 8 and 13 of the Convention that the Russian courts' refusal to enforce the decisions by the Italian courts concerning custody and residence arrangements for his children violated the right for respect for his family life and that he does not have any effective remedy to vindicate that right. He complains, in particular, that he has been unable to see his children for more than two years. He also points to a contradiction between the decision of 25 January 2013 refusing recognition and enforcement of the Florence District Court's judgment of 18 September 2012 and the judgment 23 July 2013 refusing to award residence to any of

the parents on the ground that the residence issue had been already determined by the Florence District Court's judgment of 18 September 2012. That contradictory situation deprived him of any chances either to have the Florence District Court's judgment enforced in Russia, or to have the residence issue determined by Russian courts.

2. The applicant complains under Article 6 of the Convention that judicial proceedings concerning recognition and enforcement of the Florence District Court's judgment of 18 September 2012 were unfair. In particular, he was not informed of the date of the appeal hearing of 12 March 2013 and was therefore absent from that hearing.

QUESTIONS TO THE PARTIES

1. The parties are requested to submit copies of the following documents:

— decisions of 19 December 2009 and 14 July 2010 by the Florence District Court, together with their translations into Russian or English;

— expert reports serving as a basis for the Florence District Court's decisions of 19 December 2009, 14 July and 6 December 2010, 29 June 2011 and 18 September 2012, together with their translations into Russian or English;

— minutes of the hearings before the Dzerzhinskiy District Court in the proceedings which ended with the judgment of 23 July 2013;

— if the parties appealed against the judgment of 23 July 2013, their appeal submissions, the appeal judgment and the causational appeal judgment.

2. Did the refusal to grant enforcement of the decisions of 6 December 2010 and 18 September 2012 by the Florence District Court violate the applicant's right to respect for his family life, guaranteed by Article 8 of the Convention? In particular, when refusing to grant enforcement, did the domestic courts take account of the best interests of the children? In addition, having regard to the fact that the applicant was not informed about the date of the appeal hearing of 12 March 2013, was the decision-making process fair and allowed the applicant to present his case fully?

3. Did the applicant have at his disposal an effective domestic remedy for his complaint under Article 8, as required by Article 13 of the Convention?

4. Having regard to the fact that the applicant was not informed about the date of the appeal hearing of 12 March 2013, do the circumstances of the case disclose an infringement of his right to a fair hearing as guaranteed by Article 6 § 1 of the Convention (see *Yakovlev v. Russia*, no. 72701/01, § 19 et seq., 15 March 2005; *Groshev v. Russia*, no. 69889/01, § 27 et seq., 20 October 2005; *Mokrushina v. Russia*, no. 23377/02, § 20 et seq., 5 October 2006; and *Subbotkin v. Russia*, no. 837/03, § 18 et seq., 12 June 2008)?