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

FOURTH SECTION

CASE OF SCHRADER v. AUSTRIA

(Application no. 15437/19)

JUDGMENT

STRASBOURG

12 October 2021

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

In the case of Schrader v. Austria,

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

Iulia Antoanella Motoc, *President,*
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 15437/19) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Andreas Schrader ("the applicant"), on 7 March 2019;

the decision to give the Government notice of the complaints under Articles 6 and 8 of the Convention about the length of the proceedings concerning his visiting rights and to declare the remainder of the application inadmissible pursuant to Rule 54 § 3 of the Rules of Court;

the parties' observations;

the information given to the German Government regarding their right to intervene in the proceedings pursuant to Article 36 § 1 of the Convention and the fact that the German Government did not express a wish to exercise that right;

Having deliberated in private on 14 September 2021,

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

INTRODUCTION

1. The case concerns the applicant's complaint that the length of the proceedings concerning his visiting rights had been unreasonable and that the inaction of the Austrian courts had resulted in his being alienated from his son and stepson. It raises issues under Article 8 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant was born in 1973 and lives in Vienna.

3. The applicant is the father of L., who was born in 2007 out of wedlock. The applicant and the mother of L. (hereinafter, "the mother") were in a relationship from 2005 until 2007 and from 2008 until June 2010 and cohabited during those years. In 2009 T. was born. The applicant is not the biological father of T. The couple separated in 2010. Until 2013, that is, even after the separation from the mother, the applicant continued to share the care of both children with her.

A. First set of proceedings

4. From April 2013 the mother restricted the applicant's contact with L. and prohibited his contact with T. On 7 May 2013 the applicant submitted a request for regular visiting rights regarding L. and T. On 4 August 2013 the Vienna Inner City District Court (*Bezirksgericht Innere Stadt* – hereinafter "the District Court") provisionally dismissed his request for contact with T., but granted his request in respect of L., allowing him contact for one weekend every fourteen days. Upon an appeal by the applicant, on 6 December 2013 the Vienna Regional Court (*Landesgericht*) referred the case back to the first-instance court for a fresh examination of the applicant's request for contact rights in respect of both children.

B. Second set of proceedings

5. On 17 July 2014, during a hearing before the District Court, the applicant and the mother reached a settlement regarding the applicant's contact rights in respect of T. They agreed that the applicant could see T. every three weeks for two hours. On 5 December 2014 and again on 15 May 2015, the applicant complained that the mother was not complying with his contact rights regarding T.

6. In October 2014 the District Court ordered a psychological expert opinion concerning the applicant's and the mother's relationship with the children; the opinion was obtained on 27 March 2015. The expert concluded that the applicant's contact rights in respect of L. (see paragraph 4 above) were important and sufficient, but that contact rights regarding T. would be difficult to restore, as T. was in a fragile emotional state.

7. A second expert opinion concerning the applicant's financial situation was ordered on 30 October 2015 and was obtained in November 2015. On 7 December 2015 the applicant submitted a request for the setting of a time-limit (*Fristsetzungsantrag*) under section 91 of the Court Organisation Act (see paragraph 12 below). On 18 December 2015 the District Court rejected the application for contact rights regarding T., and on 21 December 2015 it rejected a request by the applicant for extended visiting rights regarding L.

8. Upon an appeal by the applicant, the case was referred back to the first-instance court on 29 February 2016.

C. Third set of proceedings

9. In January 2017 the applicant extended the scope of his application for visiting rights. On 21 April 2017 T. was heard before the District Court. On 10 May 2017 the District Court suspended the applicant's contact rights in respect of T. and ordered another expert opinion on 5 December 2017,

which was delivered on 27 April 2018. The Regional Court dismissed appeals by the applicant on 15 and 18 October 2018.

10. It is unclear from the applicant's submissions before the Court when and for how long exactly he had no contact with T., but he alleged that he had had almost no contact with him at all during the proceedings at issue. He submitted that the contact rights granted in respect of L. had been observed more or less regularly.

II. RELEVANT DOMESTIC LAW AND PRACTICE

11. Under section 187 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), personal contact should be mutually agreed between the child and the parents. If no such agreement is reached, the court must regulate such contact in a manner which is in the best interests of the child. The court's determination in this regard should ensure that a close relationship between the parents and the child is initiated and maintained and should cover, as far as possible, periods of both leisure and care during the course of the child's everyday life. Where appropriate, the court may restrict or prohibit personal contact if it would be contrary to the child's interests, in particular where such a measure appears necessary owing to the use of force against the child or the other parent.

12. Section 91 of the Court Organisation Act (*Gerichtsorganisations-gesetz*) provides that if a court is in default (*säumig*) with regard to its performance of a procedural act, such as scheduling or holding a session or hearing, obtaining an expert opinion or executing a decision, a party may apply to that court for the higher court to set a reasonable time-limit for the performance of that procedural act.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

13. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention. Furthermore, the applicant complained under Article 8 of the Convention that his right to family life had been infringed as a result of the Austrian court's inactivity.

14. The Court, being master of the characterisation to be given in law to the facts of the case (see, for instance, *S.M. v. Croatia* [GC], no. 60561/14, § 243, 25 June 2020), will examine the present case only under the procedural aspect of Article 8 of the Convention, which, in so far as relevant, reads 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. Admissibility

15. The Court must first examine whether the relationship between the applicant and T. amounted to private or family life within the meaning of Article 8 of the Convention.

16. In this connection, the Court reiterates that the notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* "family" ties (see *Anayo v. Germany*, no. 20578/07, § 55, 21 December 2010, with further references). The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending on the real existence in practice of close personal ties (see *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001VII). Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* "family ties" (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297C).

17. In *Kopf and Liberda v. Austria* (no. 1598/06, §§ 35-37, 17 January 2012) the Court considered that the applicants' relationship with their foster child, of whom they had taken care for a period of about forty-six months, fell within the notion of family life within the meaning of Article 8 § 1, since the applicants had a genuine concern for the child's well-being, and an emotional link between the child and the applicants, similar to that between parents and their children, had started to develop during that period.

18. In the present case, T., the child of the applicant's former partner, grew up with the applicant at their common residence from his birth in 2009 until 2010 together with the applicant's child L. and the applicant continued to share the care of both children with their mother until 2013. The applicant submitted that he had always taken care of and treated L. and T. equally, regardless of biological ties. This was not contested by the Government.

19. The Court therefore considers that such a relationship falls within the notion of family life within the meaning of Article 8 § 1 of the Convention. This provision therefore applies not only to the applicant's relationship with his biological child L., but also to that with T.

20. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

21. The applicant submitted that the duration of the proceedings had been excessive. He pointed out that the unreasonableness of the length of the proceedings had led to his being alienated from L. and T. In his view, the length of the proceedings had resulted from changes in the presiding judges and because the domestic courts had taken too much time to appoint the experts.

22. The Government asserted that the duration of the proceedings could not be attributed to the domestic courts but was a consequence of the specific circumstances of the case. They contended that the Austrian courts had taken all reasonable measures to expedite the progress of the proceedings and to prevent procedural delays. The District Court had not been inactive at any stage but had made efforts to ensure a diligent investigation of the children's well-being. They further submitted that the applicant had had regular contact with L. during the entire proceedings.

2. The Court's assessment

23. The Court notes 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 afford due respect to the interests safeguarded by that provision (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V (extracts), and *W. v. the United Kingdom*, 8 July 1987, §§ 62 and 64, Series A no. 121).

24. The Court has repeatedly found that in cases concerning a person's relationship with his or her child there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. This duty is decisive in assessing whether a case concerning access to children was heard within a reasonable time as required by Article 6 § 1 and also forms part of the procedural requirements implicit in Article 8 (see *Kaplan v. Austria*, no. 45983/99, § 32, 18 January 2007; *Hoppe v. Germany*, no. 28422/95, § 54, 5 December 2002; and *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII).

25. The principle of exceptional diligence also applies to the present case. It is true that the authorities enjoy a wide margin of appreciation when assessing the necessity of the care of a child. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions on parental rights of access, and of any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively

curtailed (see *Johansen v. Norway*, 7 August 1996, § 64, *Reports of Judgments and Decisions* 1996-III).

26. The Court considers that in the present case the essential question is whether the Austrian courts complied with the inherent procedural requirements of Article 8 of the Convention. For this reason, the Court will view the case as one involving an allegation of failure on the part of the respondent State to comply with its positive obligation under Article 8 of the Convention.

27. Although the case before the domestic courts was of some complexity as expert opinions needed to be obtained and parties heard, the Court considers that this is not sufficient to explain the total length of the proceedings. Moreover, the applicant did not appear to have caused delays at any stage. On the contrary, on 7 December 2015 he took appropriate legal steps to expedite the proceedings under section 91 of the Court Organisation Act (see paragraphs 7 and 12 above; compare *M.A. v. Austria*, no. 4097/13, §§ 78-85, 15 January 2015).

28. The Court notes that there was recurrent stagnation while the case was being dealt with at first instance: after the first referral on 6 December 2013 (see paragraph 4 above), the District Court ordered an expert opinion in October 2014 and October 2015, and finally gave a decision in December 2015 (see paragraphs 6 and 7 above). After the second referral on 29 February 2016, the court ordered another expert opinion in December 2017, which is more than one year and nine months later (see paragraphs 8 and 9 above).

29. Thus, the proceedings before the District Court progressed particularly slowly, notwithstanding the applicant's request that they be accelerated. During two periods, namely between December 2013 and March 2015 and between February 2016 and May 2017, it came to phases of inactivity in the proceedings, for which no satisfactory explanation is evident from the documents at hand or from the Government's submissions. The Court considers that this passing of time must have had a direct and adverse impact on the applicant's relationships with L. and T. The children were still quite young at that point (three and five years old respectively at the outset of the proceedings), at an age where lengthy periods of not seeing a close reference person – as was the case with T. – inevitably lead to estrangement.

30. Having regard to its case-law on the subject (see *Kopf and Liberda*, cited above, § 46), the Court observes that the proceedings began on 7 May 2013, when the applicant requested visiting rights in respect of the children (see paragraph 4 above), and ended on 25 October 2018, when the Regional Court's decision of 18 October 2018 was served on him (see paragraph 9 above). Thus, the proceedings lasted five years and five months at two levels of jurisdiction, including remittals.

31. In these circumstances, the Court cannot find that the domestic courts complied with their duty under Article 8 to deal expeditiously with the applicant's request. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

32. The Court therefore finds that the procedural requirements implicit in Article 8 of the Convention were not complied with and that there has been a breach of that provision on account of the length of the proceedings.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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."

A. Damage

34. The applicant claimed 24,965 euros (EUR) in respect of pecuniary damage, arising from alimony payments.

35. In respect of non-pecuniary damage, the applicant claimed EUR 20,000, arguing that the Austrian courts' inactivity had caused him psychological stress because it had deprived him of contact with the children.

36. The Government contested those claims.

37. The Court considers that the applicant has not demonstrated the existence of a causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

38. On the other hand, it accepts that the applicant must have suffered distress as a result of the domestic courts' inactivity, which is not sufficiently compensated for by the finding of a violation of the Convention. Having regard to the sums awarded in comparable cases and making an assessment on an equitable basis, the Court awards the applicant EUR 5,200 in respect of non-pecuniary damage.

B. Costs and expenses

39. The applicant also claimed EUR 52,875.62 under the head of costs and expenses. This sum was composed of EUR 45,064.82 incurred in the proceedings before the domestic courts and EUR 7,810.80 incurred in the proceedings before the Court. These amounts included value-added tax.

40. The Government contested those claims. They submitted that the applicant had failed to adduce evidence of the necessity of the costs to avoid

the duration of the proceedings. Furthermore, the Government argued that the costs appeared excessive.

41. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the proceedings before the Austrian courts and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

42. 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 application admissible;

2. *Holds* that there has been a violation of Article 8 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 5,200 (five thousand two hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable; and
      (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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Ilse Freiwirth
Deputy Registrar

Iulia Antoanella Motoc
President