



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

FIRST SECTION

CASE OF H.P. AND OTHERS v. CROATIA

(Application no. 58282/19)

JUDGMENT

STRASBOURG

19 May 2022

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

In the case of H.P. and Others v. Croatia,

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

Péter Paczolay, *President*,

Alena Poláčková,

Davor Derenčinović, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 58282/19) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 6 November 2019 by three Croatian nationals, whose relevant details are listed in the appended table (“the applicants”), and who were represented by Ms S. Bezbradica Jelavić, a lawyer practising in Zagreb;

the decision to give notice of the application to the Croatian Government (“the Government”), represented by their Agent, Ms Š. Stažnik;

the decision not to have the applicants’ names disclosed;

the decision to give priority to the application (Rule 41 of the Rules of Court);

the parties’ observations;

Having deliberated in private on 26 April 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns a custody dispute and alleged abuse of the second and third applicants by their mother, K.P. Following the first applicant’s divorce from K.P. in 2014, the couple’s children, the second and third applicants, were ordered to live with their mother, and the first applicant had regular contact rights.

2. In November 2015, after the police were informed that K.P. was obstructing the children’s contacts with their father and emotionally abusing them, a criminal investigation was opened against her for violation of the children’s rights. In October 2016 K.P. admitted to the charges against her and agreed to seek professional help and enrol in a parenting school in order to postpone the prosecution against her. In July 2017 the charges against K.P. were dismissed because she had fulfilled the aforementioned conditions.

3. Meanwhile, in 2016 the first applicant instituted court proceedings requesting that the children live with him because K.P. was obstructing their contacts, as well as manipulating and emotionally abusing the children. A multidisciplinary expert report dated 10 June 2016 by the Polyclinic for the Protection of Children in Zagreb concluded that the second and third applicants had been emotionally abused by their mother.

4. The final report of the relevant social welfare centre (hereinafter: “the SWC”) dated 23 February 2018 noted that both parents had a loving relationship with the children and basic parenting skills. The report stated that, despite her progress through various treatments, K.P. had remained insufficiently self-critical which created a risk of repeated inadequate parenting. K.P.’s behavioural pattern had been observed by the Polyclinic as well as at the children’s school. Since the first applicant demonstrated better upbringing skills, the SWC proposed that the children live with him and maintain contact with their mother. The children’s appointed guardian *ad litem* agreed with that proposal.

5. On 30 April 2018 the Zagreb Municipal Court, accepting in full the recommendation of the SWC, ordered that the children immediately move to live with their father, which they did.

6. On appeal, on 4 September 2018, the Zagreb County Court reversed the first-instance judgment and ordered that the children return to live with their mother. Noting that the latest report of the SWC did not contain any information on abuse of the children, the second-instance court did not accept the SWC’s recommendation. K.P. had attended supportive therapy and counselling, had made notable progress and had become more self-critical about the children’s upbringing and her behaviour towards them. In the court’s opinion, the potential risk of repeated inadequate parenting harmful to the children could not be accepted as the reason to alter the custody decision because it was merely an assumed future possibility. Given that the children had an equally strong emotional bond with both parents and had no strong preference of the parent they wanted to live with, that the mother was extremely motivated to live with her children, and that the symptoms suggesting emotional abuse no longer obtained, there was no indication that the children would be in danger were they to live with their mother, with whom they had lived since birth. In the court’s view, any change in their lives could pose a risk of development of mental health disorders and this was particularly so because the case involved young children, who were normally more attached to their mother.

7. In October 2018 the second and third applicants returned to live with K.P.

8. The applicants’ constitutional complaint was dismissed on 9 April 2019, with three out of twelve judges of the Constitutional Court dissenting.

9. Meanwhile, in November 2018 and March 2019 the relevant SWC filed two fresh criminal complaints against K.P. for inappropriate behaviour towards her children, including physical abuse. The criminal complaints were dismissed by the competent prosecuting authorities in September 2020 for lack of reasonable suspicion.

10. The applicants complained that, by deciding that the children would live with K.P., the authorities failed to protect them from further abuse. They also complained that the Zagreb County Court failed to put forward relevant

and sufficient reasons for its decision and that one of its reasons was discriminatory. They relied on Articles 3, 8, 13 and 14 of the Convention.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Preliminary remark

11. As clarified in their observations, the applicants are primarily contesting the Zagreb County Court's judgment of 4 September 2018, which ordered that the second and third applicants live with K.P. In their view, the said judgment failed to protect the children from further abuse. In such circumstances, being the master of the case before it (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 124, 20 March 2018), the Court considers it most appropriate to examine the case under Article 8 of the Convention.

12. The Government did not contest that the first applicant had standing to lodge an application on behalf of his minor children. Given that the first applicant has parental authority in respect of his children, although they no longer live with him, and that the present case concerns both custody issues and alleged abuse of children, the Court finds that he has standing to act on their behalf (compare *Petrov and X v. Russia*, no. 23608/16, § 83, 23 October 2018; and *R.B. and M. v. Italy*, no. 41382/19, § 42, 22 April 2021).

B. Admissibility

13. The Government argued that the applicants' complaint concerning alleged abuse of the children had been belated, because the first set of criminal proceedings had been terminated in 2017, or premature, because the second set of criminal proceedings had still been pending. They also submitted that the first applicant could not claim to be a victim of the alleged violation because he had personally not been subjected to any sort of abuse. In view of the fact that, as stated above, the applicants' main grievance in the case concerns the Zagreb County Court's judgment of 4 September 2018 (see paragraph 11 above), the Court finds that these objections must be rejected.

14. The Government further claimed that the applicants did not suffer any significant disadvantage because nothing had changed for them as the children remained to live with their mother. In this connection, the Court recalls that mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and that domestic measures hindering such enjoyment amount to an interference with the right protected by this provision (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 202, 10 September 2019). It can therefore not be said that a

final court judgment overturning a first-instance decision according to which the applicants had already began living together and ordering the second and third applicants to live separately from the first applicant did not result in significant disadvantage for their enjoyment of family life together. Consequently, this objection must equally be dismissed.

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

C. Merits

16. General principles concerning the States' positive obligations in cases of suspected abuse of children have been summarised in *M. and M. v. Croatia* (no. 10161/13, §§ 136 and 164, ECHR 2015 (extracts)), and those concerning custody disputes in *Petrov and X* (cited above, §§ 98-102).

17. In the present case, as stated above (see paragraph 14 above), the Zagreb County Court's judgment of 4 September 2018 interfered with the applicants' right to respect for their family life. In addition, the applicants complained that the said judgment also resulted in the failure of the State to protect the children from further abuse by K.P. thus breaching the State's positive obligation under the Convention. While the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition, the Court recalls that the applicable principles are nonetheless similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests, subject in any event to the margin of appreciation enjoyed by the State (see, for example, *Lazoriva v. Ukraine*, no. 6878/14, § 62, 17 April 2018).

18. According to its well-established jurisprudence, in determining whether the refusal of custody was justified under Article 8 § 2 of the Convention, the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify such a measure were relevant and sufficient. Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance in every case of this kind (see *Sahin v. Germany* [GC], no. 30943/96, § 64, ECHR 2003-VIII; *C. v. Finland*, no. 18249/02, § 52, 9 May 2006; and *Z.J. v. Lithuania*, no. 60092/12, § 96, 29 April 2014). According to the United Nations Committee on the Rights of the Child, assessing the best interest of the child also includes the safety and integrity of the child at the current time, as well as the possibility of future risk and harm and other consequences of the decision for the child's safety (see General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), adopted on 29 May 2013, paragraphs 71-74).

19. It is not disputed between the parties that the children had been emotionally abused by K.P. Virtually all expert opinions in the present case warned about her inadequate parenting methods. The report of 10 June 2016 by the Polyclinic for the Protection of Children in Zagreb clearly stated that her behaviour amounted to emotional abuse of the children (see paragraph 3 above), which she also admitted during the criminal proceedings against her (see paragraph 3 above), as did the Government in their observations on the case.

20. The Court considers that the foregoing must have weighed heavily in the balance of the domestic courts deciding whether it was in the best interest of the children to live with K.P. or the first applicant. However, despite being aware of the situation the children were living in, instead of acting expeditiously in protecting the second and third applicants from the established emotional abuse, in custody proceedings which lasted for over three years, the domestic courts ultimately decided that the children should live with K.P.

21. Turning to the reasons for such a decision, the Court notes that the Zagreb County Court in its judgment of 4 September 2018 referred to, on the one hand, K.P.'s shown efforts in attending parenting classes and, on the other, a generalised statement that young children were usually more attached to their mother (see paragraph 6 above). The Court does not find these reasons convincing. Firstly, it does not see how attending parenting classes and understanding that her previous conduct had not been appropriate could override the numerous expert opinions and recommendations by the relevant SWC warning about the risk of further emotional abuse, in particular given the fresh criminal proceedings which had been pending against K.P. at the material time (see paragraph 9 above). Indeed, the Zagreb County Court's statement that the potential risk of repeated inadequate parenting harmful to the children could not be sufficient reason to alter an existing custody arrangement because it was merely an assumed future possibility (see paragraph 6 above) seems to be in clear disregard of the requirement to precisely take such future risk into account in assessing the best interests of the child (see paragraph 18 above).

22. What is more, the Court has serious difficulties in accepting the Zagreb County Court's statement that young children are usually more attached to their mother, as it appears to be stereotyping and discriminatory towards men. Moreover, the Court cannot see how such a biased argument could be relevant or sufficient in the circumstances of the present case, where the children expressly stated that they were equally attached to both parents and had no clear preference which parent they wanted to live with (see paragraph 6 above).

23. The foregoing considerations are sufficient to enable the Court to conclude that the Zagreb County Court failed to put forward relevant and sufficient reasons to show that it had conducted an in-depth examination of

the entire family situation and made a balanced and reasonable assessment of the respective interests of each person, exercising a constant concern for determining what would be in the best interests of the children, as required by Article 8 (compare *Petrov and X*, cited above, § 112). In doing so, it not only overstepped the wide margin of appreciation afforded to the States in custody matters, but also failed to efficiently protect the second and third applicants from further potential abuse.

24. There has accordingly been a violation of Article 8 of the Convention.

OTHER COMPLAINTS

25. The applicants also complained under Articles 3, 13 and 14 of the Convention that the Zagreb County Court failed to protect the children from further abuse, that it gave discriminatory reasons for its decision and that the applicants had no possibility of appeal because its judgment had immediately become final.

26. Having regard to the facts of the case, the submissions of the parties, and its findings above (see paragraphs 22 and 23 above), the Court considers that it has examined the main legal questions raised in the present application. It thus considers that the applicants' remaining complaints are admissible but that there is no need to give a separate ruling on them (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. The first applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage and the second and third applicants claimed EUR 20,000 each under that head. The applicants also claimed EUR 9,473,25 in respect of costs and expenses incurred before the domestic courts and before the Court.

28. The Government found those amounts excessive and unsubstantiated.

29. In view of the findings above, the Court awards the applicants, jointly, EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to them, to be paid to the first applicant.

30. Having regard to the documents in its possession, the Court also considers it reasonable to award the applicants, jointly, EUR 5,000 covering costs under all heads, plus any tax that may be chargeable to the applicants, to be paid to the first applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there is no need to examine the remaining complaints;
4. *Holds*
 - (a) that the respondent State is to pay to the first applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 7,500 (seven thousand five hundred euros) jointly to the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros) jointly to the applicants, plus any tax that may be chargeable to them, in respect of costs and expenses;
 - (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;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Péter Paczolay
President

H.P. AND OTHERS v. CROATIA JUDGMENT

APPENDIX

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	H.P.	1977	Croatian	Zagreb
2.	D.P.	2010	Croatian	Zagreb
3.	M.P.	2009	Croatian	Zagreb