

FOURTH SECTION

CASE OF BERECOVÁ v. SLOVAKIA

(Application no. 74400/01)

JUDGMENT

STRASBOURG

24 April 2007

FINAL

24/07/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Berecová v. Slovakia,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 27 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 74400/01) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovakian national, Mrs Adriana Berecová (“the applicant”), on 21 June 2001.

2. The applicant was represented by Mrs I. Rajtáková, a lawyer practising in Košice. The Government of the Slovak Republic (“the Government”) were represented by their Agent, Mrs M. Pirošíková.

3. The applicant alleged that her right to respect for her family life had been violated in that her children had been placed in institutional care.

4. By a decision of 19 September 2006 the Court declared the application admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1951 and lives in Košice.

7. By a decision which became final on 30 May 1995 the Košice II District Court pronounced the applicant's and her husband's divorce. The applicant was granted custody of the two children born in 1991 and 1993 respectively. The father was ordered to contribute to their maintenance.

8. In a letter of 17 December 1998 the Regional Office in Košice asked the Social Affairs Department of the District Office Košice IV to monitor the situation of the applicant and her children and to provide intensive social assistance to them. Reference was made to facts indicating that the applicant had not behaved in an appropriate manner in respect of her children. The Košice IV District Office found that no intervention was necessary. As the permanent address of the children had changed, the file was transmitted to the Košice II District Office on 2 February 1999.

9. Two students found the applicant's children in a street on 11 February 2000. They were hungry and could not return home as their mother was absent. According to the children the applicant had beaten and ill-treated them. The police brought the children to their aunt. This was reported by a psychologist on 14 February 2000.

10. Late in the evening on 17 April 2000 the police found the children in a park after they had fled from their home. Their examination in a hospital disclosed bruises and healed scars on their bodies. The children manifested fear of their mother and refused to return home. A psychologist concluded that their fear resulted from punishment inflicted by their mother and from her inappropriate emotional behaviour.

11. On 19 April 2000 the Košice II District Office issued an injunction ordering that the children be

placed temporarily in the father's custody. The decision was based on section 68(a)(1) of the Social Assistance Act and on section 46 of the Family Act. It stated that the applicant had grossly neglected the education of her children, that they had had to be hospitalised and that there was a suspicion that she had ill-treated them. The applicant appealed.

12. On 3 May 2000 the District Office issued two injunctions ordering that the children be placed in a juvenile diagnostic centre as the father had been unable to take care of them. The applicant appealed.

13. On 24 May 2000 the Košice II police department accused the applicant of having ill-treated her children between 1997 and 17 April 2000. According to the accusation, there was a suspicion that the applicant had inflicted inappropriate physical punishment on the children.

14. On 28 June 2000 the Košice Regional Office granted the applicant's appeal against the administrative decision of 19 April 2000 in that it ordered that an institution should take care of the children until the relevant issues had been determined by a court.

15. On 30 June 2000 the Košice Regional Office dismissed the applicant's appeal against the first-instance administrative decision of 3 May 2000 and confirmed that the children should remain in institutional care pending the final decision of a court. Reference was made to a police report indicating that the children had run away from the applicant and also to the report of a psychologist indicating that the children had been subjected to excessively hard educational methods and physical punishment as a result of which they had become anxious. The applicant had been repeatedly requested to improve the situation of the children. As she had failed to do so, the Regional Office concluded that the healthy development of the children had been jeopardised. It was therefore necessary to place them in an institution pending a judicial decision on the case.

16. In the meantime, on 20 and 23 June 2000, the Diagnostic Centre for Children in Košice drew up two reports recommending that the children be placed in a children's home temporarily. As the mother had acknowledged mistakes in her behaviour and had shown her willingness to take appropriate care of her children, the reports recommended that the possibility of returning the children to her should be re-considered at a later stage.

17. The children were placed in the children's home in Vranov nad Topľou on 27 June 2000. The applicant visited them there.

18. The applicant requested that the children be allowed to spend a part of the summer holidays with her. Her request was dismissed on the ground that the criminal proceedings against her were still pending.

19. On 5 September 2000 the Košice II District Court started proceedings for the placement of the applicant's children in an institution. The decision to bring the proceedings referred to a notification from the Košice II District Office, dated 12 May 2000, informing the court of the above injunctions.

20. As the applicant's son had serious psychological problems, he was treated in the psychiatric hospital in Michalovce from 20 September 2000. On 25 October 2001 the head physician informed the Košice II District Office of the applicant's visit. According to his letter, the applicant had disregarded the indications given by the physician and had attempted to take her son away from the medical department. She had used vulgar terms in respect of the doctor and she had thus disturbed her son's equilibrium and his confidence in the hospital staff.

21. On 10 November 2000 the children were transferred to the children's home in Nižná Kamenica.

22. On 8 December 2000 a public prosecutor conditionally discontinued the criminal proceedings against the applicant and set a one-year probationary period for her. According to the decision, the applicant had admitted the actions imputed to her and had explained that she had had psychological difficulties due to her divorce and bad financial situation. The public prosecutor also had regard to the statement of a social assistant and to opinions of experts in psychology and psychiatry.

23. On 20 December 2000 the applicant requested that the children be allowed to spend the Christmas holiday with her. She relied on the above decision to discontinue the criminal proceedings on a conditional basis and maintained that there was an urgent need for the relations between her and the children to be renewed.

24. On 21 December 2000 the director of the children's home informed the District Office that the

applicant had visited her children three times since 10 November 2000 and that it had been agreed that the children would not visit the applicant in her apartment for three months.

25. On 22 December 2000 the Košice II District Office replied to the applicant that it did not consider it appropriate to grant her request of 20 December 2000.

26. The applicant reiterated her request on 30 January 2001. She relied on a medical certificate indicating that her mental health had stabilised.

27. On 1 February 2001 the Košice II District Office informed the applicant that there was an epidemic of influenza in the institution and that her children were undergoing treatment. The letter further stated that the District Office was unable to take a position on the children's stay with the applicant at that time. Subsequently, on 16 February 2001, the administrative authority acceded to the applicant's request and allowed the children to stay with their mother from 17 to 23 February 2001.

28. On 27 February 2001 the applicant requested that the injunctions by virtue of which her children had been placed in the care of an authority should be quashed. She explained that her situation had changed and that she was in a position to take appropriate care of her children. The applicant relied on the relevant provision of the Administrative Proceedings Act which obliged administrative authorities to quash their decisions on an injunction where the reasons for such a measure were no longer valid.

29. On 7 March 2001 the Košice II District Office dismissed the request. Its letter to the applicant stated that there existed no justification for quashing the injunction prior to a final determination of the issue by a court.

30. Subsequently in the course of 2001 the Košice II District Office allowed the children to spend the Easter holiday, a part of the summer and autumn school holidays as well as the Christmas holiday with the applicant.

31. In the meantime, on 9 February 2001, the applicant lodged a petition pursuant to Article 130 § 3 of the Constitution with the Constitutional Court. She alleged a violation of Article 41(4) of the Constitution with reference to the above administrative decisions concerning the placement of her children in an institution. She stated, *inter alia*, that her children had been taken away from her for an excessively long period of time and that the administrative authorities had refused to quash their injunctions notwithstanding that the reasons therefor were no longer valid.

32. On 22 March 2001 the Constitutional Court rejected the applicant's petition. It held that it lacked power to review, in the context of the proceedings brought by the applicant, the conformity of the relevant provisions of the Family Act and of the Social Assistance Act with Article 41(4) of the Constitution. As to the applicant's complaint that the administrative authority had refused to return the children to her, the Constitutional Court relied on section 68(a)(1) of the Social Assistance Act and noted that judicial proceedings concerning the placement of the applicant's children in an institution were pending. Prior to the outcome of those proceedings the Constitutional Court could not entertain the applicant's complaint.

33. On 2 July and 29 October 2001 the applicant requested that the Košice II District Court proceed with the case concerning the custody of her children.

34. The Košice II District Court held hearings in the case concerning the custody of the applicant's children on 11 December 2001 and 8 January 2002. On the latter date it delivered a judgment ordering that the applicant's children should not be placed in an institution. The court noted that the representatives of the competent authorities had stated that the education of the children in an institution was no longer necessary as the applicant's situation had changed, and that the children themselves wished to return to the applicant. The District Court had difficulties in serving the judgment on the applicant's former husband. Its judgment became final on 13 September 2002.

35. On 11 January 2002 the applicant requested, with reference to the above judicial decision, that the children be conditionally allowed to live with her pending that judgment becoming final.

36. On 17 April 2002 the applicant again requested that the injunctions concerning her children be quashed. On 19 April 2002 the Košice II District Office replied that the injunctions had ceased to have effect following the District Court's decision of 8 January 2002.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution and practice of the Constitutional Court

37. Article 41(1) guarantees, *inter alia*, special protection of children and juveniles.

38. Article 41(4) provides that parents have the right to take care of their children and to educate them. Parental rights can be restricted and under-age children can be separated from their parents against the latter's will only pursuant to a judicial decision taken in accordance with a law.

39. Under paragraph 6 of Article 41, a law shall specify further details concerning the rights under Article 41 paragraphs 1 to 5.

40. Pursuant to Article 152(4), the interpretation and application of constitutional laws, ordinary laws and other generally binding legal rules have to be in accordance with the Constitution.

41. In its judgment II. US 8/97 the Constitutional Court held that Slovakia was a State of law where the Constitution was fundamental source of law. The Constitution was superior to all other sources of law which implied that all legal rules had to conform to the Constitution.

B. The Family Act (Act 94/1963 Coll.)

42. At the relevant time, the following provisions of the Family Act were in force.

43. Pursuant to section 42(2), only a court was entitled to take measures restricting parental rights.

44. Under section 45(2), a court could order that a child be educated in an institution where the education of the child was seriously threatened and where it was impossible to redress the situation by other means or where the parents were unable, for other serious reasons, to ensure the appropriate education of the child.

45. Section 46 obliged the competent local government authorities, in cases of urgent need, to take interim measures even on issues which otherwise fell within the jurisdiction of a court. Such a measure was to be notified to the competent court without delay. The court was to determine the issue subsequently. This provision was repealed as being contrary to Article 41(4) of the Constitution and Article 9 of the Convention on the Rights of the Child with effect from 1 April 2002 (Act 127/2002 Coll.)¹.

C. The Social Assistance Act (Act 195/1998 Coll.)

46. Section 68(a)(1), as in force at the relevant time, entitled district offices to order the immediate removal of a child from his or her family pending the determination of the issue by a court. That provision was deleted with effect from 1 February 2004 (Act 453/2003 Coll.).

D. Administrative Proceedings Act (Act 71/1967 Coll.)

47. Pursuant to section 43(1), an administrative authority can issue an interim measure prior to the termination of proceedings to the extent that such a measure is necessary. Paragraph 2 of section 43 provides that an interim measure has to be revoked as soon as the reason for it is no longer valid; otherwise, it ceases to have effect on the date on which a final decision is given on the point in issue.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The applicant complained that her right to respect for her family life had been violated by the placement of her children in an institution. She 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.”

49. The Government admitted that there had been an interference with the applicant's right under Article 8 of the Convention to respect for her family life. At the relevant time, the applicable ordinary law had been inconsistent with the Constitution. The Government concluded that, for that reason, the interference in issue had not been “in accordance with the law”.

50. The applicant maintained that the interference had been neither “in accordance with the law” nor “necessary in a democratic society” as required by Article 8 § 2 of the Convention.

51. The Court finds, and it has not been disputed between the parties, that the placement of the applicant's children in an institution pursuant to injunctions issued by administrative authorities amounted to an interference with the applicant's right under Article 8 § 1 of the Convention to respect for her family life.

52. The relevant provisions of the Family Act of 1963 and the Social Assistance Act of 1998 then in force prevented the applicant from having the decisions in issue given by administrative authorities reviewed by a court. This situation was contrary to Article 41(4) of the Constitution which permits the separation of under-age children from their parents against the latter's will only pursuant to a judicial decision. It was incompatible with Article 152(4) of the Constitution under which the interpretation and application of, *inter alia*, ordinary laws have to be in accordance with the Constitution.

53. The interference in issue was thus contrary to the Constitution which, as the Constitutional Court found, is the fundamental source of law in Slovakia to which the other legal rules have to conform. As a result, that interference was not “in accordance with the law” as required by Article 8 paragraph 2 of the Convention. In these circumstances, there is no need for the Court to determine whether or not the interference was “necessary in a democratic society” within the meaning of that paragraph.

54. The Court has noted that the relevant provisions of ordinary laws concerned were subsequently repealed as being contrary to the Constitution. This cannot, however, affect the position as regards the present application.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed 500,000 Slovakian korunas (SKK) as compensation for non-pecuniary damage. That sum was the equivalent of approximately 14,500 euros.

58. The Government objected that the sum claimed was excessive.

59. Having regard to its practice and the particular circumstances of the case, the Court awards the

applicant EUR 2,500 for non-pecuniary damage resulting from the violation found.

B. Costs and expenses

60. The applicant claimed SKK 83,200 (the equivalent of approximately 2,400 euros) in respect of her costs and expenses. That sum comprised SKK 15,000 in respect of the proceedings before the administrative authorities, SKK 15,000 in respect of the proceedings before the Constitutional Court as well as SKK 41,300 in respect of the proceedings before the Court.

61. The Government argued that the costs incurred by the applicant in the proceedings before the administrative authorities were unrelated to the alleged violation of her rights under Article 8 of the Convention. Furthermore, the applicant had not been required to use the constitutional remedy as it had not been effective for the purpose of Article 35 § 1 of the Convention at the relevant time. As to the costs related to the proceedings under the Convention, the Government invited the Court to award a reasonable amount corresponding to the circumstances of the case.

62. In accordance with the Court's practice, costs incurred in the domestic proceedings may only be reimbursed in so far as they were necessary in order to prevent or redress the violation found (see, for instance, *Moser v. Austria*, no. 12643/02, § 115, 21 September 2006).

63. In the present case, the Court notes that it was the applicant's conduct which gave rise to the proceedings complained of (see paragraph 22 above). It therefore considers it appropriate to award only a part of her costs related to the proceedings before the administrative authorities, namely EUR 250. The applicant's petition under Article 130 § 3 of the Constitution was not an effective remedy which the applicant was required to use (see *Šupa v. Slovakia* (dec.), no. 72991/01, 6 February 2007, with further references). No award should therefore be made in that respect. As to the Convention proceedings, the Court awards EUR 1,250 corresponding approximately to the sum claimed.

64. Consequently a total amount of EUR 1,500 is awarded to the applicant under the head of costs and expenses.

C. Default interest

65. The Court considers it appropriate that the default interest 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. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage and EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (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;

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

Done in English, and notified in writing on 24 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY Nicolas BRATZA

Registrar President

¹ The fact that section 46 of the Family Act of 1963 was contrary to Article 41(4) of the Constitution and Article 9 of the Convention on the Rights of the Child is indicated, for example, in the Explanatory Report to the Government's draft Family Act elaborated in 2004.

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BERECOVÁ v. SLOVAKIA JUDGMENT