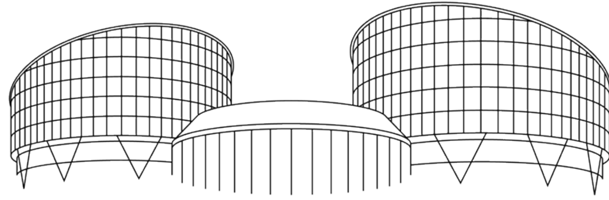

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF VOJNITY v. HUNGARY

(Application no. 29617/07)

JUDGMENT

STRASBOURG

12 February 2013

FINAL

12/05/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of Vojnity v. Hungary,

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

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 22 January 2013,

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

PROCEDURE

1. The case originated in an application (no. 29617/07) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Péro Vojnity ("the applicant"), on 9 July 2007.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged, in particular, that the complete withdrawal of his access rights amounted to an unjustified and disproportionate interference with his right to respect for family life, contrary to Article 8 of the Convention, read alone and in the light of Articles 9 and 14 .

4. On 20 March 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Szeged.

6. On 8 June 2000 the applicant, an adherent of the religious denomination *Hit Gyülekezete* (Congregation of the Faith), divorced from

his wife, and their son, born in 1994, was placed with the mother. The applicant was granted access rights.

7. The applicant lodged a motion with the Szeged District Court to reclaim custody or have his access rights re-regulated. The two psychiatric opinions prepared in the course of the ensuing proceedings established that the father's visits did not impose a burden on the child and suggested loose but regular contact between the applicant and his son. Nonetheless, the court rejected his request on 13 October 2003. Another similar motion of the applicant was also dismissed on 20 June 2004 by the same court, which stated that the child's removal from his social environment would not be in his interest and that the applicant's circumstances were not satisfactory for the upbringing of a child. Nonetheless, the court found that the applicant's behaviour was not malicious towards his son and his access rights should not be withdrawn, as requested by the mother, on the ground of his religious devotion.

8. On 11 January 2006 the Szeged Guardianship Authority filed an action to have the child placed with his older brother, the mother having been considered unfit. In respect of a potential placement with the applicant, the Authority had regard to its observations that his heavy-handed proselytism vis-à-vis the son and his inadequate housing conditions represented a danger for the boy.

9. The Szeged District Court appointed an expert psychologist. In his opinion of 5 September 2006 the expert found, having examined the applicant, the mother, their son and his older brother, that the boy had strong emotional ties to his siblings and his mother but none to his father. According to the expert, the applicant held unrealistic educational ideas hallmarked by religious fanaticism which rendered him unfit to provide the son with a normal upbringing; indeed, he forced his beliefs on his son to an extent that it resulted in the latter's alienation from him.

10. On 12 September 2006 the District Court placed the child with his brother, but maintained the applicant's access rights. This decision was upheld by the Csongrád County Regional Court, acting as a second-instance court, on 2 October 2006.

11. Subsequently the brother filed an action against the applicant seeking deprivation of his access rights.

12. The District Court appointed an expert psychologist. In his opinion of 14 September 2007 the expert submitted, after examining the brother and the son – but not the applicant –, that the applicant's participation in the boy's life was harmful, notably because of his insistence on proselytism. He was of the view that the applicant was unfit to contribute to the son's normal development and that the applicant should be subjected to examination by an expert psychiatrist. He suggested that the applicant's access rights should be removed altogether, because his visits – which went

beyond the authorised occasions – were of a vexatious nature and harmful for the child.

13. The District Court then gave judgment and removed the applicant's access rights altogether. Relying essentially on the expert's opinion, it held that his vexatious and harmful appearances in his son's life amounted to an abuse of his access rights and seriously endangered the child's development and upbringing.

14. On appeal, on 4 February 2008 the Csongrád County Regional Court upheld the first-instance judgment. It held that even considering the acknowledged mutual interest of the child and his father in maintaining a family tie based on affection, this consideration was not applicable in the case, since the applicant abused his rights to influence the child in pursuit of his own religious beliefs, which triggered anxiety and fear in the boy and endangered his development. In particular, the Regional Court found, relying on the expert opinion, that the applicant's "irrational worldview made him incapable of bringing up his child" and that he "did not exercise his right of access in accordance with its purpose ... but to impose his religious convictions on the child".

II. RELEVANT DOMESTIC LAW

15. Act no. IV of 1952 on Marriage, Family and Guardianship ("the Csjt.") provides as follows:

Section 1

"(2) In the application of this Act the minor child's interest shall always be taken into account and his or her rights shall be safeguarded."

Section 92

"(1) The child shall have the right to maintain direct contact in person with his or her parent living separately. Maintenance of regular contact with the child is a right and obligation of the parent living separately (access rights). The parent or any other person bringing up the child shall be under the obligation of ensuring undisturbed maintenance of contact.

(2) A parent shall – unless [subject to a restraining order] – have the right to maintain contact with his or her child even where the parent's custody rights are suspended.

(3) In exceptionally justified cases, in the interest of the child, the parent whose custody was withdrawn by the court or ceased under section 48 (3) and the child has not been adopted may also be entitled to maintain contact with his or her child. Such a decision shall be delivered by the court which terminated the parent's custody or – where the child has been placed in permanent foster care – by the guardianship authority.

(4) In absence of agreement between the parents, or in case of dispute between the parents and the guardian, the decision on the maintenance of contact shall be taken by the guardianship authority. The guardianship authority or the court proceeding in marriage- or child-placement-related cases may restrict or terminate this right or suspend its exercise.

(5) Where the decision on the maintenance of contact was taken by a court, amendment of the court's decision may only be sought before a court, within two years from its having become final.

(6) The execution of the court decision on the maintenance of contact shall be arranged for by the guardianship authority."

16. Government Decree no. 149/1997. (IX. 10.) on Child Custody Boards, Child Protection Procedure and Child Custody Board Procedure provides as follows:

Section 27

"(1) The aim of the access rights is:

a) to maintain family contact between the child and the persons entitled to access according to paragraph (1) of section 28, and

b) that the parent having access rights follow continuously and support, by doing his/her utmost, the upbringing and the growth of the child."

Section 28

"(1) The parents, the grandparents, the major siblings ... are all entitled to access."

Section 30

"(6) The guardianship authority or the court may appoint as the place of exercising access rights the [premises of the child welfare centre]."

Section 30/A

"(1) If the parents ... cannot find an agreement about the time or manner of exercising access rights, the guardianship authority shall draw the parties' attention to the possibility of availing themselves of 'mediation with a view to protecting the child' (*gyermekvédelmi közvetítői eljárás*)."

Section 31

"(5) The guardianship authority or the court may – upon request – withdraw the access rights of the person with access if he or she exercises the access rights in grave violation of the interest of the child or the person having custody and by this conduct gravely endangers the child's upbringing and development."

Section 32

> “(1) The re-regulation of access rights – not including the restriction, suspension or withdrawal of the access rights – may be requested within two years from the date on which the decision thereon became final, if the circumstances underlying the decision of the court or the guardianship authority have later significantly changed and the re-regulation of the access rights serves the interest of the child...
>
> (4) In the proceedings for the re-regulation of the access rights the guardianship authority or the court may, upon request, in the interest of the child, lift the restrictions imposed on the access rights and may restore the access rights where the circumstances on which the decision was based no longer prevail.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

17. The applicant complained that the denial of his access rights in respect of his son had been based on his adherence to the religious denomination *Hit Gyülekezete*, amounting to a differential treatment in respect of the enjoyment of his right to respect for family life. He claimed in this respect a violation of his rights under Article 8 of the Convention, both taken alone and read in conjunction with Article 14.

He further complained that his right to freedom of thought, conscience and religion had been violated, since the impugned measure had been directly linked to the manifestation of his religious belief and thus fell within the ambit of Article 9 of the Convention.

Article 8 reads as follows:

> “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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.”

Article 9 provides as follows:

> “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

18. The Government contested these arguments.

19. The Court considers that it is appropriate to examine the applicant's complaints under Article 14 read in conjunction with Article 8 of the Convention (see, e.g., *mutatis mutandis*, *Zaunegger v. Germany*, no. 22028/04, § 34, 3 December 2009).

A. Admissibility

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' arguments

a. The applicant

21. The applicant submitted that he had been treated differently due to his religious convictions in respect of the enjoyment of his rights under Article 8 of the Convention from other persons seeking access rights to their children following divorce or separation. In particular, he submitted that the domestic authorities' decision withdrawing his access rights in respect of his son on the basis of his religious beliefs had amounted to an unjustifiable interference with his right to respect for family life.

22. The applicant moreover argued that access to his son had been refused not in the interest of the child's physical or mental integrity but due to his religious convictions. Relying in particular on the decision of the Csongrád County Regional Court, he claimed that the domestic courts had found deficiencies in his methods and ideas of upbringing since he had intended to transfer his religious worldview to his son.

23. Furthermore, the applicant submitted that although several less restrictive measures existed under Hungarian law, the domestic authorities had failed to examine them.

b. The Government

24. The Government acknowledged that there had been an interference with the applicant's right to family life. They stressed however that intervention by the domestic courts had been prescribed by law, namely section 92 (4) of the Csjt. (see paragraph 15 above). Moreover, it pursued a legitimate aim, that is, the protection of the child's interests, and was necessary in a democratic society. They added that in this field the child's interests were paramount, overriding the interests of the parents.

25. The Government moreover disputed the allegation that in the instant case the applicant had been treated differently. They pointed out that the domestic courts had taken into account, in accordance with the Hungarian law, the child's best interest alone, and the decisions of the Szeged District Court and the Csongrád Court of Appeal had been based on the fact that, in the circumstances of the case, the maintenance of the applicant's contact rights would not have served the child's interest.

26. The Government concluded that the domestic courts, in reaching their decision, had had regard exclusively to the overriding interest of the child and not the applicant's religious beliefs. Thus, the applicant had not been discriminated against in any manner.

2. *The Court's assessment*

27. The Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, among many other authorities, *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

28. The Court notes at the outset that in the instant case the applicant had regular contact with his son until the decision of the Csongrád County Regional Court of 4 February 2008 which deprived him of all access rights (see paragraph 14 above). In this respect, the Court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (see *Eriksson v. Sweden*, 22 June 1989, § 58, Series A no. 156). The applicant having been deprived of this element, the Court finds that the Regional Court's decision constituted an interference with the applicant's right to respect for family life.

Thus the case falls within the ambit of Article 8 of the Convention.

29. The Court further reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see *Hoffmann v. Austria*, 23 June 1993, § 31, Series A no. 255-C). In other words, the notion of discrimination includes in general cases where a person or group is treated, without proper justification, less favourably than another (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94).

30. Consequently, it must first be determined whether the applicant can complain of such a difference in treatment in regard to his right to respect for family life.

31. The Court will first ascertain whether or not the applicant's access rights were removed essentially on account of his religious conviction. It is true that the domestic courts had regard above all to the child's interest when granting the request for the withdrawal of the applicant's access rights (see paragraph 13 above). However, the Court notes that when deciding on the applicant's suitability to contribute to his son's development, the domestic authorities added to their consideration the factor – for that matter, evidently the decisive one – of the applicant's religious conviction and its possible effects on the child. In particular, the Regional Court based its ruling on the expert opinion stating that the applicant's "irrational worldview made him incapable of bringing up his child". Furthermore, the Regional Court held against the applicant that during his contacts with the child, he had intended to transfer his religious convictions to him (see paragraph 14 above). It does not appear that other points of fact or law were considered in depth. In this connection, the Court has already held that a distinction based essentially on a difference in religion alone is not acceptable (see *Hoffmann,* cited above, § 36).

Therefore, in the Court's view, the applicant's religious convictions had a direct bearing on the outcome of the matter in issue. Consequently, there has been a difference of treatment between the applicant and other parents in an analogous situation, which consisted of reproaching the applicant for his strong religious convictions.

32. As has been well established in the Court's case-law, such a difference in treatment is discriminatory in the absence of an "objective and reasonable justification", that is, if it is not justified by a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among other authorities, *Palau-Martinez v. France*, no. 64927/01, § 39, ECHR 2003-XII).

33. The Court is of the opinion that the aim pursued in the instant case, namely the protection of the health and rights of the child, is legitimate.

34. It remains to be determined whether there was a reasonable relationship of proportionality between the means employed, namely depriving the father of his access rights altogether, and the legitimate aim pursued.

35. The Court recalls that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the circumstances, the subject matter and its background (see *Zaunegger*, cited above, § 50).

36. The Court notes that the subject matter of this case is the applicant's differential treatment in the context of the total removal of his access rights to his son, and this to a decisive extent on account of the applicant's religious beliefs. It considers that, in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual's self-fulfilment, such a treatment will only be compatible with the Convention if very weighty reasons exist. The Court has applied a similar approach in the context of differences in treatment on the basis of sex (see *Abdulaziz, Cabales and Balkandali*, cited above, § 50), birth status (see *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126), sexual orientation (see *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 50, ECHR 2003-I) and nationality (*Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV).

37. In the present case, the Government have pointed to the importance of protecting the child's psychological health from the purported stress exerted by the applicant's intensive efforts to transfer his convictions to him. While the Court accepts that the domestic authorities may have showed legitimate concern in this respect, it has reservations as to whether this consideration qualifies as a very weighty reason allowing for differential treatment. It would add that the rights to respect for family life and religious freedom as enshrined in Articles 8 and 9 of the Convention, together with the right to respect for parents' philosophical and religious convictions in education, as provided in Article 2 of Protocol No. 1 to the Convention, convey on parents the right to communicate and promote their religious convictions in the bringing up of their children. The Court adds in this context that this would be an uncontested right in the case of two married parents sharing the same religious ideas or worldview and promoting them to their child, even in an insistent or overbearing manner, unless this exposes the latter to dangerous practices or to physical or psychological harm, and it sees no reason why the position of a separated or divorced parent who does not have custody of his or her child should be different *per se*.

38. The Court observes that in the present case there is no evidence that the applicant's religious convictions involved dangerous practices or

exposed his son to physical or psychological harm. It is true that the expert appointed by the District Court considered that the applicant's participation in the boy's life was harmful, notably because of his insistence on proselytism (see paragraph 12 above) but no convincing evidence was presented to substantiate a risk of actual harm, as opposed to the mere unease, discomfort or embarrassment which the child may have experienced on account of his father's attempts to transmit his religious beliefs. The Court notes in this connection that the expert did not examine the applicant, nor was his suggestion that the applicant should be examined by a psychiatrist followed up. It further notes that while the Regional Court, in upholding the first-instance judgment, referred to the child's "anxiety and fear", it deprived the applicant of his access rights essentially on account of the applicant's "irrational worldview" and his attempts to impose his religious convictions on the child, without explaining what real harm these caused to the child.

39. In any event, even assuming that the authorities' concern about the psychological damage the applicant's child may have suffered amounts to a very weighty reason for the purposes of assessing the differential treatment in question, the Court considers that the solution chosen by the authorities in the face of this problem cannot be accepted for the following reasons.

40. In respect of restrictions on family life, the Court reiterates that as regards restrictions placed by authorities on parental rights of access, a stricter scrutiny is called for than in the context of custody (see *Görgülü v. Germany*, no. 74969/01, § 42, 26 February 2004). It is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots (see *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX).

41. The Court observes that the domestic courts' decisions on the removal of the applicant's access rights rendered impossible any form of contact and the establishment of any kind of further family life.

It is to be recalled that a measure as radical as the total severance of contact can be justified only in exceptional circumstances (see *B. v. the United Kingdom*, 8 July 1987, § 77, Series A no. 121).

42. In the instant case, the Court considers that the Government have not demonstrated the presence of such exceptional circumstances. This is all the more troubling in the face of the fact that – although the domestic courts examined the psychological strain which his father's religious practice would represent for the child (see paragraph 14 above) – they gave no consideration to the question whether the mere suspension of the applicant's access for a certain period of time or any other less severe measure that exists under Hungarian law (such as the exercise of access rights in controlled circumstances) would have been sufficient to allow the child to regain his emotional balance. Instead, they decided to apply an absolute ban on the applicant's access rights. For the Court, the approach adopted by

those authorities amounted to a complete disregard of the principle of proportionality, requisite in this field and inherent in the spirit of the Convention.

43. In sum, in view of the fact that the domestic courts applied a very restrictive measure to the applicant's detriment, without giving due consideration to possible alternatives, the Court concludes that in respect of the measure at issue there was no reasonable relationship of proportionality between a total ban on the applicant's access rights and the aim pursued, namely the protection of the best interest of the child. Consequently, the applicant has been discriminated against on the basis of his religious convictions in the exercise of his right to respect for family life.

There has accordingly been a violation of Article 14 of the Convention, taken together with Article 8 in the instant case.

II. ALLEGED VIOLATION OF ARTICLE 8 TAKEN ALONE OR ARTICLE 9 TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14

44. The applicant further complained that there had been an interference with his freedom of religion within the meaning of Article 9 of the Convention, and that this interference was discriminatory within the meaning of Article 9 taken in conjunction with Article 14. He also complained that there had been a breach of Article 8 taken alone.

45. The Court considers that, while these complaints are also admissible, no separate issue arises under these provisions, since the factual circumstances relied on are the same as those for the complaint examined under Article 14 taken in conjunction with Article 8, in respect of which a violation has been found.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

46. Lastly, invoking Article 6 of the Convention, the applicant complained that the courts had dealt with his case in an unfair manner, accepting unsubstantiated allegations about his capacity to contribute to the upbringing of his child.

47. The Court considers that, while this complaint is also admissible, no separate issue arises under this provision, since the factual circumstances relied on are the same as those for the complaint examined under Article 14 taken in conjunction with Article 8, in respect of which a violation has been found.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant claimed 642,857 euros (EUR) in respect of non-pecuniary damage.

50. The Government contested this claim.

51. The Court considers that the applicant must have suffered some non-pecuniary damage and awards him, on the basis of equity, EUR 12,500 under this head.

B. Costs and expenses

52. The applicant also claimed EUR 6,429 for the costs and expenses incurred before the Court. This sum corresponds to 42 hours of legal work billable by his lawyer charged at an hourly rate of EUR 120 plus VAT (that is, EUR 6,400.80) as well as travel costs in the amount of EUR 28.84.

53. The Government contested this claim.

54. 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 considers it reasonable to award the sum of EUR 3,000 covering costs under all heads.

C. Default interest

55. 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 14 read in conjunction with Article 8 of the Convention;

3. *Holds* that no separate issue arises under Article 8 of the Convention taken alone or under Article 9 taken alone or in conjunction with Article 14;

4. *Holds* that no separate issue arises under Article 6 of the Convention;

5. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 12,500 (twelve thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 12 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President