



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

FIRST SECTION

CASE OF KRUŠKOVIĆ v. CROATIA

(Application no. 46185/08)

JUDGMENT

STRASBOURG

21 June 2011

FINAL

21/09/2011

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

In the case of Krušković v. Croatia,

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

Anatoly Kovler, *President*,

Nina Vajić,

Peer Lorenzen,

Elisabeth Steiner,

Khanlar Hajiyev,

George Nicolaou,

Mirjana Lazarova Trajkovska, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 31 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 46185/08) 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”) by a Croatian national, Mr Branko Krušković (“the applicant”), on 1 September 2008.

2. The applicant was represented by Mr G. Marjanović, a lawyer practising in Rijeka. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. On 10 March 2010 the President of the First Section decided to communicate to the Government the complaint under Article 8 of the Convention concerning the applicant’s right to respect for his private and family life. 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

4. The applicant was born in 1966 and lives in Jurdani.

5. On 25 February 2003 the applicant was divested of his legal capacity (*poslovna sposobnost*) by a decision of the Opatija Municipal Court (*Općinski sud u Opatiji*). The decision was based on a report by a psychiatrist, who established that the applicant suffered from organic personality disorder and antisocial personality disorder as a result of his

long-term drug abuse. The psychiatrist recommended that the applicant be divested of his legal capacity for a period of at least five years in order to undergo psychiatric treatment.

6. On 2 April 2003 the Opatija Social Welfare Centre (*Centrar za socijalnu skrb Opatija*) appointed the applicant's mother, Lj.I.G., as his guardian.

7. On 29 September 2006 the Opatija Social Welfare Centre appointed the applicant's father, D.K., as his guardian since his mother had fallen ill. On an unspecified date the same centre appointed its employee J.L as the applicant's guardian.

8. On 30 June 2007 K.S. gave birth to a daughter, K., and named the applicant as the child's father. On 17 August 2007 the applicant, with the consent of the child's mother, gave a statement at the Rijeka Birth Registry (*Matični ured Rijeka*) saying that he was the father of the child, and he was subsequently registered as such on the child's birth certificate. On 14 September 2007 the applicant gave the same statement before the Rijeka Welfare Centre (*Centar za socijalnu skrb Rijeka*).

9. On 19 October 2007 the Rijeka Social Welfare Centre informed the Birth Registry that the applicant had been divested of his legal capacity.

10. The Rijeka Birth Registry instituted proceedings in the Primorsko-goranska County Office of State Administration (*Ured državne uprave u Primorsko-goranskoj županiji*) for the annulment of the registration of the applicant as K.'s father. On 29 October 2007 the County Office gave a decision ordering that an amendment be made to the child's birth certificate annulling the previous note stating that the applicant was the father of the child, on the ground that as a person divested of his legal capacity he did not have the right to recognise K. as his child before the law.

11. This decision was not served on the applicant, since he had been divested of his legal capacity. It was served on his mother.

12. On 21 March 2010 the Opatija Welfare Centre brought a civil action in the Opatija Municipal Court against the applicant, K.S., and K., seeking that the Municipal Court establish that the applicant was K.'s father. The proceedings are still pending.

II. RELEVANT DOMESTIC LAW

13. The relevant provisions of the Family Act (*Obiteljski zakon*, Official Gazette nos. 116/2003, 17/2004, 136/2004 and 107/2007) read:

Section 56

“(1) ... paternity may be recognised before a registrar of a registry office, a social welfare centre or a court ...

...”

Section 61

“(1) The child’s mother shall give consent to the registering of the recognition of paternity.

...”

Section 73

“A social welfare centre may lodge a civil claim seeking ... to establish paternity up until the child’s eighteenth birthday.”

Section 159

“(1) An adult who, owing to mental illness or for other reasons, is not able to care for his or her own needs, rights and interests, or who presents a risk for the rights and interests of others, shall be partially or completely divested of his or her legal capacity by a court of law in non-contentious proceedings.

(2) Before adopting a decision under paragraph 1 of this section, a court shall obtain the expert opinion of a medical expert about the health conditions of the person concerned ...”

Section 162

“The competent social welfare centre shall place under guardianship any person ... divested of his or her legal capacity ...”

Section 179

“(1) The guardian shall take care of the person, rights, obligations and well-being of the ward with due diligence, manage his or her assets and take measures to enable the ward to have an independent working and personal life.

...”

Section 184

“(1) The guardian represents the ward.

...”

Section 185

“In order to undertake more extensive measures concerning the person, personal status or health of the ward, the guardian shall obtain prior consent from a social welfare centre.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

14. The applicant complained that he had been denied the right to be registered as the father of his biological child. He relied on Article 8 of the Convention, the relevant part of which 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

1. *Applicability of Article 8*

15. The Government argued that the applicant’s statement that he was the father of K. could not produce any legal consequences and that therefore there had been no violation of his right to respect for his private life. Consequently, Article 8 was not applicable to the facts of the present case.

16. The applicant contested that argument.

17. The Court must determine whether the right asserted by the applicant falls within the scope of the concept of “respect” for “private and family life” set forth in Article 8 of the Convention.

18. As regards the issue of paternity, the Court has held on numerous occasions that paternity proceedings do fall within the scope of Article 8 (see, for example, *Rasmussen v. Denmark*, 28 November 1984, § 33, Series A no. 87, and *Keegan v. Ireland*, 26 May 1994, § 45, Series A no. 290). In this connection, the Court has held that the notion of “family life” in Article 8 is not confined solely to marriage-based relationships but may also encompass other *de facto* “family ties” where sufficient constancy is present (see, for example, *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C).

19. The present case differs from the paternity cases cited above in so far as the applicant himself has not instituted any proceedings before the national courts to establish his paternity, but simply claims, with the consent of the child’s mother, that he is the biological father of the child K.

20. The Court has already held that the legal relationship between a child born out of wedlock and his or her natural father falls within the ambit of Article 8 of the Convention (see *Mikulić v. Croatia*, no. 53176/99,

§§ 50-55, ECHR 2002-I.). There is no reason to hold otherwise in the present case.

21. The facts of the case accordingly fall within the ambit of Article 8.

2. Exhaustion of domestic remedies

22. The Government argued that the complaint under Article 8 of the Convention was premature because the proceedings concerning his paternity were still pending.

23. The applicant argued that these proceedings had been instituted only after the present application had been communicated to the respondent Government and that his legal position, irrespective of the proceedings the Government referred to, was incompatible with the requirements of Article 8 of the Convention.

24. The Court considers that the question of exhaustion of domestic remedies should be joined to the merits, since it is closely linked to the substance of the applicant's complaint about the State's alleged failure to ensure that his paternity was promptly recognised in law.

25. The Court further considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Moreover, it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

26. The applicant argued that he had no possibility of having his paternity of K. established and that in that respect he was left in a legal void. The fact that a competent social welfare centre could institute court proceedings to establish his paternity was irrelevant since there was no obligation or time-limit for a centre to do so. Nor was his guardian obliged to take any action in that regard. He had repeatedly asked the Opatija Social Welfare Centre to take legal action in order to have his paternity of K. registered, but to no avail. A situation where his paternity had not been registered for more than two and a half years could not be in the interests of the child either.

27. The Government argued that the applicant had been divested of his legal capacity because it had been established that he could not care for his own interests and, therefore, placing the applicant under guardianship was in his best interests. A person divested of his legal capacity could not undertake any legal act and it was in the best interests of the applicant and K. that he could not give any legally binding statement concerning his paternity of K. His paternity could only be established in court proceedings by DNA analysis. Proceedings for establishing the applicant's paternity before a regular court had been instituted and were still pending. Such proceedings could be instituted up until the child's eighteenth birthday.

28. The Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; *Botta v. Italy*, 24 February 1998, § 33, *Reports of Judgments and Decisions* 1998-I; and *Mikulić*, cited above, § 57).

29. However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see *Mikulić*, cited above, § 58). Nevertheless, Article 8 does not give the Contracting States an unlimited power of appreciation. The Court is responsible for ensuring the observance of those States' engagements and is empowered to give the final ruling on whether a "restriction" is reconcilable with the guarantees of Article 8 of the Convention. The domestic margin of appreciation thus goes hand in hand with European supervision.

30. As regards the issues pertinent to the present case, the Court accepts that restrictions on the rights of persons divested of legal capacity, even when they occur in the sphere of their private and family life, are not in principle in contradiction with the requirements of Article 8 of the Convention.

31. However, these restrictions should, in principle, be subject to the relevant procedural safeguards. At this juncture the Court reiterates the fundamentally subsidiary role of the Convention. Under the system of protection established by the Convention it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of restriction of the personal rights and of the remedial action to be taken (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24, and *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98). In line with the same principle, it is also primarily for the national authorities to ensure by whatever means they deem appropriate compliance with their obligations under the Convention. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention.

32. Thus, the Court's task is not to substitute itself for the competent Croatian authorities in determining the most appropriate methods for establishing paternity through judicial proceedings in Croatia, but rather to

review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. The Court will therefore examine whether Croatia, in its handling of the issue of the applicant's paternity of K., is in breach of its positive obligation under Article 8 of the Convention (see, for instance, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A, and, *mutatis mutandis*, *Handyside v. the United Kingdom*, cited above, § 49).

33. The Court notes in the present case that under the relevant domestic law the applicant has no possibility of giving any statement as to his paternity of K. As a person divested of his legal capacity he is not allowed to institute any proceedings to have his paternity established. In that respect he is entirely dependent on the actions of the competent social welfare centre.

34. In the Court's opinion, persons in the applicant's situation have a vital interest, protected by the Convention, in establishing the biological truth about an important aspect of their private and family life and having it recognised in law.

35. As to the position of the applicant in this regard, the Court notes that there was no possibility for the applicant to recognise his paternity before the national authorities or to institute any proceedings in order to prove his paternity. While this position might be seen as justified in respect of persons who have been divested of their legal capacity in order to protect them from giving legally binding statements which run contrary to their interests or even contrary to the facts, the Court is mindful of the following.

36. In the present case both the applicant and the child's mother agree that the applicant is K.'s biological father.

37. Soon after K.'s birth on 30 June 2007 the applicant gave a statement that he was the father of K. However, that statement could not have legal effect because the applicant had been divested of his legal capacity. The relevant authorities, however, did not invite the applicant's father, who appears to have been his legal guardian at that time, to give his consent to the applicant's recognition of his paternity. If J.L. had already been appointed as the applicant's guardian at that time, it was her duty, as an employee of the Opatija Social Welfare Centre, to take care of the applicant's interests. There is no doubt that the recognition and registration of his paternity of K. was of vital interest for the applicant. However, the competent social welfare centre at the time when K. was born and the applicant was making attempts to have his paternity registered took no steps to assist the applicant in his attempt to have his paternity recognised in law.

38. According to the Government, the only possible means for the applicant to have his paternity established is by the institution of civil proceedings to that end by the competent social welfare centre. In the proceedings instituted by the social welfare centre claiming that the applicant is the biological father of K, the applicant has the status only of

defendant. The Court notes, however, that the applicant has never denied his paternity and that it is he who actually wants his paternity to be established.

39. Furthermore, while proceedings for establishing paternity may be instituted up until the child's eighteenth birthday, there is no legal obligation under the national law on the relevant national authorities responsible for the applicant to institute such proceedings at all and consequently there are no time-limits for the competent authorities to answer the applicant's claim that he is the biological father of K. Thus, the social welfare centres enjoy unlimited discretion as to when to take any action in order to ensure that the paternity of persons divested of legal capacity is properly established and registered, or whether to take any action at all.

40. As a consequence of the above-described legal position, the applicant was left in a legal void until the proceedings for establishing his paternity were instituted. Furthermore, he had no means to compel the Opatija Social Welfare Centre to institute such proceedings. Thus, more than two and a half years passed between the time when the applicant gave his statement that he was the biological father of K. and the institution of the court proceedings in the matter by the Opatija Social Welfare Centre.

41. Contrary to the Government's arguments, the Court cannot accept that this situation is in the best interests of either the applicant or the child. In this connection, the Court reiterates that a child born out of wedlock also has a vital interest in receiving the information necessary to uncover the truth about an important aspect of their personal identity, that is, the identity of their biological parents (see *Mikulić*, cited above, § 64).

42. Against the above background, the Court considers that a fair balance has not been struck between the public interest in protecting persons divested of their legal capacity from giving statements to the detriment of themselves or others, and the interest of the applicant in having his paternity of K. legally recognised.

43. Having regard to the Government's objection that was joined to the merits of the complaint, the Court notes that the relevant national authorities instituted the court proceedings for the establishment of the applicant's paternity only more than two and half years after the applicant had requested them to do so, thus allowing a situation to arise in which the claim by the applicant and the child's mother that the applicant was the biological father of K. was ignored for no apparent reason.

44. In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for his private and family life. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention and dismisses the Government's objections as to the exhaustion of domestic remedies.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. The applicant further complained under Articles 2 and 14 of the Convention that he had no means of subsistence and that he had been discriminated against.

46. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3(a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 1,200 euros (EUR) per month in respect of maintenance for himself and his child and EUR 300,000 in respect of non-pecuniary damage. He also sought the immediate registration of his paternity of K. in the birth register.

49. The Government argued that the amounts claimed for maintenance were not related to the present application and that the claim for non-pecuniary damage was excessive and unfounded.

50. The Court notes that in the present case a violation of Article 8 has been found solely on account of the applicant's position as regards the recognition of his paternity of K. in law. Therefore, there is no causal link between the violation found and the claim for monthly maintenance.

51. On the other hand, the Court considers that the applicant must have suffered some non-pecuniary damage owing to the fact that his paternity has not been recognised. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,800 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

52. The applicant also claimed EUR 100 for postal expenses incurred before the Court.

53. The Government made no comment.

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 that the sum claimed should be awarded in full, plus any tax that may be chargeable on that amount.

C. Default interest

55. 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. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies and rejects it;
2. *Declares* the complaints concerning the applicant's right to respect for his private and family life admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, which are to be converted into Croatian kunas at the rate applicable on the date of settlement:
 - (i) EUR 1,800 (thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 100 (one hundred 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;

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

Done in English, and notified in writing on 21 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President