FIRST SECTION

CASE OF KOPF AND LIBERDA v. AUSTRIA

*(Application no. **1598/06**)*

JUDGMENT

STRASBOURG

17 January 2012

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 Kopf and Liberda v. Austria,

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

Nina Vajić, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. **1598**/**06**) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Austrian nationals, Ms Anna Kopf and Mr Viktor Liberda ("the applicants"), on 22 December 2005.

2. The applicants were represented by Mr P. Ozlberger, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicants alleged, in particular, that the belated decision of the Austrian courts on their request for the right to visit their former foster child breached their right to respect for their family life.

4. On 17 December 2008 the President of the First Section decided to give notice of the application 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 applicants were born in 1953 and 1943 respectively and live in Vienna.

6. In 1997 the biological mother of F., then two years old and born out of wedlock, set her apartment on fire after having consumed drugs. The mother and her child were rescued and, on 19 December 1997, the Vienna Youth Welfare Office (*Amt für Jugend und Familie*) handed F. over to the applicants as foster parents.

7. The applicants subsequently tried to obtain custody of F. and wanted to adopt him. F.'s mother recovered and was at first allowed access to visit her son. She then tried to obtain custody of F., which led to arguments between her and the applicants. Since these disputes were to the detriment of F., he was given to a "crisis foster family" (*Krisenpflegefamilie*) on 25 October 2001 for approximately eight weeks. After that period F. was handed over to his biological mother, who obtained provisional custody of him following a decision of the Vienna Juvenile Court (*Jugendgerichtshof*) on 19 December 2001. This decision entered into

force on 18 December 2002, when the Supreme Court rejected an appeal by the applicants (*Revisionsrekurs*).

8. In the meantime on 20 December 2001 the applicants requested the right to visit F. Thereupon the Juvenile Court asked the Vienna Youth Welfare Office for their observations on the applicants' request.

9. The Vienna Youth Welfare Office submitted observations on 31 December 2001, stating that because of the long-lasting relationship between F. and the applicants it would be inappropriate not to allow access to the foster parents.

10. On 31 January 2002 the Juvenile Court heard the biological mother, who opposed the granting of visiting rights to the applicants because F. was in the process of getting used to her again.

11. On 8 February 2002 the applicants requested the acceleration of the proceedings (*Fristsetzungantrag*) under Section 91 of the Austrian Court Act.

12. On 28 March 2002 the Vienna Juvenile Court Assistance Office (*Wiener Jugendgerichtshilfe*) submitted their observations to the Juvenile Court. In the following months both parties repeatedly filed written observations on that report. The applicants also requested that an expert for child psychology be appointed.

13. On 2 December 2002 the applicants complained about the length of the proceedings and requested the opinion of an expert on child psychology. The biological mother objected to this request.

14. On 4 December 2002 the Juvenile Court asked the applicants whether they were maintaining their request for the appointment of an expert, given that meanwhile a report by the doctor with whom F. had had therapy had been obtained. On 10 December 2002 the applicants informed the court that they insisted on the appointment of an expert and proposed further questions to be put to the expert appointed.

15. On 17 February 2003 the Juvenile Court designated Dr. Sp. as the expert. The biological mother filed objections against Dr. Sp.

16. In July 2003 the court file was transferred to the Vienna Regional Court for Civil Matters, which was dealing with an appeal lodged by the applicants in the custody proceedings concerning F. lodged on 23 May 2003. On an unspecified date the Vienna Regional Court transferred the file to the Wiener Neustadt Regional Court as it considered that that court was competent to decide on the appeal. The Wiener Neustadt Regional Court did so on 19 and 29 January 2004; the file was then forwarded to the Mödling District Court, which had meanwhile become competent to deal with custody and visiting-rights proceedings.

17. On 16 December 2003 Dr Sp asked the District Court for leave to be discharged from the duty to prepare an expert report. He submitted that a report was not feasible because he had not been given the opportunity to examine F. thoroughly by F.'s mother.

18. The Mödling District Court held a hearing with the parties on 1 April 2004 in order to discuss how to proceed further with the case. The judge informed the applicants and the biological mother that he would ask the Youth Office of the Mödling District Administrative Authority (*Jugendamt der Bezirkshauptmannschaft*) for a final report on the issue of visiting rights.

19. P., who was the officer in charge at the Youth Office of the Mödling District Administrative Authority, submitted the report on 29 July 2004. She recommended refusing visiting rights to the applicants, because the reestablishment of contact with F. after it had been interrupted for more than two years might harm the psychological stability of the child. On 17 August and 16 September 2004 the parties submitted their comments on that report.

20. On 3 August 2004 Dr. Z. of the Niederösterreich Child and Youth Psychological Consulting Office (*Kinder- und jugendpsychologischer Beratungsdienst*) also suggested that the applicants should not be granted access to F., explaining that F. was aware of the

difficulties between his mother and the applicants and therefore, as a protective measure, had said that he did not want to see the applicants. Dr. Z. further stated that not seeing the applicants was not to the detriment of the child. The applicants submitted observations regarding these recommendations.

21. On 9 November 2004 the Mödling District Court rejected the applicants' request to visit F. and found that failure to provide for personal contact (*Unterbleiben des persönlichen Verkehrs*) between the applicants and F. did not endanger his well-being.

22. It found that under Article 148 (4) of the Civil Code a court, upon the request of a parent, the child, a youth welfare body or of its own motion had to take the necessary measures if failure to provide for personal contact between the child and the third person would endanger his or her well-being. Third persons, in contrast to parents or grandparents, had no legal right to be granted contact rights and consequently no legal standing in related court proceedings. They could merely suggest to the court (*anregen*) that it examine the matter of its own motion, and a court could only grant contact rights if failure to do so would endanger the child's well-being.

23. Taking the applicants' request as such a suggestion, visiting rights could not be granted. From all the material in the possession of the District Court it was evident that F. was vehemently opposed to meeting the applicants, while at the same time he had developed a close and positive relationship with his mother. The District Court acknowledged that the applicants had a genuine concern for F.'s well-being; however, in the present situation the interests of the applicants did not coincide with the child's best interests. Given that F. had not been in contact with his foster parents for more than three years, the District Court would follow the conclusions in the reports of P., from the Youth Office of the Mödling District Administrative Authority, and Dr. Z., from the Niederösterreich Child and Youth Psychological Consulting Office. It was quite possible that immediately after F. had been placed with the "crisis foster family" in October 2001 the granting of visiting rights to the applicants might have been useful. However, this was no longer the case and it now served the best interests of the child, who was living with his biological mother, not to put him back in a situation of divided loyalties (*Loyalitätskonflikt*) between her and his "former family", the applicants.

24. On 6 December 2004 the applicants appealed against the District Court's decision. They argued that the refusal of visiting rights breached their rights under Article 8 of the Convention.

25. The Regional Court dismissed the applicants' appeal on 17 February 2005. It found that foster parents could file requests in proceedings concerning the foster child and also had the right to appeal against decisions. The status of a foster parent was, however, a matter which depended rather on whether the person actually cared for the child and whether a lasting emotional link similar to the one between parents and children had developed. Even though the applicants had lived with F. for approximately forty-six months in the same household with the intent to develop such emotional ties, it was actually more than forty months since they had had care of him and they could now no longer be considered his foster parents. Nevertheless, their appeal had to be considered on its merits, and, for the reasons given by the District Court, granting visiting rights to them was not in the best interests of F. The appeal was therefore unfounded.

26. On 25 May 2005 the Supreme Court dismissed an extraordinary appeal by the applicant (*außerordentlicher Revisionsrekurs*). That decision was served on the applicants' counsel on 7 July 2005.

II. RELEVANT DOMESTIC LAW

27. Article 148 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) reads as follows:

"(1) If one parent does not live in a common household with a minor child, then the child and this parent have the right to be in personal contact with each other. The exercise of this right shall be regulated by mutual consent between the child and the parents. Whenever such an agreement cannot be reached, the court shall regulate the exercise of this right in a manner appropriate for the welfare of the child, upon an application by the child or a parent, giving due consideration to the needs and wishes of the child.

(2) If necessary, the court shall restrict or not permit the exercise of the right to personal contact, especially if the authorised parent does not comply with his/her obligation under Section 145b.

(3) Paragraphs (1) and (2) shall apply by analogy to the relationship between grandchildren and their grandparents. However, the exercise of the right of grandparents shall also be restricted or not permitted to such an extent that this would otherwise disturb the family life of the parents (a parent) or their relationship to the child.

(4) Where the absence of personal contact between the minor child and a third party that is ready to engage in such contact may jeopardise the child's welfare, the court shall issue the disposition necessary to regulate the personal contact upon an application by the child, a parent, the youth welfare agency, or of its own motion."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicants complained under Article 8 of the Convention that their right to family life had been infringed as a result of the Austrian courts' decisions to refuse them access to their former foster child. They also submitted that the conduct of the Austrian courts amounted to a breach of the "reasonable time" requirement under Article 6 of the Convention. The Government contested that argument.

29. The Court considers that the complaint should be examined under Article 8 of the Convention, which 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."

A. Admissibility

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

B. Merits

1. The parties' submissions

31. The applicants submitted that the District Court had not rejected the petition for visiting rights on the ground that the visiting rights would endanger the child's welfare. The request had instead been rejected on the ground that not granting visiting rights to the foster parents would not endanger the welfare of the child. Such a criterion was not in accordance with the requirements of Article 8 of the Convention. The Regional Court and the Supreme

Court had not examined what would really be in the child's interests but had concentrated on the issue of the applicants' standing in the proceedings. They had found that because of the considerable period of time which had elapsed since the proceedings had started the applicants could no longer be considered F.'s foster parents. Such an approach was unacceptable. It was the responsibility of the Austrian courts that the proceedings had been conducted at such a slow pace and that they had consisted of a continuing exchange of submissions between the parties, the District Courts and various youth welfare bodies, whereas the authorities should have acted particularly speedily given what was at stake for the applicants and the importance the element of time has in such proceedings. Once the District Court had made its decision, the visiting rights had been refused with the argument that it had been a very long time since the child had been with the applicants. Thus, the delay caused by the Austrian courts had been used as an argument for refusing the visiting rights. The applicants did acknowledge the importance of the child's welfare but considered that regard should also be had to the interests of the foster parents.

32. The Government accepted that the judgments of the Austrian courts on the applicants request for visiting rights constituted an interference with their right to respect for their family life. That interference was in accordance with the law, that is, it was based on Article 148 (4) of the Civil Code, and it also served a legitimate aim, namely the protection of the rights and freedoms of others, that is, the child concerned and his biological mother. The interference was also necessary in a democratic society. The Austrian courts had carefully balanced the interest of the applicants in further personal contact with their former foster child against the interest of the biological mother of the child in re-constituting and protecting an undisturbed and fruitful mother-child relationship, as well as taking into account the welfare of the child himself. Austrian law attributed a particularly high priority to the welfare of the child in decisions on family-law matters and the interests of adults had often to give way to this priority.

33. The Government also argued that the proceedings on the issue of visiting rights had been conducted expeditiously; the matter had been complex and the Austrian courts had done their best to establish the essential basis for their decisions, whereas the applicants and the other party to the proceedings had filed numerous applications and submissions to which the court had had to react, which had inevitably slowed down the proceedings.

2. The Court's assessment

34. The Court must first examine whether there existed a relationship amounting to private or family life between the applicants and F. within the meaning of Article 8 of the Convention.

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

36. In the case of *Moretti and Benedetti v. Italy* the Court considered the relationship between the applicants as foster parents and the child entrusted to them, who had lived with them from the age of one month for a period of nineteen months, as falling within the notion of family life within the meaning of Article 8 § 1 because there had been a close inter-

personal bond between the applicants and the child and the applicants had behaved in every respect like the child's parents (*Moretti and Benedetti v. Italy*, no. 16318/07, §§ 49-50, 27 April 2010).

37. In the present case F. came into the applicants' household at the age of two and lived with them for a period of approximately forty-six months. The applicants tried to obtain custody of F. and to adopt him. In their different decisions the Austrian Courts acknowledged that the applicants had a genuine concern for F.'s well-being and that an emotional link between F. and the applicants similar to the one between parents and children had started to develop during that period. The Court therefore considers, and this is not in dispute between the parties, that such a relationship falls within the notion of family life within the meaning of Article 8 § 1. Article 8 therefore applies to the present case and the Court must determine whether there has been a failure to respect the applicants' family life.

38. As regards compliance with Article 8, the Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. 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 particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation *Odièvre v. France* [GC], no. 42326/98, § 40, ECHR 2003-III).

39. The Court further notes that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V (extracts), and *W. v. the United Kingdom*, 8 July 1987, §§ 62 and 64, Series A no. 121). The Court has repeatedly found that in cases concerning a person's relationship with his or her child there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. This duty is decisive in assessing whether a case concerning access to children had been heard within a reasonable time as required by Article 6 § 1 of the Convention and also forms part of the procedural requirements implicit in Article 8 (see *Kaplan v. Austria*, no. 45983/99, § 32, 18 January 2007; *Hoppe v. Germany*, no. 28422/95, § 54, 5 December 2002; and *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII). The principle of exceptional diligence applies *mutatis mutandis* to the present case.

40. The Court considers that in the present case the essential question is whether the Austrian courts in their various decisions struck a fair balance between the competing interests of the applicants, the child and the biological mother and, in doing so, complied with the inherent procedural requirements of Article 8 of the Convention. For this reason the Court will view the case as one involving an allegation of failure on the part of the respondent State to comply with its positive obligation under Article 8 of the Convention.

41. In this connection, the Court recalls that its role is not to substitute itself for the competent domestic authorities, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A).

42. The applicants argued that the Austrian courts had not properly examined their request for the granting of visiting rights because, on the basis of Article 148 (4) of the Civil Code, the courts had concentrated on the issue of whether the applicants had standing in the proceedings or a right to appeal and had dismissed their request merely on the ground that the

refusal of visiting rights would not endanger the well-being of F. That was not the kind of weighing of interests required by Article 8 of the Convention.

43. The Court observes, however, that the District Court did consider the case on its merits and, as is apparent from its decision, examined whether contact between the applicants and F. would be in the child's best interests. It concluded, however, that it was in the best interests of the child, who was living with his biological mother, not to bring him back into a situation of divided loyalties (*Loyalitätskonflikt*) between her and his "former family", namely the applicants, and the District Court therefore refused the request. Moreover, the Regional Court examined the applicants' appeal on the merits but concluded that the District Court had correctly resolved the matter before it.

44. The Court, whose task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, therefore considers that the domestic courts, at the time they took their respective decisions, struck a fair balance between the competing interests. It is not persuaded by the applicants' argument that the wording of Article 148 (4) of the Civil Code, which provides for visiting rights only if "*the absence of personal contact between the minor child and a third party ... would jeopardize the child's welfare*", prevented the domestic courts from doing so. In this context the Court reiterates that, in the balancing process, particular importance should be attached to the best interests of the child, which may override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII, and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 134, 6 July 2010).

45. The applicants also submitted that the Austrian courts had failed to decide expeditiously on their request, and that had had a direct impact on the decision taken because when the District Court eventually decided on the request it concluded that because of the time that had elapsed since its introduction the granting of visiting rights was no longer in F.'s best interests.

46. The Court observes that the proceedings on the applicants' request started on 20 December 2001, when they asked the District Court to grant them visiting rights, and ended when the final decision of the Supreme Court was served on them on 7 July 2005, thus lasting for three years, six months and thirteen days. Before the District Court, which took its decision on 9 November 2004, the proceedings lasted for two years, ten months and eleven days. During this period the applicants had no contact with F., who had meanwhile returned to his biological mother. It is true that the case was of some complexity and the applications filed by the applicants during the proceedings may have contributed to their length, but this is not sufficient to explain the total length. On the other hand, before the District Court, notwithstanding the applicants' repeated requests for the acceleration of the proceedings, the proceedings progressed particularly slowly and, on two occasions, namely between March 2002 and December 2002 (see paragraphs 12-13 above) and between February 2003 and April 2004 (see paragraphs 15-18 above), they came to a standstill, for which no satisfactory explanation has been furnished by the Government.

47. This passage of time also had a direct and adverse impact on the applicants' position. At the beginning of the proceedings the Vienna Youth Welfare Office recommended that because of the long-lasting relationship between F. and the applicants a right to access should be granted, and the District Court, in its decision of 9 November 2004, indicated that if the decision had been taken earlier there would have been good reasons to grant the request. Eventually, the District Court, basing itself on reports by the Youth Office of the Mödling District Administrative Authority and the Niederösterreich Child and Youth Psychological Consulting Office drawn up in 2004, dismissed the applicants' request. From its decision it is apparent that the passing of time was crucial for the District Court. It noted that F. had not had contact with his former foster parents for more than three years, that meanwhile he had re-

established a positive relationship with his biological mother and that it was not in his interests to put him in a situation of divided loyalties between her and his "former family", namely the applicants.

48. In these circumstances, the Court cannot find that the domestic courts complied with their duty under Article 8 to deal diligently with the applicants' request for visiting rights. The Court, therefore, finds that the procedural requirements implicit in this Article were not complied with.

49. Accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicants claimed 100,000 euros (EUR) in respect of non-pecuniary damage. They argued that the conduct of the Austrian courts had caused them profound and lasting psychological harm as they still had no contact with their foster-child and had no information on his well-being or development.

52. The Government considered the claim excessive.

53. The Court considers that the applicants must have suffered feelings of frustration, uncertainty and anxiety which cannot be compensated solely by the finding of a violation. Making an assessment on an equitable basis, as required by Article 41, the Court, therefore, awards the applicants 5,000 EUR in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants on this amount.

B. Costs and expenses

54. The applicants also claimed EUR 4,119.79 for the costs and expenses incurred before the domestic courts and EUR 6,739.30 for those incurred before the Court.

55. The Government argued that the applicants had failed to show that the costs claimed for the domestic proceedings had been actually and necessary incurred in order to ward off the violation of the Convention found. As regards the costs incurred for the proceedings before the Court, the amount claimed was excessive. Taking the correct basis for the calculation of fees under the Austrian law in respect of lawyer's fees, only an amount of EUR 3,243.92 was justified.

56. 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 5,000, covering costs under all heads, plus any tax that may be chargeable to the applicants on this amount.

C. Default interest

57. 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention as regards the duty of the domestic courts to deal diligently with the applicants' request for visiting rights;

3. *Holds*

(a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicants, 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;

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

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Nina Vajić
Registrar President

KOPF AND LIBERDA v. AUSTRIA JUDGMENT