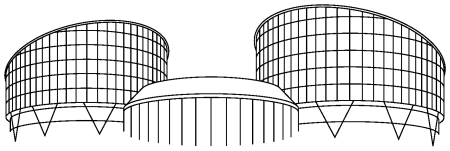

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF LEITNER v. AUSTRIA

(Application no. 55740/10)

JUDGMENT

STRASBOURG

8 June 2017

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Leitner v. Austria,

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

Erik Møse, *President,*
Yonko Grozev,
Gabriele Kucsko-Stadlmayer, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 16 May 2017,

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

PROCEDURE

1. The case originated in an application (no. 55740/10) 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 an Austrian national, Mr Hermann Leitner ("the applicant"), on 21 September 2010.

2. The applicant was represented by Mr F. Rifaat, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicant alleged, in particular, under Article 8 read in conjunction with Article 14 of the Convention that he was discriminated against, compared to the mother, regarding the granting of custody for their children.

4. On 17 April 2014 the complaint under Article 8 read in conjunction with Article 14 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lives in Blumau.

6. The applicant and his former partner, S.O., have two children, born out of wedlock in 2002 and 2004 respectively. S.O. always had sole custody of the children as the parents never agreed to have joint custody. The applicant and S.O. never cohabited on a permanent basis. The children lived

with their mother during the week. At weekends, the whole family usually stayed at the applicant's house.

7. In April 2008 S.O. and the applicant separated and the children remained with their mother.

8. On 27 June 2008 the applicant lodged an application with the Vienna Inner City District Court (*Bezirksgericht Innere Stadt*; hereinafter, "the District Court") to transfer sole custody to him, or to grant him joint custody together with S.O. Furthermore he applied for an interim measure concerning his visiting rights, as he had not seen his children since 20 April 2008.

9. On 8 October 2008 the parents agreed that the applicant would be able to see his children every second Monday from 2.30 pm or 3 pm until 6 pm and every second Saturday from 10 am until 6 pm.

10. On the same day the applicant applied for an extension of his visiting rights to the whole weekend.

11. After five visits from the applicant in October and November 2008, S.O. unilaterally stopped further visits, claiming that these had a negative influence on the children. Between November 2008 and Easter 2009, on his own initiative, the applicant secretly went to see his children at their school and kindergarten a few times.

12. The Vienna Juvenile Court Assistance Office (*Jugendgerichtshilfe)* submitted its statement on 10 March 2009 and recommended maintaining sole custody for the mother and visiting rights for the applicant according to the agreement the parents had concluded on 8 October 2008.

13. On 6 April 2009 the District Court decided to grant the applicant visiting rights on every second Saturday from 8 am until 7 pm. It dismissed the applicant's application for sole custody.

14. In its reasoning the court held that the children were well cared for by their mother. According to Article 176 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) as in force at the relevant time, a transfer of custody was only possible if the children's best interest was at risk. In the present case the court found no such risk and the applicant actually had not claimed such a risk. The court further held that the visiting rights were decided in accordance with the parents' mutual agreement.

15. The applicant appealed on 14 April 2009 and argued in essence that he was discriminated against, compared to the mother. Also, he complained that the court had not decided on the question of whether the parents could be awarded joint custody.

16. According to the applicant's submissions, his visiting rights were resumed on 24 April 2009 in the amount determined by the District Court (see paragraph 13 above).

17. On 28 July 2009 the Vienna Regional Court (*Landesgericht*) dismissed the applicant's appeal as unfounded. It confirmed the reasoning of the District Court and held that there was no indication of a risk to the

children's best interest if the mother maintained sole custody. It further held that there was no provision in law ordering a preference for granting one of the parents sole custody. The court also found that the parents had not mutually agreed on joint custody, therefore no further issues arose in this connection.

18. The applicant lodged an extraordinary appeal with the Supreme Court (*Oberster Gerichtshof*) on 10 November 2009, again claiming that he was discriminated against compared to the mother and that the decision of the lower instances violated his rights under Article 8 of the Convention.

19. On 1 September 2010 the Supreme Court rejected the applicant's extraordinary appeal for lack of an important issue of law.

20. After the amendment of the Civil Code (see paragraph 22 below), the applicant on 5 February 2013 again applied for joint custody, or sole custody in the alternative. Shortly after, S.O. moved with the children to the south of Austria, about 400 kilometers from Vienna. The applicant's requests for sole or shared custody were finally dismissed by the Supreme Court on 7 May 2014.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant provisions of the Civil Code in the version in force at the material time have been summarized in the case of *Sporer v. Austria* (no. 35637/03, §§ 37-38, 3 February 2011).

22. On 28 June 2012 the Constitutional Court (case no. G114/11) repealed the sentence "The mother shall have sole custody of an illegitimate child" of Article 166 Civil Code as unconstitutional. As a consequence, on 1 February 2013 an amendment of the relevant provisions of the Austrian Civil Code came into force. According to the amended Article 177 of the Civil Code, the mother still has sole custody of her child born out of wedlock. However, parents can be granted joint custody of a child born out of wedlock if it is in the best interest of the child and one parent has applied for transfer of custody or participation in custody. It is no longer necessary for the mother to agree on joint custody.

THE LAW

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

23. The applicant complained under Article 8 alone and read in conjunction with Article 14 of the Convention that he was discriminated against compared to the mother regarding the grant of custody of their

children and that there had been a violation of his right to respect for his private and family life.

Article 8, in so far as relevant, provides:

> "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."

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."

A. The parties' submissions

24. The applicant submitted that, as a father, he did not have the opportunity under Austrian law, as in force at the relevant time, to participate in the decision-making concerning his children's education or upbringing. He complained that mothers were favoured by the law when it came to custody of illegitimate children.

25. The applicant pointed out that as a consequence of this discrimination against him as a father, he did not see his children between Easter 2008 and 8 October 2008, and again between 13 November 2008 and 25 April 2009, as S.O. prevented him from seeing them during these periods.

26. The Government submitted that they did not dispute that the relationship between the applicant and his children fell within the scope of Article 8 of the Convention, even though he has never lived with them in a common household. The Government therefore considered Article 14 of the Convention to be applicable.

27. The Government argued that when it came to the applicant's request for sole custody, the applicable legal provisions as in force at the relevant time did not differentiate in a discriminatory manner between parents because of their gender. It was as difficult for mothers without custody rights to obtain sole custody as it was for fathers. Irrespective of the gender of the parent applying for a transfer of custody, custody could only be withdrawn from the other parent.

28. The Government conceded, however, that the legal situation in force until 31 January 2013 constituted a disadvantage for the applicant with regard to his application for joint custody. Since the mother refused to agree on joint custody, the domestic courts could not examine whether joint custody might have been in the best interest of the children. After the

amended Article 177 of the Civil Code entered into force, the applicant could apply for joint custody even without the mother's consent.

B. The Court's assessment

29. In view of the alleged discrimination against the applicant in his capacity as the father of a child born out of wedlock, the Court considers it appropriate to examine the case first under Article 14 taken in conjunction with Article 8 of the Convention (see *Zaunegger v. Germany*, no. 22028/04, § 34, 3 December 2009, and *Sporer*, cited above, § 66).

1. Applicability

30. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, among other authorities, *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008).

31. The Court must therefore determine whether the facts of the case fall within the ambit of Article 8 of the Convention.

32. In the instant case, the applicant and his children never permanently cohabited, but regularly spent the weekends together. The Court considers that in such circumstances the applicant's relationship with his children constituted "family life", a fact which is furthermore not in dispute between the parties. The Court therefore finds that the facts of the instant case fall within the ambit of Article 8 of the Convention and that accordingly, Article 14 is applicable.

33. Lastly, 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.

2. Compliance

(a) General principles

34. The relevant general principles relating to Article 14 of the Convention have been summarized in *Zaunegger* (cited above, §§ 49-51) and *Sporer* (cited above, §§ 67-75).

(b) Application to the present case

35. The applicant, as the father of two children born out of wedlock, complained of different treatment in comparison with the mother in that,

firstly, she had been granted sole custody by virtue of the law and, secondly, that he had had no opportunity to obtain joint custody without the mother's consent.

36. Regarding the first part of the complaint, the Court observes that it has already found in the comparable cases of *Zaunegger* (cited above, §§ 54-55) and *Sporer* (cited above, § 85), that in view of the different life situations into which children whose parents are not married are born, and in the absence of an agreement on joint custody, it was justified to attribute parental authority over the child initially to the mother in order to ensure that there was a person at birth who would act for the child in a legally binding way. The Court sees no reason to come to a different conclusion in the present case.

37. When it comes to the applicant's complaint regarding the refusal of joint custody, the Court reiterates that in the two above-quoted cases *Zaunegger* and *Sporer*, which both raised very similar issues to the instant case, it has found violations of Article 14 taken in conjunction with Article 8 of the Convention. In *Sporer*, the Court found that there was a difference in treatment under Austrian law as regards the attribution of custody to the father of a child born out of wedlock, in comparison with the mother (*Sporer*, cited above, § 83).

38. The Court observed that Austrian law provided for a full judicial review of the attribution of parental authority and resolution of conflicts between separated parents in cases in which the father once held parental authority, either because the parents were married or, if they were unmarried, had concluded an agreement to exercise joint custody. In such cases the parents retained joint custody unless the court, upon request, awarded sole custody to one parent in accordance with the child's best interests. In contrast, parental authority over a child born out of wedlock was attributed to the mother, unless both parents consented to make a request for joint custody. In the absence of the mother's consent, Austrian law at the relevant time did not provide for a judicial examination as to whether the attribution of joint custody would serve the best interest of the child, nor did it allow for an examination, in the event that joint custody was against the child's interests, of whether the child's interests were better served by awarding sole custody to the mother or to the father. Thus, a father's only possibility to obtain custody of the child would be a request for sole custody, but custody could only be awarded to him if the mother endangered the child's well-being (*Sporer*, cited above, §§ 77-78). The Court concluded in that case that there were no sufficient reasons to justify a different treatment for fathers of children born out of wedlock who had never obtained joint custody, and found a violation of Article 14 taken in conjunction with Article 8 of the Convention (*Sporer*, cited above, §§ 88-89).

39. The Court observes that the applicant in the instant case was in a comparable situation to the applicant in *Sporer*, and that the very same legal framework was applicable to his requests for custody of his children. The applicant's children were born out of wedlock, so he had no possibility to obtain shared custody at all, as this was not foreseen by the law, and he also had no possibility to obtain sole custody, as the national courts considered that the mother of his children did not endanger their well-being.

40. The Court therefore cannot but conclude that in the instant case there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

41. Having regard to this conclusion, the Court does not consider it necessary to determine whether there has also been a breach of Article 8 of the Convention taken alone (*Sporer*, cited above, § 91).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. In his observations of 15 October 2014, the applicant submitted new complaints under Articles 6 and 13 of the Convention, which he had not initially raised in his application to the Court. The Court observes that these complaints have been submitted outside the six-month time-limit laid down in Article 35 § 1 of the Convention and must therefore be declared inadmissible.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 17,500 euros (EUR) in respect of non-pecuniary damage. In support of his claim, the applicant submitted a psychologist's report.

45. The Government contested this claim and pointed out that the finding of a violation would constitute sufficient just satisfaction for any non-pecuniary damage suffered (see *Zaunegger*, cited above, § 69, and *Sporer*, cited above, § 96).

46. The Court observes that in contrast to the cases of *Zaunegger* and *Sporer* quoted by the Government, the applicant was separated from his children between Easter 2008 and 25 April 2009 (compare *Elsholz v. Germany* [GC], no. 25735/94, § 70-71, ECHR 2000-VIII), with the

exception of a few visits in October and November 2008. In the Court's view, it cannot be ruled out that this separation would not have occurred, or would have occurred to a lesser extent, if the applicant had had the possibility under the applicable law to request shared custody.

47. The Court thus concludes that the applicant suffered some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Making an assessment on an equitable basis, the Court awards the applicant EUR 5,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

48. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court.

49. The Government submitted that the applicant has not specified the costs of his legal representation and therefore contested this claim.

50. 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, in particular the fact that the applicant has failed to submit proof of the costs allegedly incurred, the Court rejects the claim for costs and expenses in the proceedings before it.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 8 taken alone and in conjunction with Article 14 of the Convention admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 8 of the Convention taken alone;

4. *Holds* 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 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and 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 8 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President