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

FIRST SECTION

CASE OF MOSER v. AUSTRIA

(Application no. 12643/02)

JUDGMENT

STRASBOURG

21 September 2006

FINAL

21/12/2006

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 Moser v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 31 August 2006,

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

PROCEDURE

1. The case originated in an application (no. 12643/02) 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 Zlatica and Luca Moser, citizens of the Republic of Serbia ("the applicants"), on 13 March 2002.

2. The applicants, who had been granted legal aid, were represented by Mr H. Pochieser, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador Ferdinand Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs. The Government of Serbia did not make use of their right to intervene (Article 36 § 1 of the Convention).

3. The applicants alleged, in particular, that the transfer of custody over the second applicant to the Youth Welfare Office violated their right to respect for their family life and discriminated against them, that the lack of involvement of the first applicant in the custody proceedings violated their right to respect for their family life and rendered the proceedings unfair and that these proceedings were conducted without any public hearing and any public pronouncement of the decisions.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 19 May 2005 the Court declared the application partly admissible.

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, born in 1973, has been living in Austria since 1991 and had a residence and work permit until November 1997. On 27 August 1999 the Vienna Federal Police Authority (*Bundespolizeidirektion*) issued a five-year residence prohibition against her for illegal employment. The residence prohibition was lifted in 2004 (see below, C.).

8. On 20 December 1999 she married an Austrian citizen, Mr M.

9. On 8 June 2000 the first applicant gave birth to the second applicant in a hospital in Vienna.

A. Proceedings concerning the transfer of custody of the second applicant to the Youth Welfare Office

10. On 9 June 2000 the Vienna Youth Welfare Office (*Amt für Jugend und Familie*) ordered that the second applicant should not accompany the first applicant upon her departure from hospital since her unclear personal and financial situation and lack of a residence permit would endanger the child's welfare.

11. On 16 June 2000 the Youth Welfare Office, relying on Section 176a of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) requested the Vienna Juvenile Court (*Jugendgerichtshof*) that custody as regards the care and education of the second applicant be transferred to it. The Youth Welfare Office noted that the first applicant had, at first, incorrectly informed the hospital about her personal data, in particular on her name and residence. According to the Youth Welfare Office she had also expressed the wish to place the child with foster parents. One day after she had given birth, she had changed her mind and wanted to keep the child. Upon inquiries undertaken by the Youth Welfare Office, her real name, the periods of her lawful residence in Austria and her marriage to Mr M. had been discovered. Confronted with these facts, she had been very upset, had refused to give any further information and had insisted on keeping her child. Given her completely unclear situation, the means of existence of the second applicant were at risk and a transfer of custody to the Youth Welfare Office was necessary.

12. On the same day, the first applicant left the hospital. The second applicant was placed with foster parents.

13. On 11 August 2000 Mr M. instituted proceedings contesting paternity (*Ehelichkeitsbestreitungsklage*) of the second applicant.

14. On 3 December 2000 the Juvenile Court granted the Youth Welfare Office's request of 16 June 2000.

15. It noted in its reasoning that, on 2 August 2000, the first applicant had appeared at the court of her own motion, had given her new address in the 20th District of Vienna and further information on her situation and had insisted to have her son back. She had alleged that she obtained financial support from her husband, although she was no longer living with him.

16. Relying on a report by the Youth Welfare Office of 1 September 2000, the court noted that the first applicant had not cooperated with that office. In particular, it had not been possible to arrange a visit at her husband's address and she had not kept her appointments with the Youth Welfare Office. On 23 August 2000 the first applicant had contacted the Youth Welfare Office and had informed it about her address at the 20th District of Vienna, where she was allegedly supported by a Ms M. That Office's subsequent visit at Ms M.'s apartment had shown that Ms M. was not prepared to further support the first applicant. Given that she was living with her three children in an apartment of 40 square meters, she could not accommodate the applicant and her son.

17. Relying further on a report by the Juvenile Court Assistance Office (*Jugendgerichtshilfe*) of 2 November 2000, the court noted that the first applicant had admitted in a meeting that a baby needed orderly conditions, which she could not offer at that moment. Otherwise, she had given evasive answers and, on questions she had been uncomfortable with, she had started crying or had complained that nobody was helping her. The Assistance Office's visit at the foster parents' home had shown that the second applicant had got accustomed to them. Until that date, the first applicant twice had a right of access at the parents-child centre (*Eltern-Kind-Zentrum*). The first time, she had not appeared at all, the second time she had been thirty minutes late. The foster parents had subsequently met her by chance and had arranged a short meeting at a nearby parking.

18. In sum, the court stated that the first applicant was still in a very unstable and obscure situation, which was not enhanced by her unlawful residence in Austria, and which did not entitle her to financial aid. It was also not possible to cooperate with her, as she partly did not keep appointments and lacked any willingness to make active contributions. In order to assure the second applicant's positive development, it was necessary to transfer custody of the second applicant to the Youth Welfare Office and to have him in care of foster parents.

19. The Juvenile Court's decision was served on the first applicant on 20 December 2000.

20. On 3 January 2001 the first applicant, now assisted by counsel, appealed against this decision, in which she made the following submissions.

21. She had been desperate when giving birth, due to the fact that her husband was not the second applicant's father, but a certain Mr U. She stated, that being married to an Austrian national, she had a right to reside in Austria. According to the Administrative Court's case-law the residence prohibition against her would have to be lifted. However, in her contacts with the Juvenile Court and the other authorities involved she had not obtained any support to regulate her residence status or any help to preserve her relationship with her child. She had gained the impression that from the very beginning they were determined to place her child with foster parents.

22. She had also wished to make use of her access rights. However, the first time, she had not found the address, the second time she had been late, had met the foster parents and had briefly seen her son. She had asked the foster parents to inform the authorities that she had been late on account of an unfortunate obstruction.

23. Finally, the applicant noted that the decision of 3 December had been served on her shortly before Christmas, namely on 20 December. It had been impossible to obtain legal advice from the service institutions. Not being familiar with legal matters, she had not been in a position to procure the case-file and had only handed out the decision to her newly appointed counsel, who had returned from holidays one day before the appeal was lodged. Once paternity of Mr U. was established, maintenance payments for the second applicant would be secured. As to her housing situation, she was still accommodated at her friend's place. Finally, she requested that an expert opinion be obtained to prove that she was capable of taking care of her child and that meanwhile she be granted a right of access to the second applicant once a week.

24. On 19 January 2001 the Vienna Juvenile Court, sitting as an Appeal Court, dismissed the appeal against the decision of 3 December 2000 without holding a hearing and confirmed the lower court's decision.

25. It noted that the first applicant had only disputed the facts established by the lower court by alleging that she had not received any support by the authorities. However, this reproach was to be rejected in the light of the reports by the Youth Welfare Office and the Assistance Office. The lower court had correctly decided on the basis of these facts and the first applicant's situation at the time of its decision. Any positive developments concerning her situation, as alleged in her appeal, were not to be taken into consideration, but could be taken into account upon a new request. Under Section 176 of the Civil Code the court had to undertake measures to ensure the child's welfare, if it was at risk due to the parents' conduct. The court had to transfer custody, entirely or in part, to the Youth Welfare Office, even against the wish of the legal guardian, when a child's entire dislocation from his or her habitual environment was necessary and a placement with relatives or other qualified persons close to the child was not possible. The first applicant's completely unclear financial and personal

situation, in particular as regards her residence, and her incapability to cooperate constructively with the Youth Welfare Office – as had been established by the lower court – constituted a situation, which endangered the child's well-being. Referring to the Supreme Court's case-law in custody matters, it did not allow an ordinary appeal on points of law (*ordentlicher Revisionsrekurs*), pursuant to Section 14 § 1 of the Non-Contentious Proceedings Act (*Außerstreitgesetz*).

26. On 12 February 2001 the first applicant requested the Appeal Court to allow her ordinary appeal on points of law (*nachträgliche Zulassung des ordentlichen Revisionsrekurses*).

27. She complained that she had not been sufficiently involved in the proceedings, in particular, that access to the court files had not been possible. She further complained that the courts' decisions were not in line with this Court's case-law under Article 8 of the Convention. She asserted that the authorities involved had not even attempted to take measures which would have allowed her son to stay with her, such as placing her in a mother-child centre for instance.

28. Furthermore, relying on Article 6 of the Convention, she complained that there were no public and oral hearings in the custody proceedings and the decisions were not pronounced publicly. The courts' taking of evidence had been insufficient. As regards the second applicant, she complained that he had no legal standing in the proceedings, where he could claim his right to respect for family life with her, pursuant to Article 8 of the Convention, which was also in breach of Article 6 of the Convention. Relying on Article 14 in conjunction with Article 8 of the Convention, she complained of discrimination on the ground of her nationality. Had she been an Austrian citizen or citizen of any other member State of the European Union, she would have had the right to placement in a mother-child centre.

29. On 30 May 2001 the Liesing District Court allowed Mr M.'s action contesting paternity of the second applicant. This decision became final.

30. On 20 August 2001 the Vienna Juvenile Court, sitting as an Appeal Court, referring again to the Supreme Court's case-law in custody matters, refused to allow the ordinary appeal on points of law, as in its decision of 19 January 2001, it had not departed from that case-law. There was no other reason to allow the ordinary appeal on points of law under Section 14 § 1 of the Non-Contentious Proceedings Act, as it did not raise any important legal issue. Further, it noted that access to the court file had been possible throughout the proceedings. The decision was served on 13 September 2001.

B. Further proceedings concerning the applicant's access rights

31. On 9 December 2002 the applicant requested the District Court to be granted the right to see the second applicant every other Friday from 1 p.m. until Sunday 6 p.m.

32. While the case was pending before the Liesing District Court the first applicant was allowed to see her son in the presence of a representative of the Youth Welfare Office once a month on Mondays from 1.30 p.m. until 3 p.m. in a visitors' café (*Besuchscafé*) run by the Youth Welfare Office.

33. On 4 February 2004 the Liesing District Court dismissed the applicant's request. Upon the first applicant's appeal, the Vienna Regional Civil Court (*Landesgericht für Zivilrechtssachen*) quashed this decision and ordered the court to issue a new decision.

34. During the District Court's hearing on 15 July 2004, at which the first applicant, assisted by counsel, the foster parents and a social worker were present, the parties reached an agreement that the first applicant was allowed to see the second applicant in three-week-intervals in the presence of the foster mother on Wednesdays from 2.30 p.m. until 5 p.m.

35. On 6 October 2004 the court held another hearing and by a decision of 8 October 2004 amended the agreement of 15 July 2004 in that the meetings were to be held again in the visitors' café.

36. On 11 March 2005 an expert in child psychology submitted an opinion, stating that the second applicant was caught in a loyalty conflict between this foster parents and the first applicant. Nevertheless, contacts with the first applicant in intervals of three to four weeks were in his interest.

37. On 5 April 2005 a further agreement was reached which grants the first applicant access rights once a month from 3 p.m. to 5 p.m. and in addition on her birthday on the second applicant's birthday and at Christmas. The contacts take place at the visitors' café.

38. The first applicant has so far not filed a request to re-transfer custody of the second applicant to her, but considers that regular visits serve to prepare a re-transfer of custody.

C. Proceedings relating to the first applicant's request to lift the residence prohibition against her

39. On 20 October 2000 the first applicant filed a request with the Vienna Federal Police Authority (*Bundespolizeidirektion*) that the residence prohibition be lifted.

40. On 17 January 2001 the first applicant supplemented her request that the residence prohibition be lifted and argued that leaving Austria would mean losing her child and would impede her efforts of obtaining custody of the second applicant.

41. On 17 April 2001 the Federal Police Authority dismissed the first applicant's request of 20 October 2000. On 6 November 2001 the Vienna Public Security Authority (*Sicherheitsdirektion*) dismissed the first applicant's appeal.

42. On 24 February 2003 the Constitutional Court, allowing the first applicant's complaint, quashed the Public Security Authority's decision and remitted the case to it. The court found that the authority had failed to take proper account of the first applicant's right under Article 8 of the Convention.

43. On 22 April 2003 the Public Security Authority quashed the Federal Police Authority's decision of 17 April 2001. Subsequently, the residence prohibition was lifted and on 12 November 2004, the applicant was granted a residence permit for a limited duration.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Transfer of custody

44. Section 176 of the Civil Code empowers the courts to withdraw or restrict custody. So far as relevant, the version in force at the material time, read as follows:

> "1. If the parents put the well-being of the minor child at risk, on account of their conduct, the court shall take the decisions necessary to ensure the well-being of the child, ... In particular, the court may withdraw entirely or in part custody for the child, ..."

45. Section 176a of the Civil Code, in the version in force at the material time, read as follows:

> "If the child's well-being is at risk, therefore requiring the complete removal of the child from his/her previous environment against the will of the person entitled to raise the child, and if the child cannot be accommodated with relatives or other suitable persons close to the child, the court shall transfer custody of the child entirely or in part to the youth welfare institution. The youth welfare institution may transfer the exercise of custody to third parties."

B. Placement in a mother-child centre

46. Section 14 of the 1990 Vienna Youth Welfare Act (*Wiener Jugend-wohlfahrtsgesetz*) deals with social services for parents, babies and young children. Section 14 § 2 (3) mentions the placement of mothers/fathers with babies or young children in crisis apartments, specialised centres or other institutions as one of these services. According to Section 3 of that Act youth welfare is to be granted to all persons residing in Vienna.

47. There is no enforceable right to social services, such as a placement under Section 14 § 2 (3). Consequently, no legal remedy lies against the refusal or the failure to grant social services.

48. General social services, designed to help persons in an emergency situation, are provided for in the Vienna Social Services Act (*Wiener Sozialhilfegesetz*). Austrian nationals and certain groups of foreigners who are lawfully resident in Austria (e.g. nationals of countries having concluded a reciprocity agreement with Austria, persons with refugee status or nationals of member States of the European Economic Area) are entitled to benefits or services under this Act.

C. Non-Contentious Proceedings Act

49. The Non-Contentious Proceedings Act 1854 (*Außerstreitgesetz*), in the version in force at the material time, did not contain any specific provision on hearings. It was the Austrian courts' practice and the understanding of academic writers that hearings under this act were not public (see *Fasching*, *Lehrbuch des österreichischen Zivilprozessrechts, Wien*, *1984*, marginal number *682*, and *Gögl*, *Der Beweis im Verfahren außer Streitsachen, ÖJZ 1956, 344 (347)*).

50. On 1 January 2005 a new Non-Contentious Proceedings Act entered into force replacing the 1854 Act. It provides for the conduct of oral and public hearings (Sections 18 and 19) as a general rule and leaves it to the discretion of the court to decide whether or not the public should be excluded, for instance for the protection of the persons involved in a particular case.

51. In family-law and guardianship proceedings, Section 140 provides for oral hearings open only to the parties. The court may decide to hold a public hearing, unless protected details of a person's private and family life are discussed, a party opposes a public hearing or if such a hearing would be incompatible with the child's well-being.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicants complained that the transfer of custody of the second applicant to the Youth Welfare Office violated their right to respect for family life as guaranteed by Article 8 of the Convention, which provides 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. The parties’ submissions

53. The applicants maintained that the authorities, instead of transferring custody of the second applicant to the Youth Welfare Office, should have ordered a less intrusive measure such as a placement in a mother-child centre. However, the Youth Welfare Office never offered any constructive alternative proposal to the transfer of custody. The Juvenile Court’s finding that the first applicant had not co-operated was exclusively based on the reports of the Youth Welfare Office. Given the lack of an oral hearing in custody proceedings under the Non-Contentious Proceedings Act, the first applicant had not been able to challenge these findings. The applicants contested the Government’s statement as untrue insofar as it concerned the second applicant’s father, whose name and address the first applicant had disclosed in her appeal of 3 January 2001.

54. Moreover, the first applicant complained that she had not been given an opportunity to comment on the reports on which the Juvenile Court relied in its decision of 3 December 2000.

55. The Government argued that the interference with the applicants’ right to respect for their family life was justified under Article 8 § 2 of the Convention. It was prescribed by law, namely by Sections 176 and 176a of the Civil Code, and it pursued legitimate aims, namely the protection of health or morals and of the rights and freedoms of the second applicant.

56. In the Government’s view, the measure was also necessary in a democratic society as it met an urgent need, namely to secure the second applicant’s well-being. Referring to the findings of the Vienna Juvenile Court, the Government maintained that the first applicant had been unable to offer her son adequate lodging conditions and to secure a regular income. In addition, the residence prohibition issued against the first applicant had still been in force at the material time.

57. Furthermore, the Austrian authorities had not overstepped their margin of appreciation and the measure was proportionate to the legitimate aim pursued. The Government asserted in particular, that the authorities had attempted to find alternative solutions. However, as was stressed in the Juvenile Court Assistance Office’s report of 2 November 2000, the first applicant did not cooperate with the authorities. The alternative proposal made by her, namely that a friend of hers with whom she was staying could

also accommodate the second applicant proved to be unrealistic in view of the limited size of the apartment and the number of persons already living there. The alternative of placing the second applicant with relatives or other persons close to the child, as provided for by Section 176 a of the Civil Code, was not available either, since the first applicant's husband had refused any co-operation and she had not disclosed the name of the second applicant's father. In sum, less intrusive measures had not been available.

58. The Government maintained that the Austrian courts had complied with the procedural requirements inherent in Article 8. They pointed out that proceedings under the Non-Contentious Proceedings Act are governed by the principles of flexibility and expediency. The first-instance court took its decision, after having heard the first applicant on 2 August 2000 and having obtained the reports of the Youth Welfare Office of 1 September 2000 and the Vienna Court Assistance Office of 2 November 2000. Furthermore, the first applicant had raised the complaint concerning her alleged insufficient involvement for the first time in her application to the Court.

59. Finally, the Government pointed out that the first applicant had access rights and that custody of the second applicant was only transferred on a temporary basis, and had to be re-transferred immediately, when no further impairment of the child's well-being was to be feared. Thus far, the first applicant had not submitted any motion for a re-transfer of custody.

B. The Court's assessment

60. The Court notes at the outset that the first applicant is also complaining on behalf of her son, the second applicant. In accordance with the Court's case-law she is entitled to do so, given that the present case concerns a conflict over a minor's interests opposing the first applicant as his natural mother and the authorities having custody over him. Her standing as the natural mother suffices to afford her the necessary power to apply to the Court on her son's behalf, too, in order to protect his interests (see, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 138, ECHR 2000-VIII).

61. Furthermore the Court observes that the applicants do not complain about the order given immediately after the second applicant's birth which prohibited the hospital from handing him over to the first applicant, but about the subsequent transfer of custody to the Youth Welfare Office.

62. It is not in dispute that the transfer of custody constitutes an interference with the applicants' right to respect for their family life. This interference will only be justified if it complies with the requirements set out in Article 8 § 2 of the Convention.

63. The interference had a basis in domestic law, namely Articles 176 and 176a of the Civil Code, and served a legitimate aim in that it was

intended to protect the "heath and morals" and "the rights and freedoms" of the second applicant.

64. The parties' argument concentrated on the necessity of the interference. The Court reiterates that in order to determine whether the impugned measures were "necessary in a democratic society", it has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of Article 8 § 2 (see, among many other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 154, ECHR 2001-VII; *Kutzner v. Germany*, no. 46544/99, § 65, ECHR 2002-I; *P., C. and S. v. the United Kingdom*, no. 56547/00, § 114, ECHR 2002-VI; all with a reference to *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, p. 32, § 68). It will also have regard to the obligation which the State has in principle to enable the ties between parents and their children to be preserved (*Kutzner*, ibid.).

65. In doing so, it is not the Court's task to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in their exercise of their power of appreciation (see the above-cited cases, *K. and T. v. Finland*, § 154; *Kutzner*, § 66, and *P., C. and S v. the United Kingdom*, § 115, and *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55).

66. The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care was carried out prior to the implementation of such a measure (see, in particular, *P., C. and S. v. the United Kingdom*, cited above, § 116, and *K. and T. v. Finland*, cited above, § 166). Following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example on parental rights of access, as such further restrictions entail the danger that the family relations between the parents and the child are effectively curtailed (*P., C. and S. v. the United Kingdom*, § 117, and *Kutzner*, § 67, both cited above).

67. Moreover, it is the Court's well established case-law that Article 8 contains implicit procedural requirements. What is to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been

involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests (*Elsholz v. Germany* [GC], no. 25735/94, § 52, ECHR 2000-VIII, *P., C. and S. v. the United Kingdom*, cited above, § 119, and *Venema v. the Netherlands*, no. 35731/97, § 91, ECHR 2002-X, with references to *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, § 64).

68. The Court observes that, unlike in most child care cases, the reason for the transfer of custody of the second applicant did not lie in the first applicant's incapacity to care for him on account of any physical or mental illness or on account of any violent or abusive conduct (see, in contrast, the above cited-cases, *Scozzari and Giunta*, §§ 149-50, *K. and T. v. Finland*, § 173, and *P., C. and S. v. the United Kingdom*, § 134). It was based solely on her lack of appropriate accommodation and financial means and her unclear residence status, i.e. her precarious situation which would have made it difficult for her to care for a very young child.

69. In the Court's view, a case like the present one called for a particularly careful examination of possible alternatives to taking the second applicant into public care. The Government argued in essence that the courts examined alternative measures and dismissed them as not being practicable. Moreover, they alleged that the first applicant herself failed to co-operate. The applicants, for their part, maintained that no alternatives whatsoever were proposed or assessed by the authorities.

70. The Court does not share the applicants' view that the authorities made no assessment of alternatives at all. In fact, the courts noted that there was no possibility to place the second applicant with any relatives and they examined and dismissed the alternative proposed by the first applicant to lodge her and the second applicant with a friend of hers. However, no positive action was taken to explore possibilities which would have allowed the applicants to remain together, for instance by placing them in a mother-child centre. In this connection, the Court notes that according to the Government the fact that the applicants were foreigners did not exclude them from admission to a mother child centre under the Vienna Youth Welfare Act. However, this possibility was apparently not contemplated and no other measures such as clarifying the applicant's residence status were taken. In this connection, the Court notes that the residence prohibition against the applicant was subsequently quashed by the Constitutional Court as being at variance with her rights under Article 8.

71. This failure to make a full assessment of all possible alternatives is aggravated by the fact that no measures were taken to establish and maintain the contact between the applicants while the proceedings were pending. This is particularly serious given that they did not have a chance to bond in the first place, since the second applicant had been removed immediately after his birth. It follows from the Juvenile Court's decision of 3 December

2000 that in the six months between the second applicant's birth and the decision transferring custody to the Youth Welfare Office, the first applicant had only twice been given an opportunity to see her son. Referring to reports of the Youth Welfare Office and the Juvenile Court Assistance Office, the court found that she had not properly exercised her access rights and had generally failed to co-operate with the authorities. However, the applicant alleges that she had not been able to comment on these reports.

72. At this juncture the Court will turn to the question whether the procedural requirements inherent in Article 8 were complied with. The Court notes, firstly, that the first applicant was only heard once by the Juvenile Court, namely on 2 August 2000 when she had appeared in court of her own motion to give information on her situation. Secondly, the Court notes that, in its decision of 3 December 2000, the Juvenile Court relied on a report of the Youth Welfare Office of 1 September 2000 and a report of the Juvenile Court Assistance Office of 2 November 2000 which had not been served on the applicant and on which she had had no possibility to comment (see, as a similar case, *Buchberger v. Austria*, no. 32899/96, § 43, 20 December 2001). Thirdly, the Court observes that the first applicant was not assisted by counsel in the proceedings before the Juvenile Court. The appeal proceedings, in which she was represented, were conducted without any hearing and it cannot be said that the deficiency of the first instance proceedings was remedied by the opportunity to comment on the reports at issue in the appeal, since the appellate court did not examine the first applicant's complaint that no alternatives to the transfer of custody had been explored but repeated the assessment contained in the reports that she had failed to co-operate. As regards the alleged failure to exercise her access rights, the appellate court did not reply to her submissions at all. In sum, the Court considers that the first applicant was not involved in the decision-making process to a degree required for the protection of her interests.

73. Having regard to the authorities' failure to examine all possible alternatives to transferring custody of the second applicant to the Youth Welfare Office, their failure to ensure regular contacts between the applicants following their separation and the first applicant's insufficient involvement in the decision making process, the Court considers that although the reasons relied on by the domestic courts were relevant, they were not sufficient to justify such a serious interference with the applicants' family life. Notwithstanding the domestic authorities' margin of appreciation, the interference was therefore not proportionate to the legitimate aims pursued.

74. Consequently, there has been a violation of Article 8 of the Convention as regards the transfer of custody of the second applicant to the Youth Welfare Office.

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

75. The applicants also complained of discrimination on account of their nationality, alleging that they would have been placed in a mother-child centre if they were Austrian nationals or nationals of another member state of the European Union. They rely on Article 8 taken in conjunction with Article 14 of the Convention which 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."

76. As to the legal basis for placement in a mother-child centre, the applicants asserted that it was to be found in the Vienna Social Services Act, which applied only to Austrian citizens and certain groups of foreigners who were lawfully residing in Austria.

77. The Government submitted that a placement in a mother-child centre was a social service provided for by Section 14 § 2 (3) of the 1990 Vienna Youth Welfare Act, which applied to all persons resident in Vienna (Section 3 of that Act).

78. The Court notes that the Act relied on by the Government specifically mentions the placement of mothers and babies or young children in specialised centres and does not make access to them dependent on nationality. For nationals and non-nationals alike there is no right to placement which may only be granted on the basis of availability. Thus, the law itself does not distinguish on the basis of nationality and there is no indication in the file that the failure to examine the possibility of a placement, which the Court has already examined in the context of Article 8 was based on the applicants' status as foreigners.

79. Consequently, there has been no violation of Article 14 taken in conjunction with Article 8.

III. ALLEGED VIOLATIONS OF ARTICLES 6 OF THE CONVENTION

80. The first applicant raised further complaints under Article 6 of the Convention which so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

A. The lack of a possibility to comment on the reports relied on by the Juvenile Court

81. The first applicant complained that she had not been given an opportunity to comment on the reports on which the Juvenile Court relied in its decision of 3 December 2000. In the proceedings of first instance, she had not been assisted by counsel, and the judge had failed to instruct her of her right to examine her file and to make copies.

82. The Government asserted that the applicant had had the possibility to examine the case-file throughout the entire proceedings. However, she had not made use of this possibility. Furthermore, the first applicant had raised this complaint for the first time in her application to the Court.

83. The Court notes that the Government have not explicitly made a plea of non-exhaustion. In any case, the Court observes that the applicant had raised the complaint about the allegedly insufficient access to the file and about the lack of her involvement in the proceedings in her request to allow her ordinary appeal on points of law.

84. The Court observes that the above complaint resembles the issue raised in the case of *Buchberger v. Austria* (cited above, §§ 43-45 and 49-51, 20 December 2001), also concerning a transfer of custody to the Youth Welfare Office in which the Court found violations of both Articles 6 and 8 of the Convention on the ground that the applicant had not been sufficiently involved in the proceedings, *inter alia* in that the applicant had not been informed of and given the possibility to comment on reports by the Youth Welfare Office.

85. Having regard to the difference between the purpose pursued by the respective safeguards afforded by Article 6 § 1 and Article 8 (see, *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91), the Court considers it necessary in the present case to examine the first applicant's complaint also under Article 6 § 1 and, more precisely under the principle of equality of arms, since the Youth Welfare Office was the party opposing the first applicant in the proceedings.

86. The principle of equality of arms - one of the elements of the broader concept of a fair trial - requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (see, among many other authorities, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 33). Each part must be given the opportunity to have knowledge of and to comment on the observations filed or evidence adduced by the other party (see, for instance, *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, Series A no. 262, p. 25, § 63; *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 108, § 24; *Buchberger*, cited above, § 50).

87. It is not disputed that the courts relied on reports by the Youth Welfare Office and the Juvenile Court Assistance Office and that the first applicant had not been given a possibility to comment on them. The Court is not convinced by the Government's argument that the applicant had access to the file throughout the proceedings. It was not for the applicant, who was moreover unrepresented in the first instance proceedings, to inspect the case-file in order to become aware of any reports filed by the opposite party, but for the courts to inform her and to provide her with an opportunity to comment thereon.

88. Having further regard to the considerations under Article 8, the Court finds that there has been a violation of Article 6 § 1 in that the proceedings breached the principle of equality of arms.

B. The lack of a public hearing

89. The first applicant further complained under Article 6 § 1 that she did not have a public oral hearing. She asserted that the Juvenile Court had "heard" her rather in the form of obtaining a witness statement than by conducting an adversarial hearing. In any case, she had no public hearing although the domestic courts had not examined whether there were specific circumstances which justified excluding the public from the present proceedings.

90. The Government asserted that the Juvenile Court had heard the applicant in person on 2 August 2000. As to the question whether there should have been a public hearing, the Government asserted that the 1854 Non-Contentious Proceedings Act left it to the discretion of the court whether or not to hold a hearing in public. However, the right to a public hearing was not absolute and an exclusion of the public was admissible under Article 6 § 1 of the Convention, *inter alia*, in the interests of a minor or for the protection of the private life of the parties. Referring to *B. and P. v. the United Kingdom* (nos. 36337/97 and 35974/97, § 38, ECHR 2001-III), the Government argued that court proceedings involving custody decisions of minors were prime examples of such justified exclusion of the public. Finally, they submitted that the applicant had not asked for a public hearing.

91. According to the Court's case-law, the right to a public hearing under Article 6 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Stallinger and Kuso v. Austria*, judgment of 23 April 1997, *Reports* 1997-II, pp. 679-80, § 51, and *Allan Jacobsson v. Sweden (no. 2)*, judgment of 19 February 1998, *Reports* 1998-I, p. 168, § 46).

92. In the present case, there were no such circumstances. Neither did the proceedings concern highly technical issues or purely legal questions (see, as regards these criteria, *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58, and *Varela Assalino v.*

Portugal (dec.), no. 64336/01, 25 April 2002). Thus, the first applicant was entitled to a hearing. The Court does not share the Government's view that the first applicant's questioning on 2 August 2000 qualified as a hearing for the purpose of Article 6 § 1. It observes that the first applicant had appeared before the Juvenile Court of her own motion. Moreover, it follows from the Juvenile Court's decision of 3 December 2000 that she gave some factual information on her situation. However, there is no indication that this "hearing" of the first applicant encompassed all factual and legal aspects of the case. The appellate Court did not hold a hearing either.

93. In any case, it remains to be examined whether the first applicant was entitled to a public hearing. The Court reiterates that the public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, a fair hearing, the guarantee of which is one of the foundations of a democratic society (see *B. and P. v. the United Kingdom*, cited above, § 36 with a reference to *Sutter v. Switzerland,* judgment of 22 February 1984, Series A no. 74, p. 12, § 26).

94. However, the requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the provision that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Moreover, it is established in the Court's case-law that, even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (*B. and P. v. the United Kingdom*, cited above, § 37 with further references).

95. In *B. and P. v. the United Kingdom* (cited above, § 39) the Court found that it was inconsistent with Article 6 § 1 for a State to designate an entire class of cases as an exception to the general rule of public hearings where considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties. It noted moreover, that the child residence proceedings which were at stake, were prime examples of proceedings where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice.

96. The Court considers that there are a number of elements which distinguish the present case from *B. and P. v. the United Kingdom*. In that

case, the Court attached weight to the fact that the courts had discretion under the Children Act to hold proceedings in public if merited by the special features of the case and a judge was obliged to consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. The Court noted that in both cases the domestic courts had given reasons for their refusal to hear the case in public and that their decision was moreover subject to appeal (ibid., § 40). The Court notes that the Austrian Non-Contentious Proceedings Act now in force gives the judge discretion to hold family-law and guardianship proceedings in public and contains criteria for the exercise of such discretion. However, no such safeguards were provided for in the 1854 Non-Contentious Proceedings Act. It is therefore not decisive that the applicant did not request a public hearing, since domestic law did not provide for such a possibility (see *Osinger v. Austria*, no. 54645/00, § 49, 24 March 2005, and *Diennet v. France,* judgment of 26 September 1995, Series A no. 325-A, p. 14, § 31) and the courts' practice was to hold hearings in camera.

97. Moreover, the case of *B. and P. v. the United Kingdom* concerned the parents' dispute over a child's residence, thus, a dispute between family members, i.e. individual parties. The present case concerns the transfer of custody of the first applicant's son to a public institution, namely the Youth Welfare Office, thus, opposing an individual to the State. The Court considers that in this sphere, the reasons for excluding a case from public scrutiny must be subject to careful examination. This was not the position in the present case, since the law was silent on the issue and the courts simply followed a long-established practice to hold hearings in camera without considering the special features of the case.

98 Having regard to these considerations, the Court finds that lack of a public hearing was in breach of Article 6 § 1 of the Convention.

C. The lack of any public pronouncement of the decisions

99. The first applicant complained that the courts' decisions in the custody proceedings were not pronounced publicly.

100. The Government submitted that a public pronouncement of decisions in proceedings where the public had been excluded would undermine the objective pursued, namely to secure the protection of the private sphere to the persons involved in custody proceedings. Referring to the case of *Sutter* (cited above, p. 14, §§ 33-34), the Government pointed out that under Austrian law any person who could establish a legal interest in receiving a decision was entitled to consult the file and to obtain copies. In addition, decisions of special interest were published on a broad scale electronically in the Federal Legal Information System, whereby the decisions of the Supreme Court and appellate courts were given priority over first-instance court decisions.

101. The Court has applied the requirement of the public pronouncement of judgments with some degree of flexibility. Thus, it has held that despite the wording which would seem to suggest that reading out in open court is required, other means of rendering a judgment public may be compatible with Article 6 § 1. As a general rule, the form of publicity to be given to the judgment under domestic law must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1. In making this assessment, account must be taken of the entirety of the proceedings (see, *B. and P. v. the United Kingdom*, previously cited, § 45; *Pretto and Others v. Italy*, judgment of 8 December 1983, Series A no. 71, p. 12, §§ 25-27; and *Axen v. Germany*, judgment of 8 December 1983, Series A no. 72, pp. 13-14, §§ 30-32).

102. It is not disputed that none of the courts' decisions was pronounced publicly. Therefore, it remains to be examined whether publicity was sufficiently ensured by other means. In the case of *B. and P. v. the United Kingdom* (cited above, §§ 46-48*)*, the Court found that alternative means of giving the public access to the courts' decisions, similar to those referred to by the Government in the present case, were sufficient. In doing so, it relied on the fact that the courts were entitled to hold proceedings in camera. In the case of *Sutter v. Switzerland* (cited above, p. 14, §§ 33-34) to which the Government referred, the Court found that the publicity requirement was satisfied by the fact that anyone who established an interest could consult or obtain a copy of the full text of the Military Court of Cassation, together with the fact that that court's most important judgments were published in an official collection. However, in that case a public hearing had been held by the lower instance and the Court had regard to the particular nature of the issues dealt with by the military Court of Cassation.

103. The Court finds that in the present case, in which dispensing with a public hearing was not justified in the circumstances, the above means of rendering the decisions public, namely giving persons who establish a legal interest in the case access to the file and publishing decisions of special interest, mostly of the appellate courts or the Supreme Court, did not suffice to comply with the requirements of Article 6 § 1.

104. Consequently there has been a violation of Article 6 on account of the failure to pronounce the courts' decisions publicly.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The first applicant requested compensation for non-pecuniary damage in respect of the violation of her and son's right to respect of their family life. She claims 30,000 euros (EUR) for herself and EUR 50,000 for the second applicant.

107. The Government asserted that these claims were excessive. They noted in particular that the Court had awarded 80,000 Austrian schillings (that is EUR 5,813.83) in the comparable case of *Buchberger* (cited above, § 56).

108. The Court considers that, as far as Article 6 is concerned, the finding of violations constitutes sufficient just satisfaction for any non-pecuniary damage the first applicant may have suffered.

109. However, as regards the violation of Article 8, the Court considers that the shortcomings of the custody proceedings must have caused the first applicant distress and anxiety, which are not sufficiently compensated by the finding of a violation. Having regard to the sums awarded in comparable cases and making an assessment on an equitable basis, the Court awards the first applicant EUR 8,000 for non-pecuniary damage.

110. In contrast, the Court does not find that the deficiencies of the custody proceedings had any direct effect on the second applicant (see, *mutatis mutandis*, *P., C. and S. v. the United Kingdom*, cited above, § 150). Moreover, it is not for the Court to speculate what the outcome of the proceedings would have been had they been in compliance with the requirements of Article 8. In respect of the second applicant, the Court therefore considers that the finding of a violation of Article 8 constitutes sufficient just satisfaction for any non-pecuniary damage he may have suffered.

B. Costs and expenses

111. The first applicant requested the reimbursement of EUR 2,416.12, inclusive of VAT, for costs incurred in the domestic proceedings concerning the transfer of custody and in subsequent proceedings relating to her access rights and of EUR 7,705.80, inclusive of value-added tax (VAT), for costs incurred in the Convention proceedings.

112. In addition she requested reimbursement of costs incurred in the domestic proceedings relating to her request to annul the residence prohibition against her and in further proceedings concerning her request for a residence permit. These costs amount to EUR 5,554.19 inclusive of VAT.

113. The Government commented that only the costs of the appeals against the decision to transfer custody of the second applicant were recoverable, whereas there was no direct link between the alleged violations

at issue in the present case and the costs incurred in subsequent proceedings relating to the first applicant's access rights and her residence status.

114. Regarding the costs of the Convention proceedings, the Government pointed out that the first applicant was granted legal aid and that the application was only partially declared admissible.

115. The Court reiterates that costs incurred in the domestic proceedings may only be reimbursed as far as they were necessary in order to prevent or redress the violation found (see, for instance, *Buchberger*, cited above, § 58). In the present case only the costs incurred for the appeal and the appeal on points of law lodged in the custody proceedings fulfil this condition. These costs amount to EUR 694.74 including VAT.

116. As to the Convention proceedings, the Court notes that the applicants had the benefit of legal aid. Moreover, as the Government pointed out, their application was only partially declared admissible. The Court notes however, that only two rather minor complaints were declared inadmissible. Having regard to these considerations, the Court awards EUR 6,000, including VAT, in respect of costs and expenses incurred in the Convention proceedings.

117. Consequently a total amount of EUR 6,694.74, inclusive of VAT, is awarded under the head of costs and expenses.

C. Default interest

118. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that there has been no violation of Article 14 taken in conjunction with Article 8;

3. *Holds* that there has been a violation of Article 6 on account of the failure to give the first applicant an opportunity to comment on the reports of the Youth Welfare Office and the Juvenile Court Assistance Office;

4. *Holds* that there has been a violation of Article 6 on account of the failure to hold a public hearing;

5. *Holds* that there has been a violation of Article 6 on account of the failure to pronounce the judgments in those proceedings publicly;

6. *Holds*
(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage and EUR 6,694.74 (six thousand six hundred ninety-four euros and seventy-four cents) 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;

7. *Holds* that the finding of a violation of Article 8 constitutes in itself sufficient just satisfaction for any non-pecuniary damage the second applicant may have suffered;

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

Done in English, and notified in writing on 21 September 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President