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

SECOND SECTION

CASE OF WELLER v. HUNGARY

(Application no. 44399/05)

JUDGMENT

STRASBOURG

31 March 2009

FINAL

30/06/2009

This judgment may be subject to editorial revision.

In the case of Weller v. Hungary,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges,*
and Sally Dollé, *Section Registrar,*

Having deliberated in private on 3 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 44399/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Hungarian nationals, Mr Lajos Weller and his twin sons, Dániel and Máté Weller ("the applicants"), on 6 December 2005.

2. The applicants, who had been granted legal aid, were represented by Mr T. Kőrösi, a lawyer practising in Cegléd. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicants alleged that their exclusion from "maternity benefit", on the ground of the nationality of the mother of the second and third applicants and the first applicant's parental status, amounted to a violation of Article 14 taken together with Article 8 of the Convention.

4. On 20 September 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it also decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The first applicant ("the applicant"), was born in 1974 and lives in Budapest. The second and the third applicant, Dániel Weller and Máté Weller, the applicant's twin sons, were born in 2005 and live in Budapest.

A. The circumstances of the case

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. In 2000 the first applicant married a Romanian citizen, who currently lives in Hungary. The couple are raising four children from the previous marriage of the wife and they have successfully claimed numerous allowances on their behalf. On 30 June 2005 the wife gave birth to the second and third applicants. Both of them acquired Hungarian nationality by birth, through their father. At the material time, the mother held a residence permit *(tartózkodási engedély)*. She was granted a settlement permit *(letelepedési engedély)* in May 2007.

8. On 7 September 2005 the first applicant requested maternity benefit *(anyasági támogatás)* amounting to 148,000 Hungarian forints (HUF)[1] from the Budapest and Pest County Regional Directorate of the Hungarian Treasury in his own name and on behalf of his children.

9. On 8 September 2005 the Regional Directorate refused the applicant's claim. It pointed out that, in the light of the relevant provisions of Act no. 84 of 1998 on Family Support ("the Act"), only mothers, adoptive parents and guardians were entitled to the benefit in question. It also noted that the natural father might only apply for such an allowance if the mother were deceased. The first applicant appealed.

10. On 20 January 2006 the Hungarian Treasury dismissed his appeal. The Treasury established that, pursuant to the Act, only mothers with Hungarian citizenship might apply for maternity benefit. It further observed that the Act applies only to those non-Hungarian citizens who have obtained settlement permits *(letelepedési engedély)*, being either refugees or citizens of another Member State of the European Union. It concluded that, since the applicant's wife did not fall into either of these categories, the claim had to be rejected, since the natural father was not entitled to such benefits.

11. On 6 March 2006 the first applicant sought judicial review before the Pest County Regional Court. He argued that the legal background of the institution of maternity benefit, as well as the decisions of the competent

[1] Approximately 570 euros.

Hungarian authorities, were discriminatory and contravened the Hungarian Constitution and Article 14 of the Convention.

12. On 5 July 2005 the Regional Court, finding that the administrative authorities' decisions had been in compliance with the law, dismissed the applicant's claim. It held, *inter alia*, that the purpose of maternity benefit was to support the mother and not the entire family or the children, therefore the latter could not be considered to have suffered discrimination.

13. On 7 August 2006 the applicant lodged a constitutional complaint with the Constitutional Court. These proceedings are apparently still pending.

B. Relevant domestic law

Act no. 84 of 1998 on Family Support

"Governed by its responsibility for the well-being of families and children, Parliament enacts the following Act, in order to implement the social rights laid down in the Constitution and international treaties:"

Section 1

The purpose of the Act

"The purpose of this Act is – in order to promote the social security of families and to reduce the material burden of bringing up children – to determine the system and forms of family allowances payable by the State, the conditions of entitlement to these allowances, and, moreover, the most important rules on competence and procedure relating to the establishment and disbursement thereof."

Section 2

The scope of the Act

"The Act shall be applied – unless an international treaty regulates otherwise – to those living on the territory of the Republic of Hungary, who

a) are Hungarian nationals,

b) have obtained an immigration or settlement permit, and to those who have been recognised as refugees by the Hungarian authorities,

c) fall under the scope of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and – with the exception of the maternity benefit (Chapter IV of the Act) – of the Regulation (EEC) No. 140//71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the

Community, provided that such persons – with the exception of frontier workers – at the time of requesting the allowance have obtained a valid residence permit."

Section 29

"(1) Persons entitled to maternity benefit after giving birth are:

a) women who, during pregnancy, attended at least four times – in case of premature birth, once – prenatal care;

b) adoptive parents, if the adoption was finally authorised within 180 days of the birth;

c) the guardian, if the child – based on a final decision – was taken into his/her custody within 180 days of the birth."

Section 30

"If the woman entitled to maternity benefit dies before it is paid, then it shall be paid to the father living under the same roof or, in the absence of such a person, to the guardian of the child."

Section 32

"A request for maternity benefit may be submitted within 180 days of giving birth."

THE LAW

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

14. The applicants maintained that, when claiming maternity benefit, they had suffered discrimination because of the nationality of the mother of the second and the third applicants as well as the first applicant's parental status. They relied on Article 14 of the Convention, read in conjunction with Article 8, which provide insofar as relevant as follows:

Article 14 of the Convention

"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."

Article 8 of the Convention

"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 ... the economic well-being of the country, ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

15. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 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

(a) The Government

16. The Government submitted that the Contracting States enjoy a wide margin of appreciation in respect of welfare policy. Moreover, they pointed out that there was a substantial diversity of social security schemes in the Member States of the Council of Europe, particularly in the regulation of maternity allowances.

17. The Government maintained that the aim of maternity allowances was primarily to facilitate the development of the foetus and for the mother to maintain a healthy life. Had it only been pecuniary assistance, it would have been sufficient to connect such a grant to the birth of the child. This was not the case, since future mothers had to participate in courses on parental care regularly in order to be entitled to the allowance. It is true that in the absence of natural parents, as a subsidiary rule, guardians may be entitled to the allowance, but this special requirement was not met in the present circumstances.

18. Moreover, the Government drew attention to the fact that the mother in the present case had only obtained authorisation to reside in Hungary, but not a settlement permit since she most probably did not fulfil the requirements of the latter at the material time. Exclusion from the benefit served the purpose of reducing the number of marriages of convenience and establishing a verifiable allowance system. By acting in this way, the Hungarian State did not overstep the limits of its margin of appreciation.

19. Lastly, the Government underlined that from 1 January 2008 onwards all citizens of the European Union residing in Hungary for more than three months are entitled to a maternity allowance under the same conditions as Hungarian citizens. In sum, the Government were of the view that the exclusion of the natural father from the benefit was not an unjustifiable difference in treatment.

(b) The applicants

20. The applicants submitted that the maternity benefit – although its name was misleading – did not aim at reducing the hardship of giving birth but at promoting the social security of families and diminishing the financial burdens ensuing from bringing up children, since not only mothers but adoptive parents and guardians were entitled to it. In their view, the primarily financial character of the allowance was also supported by the fact that it could only be claimed within 180 days of the birth.

21. The applicants drew attention to the fact that the benefit was payable after birth when the responsibilities of the father and mother concerning the child became equal. The first applicant's exclusion from the benefit therefore constituted an unjustifiable difference in treatment on the ground of his parental status.

22. The applicants also submitted that section 29 of the Act was in itself discriminatory against all fathers, taking into consideration Article 5 of Protocol No. 7 to the Convention, since men with foreign spouses were treated less favourably in the enjoyment of the benefit than those with Hungarian wives. The applicants also maintained that any reluctance on the part of the mother to participate in the obligatory courses on parental care may justify different treatment in respect of her alone, but not in respect of the father, who may have shown that he cared for the unborn child in many other ways. In any event, the applicant's wife attended the parental care courses, accompanied and assisted by the first applicant. Therefore the aim of protecting the foetus could not serve as a basis for the refusal to grant the allowance in the present case.

23. Moreover, the applicants were of the view that the argument of Government concerning the legitimate aim of protecting the system of social welfare from abuse by immigrants was irrelevant, since all three of them have Hungarian citizenship. They drew attention to the fact, in this connection, that the mother had four children from her previous marriage and that the first applicant could claim, since the couple were also raising these children together, various social allowances on their behalf. The Hungarian State did not raise the issue of abuse concerning those benefits; therefore it was illogical to use this argument in connection with maternity benefit, the amount of which was in any event rather small.

24. The applicants also pointed out that, although it is true that the Member States enjoy a certain margin of appreciation when regulating such

matters, the equality of the sexes is a major goal of Council of Europe. Therefore, there must be a compelling reason advanced before a difference in treatment on grounds of sex could be regarded as being compatible with the Convention. In their view, the Government had failed to put forward such an argument.

25. Lastly, they argued that the exclusion of the second and third applicants from the benefit, although both of them were Hungarian nationals by birth, on account of their mother's foreign nationality constituted an unjustified difference in treatment compared with other Hungarian children. In sum, they concluded that they had suffered discrimination in breach of Article 14 read in conjunction with Article 8 of the Convention.

2. The Court's assessment

(a) General principles

26. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I, and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, § 22).

27. The Court has also held that not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (*Unal Tekeli v. Turkey*, no. 29865/96, § 49, 16 November 2004). A difference in treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, *Petrovic*, cited above, § 30, and *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, § 177).

28. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (*Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports* 1996-IV, § 42). The scope of the margin of

appreciation will vary according to the circumstances, the subject matter and its background (see *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, § 40, and *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, § 41), but the final decision as to observance of the Convention's requirements rests with the Court. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Unal Tekeli*, judgment cited above, § 54, and, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).

(b) Application of these principles to the present case

(i) Applicability of Article 14 taken together with Article 8

29. The Court observes at the outset that it was not disputed between the parties that the applicant could rely on Article 14 of the Convention. Since, by granting the allowances in question, the Hungarian State was supporting the right to respect for family life within the meaning of Article 8 (see *Petrovic*, cited above, § 29), the Court sees no reason to hold otherwise. Moreover, it was not disputed that the applicants' exclusion from the benefit amounted to a difference in treatment on grounds of the first applicant's parental status and the nationality of the mother of the second and the third applicants. However, the Government argued that these differences pursued a legitimate aim and have been applied in a proportionate manner.

(ii) Justification for the difference in treatment

30. The starting point of the Court's assessment is the nature of the maternity benefit, since it is the key element when defining the group with which the applicants' situation should be compared. The Court observes that this allowance related to the period after giving birth. For the Court, the primarily financial character of the benefit is well shown by the fact that adoptive parents and guardians and, in special circumstances, fathers may also claim it.

31. The Court is of the view that this wide range of entitled persons proves that the allowance is aimed at supporting newborn children and the whole family raising them, and not only at reducing the hardship of giving birth sustained by the mother. The Government's counter-argument, namely that the entitlement to the benefit was conditional on participation in parental care courses, cannot be decisive, since this requirement had to be fulfilled only by the mother. Adoptive parents or guardians were obviously exempt from that requirement.

32. The applicants' situation can therefore be compared to those families and their members enjoying maternity benefits.

α. The different treatment of the first applicant

33. The Court reiterates that, while differences may exist between mother and father in their relationship with the child, both parents are "similarly placed" in taking care of the unborn child (see *Petrovic*, cited above, § 36). It further draws attention to the fact that not only mothers but also adoptive parents and guardians were entitled to the benefit in dispute, while the first applicant was not. He was therefore differently treated on the grounds of his parental status compared with other persons who are similarly responsible for bringing up newborn children. However, the Court is of the view that this difference in treatment is not connected to the applicant's sex, since adoptive parents or guardians, irrespective of their sex, were not excluded from the benefit.

34. The Court recognises that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment under the law. Moreover, the Court notes that widely different social security systems exist in the Member States. However, the lack of a common standard does not absolve those States which adopt family allowance schemes from making such grants without discrimination.

35. The Court observes that neither the domestic authorities nor the Government have put forward any objective and reasonable ground to justify the general exclusion of natural fathers from a benefit aimed at supporting all those who are raising newborn children, when mothers, adoptive parents and guardians are entitled to it. It therefore concludes that the first applicant suffered discrimination on the ground of his parental status in the exercise of his right to respect his family life.

β. The different treatment of the second and the third applicants

36. Concerning the second and the third applicants, the Court notes that there is no indication in the case file that the applicants' mother abused or at least intended to misuse the Hungarian social security system. It is true that at the time of the events she only had a residence permit, but later she received a settlement permit (see paragraph 7), which shows that her situation in Hungary was lawful and fully regulated by the authorities.

37. The Court observes that, flowing from the relevant provisions of the Act, a family with children of a Hungarian mother and a foreign father are entitled to maternity benefits. However, this was not the situation of the second and the third applicants as their father is Hungarian and their mother a foreigner. They were therefore prevented from benefitting from such an allowance on the basis of this difference.

38. The Court finds no reasonable justification for this practice. It considers that the entitlement to an allowance due to a family under sections 1 and 2 of the Act cannot be dependent on which of the two biological parents of the children is a Hungarian national. The Court would

add that it is irrelevant that, as of 1 January 2008, the applicants' mother became entitled to the allowance under the same conditions as Hungarian nationals, because by then she was barred from claiming it as the request had to be made within 180 days of the children's birth and could not be made retroactively.

39. In sum, since the Government have failed to put forward any convincing argument to justify the second and third applicants' exclusion from the benefit of the allowance in question, the Court concludes that this difference in treatment amounted to discrimination.

γ. Conclusion

40. Having regard to the above considerations, the Court concludes that there has been a violation in the instant case of Article 14 of the Convention, read in conjunction with Article 8, as regards each of the applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicants claimed, jointly, HUF 179,719 (approximately EUR 720) in pecuniary damages, which sum corresponds to the actual loss originating from the refusal of maternity benefits, plus interest. Moreover, they claimed 4,000 euros (EUR), jointly, in respect of non-pecuniary damage.

43. The Government considered the applicants' claim excessive.

44. The Court finds that the applicants have sustained pecuniary damage from the refusal to grant them this allowance. The Court therefore awards the applicants the entirety of the sum requested under this head. The Court also considers that the applicants can reasonably be deemed to have suffered some non-pecuniary damage in the circumstances. Making its assessment on an equitable basis, the Court finds it reasonable to award them, jointly, EUR 1,500 under this head.

B. Costs and expenses

45. The applicant claimed, jointly, EUR 1,500 plus 20% VAT, for the legal fees incurred before the domestic courts and the Court. They submitted the agreement concluded with their lawyer, according to which they would only be billed if the case ended successfully.

46. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award the sum claimed in its entirety, less the sum of EUR 850 which the applicants have already been paid under the legal-aid scheme of the Council of Europe, making an overall award of EUR 950 (including provision for 20% VAT).

C. Default interest

47. 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 14 of the Convention read in conjunction with Article 8 of the Convention;

3. *Holds*

a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:

(i) EUR 720 (seven hundred and twenty euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 950 (nine hundred and fifty euros) 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.

Done in English, and notified in writing on 31 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Tulkens is annexed to this judgment.

F.T.
S.D.

CONCURRING OPINION OF JUDGE TULKENS

(Translation)

I fully agree with the absolute necessity and Convention obligation of abolishing all forms of discrimination, including on grounds of sex, in the enjoyment of the rights guaranteed by the Convention. However, in the present case the relatively artificial nature of the application troubles me for two reasons.

Firstly, as the benefit in question is expressly called *maternity* benefit, the main purpose of which is to allow mothers to recover after pregnancy and giving birth and to breastfeed their child, I think that the mother is the first "victim" of the refusal to award the benefit. The situation we have here is therefore not the same, it appears to me, as the one in *Petrovic v. Austria* of 27 March 1998, which concerned parental leave and in which the benefit in question, the provision for which was made under the unemployment insurance scheme, compensated the loss of salary. What was at stake in that case was the financial assistance for young parents that allowed them to take time out from work in order to look after their newborn child and in respect of which, in my view, there is no justification for treating fathers and mothers differently (see the joint dissenting opinion of Judges Bernhardt and Spielmann).

Secondly, if the children's mother had herself lodged an application with the Court, the refusal to award her maternity benefit on the basis of nationality could certainly have been challenged, on the basis of our case-law, as being contrary to Article 14 of the Convention taken together with Article 8, construed, *inter alia*, in the light of Article 12 § 4 of the European Social Charter, which provides that domestic law cannot reserve social-security rights to their own nationals[1].

[1] Admittedly, Hungary, whilst being a party to the Social Charter, has not accepted Article 12 § 4. However, the Court has already had occasion to rely on provisions of the Social Charter which have not been accepted by the respondent State (see *Demir and Baykara v. Turkey* of 12 November 2008 [GC], §§ 45, 46, 49, 50, 86, 103, 129 and 149, regarding Articles 5 and 6 of the Social Charter).