

April 2010

Moretti and Benedetti v. Italy - 16318/07

Judgment 27.4.2010 [Section II]

Article 8

Positive obligations

Article 8-1

Respect for family life

Failure to examine request for adoption by foster parents before declaring child free for adoption: *violation*

Article 35

Article 35-3

Ratione personae

Application lodged on behalf of minor child by foster parents: *inadmissible*

Facts – The first and second applicants are a married couple. In June 2004 a one-month old baby girl, who had been abandoned by her birth mother shortly after her birth, was temporarily placed with the applicants. In December 2005 she was given to a new adoptive family chosen by the court. In January 2006 a request for a special adoption order, which had been lodged by the applicants in respect of the child in March 2005, was examined and dismissed by the children's court. Subsequently the court of appeal set that decision aside. However, it went on to find, basing its decision on an expert report, that a further separation would be detrimental to the child. The adoption became final.

Law – Article 8: a) *Admissibility* – The respondent Government raised three preliminary objections. They submitted, firstly, that the applicants did not have standing to represent the child before the Court; secondly, that the applicants had not exhausted domestic remedies because they could have appealed on points of law to the Court of Cassation; and, thirdly, that the applicants could not rely on the existence of "family life" requiring protection in the present case.

(i) *Regarding the part of the application submitted on behalf of the child*: Whilst pains should be taken to avoid a restrictive or purely technical approach regarding the representation of children before the Court, in the present case the applicants did not exercise parental responsibility over the child, were not her guardians and had no biological tie with her; nor had any power of attorney been signed to allow them to represent her interests. Moreover, in the domestic proceedings the child had been represented by a guardian. In the circumstances the applicants did not have standing before the Court to represent the child.

Conclusion: preliminary objection upheld (unanimously).

(ii) *Regarding the non-exhaustion of domestic remedies*: A possible appeal on points of law would not have had the effect of remedying the applicants' complaints. As the grounds of appeal submitted by the applicants would have mainly concerned the merits of the case the Court of Cassation would have declared the appeal inadmissible.

Conclusion: preliminary objection dismissed (unanimously).

(iii) *Regarding the existence of a bond constituting family life*: The applicants had taken the baby girl in when she was one month old and had shared the first important stages of her youth for nineteen months. During that period the child had lived with a sister and brother. The expert reports had shown that she was well integrated into the family and deeply attached to the applicants and their children. Furthermore, the applicants had fostered the girl's social development by, among other things, enrolling her in a crèche and taking her on holiday. Those factors were sufficient to find that there had been a close inter-personal bond between the applicants and the child and that the applicants had behaved in every respect like the girl's parents, so that family ties had existed *de facto* between them. At all events, although the applicants had previously, on a temporary basis, taken in children who had then been adopted by other families, in this case they had lodged a request to adopt the child, which was further evidence of the strength of the bond that had been established. Accordingly, the relationship between the applicants and the child fell within the notion of family life within the meaning of Article 8.

Conclusion: preliminary objection dismissed (majority).

(b) *Merits* – The interests with which the Court was confronted in the present case, which concerned an adoption procedure, were not easily reconcilable. On the one hand there were those of the child and on the other those of the two families concerned. In attempting to achieve a balance between those various interests, the child's best interests must be a primary consideration. The question arose as to whether the proceedings that had resulted in the interference had guaranteed the applicants protection of their interests. It had been of primary importance here that the request for a special adoption order lodged by the applicants be examined carefully and speedily. The children's court had not provided any reasons for dismissing the request in question and, moreover, had not examined it before declaring the child free for adoption and choosing the new family. The court of appeal had failed to remedy that shortcoming. After ordering an expert report, it had considered that the young girl appeared to be well integrated into her new family and that a further separation, which might traumatise her, was inappropriate. The passage of time had also had the effect of rendering the decision of the children's court final. It was regrettable that the court had not examined the adoption request lodged by the applicants before declaring the child free for adoption, and that the request had been dismissed with no reasons being stated. It was not for the Court to substitute its own reasoning for that of the national courts, which had acted in good faith regarding the measures taken to ensure the child's well-being. However, the failure to comply with the law and rules of procedure had had a direct effect on the applicants' right to family life. The shortcomings observed in the conduct of the proceedings had resulted in an infringement of the positive obligation to ensure effective respect for the applicants' right to their family life.

Conclusion: violation (six votes to one).

Article 41: EUR 10,000 jointly in respect of non-pecuniary damage.

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