Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Racial Profiling, Poverty, and the Best Interest of the Child

Question(s) at stake:

Whether the state measures, in particular the prohibition of all contact between the applicant (a migrant Muslim black woman) and her children as well as the children's placement with a view to adoption, constituted a violation of the right to respect for family life.

Outcome of the ruling:

The ECtHR found a breach of the right to respect for family life pursuant to Article 8 of the ECHR. The state measures failed the proportionality test. The removal of the applicant's children due to the applicant's poverty and her refusal to undergo sterilization violated Article 8 of the ECHR. The best interest of the child implies that the tie between parents and offspring be maintained and developed except in strictly necessary situations.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Adoption
- Best interests of the child
- Measures and actions involving children
- Motherhood
- Right to respect for family life

Tag(s):

- Poverty

- Racial profiling
- Ethnic profiling

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Country:

Portugal

Official citation:

Soares de Melo v. Portugal, App. no. 72850/14, 16 February 2016

Link to the decision:

https://hudoc.echr.coe.int/eng?i=001-160938

ECLI:

ECLI:CE:ECHR:2016:0216JUD007285014

Date:

16 May 2016

Jurisdiction / Court / Chamber:

European Court of Human Rights, Fourth Section

Remedy / Procedural stage:

Merits and Just Satisfaction

Previous stages:

-

Subsequent stages:

-

Branches / Areas of law:

Facts:

The applicant was a Cape Verdean citizen living with her ten children in Lisbon. She identified as Muslim and was married under a polygamous arrangement. She had no stable job with a work contract.

In 2005, state authorities were informed about the precarious living conditions of the applicant's family by the Committee of Protection of Children and Youth (Portuguese acronym: CPCJ). To improve their living conditions and allow the children to live with their parents, a protection agreement was put in place, imposing several duties on the applicant and her husband.

By the end of 2007, the applicant's precarious living conditions had not changed. As a consequence, the public prosecutor's office initiated child protection proceedings on the grounds of the applicant's alleged neglect of her children and poor living conditions. Additionally, social services, in cooperation with the family court, started to monitor the applicant's family.

In 2009, the family court held hearings on the applicant's case. It subsequently included new obligations for the applicant and her husband in the protection agreement. Among them was the following: "The mother has to show evidence of treatment at the Hospital Fernando Fonseca regarding her sterilization through tubal ligation."

The family situation continued to be monitored over the years. In 2012, there was a new hearing. On this occasion, counter to the applicant's claims, the family court ruled that the applicant and her husband had failed to comply with the protection agreement. Therefore, it decided to remove the children from their home with a view to adoption, to deprive the parents of parental responsibility in respect of their seven youngest children, and prohibit all contact between them. The applicant and her husband appealed this decision without success before the first and second instance courts.

In 2013, the Constitutional Court decided in favour of the applicant on procedural grounds regarding her appeal. Consequently, the second instance court revised her appeal on the merits and upheld the first instance court's judgment. The applicant's legal representative appealed this decision without success.

In 2014, the applicant filed a complaint before the ECtHR, requesting interim measures to visit her children, which were granted by the ECtHR. On the merits, the applicant alleged that the state measures amounted to a violation of Articles 6(1), 8, and 13 of the ECHR. The applicant highlighted that the domestic courts based their decisions on her alleged failure to engage in adequate family planning. As evidence for the case, there were several reports prepared by the social services on the applicant. The state contested the applicant's allegations.

By the time of the application before the ECtHR, the applicant's appeal before the Constitutional Court was still pending.

Ruling:

The application was admitted pursuant to Article 8 of the ECHR.

Pursuant to Article 8 of the ECHR, interference in family life is allowed when it meets the following requirements: legality, legitimate aim, and necessity. The parties contested neither the legality of state measures nor the presence of a legitimate aim (*i.e.*, the best interests of the child). The controversial issue was the requirement of necessity.

The relevant state measures failed to meet the requirement of necessity. Fundamental to this conclusion was the fact that the applicant had not received enough state support so that she could exercise a professional activity. The role of social services is to support people in need, among other things by giving advice about available state-provided financial aid. Social services were not responsive to the applicant's needs in her role as a single parent. Besides that, despite the precarious living conditions, the emotional ties between the applicant and her children were very strong and observed by the domestic courts. There was no sign of abuse of the children, such as emotional deficiencies, health concerns, or mental disturbance.

Notably, the requirement of sterilization in the protection agreement was incompatible with the ECHR. Such a procedure may never be imposed as a condition to retaining parental rights.

Article 8 of the ECHR was violated in four different ways: 1) the removal of the applicant's children with a view to adoption; 2) the requirement of sterilization in the parental protection agreement; 3) the prohibition of contact between the applicant and her children; 4) the absence of consideration of the emotional ties between the applicant and her children in the domestic legal proceedings that constrained her parental rights.

The relevant interim measures adopted by the ECtHR should remain in place. State authorities should reexamine the case in a short-term period and redress the applicant due to non-pecuniary damage with an award of 15,000 euros.

Main quotations on cultural or religious diversity:

"The applicant also complained about the social service's insistence on including in the protection agreement an obligation to undergo a sterilization operation because she believed that such a procedure went against her culture and her Muslim religion." (para. 79)

"Regarding the examination of the necessity of state interference, the court will analyze it considering that the conception of the suitability of a state intervention in childcare varies among state members according to different elements, such as traditions regarding family roles and state intervention in domestic affairs, as well as the availability of state resources. Regardless of that, the best interests of the child should prevail on a case-by-case basis." (para. 90)

"The court also notes that judicial authorities have not properly considered the cultural differences in the present case. It observes the pressure on the applicant to submit to a sterilization procedure under the parental protection agreement." (para. 118)

Main legal texts quoted in the decision:

International Law

- Articles 3, 9, 44 of the Convention on the Rights of the Child
- Articles 8, 41 of the European Convention on Human Rights

Domestic Law

- Articles 1978, 1978-A of the Civil Code
- Article 1409 of the Procedural Civil Code
- Law 147/99, 1 September 1999
- Articles 9, 35, 38, 39, 41, 45, 49, 55, 56, 62, 85, 100, 103, 104, 106, 110, 112, 114 of Law 31/2003, 22 October 2003

Cases cited in the decision:

European Court of Human Rights

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- *B. v. Romania (no. 2)*, App. no. 1285/03, 19 February 2013
- *Barelli and Others v. Italy*, App. no. 15104/04, 27 April 2010
- *Bertrand v. France*, App. no. 57376/00, 19 February 2002
- *Bondavalli v. Italy*, App. no. 35532/12, 17 November 2015
- *Cardot v. France*, App. no. 11069/84, 19 March 1991
- *Christine Goodwin v. the United Kingdom*, App. no. 28957/95, 11 July 2002
- *Clemeno and Others v. Italy*, App. no. 19537/03, 21 October 2008
- *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, App. nos. 11182/03 and 11319/03, 18 October 2005
- *Couillard Maugery v. France*, App. no. 64796/01, 1 July 2004
- *Covezzi and Morselli v. Italy*, App. no. 52763/99, 9 May 2003
- *Dalia v. France*, App. no. 26102/95, 19 February 1998
- *Dewinne v. Belgium*, App. no. 56024/00, 10 March 2005
- *Errico v. Italy*, App. no. 29768/05, 24 February 2009
- *Glass v. the United Kingdom*, App. no. 61827/00, 9 March 2004
- *Gnahoré v. France*, App. no. 40031/98, 19 September 2000
- *Jehovah's Witnesses of Moscow v. Russia*, App. no. 302/02, 10 June 2010

- *K.A.B. v. Spain*, App. no. 59819/08, 10 April 2012
- *Kříž v. the Czech Republic*, App. no. 26634/03, 29 November 2005
- *M.G. and M.T.A. v. Italy*, App. no. 17421/02, 28 June 2005
- *N.B. v. Slovakia*, App. no. 29518/10, 12 June 2012
- *Pontes v. Portugal*, App. no. 19554/09, 10 April 2012
- *R. and H. v. the United Kingdom*, App. no. 35348/06, 31 May 2011
- *R.M.S. v. Spain*, App. no. 28775/12, 18 June 2013
- *Rampogna and Murgia v. Italy*, App. no. 40753/98, 11 May 1999
- *Reigado Ramos v. Portugal*, App. no. 73229/01, 22 November 2005
- *Smirnov v. Russia*, App. no. 14085/04, 6 July 2006
- *Szott-Medyńska v. Poland*, App. no. 47414/99, 9 October 2003
- *Todorova v. Italy*, App. no. 33932/06, 13 January 2009
- *Vučković and Others v. Serbia*, App. nos. 17153/11 and 29 others, 25 March 2014
- *Zakharova v. France* (dec.), App. no. 57306/00, 13 December 2005
- *Zhou v. Italy*, App. no. 33773/11, 21 January 2014

Commentary

Racial Profiling, Poverty, and the Best Interest of the Child

The case of *Soares de Melo v. Portugal* represents the largely invisible predicament of migrant black women on European soil. The case's factual background stands for the shared plight of several women belonging to vulnerable groups, such as Roma or Afro-descendant communities (Fernandes 2021). Conversely, due to the obstacles in accessing justice, legal issues experienced by these women seldom come before courts, and hardly ever before the ECtHR. Without adequate economic resources or access to public judicial assistance, the applicant could bring her case to Strasbourg only with the support of two *pro bono* attorneys (Sanches 2016). This case represents the second condemnation of the Portuguese state regarding childcare and parental rights, following *Pontes v. Portugal* (App. no. 19554/09, 10 April 2012).

The present decision adds to the ECtHR's strand of cases on child removals from families living in poverty (David 2016; Kriona Saranti 2016). The striking difference of the Soares de Melo case to the established case law was that to prevent her children's adoption, the applicant was compelled to sign the protective agreement. This document stipulated that the applicant had to undergo sterilization to retain custody of her children, a requirement which the ECtHR considered illegal. Therefore, it is worth noting that this judgment relates to the case law on reproductive rights and sterilization operations, such as *Gauer and Others v. France* (App. no. 61521/08, 23 October 2012), *G.B. and R.B. v. The Republic of Moldova* (App. no. 16761/09, 18 December 2012), and *K.H. and Others v. Slovakia* (App. no. 32881/04, 28 April 2009).

At the domestic level, this case twice reached the highest judicial instance (the Portuguese Constitutional Court). The first decision was in favour of the applicant (Constitutional Court, Judgment no. 243/2013, Application no. 12/13, 10 May 2013). Likewise, the Constitutional Court decided that the interpretation given by the first and second instance courts on procedural matters concerning the law at issue (LPCJP, in Portuguese *Lei de Protecção de Crianças e Jovens em Perigo*, which can be translated as Law on the Protection of Children and Youth at Risk) was incompatible with the Portuguese Constitution. In short, it addressed the issue of whether the legal provision regarding the calculation of the deadline to appeal against a judgment complied with constitutional rules. The first and second instances of the courts had previously interpreted the relevant provision in a manner that calculated the deadline for appeal from the moment the decision was read in front of the interested parties, even in the absence of the attorney. The Constitutional Court subsequently determined that this interpretation contravened the Constitution.

Moreover, the second judgment by the Constitutional Court came after the relevant ECtHR decision (Constitutional Court, Judgment no. 193/2016, Application no. 919/15, 4 May 2016). The Constitutional Court decided in favour of the applicant on the basis of the procedural issues described above. It avoided dealing with the controversial issue concerning the requirement of the applicant's

sterilization (para. 12.5). A few months after the Constitutional Court's decision, the applicant made a parental agreement with the first instance court and got back her children (Sanches and Faria 2016). She received due compensation by the state.

As a follow-up to this case, the LPCJP was modified to ensure consistency with the Portuguese Constitution – and, indirectly, the ECHR. Thus, this case had a direct impact on Portugal's laws. In addition, the Portuguese Centre for Judicial Studies highlights the contribution of the relevant ECtHR judgment to a change in the interpretation of the concept of "best interest of the child" (Centro de Estudos Judiciários 2018). Accordingly, the best interest of the child has to be balanced with the parental interest in having a family life. The fact that the parents are reliant on donations and do not have ideal housing conditions does not justify the removal of children according to the "best interest of the child". Emotional ties between parents and offspring must be taken into account.

Furthermore, interdisciplinary scholarship points out issues of discrimination underlying the present case. David (2016) explains that the applicants in poverty-related child removal cases often complain – without success – on the basis of Article 14 ECHR (prohibition of discrimination). In the present case, perhaps as a matter of legal strategy, the applicant did not raise her complaint according to Article 14 ECHR, despite having factual evidence in that regard. Fernandes (2021) demonstrates that domestic proceedings in the case *Soares de Melo* show strict state control over the applicant's life, as documented by several official reports issued over a decade.

The state's control over the applicant's life was not a mere coincidence. Rather, it was a matter of structural discrimination and racism. The literature (Maeso et al. 2021) elucidates that there is a well-established discourse in Portugal on the continuum between cultural diversity, social exclusion, and criminality. Consequently, public security demands the intervention and monitoring of families through state services belonging to Afro-descendant communities and Roma people, who are spatially segregated (Alves 2021). The aforementioned families reside primarily in socially disadvantaged neighbourhoods situated in the

periphery of Lisbon, a demographic profile that aligns with that of the applicant, Ms Soares de Melo.

To control Roma and Afro-descendant families, the state performs so-called racial profiling, using multiple institutions and methods. After a country visit in 2021, the UN Working Group of Experts on People of African Descent declared its concern about the prevalence of systemic racism and racial profiling in Portugal. Several international and European organizations made official statements addressing issues of racism on Portuguese soil. The UN Human Rights Committee, in its latest report on Portugal (CCPR/C/PRT/CO/5, 28 April 2020), noted the excessive use of force against Roma people and Afro-descendant communities, highlighting that those crimes are not adequately investigated and prosecuted.

Notably, Portuguese society has been actively engaging with issues concerning racism. In 2018, there were the first national demonstrations against racism in several Portuguese cities (Maeso et al. 2021). In 2021, the government approved the inaugural National Programme Against Racism and Discrimination (Plano Nacional de Combate ao Racismo e à Discriminação, *Diário da República* 145/2021, Série I of 28 July 2021: 20–72). However, in light of the gradual ascension of right-wing political actors in European politics, a social backlash with respect to the implementation of human rights and anti-racism measures cannot be discounted.

Last update: July 2024.

Literature related to the main issue(s) at stake:

Case-relevant

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- United Nations Working Group of Experts on People of African Descendant. 2021. “Portugal at Crossroads of Anti-racism”, available at <ohchr.org/EN/issues/Racism/WGAfricanDescendent/Pages/WGEPADIndex.asp> accessed 9 December 2021.

Interdisciplinary literature

- Alves, A.R. 2021. “Quando ninguém podia ficar: Racismo, habitação e território”. Lisboa: Tigre de papel.
- Fernandes, S. 2021. “As múltiplas faces da benevolência violenta: intervenção legal, proteção social e família”. In S. Rodríguez Maeso (ed), *O Estado do Racismo em Portugal*. Lisboa: Tinta da China.
- Rodríguez Maeso, S., A.R. Alves, and D. Araújo. 2021. “Racismo e políticas de segurança interna em Portugal: policiamento e controlo da juventude negra e Roma/cigana”. In S. Rodríguez Maeso (ed), *O Estado do Racismo em Portugal*. Lisboa: Tinta da China.

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Suggested citation of this case-law comment:

Monteiro de Matos, Mariana (2025): Racial Profiling, Poverty, and the Best Interest of the Child, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI018PT012, https://doi.org/10.48509/CUREDI018PT012.