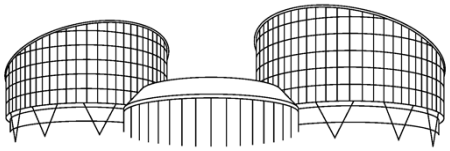

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BIERSKI v. POLAND

(Application no. 46342/19)

JUDGMENT

This version was rectified on 24 October 2022
under Rule 81 of the Rules of the Court

Art 8 • Positive obligations • Authorities' failure to take measures re-establishing father's contact with his incapacitated adult son resulting in no contact for over two years • Lack of regulatory framework protecting applicant's right to family life

STRASBOURG

20 October 2022

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 Bierski v. Poland,

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

Marko Bošnjak, *President,*
Krzysztof Wojtyczek,
Alena Poláčková,
Erik Wennerström,
Lorraine Schembri Orland,
Ioannis Ktistakis,
Davor Derenčinović, *Judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 46342/19) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Stanisław Bierski ("the applicant"), on 23 August 2019;

the decision to give notice of the application to the Polish Government ("the Government");

the parties' observations;

Having deliberated in private on 20 September 2022,

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

INTRODUCTION

1. The present application concerns complaints of violations of the applicant's right of access to a court and right to respect for his family life on account of the courts' refusal to regulate his contact with his incapacitated adult son.

THE FACTS

2. The applicant was born in 1949 and lives in Wrocław. He was granted legal aid and was represented before the Court by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. THE APPLICANT'S ATTEMPTS TO HAVE CONTACT WITH HIS SON REGULATED

5. In 1999 the applicant married A.R. and in the same year their son, D.B., was born. The son suffers from Down's syndrome.

6. In 2001 the applicant and A.R. divorced and the son lived with his mother. According to the applicant's submissions, A.R. impeded the applicant's contact with D.B., but it appears that the necessary arrangements were made, a guardian for D.B. was appointed and the applicant regained contact with his son, although not as frequently as he had wished.

7. On 25 October 2017 the applicant requested the Wrocław-Śródmieście District Court to regulate contact with D.B. by way of an interim measure. The applicant submitted that his son would reach the age of 18 on 13 November 2017 and that, therefore, the guardian appointed for D.B. would no longer be exercising his functions. He also submitted that A.R. had refused to allow him to visit his son on the dates "indicated in the judgment".

8. On 27 December 2017 the Wrocław-Śródmieście District Court granted the request and secured the applicant's contact with D.B. by way of an interim measure, in force until the termination of the proceedings. It held that the applicant was allowed to see his son on the first and third Saturdays of each month between 10 a.m. and 5 p.m. in the presence of the court-appointed guardian. The applicant was to collect D.B. from his place of residence and accompany him home afterwards.

9. The applicant submitted that, in spite of the above-mentioned arrangements, by September 2018 he had only seen D.B. five times, whereas he should have seen him eighteen times. This was due to A.R.'s actions aimed at impeding his contact with their son.

10. On 26 February 2018, at the request of A.R., the Wrocław Regional Court declared D.B. incapacitated.

11. On 24 May 2018 the Wrocław-Śródmieście District Court appointed A.R. as D.B.'s guardian.

12. On 4 October 2018 the Wrocław-Śródmieście District Court dismissed the applicant's request for the regulation of contact with D.B. and quashed its decision of 27 December 2017 regulating contact by means of an interim measure. The court held that the applicant was not entitled to request contact with his incapacitated adult son. It referred to the Supreme Court's resolution of 17 May 2018 according to which "parents of an adult child who is totally incapacitated because of mental disability and for whom a guardian has been appointed are not entitled to request a court to regulate contact with the child". In all issues concerning the personal or financial matters of the incapacitated person, only the court-appointed guardian was entitled to request the family court to make the relevant arrangements. The request could not be submitted by any other person. Likewise, the relevant arrangements could not be made by the court of its own motion. In that connection, the court referred to Article 593 of the Code of Civil Procedure.

13. On 13 November 2018 the applicant appealed. He complained, among other things, that the first-instance court had failed to hear him and D.B.

14. On 18 January 2019 the Wrocław Regional Court dismissed the applicant's appeal. It agreed with the facts established by the first-instance

court and accepted its legal reasoning, holding that the applicant had not been entitled to seek the regulation of contact with his incapacitated adult son. As for the hearing of D.B., the court held that in accordance with the relevant provisions of the Code of Civil Procedure, the court could hear minors in cases of this kind, whereas D.B. was already an adult. Moreover, as indicated in the case file, D.B. did not react to questions posed to him and communication between him and people not known to him was impossible. The court further confirmed that in the Polish legal system there was no provision allowing the regulation of contact between a parent and his or her adult child, including, in particular, an adult child who was totally incapacitated.

II. EVENTS AFTER THE GOVERNMENT WERE GIVEN NOTICE OF THE APPLICATION

15. On 18 February 2019 the applicant submitted a request to the Wrocław-Śródmieście District Court to change D.B.'s guardian and, again, to regulate contact with his son.

16. In the course of the proceedings, the court informed the competent prosecutor of the ongoing proceedings and, on 8 June 2020, the Wrocław District Prosecutor requested the court to regulate contact between the applicant and his son.

17. On 17 November 2020 the Wrocław-Śródmieście District Court dismissed both requests submitted by the applicant. It found no grounds to change D.B.'s court-appointed guardian and confirmed that the applicant lacked legal standing to request the regulation of contact with his adult son. However, the court also examined the prosecutor's request and granted it in part. It found that since September 2018, A.R. had arbitrarily (*samowolnie*) hindered the applicant's contact with D.B. The court decided, among other things, that the applicant could see D.B. on every second Saturday of each month between 10 a.m. and 1 p.m. in the presence of a court-appointed guardian.

18. Both the applicant and A.R. appealed.

19. On 17 March 2021 the Wrocław Regional Court partly altered the first-instance decision. However, as regards the applicant's contact rights, the decision of 17 November 2020 was in principle upheld.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF CIVIL PROCEDURE

20. Article 593 of the Code of Civil Procedure, in so far as relevant, reads as follows:

> "In all important issues concerning the personal or financial matters of an incapacitated person, permission shall be granted by the custody court at the request of the court-appointed guardian."

II. THE FAMILY AND CUSTODY CODE

21. Contact with children is regulated in Articles 113-113[6] of the Family and Custody Code (*Kodeks Rodzinny i Opiekuńczy*). However, those provisions only apply to contact between adults and minor children. Their application is thus ruled out once a child reaches the age of 18, even if he or she is incapacitated.

III. THE SUPREME COURT'S RESOLUTION OF 17 MAY 2018

22. On 17 May 2018 the Supreme Court adopted a resolution (III CZP 11/18), which reads as follows:

> "Parents of an adult child who is totally incapacitated because of mental disability and for whom a guardian has been appointed are not entitled to request a court to regulate contact with the child."

THE LAW

I. SCOPE OF THE CASE

23. The Court notes that after the Wrocław-Sródmieście District Court had informed the prosecutor of the ongoing proceedings and after the prosecutor had made the relevant request, contact between the applicant and his son was finally regulated. However, between 4 October 2018 and 17 November 2020 – that is, for more than two years – there were no contact arrangements in place that would allow the applicant to see his son. The Court will therefore deal with the applicant's complaints in relation to this specific period.

II. ADMISSIBILITY

The Government's preliminary objections

1. The parties' submissions

24. The Government submitted that the applicant had failed to exhaust the available domestic remedies, specifically a request on the basis of Article 168 of Family and Custody Code, in accordance with which the court could deliver a custody decision if a guardian did not exercise custody in a proper manner. They further submitted that the applicant should have lodged a claim

for the protection of his personal rights on the basis of Articles 23 and 24 of the Civil Code.

25. The applicant argued that a request based on the Family and Custody Code was not an effective remedy since it could not have led to the establishment of contact with his son. It was aimed rather at the possibility of changing the court-appointed guardian in the event that the one appointed did not carry out his or her duties properly. A claim for the protection of his personal rights could likewise not have led to the desired effect.

2. The Court's assessment

26. The Court notes that the applicant never claimed that A.R. had exercised custody in an improper manner. His complaint focused on the fact that there was no relevant provision in the domestic legal system that would allow him to make a request to the competent court to seek the regulation of contact arrangements with his totally incapacitated adult son. The courts confirmed on two occasions that the applicant lacked legal standing to make such a request (see paragraphs 12 and 14 above).

27. As regards a claim for the protection of his personal rights, the Court notes that that remedy could only be successful if the action or inaction complained of lacked a legal basis (*bezprawność*). In the present case, the courts referred to the relevant domestic provisions in refusing to examine the applicant's request.

28. It follows that the remedies relied on by the Government could not have led to the applicant being granted contact arrangements with his son. In any event, the Government failed to demonstrate the contrary. In these circumstances the Government's preliminary objections must be dismissed.

29. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained that he had had no effective access to a court. He relied on Article 6 § 1 of the Convention, the relevant part of which provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

31. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case, and that it has previously held that whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see, among other authorities, *Kutzner v. Germany*, no. 46544/99, § 56,

ECHR 2002-I; *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 99, ECHR 2000-I).

32. In the present case, the Court considers that the complaint raised by the applicant under Article 6 of the Convention is closely linked to his complaint under Article 8 and may accordingly be examined as part of the latter complaint.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that the refusal to regulate contact with his incapacitated adult son had amounted to a violation of his right to family life, secured by Article 8 of the Convention, which reads 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

34. The applicant submitted that he had managed to maintain contact and good relations with D.B. until the latter turned 18, despite the obstacles created by A.R. The domestic courts' refusal to regulate his contact with D.B. after he had become an adult had amounted to an interference with his right to family life. This interference had not been "necessary in a democratic society" and had resulted in the interruption of the applicant's family ties with his son, in violation of Article 8 of the Convention.

35. The applicant underlined that he had had no access to a court for the determination of contact arrangements with his fully incapacitated son. He pointed to the decision of the Wrocław Śródmieście District Court of 4 October 2018, upheld by the decision of the Wrocław Regional Court of 18 January 2019, which had expressly confirmed, with reference to the Supreme Court's resolution of 17 May 2018, that he lacked legal standing to request a judicial arrangement for contact with his son.

36. The Government submitted that the relevant provisions of the Family and Custody Code concerned contact arrangements between parents and their minor children. They had thus been inapplicable once D.B. had turned 18. The Government further asserted that no adult person could be forced to maintain contact with his or her parents against his or her will, and that that also applied to incapacitated persons.

37. As concerns the procedural aspect, the Government argued that the applicant had had effective domestic remedies at his disposal. Had he chosen

to make use of them, his grievances would have been examined by the appropriate courts.

38. Lastly, the Government claimed that the applicant had been "entitled to contact his adult son with the latter's consent" and argued in conclusion that there had been no interference with the applicant's right to family life.

B. The Court's assessment

1. General principles

39. In keeping with its case-law, the Court notes that the question of the existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 14 et seq., § 31, and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII).

40. It further reiterates the principle that relationships between parents and adult children do not fall within the protective scope of Article 8 unless "additional factors of dependence, other than normal emotional ties, are shown to exist" (see, *Senchishak v. Finland*, no. 5049/12, § 55, 18 November 2014; *Emonet and Others v. Switzerland*, no. 39051/03, § 35, 13 December 2007; and *mutatis mutandis*, *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000).

41. Thus, in the case of *Emonet and Others* (cited above), the first applicant, an adult who became paraplegic after a serious illness, needed to be cared for by her mother and her mother's partner (the other two applicants), with whom she lived. She requested to be adopted by her mother's partner which request was granted but, under the Swiss law, that adoption had the automatic effect of terminating legal parent-child relationship between the first applicant and her mother. The applicants complained about that effect. The Court found that:

(a) a *de facto* family tie existed between the three applicants, and that "additional factors of dependence other than normal ties of affection" existed to bring Article 8 of the Convention into play (§§ 37-38);

(b) the severing of the mother-daughter relationship between the first and second applicants as a result of the adoption constituted an interference with the applicants' enjoyment of the right to respect for their family life (§ 70).

42. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may, however, be positive obligations inherent in effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and, *mutatis*

mutandis, *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII). In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see, among other authorities, *Keegan v. Ireland,* 26 May 1994, § 49, Series A no. 290).

43. The Court has consistently held that Article 8 includes a right for a parent to have measures taken with a view to his or her being reunited with their child, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures (see, *inter alia*, *Olsson v. Sweden (no. 2)*, 27 November 1992, § 90, Series A no. 250), but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A).

44. The obligation of the national authorities to take measures to facilitate contact by a non-custodial parent with children after divorce is not, however, absolute (see, *mutatis mutandis*, *Hokkanen*, cited above, § 58). The key consideration is whether those authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case (ibid.). Other important factors in proceedings concerning children are that time takes on a particular significance as there is always a danger that any procedural delay will result in the *de facto* determination of the issue before the court (see *H. v. the United Kingdom*, 8 July 1987, §§ 89-90, Series A no. 120).

45. In this respect, the Court reiterates that, whilst Article 8 contains no explicit procedural requirements, the applicant must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his interests, as safeguarded by that Article (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 147, ECHR 2014 (extracts); *Elsholz v. Germany* [GC], no. 25735/94, § 52, ECHR 2000-VIII; *Z.J. v. Lithuania*, no. 60092/12, § 100, 29 April 2014; and *W. v. the United Kingdom*, 8 July 1987, § 64, Series A no. 121).

2. Application of those principles to the present case

46. The Court first notes that the applicant's complaints refer to the period when his son was already adult. Therefore, in the light of the Court's case law (see paragraph 40 above) it is necessary to establish whether "family life" existed between the applicant and D.B. and so whether Article 8 of the Convention is applicable.

47. In this respect, the Court notes that the applicant is D.B.'s biological father with whom he lived for the first two years of his life. Following that, they had regular contact throughout D.B.'s childhood and youth and enjoyed

a father-son relationship. Moreover, before D.B. turned 18 years of age, the applicant took the necessary steps to have contact with him secured by way of interim measure (see paragraph 7 above). On the basis of this measure, he continued to have contact with his son until A.R. was appointed as D.B.'s guardian and the measure was lifted (see paragraphs 9 and 12 above). Already against this background, the Court finds that even after he had reached the age of 18, D.B. was part of the applicant's core family. In addition, D.B. suffers from Down syndrome and is fully incapacitated. Indeed, according to the findings of the Wrocław Regional Court in its decision of 18 January 2019 (see paragraph 14 above) D.B. did not react to questions posed to him and communication between him and people not known to him was impossible. In view of this, it is clear to the Court that there existed "additional factors of dependence" between the applicant and his son, as the applicant was one of the close persons who could communicate with D.B. Taking into account the above considerations, the Court finds that, even though D.B. was no longer a minor at the relevant time, there existed "family life" between the applicant and his son within the meaning of Article 8 of the Convention and that, therefore, Article 8 is applicable to the present case.

48. The Court further notes that the initial interference with the applicant's contact with his son was caused by A.R.'s refusal to allow such contact. As she was D.B.'s appointed legal guardian (see paragraph 11 above), the applicant turned to the domestic courts to regulate contact rights with D.B. However, the domestic courts dismissed his request, which resulted in the applicant not having any contact with D.B. for over two years.

49. While the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, the Court reiterates that the applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 75, ECHR 2007-I).

50. In the present case, as transpires from the domestic courts' decisions and from the Supreme Court's resolution of 17 May 2018, the applicant was not entitled to institute proceedings for the determination of contact arrangements with his fully incapacitated adult son. At the same time, the court which examined the applicant's first request did not inform the competent prosecutor of the ongoing proceedings. Likewise, it did not take any action of its own motion. Only after the applicant's second request the Wrocław Śródmieście District Court decided to give notice of the proceedings to the prosecutor[1]. The Court notes, however, that both the courts

[1] Rectified on 24 October 2022: the text was "It was not until 17 November 2020 that the Wrocław Śródmieście District Court decided to give notice of the proceedings to the prosecutor."

and the prosecutor enjoy full discretion in this respect and may choose not to intervene, without giving the interested party any reasons for their decision.

51. Thus, the applicant had nowhere to turn to ensure contact rights with his son as there was no regulatory framework in place to protect his family rights. Indeed, the Supreme Court's resolution of 17 May 2018 expressly excluded such right (see paragraph 22 above). The Court observes that there is no indication that the limitation in question pursued any legitimate aim or could be considered as "necessary in a democratic society", and the Government have not argued otherwise. Moreover, the Court fails to see what competing interests were present in the case at hand. The applicant, as the biological father with an established relationship with his son, clearly had an interest to pursue the relationship once D.B. entered adulthood, and there is nothing to suggest that this would not be to the benefit of the son.

52. In this respect, referring to the Government's arguments, the Court notes that the applicant did not seek contact with his son against the latter's will; at least, there is no such indication in the case file. Firstly, the state of health of the applicant's son apparently did not allow him to express his own will (see paragraph 14 above). Secondly, the applicant did not seek forced contact with his son. Rather, he sought judicial proceedings which would determine the scope and frequency of contact between them since D.B.'s guardian, A.R., refused to cooperate to maintain contact between father and son. Of course, the court called upon to give a decision on the matter would have to weigh the interests of the applicant and those of his son, should they contradict each other, or if it appeared that the son did not wish to have contact with his father.

53. However, as the domestic law stands, the domestic courts did not examine the applicant's request at all. It was dismissed on account of the applicant's lack of legal standing. It was not until 17 November 2020 that contact arrangements were made, following the request submitted by the prosecutor (see paragraph 17 above). Before that date, that is, for over two years, the applicant was deprived of any contact with his son. In this connection, the Court reiterates that time is an important factor in proceedings concerning children, since any delay may result in a certain level of alienation and, in the Court's view, the same is likely to happen in relation to a young adult person with severe mental disabilities.

54. The Court considers, therefore, that in the period referred to above, the authorities failed to discharge their positive obligation to take measures aimed at re-establishing contact between the applicant and his son. Even having regard to the State's margin of appreciation, the Court finds that the lack of any regulatory framework to protect the applicant's right to his family life, in a situation where his adult son is fully incapacitated, amounts to a violation of Article 8 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 200,000 euros (EUR) in respect of non-pecuniary damage.

57. The Government submitted that the amount claimed by the applicant was excessive and unjustified.

58. The Court, ruling on an equitable basis, awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

59. The applicant also claimed EUR 3,600 in respect of the costs and expenses of legal representation before the Court and EUR 110 in respect of the costs of translations.

60. The Government submitted that it had not been shown that the costs and expenses claimed had been actually and necessarily incurred.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full amount claimed, EUR 3,710, less the sum of EUR 850 received under the Court's legal-aid scheme, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be

converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,860 (two thousand eight hundred and sixty euros), plus any tax that may be chargeable to the applicant, 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President