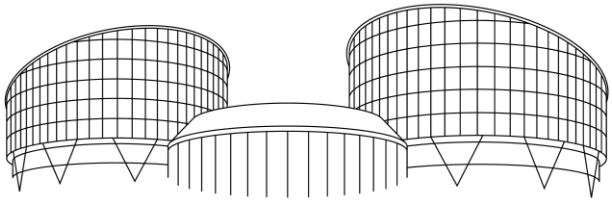

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GINEITIENĖ v. LITHUANIA

(Application no. 20739/05)

JUDGMENT

STRASBOURG

27 July 2010

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 **Gineitienė v. Lithuania**,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria,
Kristina Pardalos,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 6 July 2010,

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

PROCEDURE

1. The case originated in an application (no. 20739/05) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms Ilona Gineitienė ("the applicant"), on 31 May 2005.

2. The applicant, who had been granted legal aid, was represented by Ms J. Kiršienė and Ms N. Mockutė, lawyers practising in Kaunas and Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged, in particular, that the decision to place her two daughters with their father had been in breach of Articles 8, 9 and 14 of the Convention.

4. On 11 January 2007 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Vilnius. In 1990 the applicant married VG.

6. In 2000, the applicant became involved in the activities of the Ojas Meditation Centre, a Lithuanian branch of a new religious movement called Osho.

7. In 2001, she divorced her husband. The permanent place of residence of the applicant's two daughters, IG and AG, born in 1995 and 1996 respectively, was not determined and they stayed with the applicant and her former husband in Kaunas.

8. In July 2003, the applicant's former husband brought an action requesting that his home be fixed as the place of residence of his daughters. He alleged, *inter alia*, that the applicant's involvement in the Osho religious movement could have a negative influence on the children.

9. On 24 July 2003 the Kaunas District Child Rights Protection Agency, having visited the father's place of residence, concluded that the living conditions were suitable and, taking into consideration the wishes of AG and IG, suggested fixing their place of residence with the father. On 28 August 2003 the same Agency proposed to the District Court of Kaunas that it hear the views of the children.

10. By a ruling of 29 September 2003, the Kaunas District Court decided that, pending the proceedings, AG should reside with the applicant, and IG should stay with her father.

11. On 1 October 2003 the applicant and AG moved to Vilnius, settling in an apartment situated in the same building as the Ojas headquarters. The applicant was allowed to use that apartment free of charge. IG stayed with her father.

12. On 3 October 2003 the employees of the Vilnius City Child Rights Protection Agency (*Vaiko teisių apsaugos tarnyba*) visited the applicant's residence. They noted the applicant's explanation that she had two rooms for her use, one of them being reserved for AG. When the applicant was absent, a nanny would take care of her. The living conditions seemed suitable for a child. However, during the interview AG explained that she wanted to stay with her father, who took better care of her and did not leave her alone. She elaborated that her mother left her alone during the day and that she often felt scared. The Agency then suggested fixing AG's place of residence with her father.

13. On 9 December 2003 the employees of the Vilnius City Child Rights Protection Agency, having visited the applicant's place of residence in Vilnius, concluded that it was unsafe for AG to live there and that the applicant was not caring enough about AG's upbringing and education. They noted that the applicant's living space consisted of one room and that the kitchen was shared with other residents of the house. AG lived in that room with her mother, both of them sleeping in the same bed. The other room, which was supposed to be part of the applicant's living space, was apparently also used by other persons. At the time of the interview with AG, two teenage boys entered the room without asking for permission.

According to AG, her mother did not take care of her; she did not have any friends and, during the day, was left alone. The girl had to cook for herself; she was not allowed to go to the adjoining yard and the building next to it, where her mother was meditating. The nanny would only come to take care of AG when the applicant left for a few days. AG expressed her wish to live in Kaunas with her father and sister IG. The Agency's workers also interviewed AG's kindergarten teachers. According to them, AG was often sad about not seeing her sister and father. AG would also be picked up from the kindergarten by some fifteen year old girl, but at the time of the interview she was going home on her own. The Agency's workers suggested to the applicant that she find another place to live where AG would feel safer. However, the applicant refused because she did not have to pay rent for the current flat, and it was close to her meditation centre.

14. On 26 March 2004 the employees of the Vilnius City Child Rights Protection Agency again interviewed AG, who repeated her wish to live with her father. The Agency also noted that AG had stressed that she had made the same statement before the court of first instance and to the psychologists.

15. From 25 June to 2 July 2004, AG was examined by a psychologist. Again, she expressed her wish to stay with her father and older sister.

16. On 13 April 2004 the Kaunas District Court granted the action in part, ruling that IG should live with the applicant's former husband, and AG should live with the applicant. The court noted that both parents were well educated and had sufficient salaries to provide for their daughters. In the course of the proceedings, both girls had been heard by the court as well as by a psychologist. They had both expressed their wish to stay with their father. However, the court agreed with one of the experts that AG (then 8 years old) was not mature enough to take a reasonable decision about her parental preferences. With respect to the applicant's affiliation to the meditation centre, the court noted:

> "The Ministry of Justice has refused to register [Ojas] as a religious community, suggesting that it should be registered as [a non governmental organisation]. There is no indication in the case file that the meditation centre has a negative influence on children or that it propagates certain intolerable views; nor is there any evidence that the [applicant's] children are involved in the activities of the centre.
>
> The court concludes that [the applicant's] active participation in the activities of the meditation centre does not have any negative impact on her children. In accordance with Article 26 § 2 of the Constitution, everyone is free to choose a religion or belief and ... to profess his religion, to perform religious practices, and to practise and teach his beliefs."

17. On 16 July 2004 the Kaunas Regional Court amended the decision, ruling that both daughters should live with their father. The court considered that too little weight had been afforded by the lower court to the express wish of AG to live with her father. According to the appellate court, this had

not complied with Article 12 of the United Nations Convention on the Rights of the Child or the relevant provisions of national law, which obliged the court to take into account a child's wishes irrespective of its age. The appellate court had regard to the expert's conclusion of 9 December 2003 that the environment in which the applicant lived was unsafe, whereas the applicant's husband was able to provide good living conditions for AG. The recommendation by the Kaunas District Child Rights Protection Agency to fix the place of residence of both daughters with the father was taken into account. The court also observed the girls' wish to stay together, and to be close to other family members (grandparents) and friends living in Kaunas. Certain instances of inadequate care were noted, namely, the applicant's failure on one occasion to arrange for AG's medical assistance or to ensure her attendance at school. Finally, the appellate court observed that the first-instance court had not assessed (*nevertino*) the material submitted to the Ministry of Justice characterising the Osho movement as controversial. Neither did the first-instance court give any credit to the fact that the movement had been unable to obtain registration as a religious community.

18. The applicant submitted a cassation appeal, alleging, *inter alia*, that the court's decision was discriminatory, and that it had failed to respect her family life. She requested that her youngest daughter, AG, live with her.

19. On 1 December 2004 the Supreme Court dismissed the applicant's cassation appeal. It emphasised that the rights of both parents in the education of their children were equal, regardless of their beliefs, convictions or views. The custody dispute was to be resolved taking into account the best interests of the children, in which context their wishes should be considered, regardless of their age. In assessing the significance of such wishes, the most important factor would be the children's ability to formulate, express and substantiate their views.

20. The Supreme Court established that AG had amply explained her preference to stay with her father during the entire proceedings, both in her submissions to the courts and during the interviews with the experts. She had stressed, in particular, that her mother had not taken adequate care of her, often leaving her alone and neglecting to cook meals. The girl had also expressed a preference for living in Kaunas, together with her sister and close to other relatives and friends. She had noted that her father spent more time with her and took better care of her. The Supreme Court emphasised that the experts had considered that the living conditions of the applicant were unsafe for children.

21. The Supreme Court further assessed the material conditions of accommodation offered by both parents. It was established that the applicant's husband was able to provide his daughters with a separate room in a private cottage in the countryside near Kaunas.

22. The Supreme Court also emphasised the importance for the two sisters to be brought up together, and underlined that close ties existed between them.

23. The applicant's allegations of discrimination were dismissed as unsubstantiated. In this respect, the Supreme Court noted:

> "The applicant's claim in her cassation appeal that the appellate court had breached the principle of non-discrimination, enshrined in Article 14 of the Convention as well as in [Lithuanian law], by wrongly assessing the evidence on the Ojas Meditation Centre and taking into account that the applicant belonged to it, is unfounded. When determining the place of residence of the two children, whose parents live separately, the Court of Appeal gave priority to the interests of the children, took into account their wishes, the ability and efforts of each parent to guarantee the basic rights of the children, and each parent's living conditions, that is to say, those conditions in which the children would have to live once their place of residence was decided. The decision of the appellate court did not contain any indication that the resolution of the dispute was influenced by the fact that the applicant was a member of [Osho/Ojas] ... The appellate court only noted that the first-instance court had not assessed all the evidence regarding the meditation centre. However, that does not presuppose that the appellate court considered the applicant's membership of the centre important in the resolution of the dispute. Had that been so, such a consideration would require an assessment of whether the prohibition of discrimination on grounds of religion was observed. In its judgments in the cases of *Hoffmann v. Austria* and *Palau-Martinez v. France*, the European Court of Human Rights ruled that the prohibition of discrimination on the basis of religion, enshrined in Articles 14 and 8 of the Convention, had not been respected in cases where the courts had attached decisive importance to the [applicant's] religious affiliation. However, when determining [the custody dispute], the appellate court did not attach significance to the fact that the applicant was a member of [Osho/Ojas]."

24. In an unrelated set of proceedings, the Ojas Meditation Centre requested a court order obliging the Ministry of Justice to register it as a religious community. The action was granted by the Supreme Administrative Court on 4 February 2005. The court found no evidence that Ojas propagated any controversial practices amongst its members. Ojas was registered as a religious community on 12 April 2005.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. Article 23 of the Law on the Fundamentals of Protecting the Rights of the Child (*Vaiko teisių apsaugos pagrindų įstatymas*), in force at the material time, provided that disputes arising over a child's place of residence, in cases where the parents live separately, were to be resolved in court. It further stipulated that priority consideration had to be accorded to the interests and wishes of a child capable of expressing its own opinion as to which one of its parents it would wish to live with.

26. Article 3.174 of the Civil Code stipulates that, in the case of a dispute over a child's place of residence, the court is to take into consideration the wishes and interests of the child. The child's choice in the

matter may be only disregarded if it is contrary to its best interests. Under Article 3.177 of the Code, when adjudicating disputes over children, the court must hear the child capable of expressing its views and ascertain its wishes.

27. On 21 June 2002 the Senate of the Judges of the Supreme Court adopted a ruling "On the application of laws in the case-law of the courts in determining the place of residence of minors when the parents are separated". The ruling reads:

> "4. In deciding the dispute between separated parents over a child's place of residence, the court hearing the case must clarify and establish the following facts of legal importance:
>
> 1) the opportunities and efforts of each parent to ensure the implementation of the fundamental rights and duties of the child enshrined in legal provisions ...;
>
> 2) the conditions of the environment of each parent, namely, those conditions in which a child would live once its place of residence with one of the parents had been decided;
>
> 3) the wishes and views of the child. ...
>
> 6. (...) The court must also find out whether a child, over whose place of residence the dispute arose, has brothers or sisters .... The separation of brothers and sisters, especially in cases where the children have strong emotional attachments to each other and where they are fond of communicating and being together, would violate the interests of the children. ..."

28. Article 185 of the Code of Civil Procedure provides that a court shall make its own judgement on the probative value of evidence, based on the comprehensive and unbiased examination of that evidence in court.

III. RELEVANT INTERNATIONAL INSTRUMENTS

29. On 3 July 1995 the Seimas of the Republic of Lithuania ratified the 1989 United Nations Convention on the Rights of the Child which then became an integral part of Lithuanian law. The convention provides, in so far as relevant in the present case, the following:

Article 3

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

Article 12

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

THE LAW

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

30. The applicant was dissatisfied with the decisions of the domestic courts which fixed the father's home as the place of residence for her two daughters. She complained that those decisions had been in breach of Article 8 of the Convention, read in conjunction with Article 14, which, in so far as relevant, provide as follows:

Article 8

"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 ... for the protection of health ..., or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... religion ... or other status."

A. The parties' submissions

31. In their submissions on the admissibility and merits of the case, the Government argued that the decision to permanently place the daughters with their father had been lawful, reasonable and taken in the best interests of the children. They pointed out that the father's living conditions were much better than those of the mother, and stressed that the children preferred to live together with their father. Overall, the Government argued that there had been no interference with the applicant's Article 8 rights as a result of the decision in question, given that the applicant retained her parental rights and duties in their entirety, and could freely participate in the education and upbringing of her daughters. If the Court found that an interference existed, the Government submitted that it would be justified under the second paragraph of that Convention provision. According to the information received from the social services, the children were living and studying at their father's home in much better conditions than in the apartment where their mother lived. The Government also stressed that the applicant's religious affiliation had in no way been a decisive factor capable of affecting the decision as to the daughters' place of residence. On the contrary, the Lithuanian courts made an explicit distinction between the applicant's situation and that in the case of *Hoffmann v. Austria* (23 June 1993, Series A no. 255-C, p. 58). They affirmed that their verdict on the children's place of residence had only been reached with the girls' best interests in mind.

32. The applicant argued that the Lithuanian court decisions to place her two daughters with their father in preference to herself had been unreasonable, unjustified and clearly discriminatory. She submitted that it was her and not her former husband who mainly took care of the girls. For the applicant, the domestic court decisions were based on superficial arguments which were used only to hide the true reason for taking away her daughters – the applicant's membership of the Osho religious movement.

B. The Court's assessment

1. Admissibility

33. The Court considers that the applicant's complaints under Articles 8 and 14 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 thereof. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

34. The Court reiterates that Article 14 of the Convention 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 by those provisions. 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, *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

(a) Whether the facts of the case fall within the ambit of Article 8 of the Convention

35. It should be noted at the outset that, in the instant case, the two daughters had been living with their mother since birth and until temporary custody over IG was awarded to her father on 29 September 2003. In such circumstances, the Court considers that the subsequent decision permanently placing both girls in their father's home constituted an interference with the applicant's right to respect for her family life and cannot be regarded merely as the judicial interference necessary in any divorce. The case therefore falls within the ambit of Article 8 of the Convention (see *Hoffmann v. Austria*, cited above, § 29, and *Palau-Martinez v. France*, no. 64927/01, § 30, ECHR 2003-XII).

(b) Whether the applicant and her former husband were in an analogous or substantially comparable situation but were treated differently

36. The Court further recalls that Article 14 of the Convention only comes into play where an applicant has demonstrated that he or she has been treated differently from a person in a comparable position with respect to a substantive right guaranteed by the Convention without any objective or reasonable justification (see *Ismailova v. Russia*, no. 37614/02, § 49, 29 November 2007).

37. It is not the Court's role to substitute itself for the competent Lithuanian authorities in regulating custody and access issues in Lithuania, but rather to review under the Convention the decisions that those authorities took in exercising their power of appreciation. What matters for the Court is whether the reasons purporting to justify the actual measures adopted with regard to the applicant's enjoyment of her right to respect for family life were relevant and sufficient under Article 8 (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; *Kutzner v. Germany*, no. 46544/99, § 65, ECHR 2002-I).

38. As to the facts of the instant case the Court observes that, when determining the place of residence of IG and AG, the Lithuanian courts made a thorough analysis of the best interests of the children. The Court is

particularly struck by the Supreme Court's emphasis (paragraphs 19-20, 22 above) on the views of the children, who had, at all stages of the proceedings, voiced a strong desire to live with their father. AG had even alleged that the applicant had not taken proper care of her. The Court notes that the child protection experts had qualified the living conditions offered by the applicant to her daughter AG as "unsafe", apparently because of the lack privacy, the fact that AG was often left alone and was scared, that the mother did not take proper care of her, etc. (paragraphs 12-13 above). The father, however, was able to provide more fitting living conditions. Finally, the Court takes into consideration the policy which was pursued in the present case not to separate siblings, especially as they have close emotional ties (paragraphs 22 and 27, point 6, above).

39. In the Court's view, this reasoning of the Lithuanian courts clearly shows that it was the interests of the children which were considered paramount. It concludes that this reasoning was relevant and sufficient, untainted by any element of arbitrariness.

40. The Court now turns to the applicant's claim that the Lithuanian courts discriminated against her on the basis of her religious beliefs. However, having examined the decisions of the Lithuanian courts in detail, the Court finds that, in contrast to the *Palau-Martinez* judgment (cited above, §§ 33-38), it cannot be said that the domestic courts decided the present case on the basis of the applicant's religious affiliation. It can be seen from the court decisions that their primary concern was the children's best interests, particular account being taken of the factors enumerated in paragraph 38 above. It is true that in a couple of paragraphs of the judgments the domestic courts did touch upon the applicant's religious affiliation. However, that text was an isolated reference and was unrelated to the applicant's ability to bring up her children.

41. Moreover, the Supreme Court expressly distinguished the present case from the Court's earlier judgments in *Hoffmann* and *Palau-Martinez* (cited above), in which a violation of Article 8 in conjunction with Article 14 was found on account of the fact that residence rights had been determined on the basis of the applicants' religious beliefs. The Court shares the Supreme Court's view in the present case and notes that the applicant's suitability to have her daughters live with her was not assessed *in abstracto* (see, by converse implication, *Palau-Martinez*, cited above, §§ 42-43). Unlike in the *Hoffmann* judgment (cited above, § 32), the domestic courts did not attribute any particular weight to the applicant's religious affiliation or hold it against her. In sum, nothing in the present case regarding the reasoning of the Lithuanian courts suggests that it might have been decided differently had it not been for the applicant's religion.

42. In such circumstances, the Court cannot but conclude that there existed a reasonable relationship of proportionality between the means

employed and the legitimate aim pursued (see, by contrast, *Hoffmann*, cited above, § 36, and *Palau-Martinez*, cited above, §§ 42-43).

43. In the light of the foregoing considerations, the Court finds that any difference in treatment between the parents had an objective and reasonable justification. Consequently, there has been no violation of Article 8 of the Convention taken in conjunction with Article 14.

II. ALLEGED VIOLATION OF ARTICLE 8 TAKEN ALONE OR ARTICLE 9 TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14

44. The applicant complained that there had been an interference with her freedom of religion within the meaning of Article 9 of the Convention, and that this interference was discriminatory within the meaning of Article 9 taken in conjunction with Article 14. She also complained that there had been a breach of Article 8 taken alone.

45. The Court considers that no separate issue arises under these provisions, since the factual circumstances relied on are the same as those for the complaint examined under Article 8 taken in conjunction with Article 14, in respect of which no violation has been found.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. Lastly, invoking Article 6 of the Convention, the applicant complained that the courts had failed to protect her children from the distress associated with court proceedings since they had allowed her daughters, who were minors, to be questioned.

47. Whilst acknowledging that judicial proceedings could be demanding for children, the Court finds nothing in the case file to suggest that Article 6 guarantees have not been observed during the proceedings at issue. What is more, Lithuanian and international legal acts for the protection of children's rights attach primary importance to the child's right to be heard when its interests are at stake (see paragraphs 25-27 and 29 above). In such circumstances, the applicant's complaint must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning an alleged violation of Article 8 of the Convention, taken in conjunction with Article 14, admissible;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* that there has been no violation of Article 8 of the Convention, taken in conjunction with Article 14;

4. *Holds* that no separate issue arises under Article 8 of the Convention, taken alone or under Article 9 taken alone or in conjunction with Article 14;

Done in English, and notified in writing on 27 July 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President