CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF LUBINA v. SLOVAKIA

(Application no. 77688/01)

JUDGMENT

STRASBOURG

19 September 2006

FINAL

19/12/2006

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 Lubina v. Slovakia,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 29 August 2006,

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

PROCEDURE

1. The case originated in an application (no. 77688/01) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Ľubomír Lubina ("the applicant"), on 12 November 2001.

2. The applicant was represented by Mrs E. Ľalíková, a lawyer practising in Bratislava. The Government of the Slovak Republic ("the Government") were represented by their Agent, Mrs A. Poláčková.

3. On 29 November 2004 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1954 and lives in Bratislava.

1. Background to the case

5. On 30 December 1997 the applicant's wife stopped living with the applicant. She moved to her parents' house together with her and the applicant's son who was born on 4 July 1995.

6. On 20 March 1998 the applicant sought the determination of his right to meet his son. His wife counter-claimed that the applicant should be prohibited from meeting the boy.

7. On 8 June 1998 the applicant requested the Bratislava III District Court to issue an injunction granting him the right to meet his son every weekend. On 7 July 1998 the District Court dismissed that request. On 29 October 1998 the court of appeal upheld that decision. It noted that the request was premature as no decision had yet been given as regards the custody of the child.

8. On 29 June 1999 the Bratislava III District Court granted a divorce to the applicant and his wife. The latter was given custody of their son and the applicant was obliged to contribute to his maintenance.

9. On 28 July 1999 the applicant, with reference to the above judgment, informed the District Court that he wished to withdraw his action. His former wife withdrew her counter-claim. The Bratislava III District Court therefore discontinued the proceedings on 21 October 1999.

2. Proceedings concerning the applicant's right to meet his son

10. In an action filed on 18 January 2000 before the Bratislava III District Court the applicant claimed the right to meet his son.

11. A hearing was held on 4 May 2000. On 24 May 2000 the child's mother counter-claimed that the applicant should be prohibited from meeting their son on the ground that the applicant drank and had behaved in an aggressive manner. At a hearing held on 15 June 2000 the District Court decided to examine jointly the claims of both parents.

12. On 13 July 2000 neither the child's mother nor her lawyer appeared before the District Court. The mother did not appear on 17 August 2000 either, and the District Court imposed a procedural fine on her. On 11 September 2000 the police informed the court that they had been unable to serve a document on the applicant's former wife in person.

13. A hearing was held on 5 October 2000.

14. On 16 October 2000 the Bratislava III District Court appointed an expert and instructed her to submit an opinion.

15. On 3 November 2000 the court requested the applicant to pay an advance on the expert's fee. The applicant paid the sum on 21 June 2001.

16. On 6 April 2001 the expert asked to be excused from the case as she was ill.

17. On 17 April 2001 the District Court excused the expert. At the same time it appointed a different expert and instructed her to submit an opinion within thirty days.

18. On 2 July 2001 the new expert asked to be excused as she could not assess the case in an impartial manner.

19. On 1 August 2001 another person was instructed to submit an expert opinion. On 12 September 2001 that person informed the court that he no

longer worked as a court expert. According to a note of 16 October 2001 drafted by the judge dealing with the case, the person in question was still registered as an expert.

20. On 24 September 2001, in reply to the applicant's complaint, the president of the Bratislava Regional Court admitted that there had been undue delay in the proceedings between November 2000 and the beginning of April 2001. Otherwise, the judge had dealt with the case in an orderly manner, holding hearings at regular intervals.

21. On 12 November 2001 a fourth expert was appointed. On 22 March 2002 the court urged the expert to submit an opinion. It was submitted on 9 April 2002.

22. On 29 April 2002 the applicant appealed against the decision of 12 April 2002 concerning the expert's fees. The appeal was submitted to the Regional Court on 15 May 2002. The Regional Court dismissed the appeal on 5 August 2002.

23. At the hearing held on 12 November 2002 the District Court heard the expert. The applicant requested that the expert be excluded from the case on grounds of bias. On 12 December 2002 the District Court requested the expert to comment on the applicant's request. The expert replied on 31 December 2002. On 27 January 2003 the District Court found that the expert was not biased. The applicant appealed on 17 February 2003.

24. In the meantime, on 15 January 2003 the applicant appealed against the District Court's decision of 19 December 2002 on the expert's fees.

25. On 12 February 2003 and on 25 April 2003 the applicant made further written submissions to the District Court.

26. In February 2003 the case was submitted to the Regional Court for a decision on the applicant's appeals against the above-mentioned procedural decisions.

27. On 25 March 2003 the child's mother sought an interim measure ordering the applicant to abstain from any contact with their son. She submitted that the applicant had attacked her and the boy on their way to school.

28. On 27 March 2003 the District Court asked the Regional Court to return the file to it so that it could decide on the request for an injunction.

29. On 6 May 2003 the Regional Court returned the file to the District Court after it had upheld the first-instance decisions challenged by the applicant.

30. On 7 May 2003 the District Court asked the expert to answer additional questions. The court dismissed the mother's request for an injunction. The decision stated that extensive expert evidence was being taken with a view to establishing in a reliable manner whether or not the applicant's contacts with the child could threaten the latter's physical and mental health. At that time, it had not yet been established that the

injunction which the mother sought to obtain was required to protect the interests of the child.

The child's mother appealed on 20 May 2003.

On 28 November 2003 the Regional Court in Bratislava upheld the first-instance decision. It underlined that the mother's fear of the applicant's negative impact on the child did not, as such, justify the injunction requested. The court also noted that, because of the mother's behaviour, the applicant had been unable to participate in the education of his son.

31. On 12 May 2003 the District Court appointed a guardian to represent the child in the injunction proceedings. On the same day the file was sent to the Constitutional Court which dealt with the applicant's complaint about the length of the proceedings. The file was returned to the District Court on 5 June 2003.

32. On 18 June 2003 an administrative authority submitted observations to the District Court.

33. As indicated above, on 28 November 2003 the court of appeal upheld the decision of 7 May 2003 on the mother's request for an injunction. The file was returned to the District Court on 14 January 2004.

34. On 6 February 2004 the District Court asked the applicant to explain one of his earlier submissions. The applicant replied on 18 February 2004. Between 24 February 2004 and 16 March 2004 the case was submitted to the court of appeal. The latter found that no request for the exclusion of the judge of the first-instance court had been filed.

35. On 21 April 2004 the District Court found that the expert was not to be excluded.

36. On 21 May 2004 the District Court ordered the assessment of the applicant's mental health. The expert's opinion was submitted on 22 November 2004. On 3 February 2005 the opinion was sent to the parties. On the same day the expert who had submitted an opinion on 9 April 2002 was requested to supplement it. On 1 March 2005 that expert informed the court that the child's mother had refused to co-operate with him. Subsequently, the mother and the child appeared before the expert and he submitted his opinion on 11 May 2005. The opinion was sent to the parties on 17 May 2005.

37. The District Court scheduled a hearing in the case for 30 May 2006.

38. The Court has received no information about any further development in the case.

3. Proceedings before the Constitutional Court

39. On 7 February 2003 the applicant complained to the Constitutional Court about undue delays in the Bratislava III District Court proceedings. He requested that the Constitutional Court find as follows:

> "The Bratislava III District Court violated the applicant's right under Article 48(2) of the Constitution to a hearing without unjustified delay in proceedings 26 P 9/00.

> [The Constitutional Court] awards the applicant 1.2 million Slovak korunas by way of just satisfaction as well as 120,000 Slovak korunas for costs and expenses."

In the reasons for his complaint the applicant also mentioned Article 8 of the Convention submitting that he had been prevented from meeting his son for more than five years. However, as the applicant did not include this particular complaint in the text of the finding which he requested the Constitutional Court to make, the relevant domestic law prevented the Constitutional Court from expressing its view on that issue (see paragraphs 46-48 below).

40. On 17 September 2003 the Constitutional Court found that the applicant's right under Article 48(2) of the Constitution had not been violated.

41. The Constitutional Court held, in particular, that the case was complex. The applicant had contributed to the length of the proceedings in that he had repeatedly challenged the expert and the decisions on the expert's fees, thus prolonging the period for an overall period of nine months. The Constitutional Court also took into account that the applicant had belatedly paid the advance on the expert's fees.

42. As to the conduct of the District Court, the Constitutional Court held that the judge had displayed due diligence when dealing with the case. The length of the proceedings was substantially due to difficulties in obtaining an expert opinion. However, the fact that the three experts appointed were unable to submit an opinion could not have been foreseen and no unjustified delays could be imputed to the District Court on that account. The fact that the judge had not urged the first expert to submit the opinion after the expiry of the time-limit set could not affect the position.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The Code of Civil Procedure

43. Pursuant to Article 74(1), courts can issue an interim measure when there is a need to regulate the parties' situation in a temporary manner or where it is feared that the execution of a judicial decision could be jeopardised.

44. Article 75(1) provides that a court shall issue an interim measure upon request. Such a request is not necessary where an interim measure concerns proceedings which courts can start of their own motion.

45. Under Article 81(1) courts can start proceedings even in the absence of a request in matters concerning, *inter alia*, the care of minors.

2. The Constitutional Court Act of 1993

46. Section 20(1) of the Constitutional Court Act of 1993 provides that a complaint to the Constitutional Court must indicate, *inter alia*, the decision which the plaintiff seeks to obtain. Under paragraph 3 of section 20, the Constitutional Court is bound by a plaintiff's proposal for proceedings to be initiated unless this Act explicitly provides otherwise.

47. Pursuant to section 50(1)(a), a complaint must indicate, in addition to the information mentioned in section 20, the fundamental rights or freedoms the violation of which the plaintiff alleges.

3. Practice of the Constitutional Court

48. The Constitutional Court has declared itself bound, in accordance with section 20(3) of the Constitutional Court Act, by a party's submission aimed at initiating proceedings before it. The Constitutional Court has expressly stated that the above was particularly relevant as regards the order which parties seek to obtain as it can only decide on matters which a party requests to be determined (see, for example, decisions III. ÚS 166/02 of 6 November 2002 or III. ÚS 65/02 of 9 October 2002).

THE LAW

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

49. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, provided in Article 6 § 1 of the Convention, which, as relevant, reads:

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

50. The Government contested that argument.

51. The period to be taken into consideration began on 18 January 2000 and has not yet ended. It has thus lasted 6 years and more than 7 months. During this period the merits of the case have been dealt with at first instance and several procedural issues have been determined by the court of appeal.

A. Admissibility

52. The Court notes that this complaint 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

53. The Government, with reference to the decision of the Constitutional Court, submitted that there had been no violation of the applicant's right to a hearing within a reasonable time.

54. The applicant maintained that the subject-matter of the case called for particular diligence. Only six hearings had been held in the case and unjustified delays had occurred during the process of obtaining the opinions of experts.

55. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). In cases relating to civil status, what is at stake for the applicant is also a relevant consideration, and special diligence is required in view of the possible consequences which the excessive length of proceedings may have, notably on enjoyment of the right to respect for family life (*Laino v. Italy* [GC], no. 3158/96, § 18, ECHR 1999-I).

56. The proceedings in issue concern the applicant's right to meet his son who has lived with the mother since 1998. What was at stake for the applicant thus called for particular diligence on the part of the authorities involved.

Admittedly, the case can be considered somewhat complex as it was necessary to obtain the opinions of experts. The parties by their behaviour contributed to the length of the proceedings. In particular, the Court notes that the mother refused to co-operate with the court at the initial stage of the proceedings and that the applicant challenged several procedural decisions and requested the exclusion of an expert. The relevant issues had to be determined by the second-instance court as a result of which the proceedings were prolonged.

As to the conduct of the District Court before which the case is still pending, the President of the Bratislava Regional Court admitted that there had been an undue delay between November 2000 and the beginning of April 2001 (see paragraph 20 above). The Court can accept the applicant's view that undue delays occurred during the process of obtaining the opinions of experts. Finally, the most recent expert opinion was submitted on 11 May 2005, and the District Court scheduled a hearing in the case for 30 May 2006. No explanation for this delay has been provided. In this

respect the Court also notes that the previous hearing in the case had been held on 12 November 2002.

57. Having examined all the material submitted to it and having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

58. The applicant complained that he has not been able to meet his son due to the national courts' failure to decide on the case speedily. He relied on Article 8 of the Convention which, in its relevant part, provides:

> "1. Everyone has the right to respect for his ... 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 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."

59. The Government objected that the applicant had not exhausted domestic remedies as he had not formally requested, in accordance with the relevant provisions of the Constitutional Court Act, that the Constitutional Court determine whether or not there had been a violation of Article 8 as a result of the length of the proceedings in issue. The applicant could have requested that the District Court issue an injunction pending the determination of his claim. There was no need to examine separately the complaint under Article 8 of the Convention which, in any event, was manifestly ill-founded.

60. The applicant maintained that the Constitutional Court had refused to provide redress to him. The relevant law permitted the District Court to issue, of its own initiative, an injunction allowing the applicant temporarily to meet his son. By failing to issue such an injunction the District Court had disregarded the positive obligations incumbent upon the respondent State under Article 8 of the Convention.

61. The Court accepts the Government's argument that it was open to the applicant to seek an interim measure granting him the right, pending the determination of his action, to meet his son. The fact that the applicant had sought such an injunction in the context of the proceedings brought in 1998 (see paragraph 7 above) indicates that he was aware of that possibility. Furthermore, in its decision of 7 May 2003 the District Court dismissed the mother's request for an injunction prohibiting the applicant from meeting the child. The decision stated that, at that time, it had not yet been established that the injunction which the mother sought to obtain was

required in the interests of the child. The court of appeal upheld that decision (see paragraph 30 above). The reasons invoked indicate that a possible request of the applicant for an interim measure permitting him to meet his son was not clearly devoid of any prospects of success. In this context the Court does not attach decisive importance to the applicant's argument that the relevant law permitted the District Court to issue an injunction of its own motion.

62. The Court recalls that the rule of exhaustion of domestic remedies laid down in Article 35 § 1 of the Convention requires that the complaints intended to be made subsequently at the international level should have been aired before the appropriate domestic courts, at least in substance and in compliance with the formal requirements laid down in domestic law *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

63. The applicant invoked Article 8 of the Convention in the reasons for his complaint to the Constitutional Court, but he did not include this particular complaint in the text of the finding which he requested the Constitutional Court to make. The relevant domestic law prevented the Constitutional Court from expressing its view on that issue (see paragraphs 39 and 46-48 above). In respect of his complaint under Article 8 of the Convention the applicant did not, therefore, use the constitutional remedy in accordance with the formal requirements, as interpreted and applied by the Constitutional Court.

Since the proceedings complained of have not yet ended, there is nothing to prevent the applicant from using that remedy, relying on the arguments which he has advanced before the Court and, as the case might be, complaining of the ordinary courts' refusal to issue an interim measure permitting him to renew his contacts with his son.

64. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 1.2 million Slovak korunas (SKK) which is the equivalent of approximately 31,600 euros (EUR) in respect of non-pecuniary damage.

67. The Government contested the claim.

68. The Court considers that the applicant must have suffered non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 4,500 under that head.

B. Costs and expenses

69. The applicant also claimed, for costs and expenses incurred, 20% of the sum which the Court would award him under Article 41 in respect of the damage which he had suffered.

Should the Court not accept that proposal, the applicant claimed SKK 15,702 (the equivalent of approximately EUR 410) in respect of the costs incurred in the proceedings before the Constitutional Court and SKK 15,702 in respect of the costs and expenses related to the Convention proceedings.

70. With reference to the Court's practice, the Government left the matter to the Court's discretion.

71. According to the Court's case-law, an applicant is entitled to reimbursement of his 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 information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 800 covering costs under all heads.

C. Default interest

72. 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 complaint under Article 6 § 1 of the Convention concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 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, EUR 4,500 (four thousand five

hundred euros) in respect of non-pecuniary damage and EUR 800 (eight hundred euros) in respect of costs and expenses, the above amounts to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(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 19 September 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President