

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

FIFTH SECTION

CASE OF SPITSYN v. UKRAINE

(Application no. 52411/18)

JUDGMENT

STRASBOURG

7 October 2021

This judgment is final but it may be subject to editorial revision.



In the case of Spitsyn v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:

Stéphanie Mourou-Vikström, *President,*
Jovan Ilievski,
Arnfinn Bårdsen, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 52411/18) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Borys Ivanovych Spitsyn ("the applicant"), on 29 October 2018;

the decision to give notice to the Ukrainian Government ("the Government") of the complaint concerning non-enforcement of child contact arrangements and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 7 October 2021,

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

INTRODUCTION

1. The case concerns the non-enforcement of child contact arrangements, allegedly in breach of Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1965 and lives in Sumy.

3. The Government were represented by their Agent, Mr I Lishchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. In 2005 the applicant started to live with S. On 7 October 2012 their daughter was born. In 2015 the couple separated. The child continued to live with S, who is the mother of the child.

6. On 22 June 2016 the Kovpakivskyy District Court of Sumy instructed S. not to prevent the applicant from seeing the child and established a schedule for regular meetings of the applicant with the child. That judgment became final on 2 August 2016.

7. Enforcement proceedings were opened at the request of the applicant. However, they were closed on 12 September 2016.

8. On 21 October 2016 the applicant requested criminal prosecution of S. for her failure to comply with the above-mentioned court judgment. According to the information available to the Court, those proceedings were pending at the time of the exchange of observations.

9. In February 2017 the applicant initiated civil proceedings to establish new contact arrangements with his daughter.

10. On 3 August 2017 the Kovpakivskyy District Court of Sumy again instructed S. not to prevent the applicant from seeing the child and ordered that the applicant should have regular meetings with the child every Tuesday and Thursday from 4 p.m. to 8 p.m. and every Saturday from 10 a.m. to 8 p.m. The child's state of health and her willingness to see the applicant had to be taken into consideration at the time of the meetings, which were to be held in the presence of the child's mother and in a place agreed upon by the parents.

11. On 28 September 2017 and 14 June 2018 the Sumy Regional Court of Appeal and the Supreme Court, respectively, upheld that judgment.

12. Following the applicant's request of 21 August 2018, on 3 September 2018 the State Bailiffs Service ("the bailiffs") initiated enforcement proceedings in respect of the court decision of 3 August 2017.

13. On 18 September 2018 the bailiffs read to S. the operative part of the judgment of 3 August 2017. On 20 September 2018 they closed the enforcement proceedings.

14. At the applicant's request, on 26 September 2018 the bailiffs resumed the enforcement proceedings in order to ensure forthcoming meetings between the applicant and his daughter. On 9 October 2018 the child refused to stay with the applicant. On 13 October 2018 the child was sick and could not meet with the applicant. On 8 January 2019 the bailiffs terminated the enforcement proceedings.

RELEVANT LEGAL FRAMEWORK

15. The relevant provisions of domestic law can be found in *Bondar v. Ukraine* ([Committee] no. 7097/18, §§ 17 and 18, 17 December 2019).

16. The Enforcement Proceedings Act of 2 June 2016, with the amendments introduced on 3 July 2018, provides that if an applicant is prevented from seeing the child by the other party after the termination of the enforcement proceedings, that applicant may apply to the bailiffs seeking resumption of the enforcement proceedings (section 64-1 § 6).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

17. The applicant complained under Article 8 of the Convention that the child contact arrangements established by the court decision of 3 August 2017 had not been effectively implemented by the authorities.

18. Article 8 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. Admissibility

19. The Government submitted that the applicant had not exhausted domestic remedies because he had failed to request any further measures after the bailiffs terminated the enforcement proceedings on 8 January 2019.

20. The Government further submitted that the applicant had abused his right of application to the Court because he had only pursued his own interests without due respect to those of his child and he had not presented a full picture of all the events, apparently in order to mislead the Court.

21. Lastly, the Government submitted that the complaint was manifestly ill-founded because the applicant had access to effective procedures and the national authorities had taken all measures to ensure the applicant's right to contact with his daughter.

22. The applicant disagreed.

23. The Court considers that the Government's objection of non-exhaustion of domestic remedies is closely linked to the substance of the applicant's complaint. In these circumstances, it joins the objection to the merits.

24. The Court further finds no indication of abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention. Moreover, this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

25. The applicant maintained his complaint.

26. The Government submitted that the bailiffs took all possible action in order to enforce the court decision of 3 August 2017.

27. The Court reiterates that mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 151, ECHR 2001-VII). The general principles concerning the State's positive obligations with regard to the protection of the relationship between parents and their children are set out in *Vyshnyakov v. Ukraine* (no. 25612/12, §§ 35-37, 24 July 2018, with further references).

28. Bearing in mind that the positive obligation in this area is not one of result, but one of means (see *Vyshnyakov,* cited above, § 36), the Court must determine whether the domestic authorities took sufficient steps to enforce the court decision of 3 August 2017 establishing child contact arrangements.

29. The Court notes at the outset that the applicant's request for enforcement measures was not treated with requisite diligence (see paragraph 12 above). Moreover, once the bailiffs opened the enforcement proceedings, their intervention amounted only to reading out the terms of the child contact arrangements (see paragraph 13 above). Subsequently, in reply to the applicant's request, the bailiffs resumed the enforcement proceedings, but essentially only to report two unsuccessful meetings (see paragraph 14 above).

30. The Court considers that such a limited approach was not sufficient. It does not appear that during the enforcement proceedings the authorities ever considered arrangements for voluntary compliance with the judgment, for example, by developing a comprehensive compliance strategy, including targeted support for the child (in that latter regard see *Gen and others v. Ukraine* ([Committee], nos. 41596/19 and 42767/19, § 66, 10 June 2021). It remains unclear to what extent the childcare and family services could have been involved in that context and whether any family mediation could have been used (see *Vyshnyakov*, cited above, § 43).

31. Apart from that, even though voluntary compliance is preferable, the entrenched positions often taken by the parents in such cases can render such compliance difficult, making it necessary, in certain cases, to have recourse to proportionate coercive measures (see *Vyshnyakov*, cited above, § 43, with further references). However, nothing suggests that such coercive measures were taken by the authorities.

32. The Court has repeatedly found in cases against Ukraine that inappropriate means of implementing court judgments regarding children are the result of a lack of any developed legislative and administrative framework that could facilitate voluntary compliance arrangements involving family and childcare professionals. Furthermore, the available framework did not provide for appropriate and specific measures to ensure, subject to the proportionality principle, coercive compliance with those arrangements (see *Vyshnyakov*, cited above, § 46; *Bondar v. Ukraine* [Committee], no. 7097/18, § 36, 17 December 2019; *Shvets v. Ukraine* [Committee], no. 22208/17, § 38, 23 July 2019; and *Gen and others*, cited above, § 68). The Court considers that these findings are equally pertinent to the present case.

33. Having regard to those circumstances, the Court does not consider that the applicant was obliged to pursue the enforcement proceedings after 8 January 2019, as suggested by the Government. It follows that the Government's objection based on the rule of exhaustion of domestic remedies must be dismissed.

34. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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."

36. The applicant claimed 70,000 euros (EUR) in respect of non-pecuniary damage.

37. The Government maintained that the applicant's claim was unfounded.

38. The Court considers that the applicant must have suffered distress and anxiety on account of the violation it has found. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 4,500 in respect of non-pecuniary damage.

39. The applicant further claimed EUR 7,720 in respect of costs and expenses.

40. The Government contended that the claim was unsubstantiated.

41. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 1,000 for costs and expenses, plus any tax that may be chargeable to the applicant.

42. The Court considers it appropriate that the default interest rate 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. *Joins to the merits* the Government's objection of non-exhaustion of domestic remedies;

2. *Declares* the application admissible;

3. *Dismisses* the Government's objection of non-exhaustion of domestic remedies;

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

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand 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;

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

Done in English, and notified in writing on 7 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller
Deputy Registrar

Stéphanie Mourou-Vikström
President