

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

FIFTH SECTION

CASE OF VYKHOVANOK v. UKRAINE

(Application no. 12962/19)

JUDGMENT

STRASBOURG

7 October 2021

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Vykhovanok 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. 12962/19) 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 Rostyslav Stepanovych Vykhovanok ("the applicant"), on 23 February 2019;

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

the parties' observations;

Having deliberated in private on 16 September 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 1974 and lives in Lviv.

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 2007 the applicant started to live with I. in the city of Lviv. On 19 July 2008 their daughter D. was born. In 2011 the applicant and I. separated. I., who is the mother of the child, moved with the child to live in the town of Vynnyky, Lviv Region.

6. The applicant instituted civil proceedings, claiming that I. prevented him from having access to the child. The applicant requested that the court establish arrangements for his regular contact with the child.

7. On 20 February 2013 the Zaliznychnyy District Court of Lviv found that I. had prevented the applicant from seeing the child. The court ruled that the applicant should be granted (i) meetings with his daughter from 6 p.m. on Friday until 9 p.m. on Saturday every week at the applicant's residence in Lviv; (ii) outdoor walks with his daughter from 6 p.m. to 9 p.m. every Wednesday; and (iii) fifteen-day holidays with his daughter every

summer and winter. The judgment was not appealed by the parties and became final.

8. The applicant regularly met his daughter according to the contact schedule until summer 2014 when he introduced his daughter to his new girlfriend, following which they became friends. According to the applicant, when I. learned of that friendship, the applicant started having difficulties in seeing his daughter again.

9. On 14 August 2014 the applicant requested that the State Bailiffs Service ("the bailiffs") ensure the enforcement of the contact arrangements. On 29 August 2014 the bailiffs initiated enforcement proceedings and assisted the applicant in having two meetings with the child. They found that I. had not prevented the applicant from seeing the child and on one of those occasions the child did not wish to stay with the applicant. On 14 October 2014 the bailiffs terminated the enforcement proceedings.

10. The applicant attempted to challenge the bailiffs' decision of 14 October 2014 in a court. However, his complaint was rejected as being out of time.

11. On 28 November 2016, following the applicant's complaint, the bailiffs reopened the enforcement proceedings. On 17 February 2017 the bailiffs found that the child did not wish to stay with the applicant during the meetings. On 17 May 2017 they terminated the enforcement proceedings. The applicant disagreed and challenged that decision in a court (see paragraph 13 below).

12. On 27 March 2019 the bailiffs reopened the enforcement proceedings at the applicant's request submitted in accordance with the amended section 64-1 of the Enforcement Proceedings Act (see paragraph 20 below).

13. On 18 July 2019 the Zaliznychnyy District Court of Lviv found that the bailiffs' decision of 17 May 2017 to terminate the enforcement proceedings had been groundless as the bailiffs had not taken all the measures in order to enforce the child contact arrangements. On 23 January 2020 the Lviv Regional Court of Appeal upheld that decision.

14. On 7 August 2019 the Zaliznychnyy District Court of Lviv, having examined the applicant's complaint against the bailiffs, found that during the enforcement proceedings in 2016 the bailiffs had made several defective reports without paying due regard to the applicant's rights.

15. On 22 July 2019 the bailiffs decided to impose a fine on I. and attach her property because of her failure to comply with the contact schedule. On 4 October 2019 those decisions were invalidated by a court.

16. On 5 August 2019 the bailiffs decided to impose a fine on I. for her failure to comply with the contact schedule.

17. On 19 December 2019 the Zaliznychnyy District Court of Lviv refused the application from I. in which she had requested that the writ of execution issued regarding the applicant's contact schedule not be enforced.

The court found that the fact that the child had not wished to see her father could not be sufficient for not enforcing the contact schedule. There had been no evidence that those contact arrangements had been contrary to the natural development of the child.

18. As of 12 March 2021, the enforcement proceedings are pending.

RELEVANT LEGAL FRAMEWORK

19. Relevant provisions of domestic law can be found in *Vyshnyakov v. Ukraine* (no. 25612/12, § 28, 24 July 2018) and *Bondar v. Ukraine* ([Committee] no. 7097/18, §§ 17 and 18, 17 December 2019).

20. 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

21. The applicant complained under Articles 6, 8 and 13 of the Convention that the child contact arrangements established by the court decision of 20 February 2013 had not been effectively implemented by the authorities.

22. The Court, master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018), will examine the complaint from the standpoint of Article 8 of the Convention. 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

23. The Government 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 to mislead the Court.

24. The Government further submitted that the application was manifestly ill-founded because the applicant had access to effective procedures and the national authorities had taken all the measures to ensure the applicant's right of contact with his daughter.

25. The applicant disagreed.

26. The Court finds no indication of abuse of the right of individual application in 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

27. The applicant maintained his complaint.

28. The Government submitted that the bailiffs took all possible actions in order to enforce the court decision of 20 February 2013.

29. 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).

30. 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 20 February 2013 establishing child contact arrangements.

31. The Court notes that during the enforcement proceedings, the intervention by the bailiffs essentially amounted only to reporting unsuccessful meetings and the child's refusal to see the applicant. Following the applicant's complaints, the domestic courts criticised the manner in which the enforcement proceedings had been conducted by the bailiffs (see paragraphs 13 and 14 above).

32. The Court considers that such a limited approach taken by the bailiffs 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 to the child who apparently showed the signs of parental alienation (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). The Court reiterates that the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being considered and an examination being carried out to determine their best interests; moreover, such interests normally dictate that the child's ties with his or her family must be maintained, except in cases where this would harm his or her health and development (see *A.V. v. Slovenia*, no. 878/13, § 72, 9 April 2019, with further references). Indeed, in December 2019 the domestic court, despite the child's reluctance to see her father, considered it necessary to implement the contact arrangements between the child and the applicant (see paragraph 17 above).

33. 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 in a sufficient and timely manner (compare *Kuppinger v. Germany*, no. 62198/11, § 105, 15 January 2015).

34. The Court has repeatedly found in cases against Ukraine that the inappropriate means of implementing court judgments regarding the 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; *Shvets v. Ukraine* [Committee], no. 22208/17, § 38, 23 July 2019; *Bondar v. Ukraine* [Committee], no. 7097/18, § 36, 17 December 2019; and *Gen and others*, cited above, § 68). The Court considers that these findings are equally pertinent to the present case.

35. Having regard to those circumstances, the Court finds that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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."

37. The applicant claimed 48,000 euros (EUR) in respect of non-pecuniary damage.

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

39. 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.

40. The applicant further claimed EUR 1,230 in respect of costs and expenses.

41. The Government contended that the claim was unsubstantiated.

42. 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 on the applicant.

43. 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. *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, 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 hundred five thousand 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;

4. *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.

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Martina Keller
Deputy Registrar

Stéphanie Mourou-Vikström
President