

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

FIFTH SECTION

CASE OF ZHUPAN v. UKRAINE

(Applications nos. 38882/18 and 50200/19.)

JUDGMENT

STRASBOURG

7 October 2021

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



In the case of Zhupan 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 applications (nos. 38882/18 and 50200/19) 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, Ms Maryna Mychaylivna Zhupan ("the applicant"), on 10 August 2018 and 19 September 2019 respectively;

the decision to give notice to the Ukrainian Government ("the Government") of the complaint concerning non-enforcement of a court decision ordering the transfer of the child and to declare inadmissible the remainder of the applications;

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 allegations under Article 8 of the Convention that the authorities failed to implement a court decision ordering the transfer of the child from his father to his mother.

THE FACTS

2. The applicant was born in 1988. She currently lives in the Czech Republic. The applicant was represented by Mr A. Hájek, a lawyer practising in Prague.

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 2010 the applicant married V. On 13 May 2011 their son I. was born. Subsequently, the applicant and V. separated. The child continued to live with the applicant, who is his mother

6. On 27 October 2014 the Khust District Court of Zakarpattya Region ("the Khust court") dissolved the marriage. As regards the child's residence, the court ruled that the child should live with the applicant.

7. In August 2015, while the applicant was in the Czech Republic, the child stayed with the applicant's parents in Ukraine. During that time, the applicant's parents voluntarily gave the child to V. The transfer was attested

by a notary. From September 2015 the child started to live with V. on a permanent basis.

8. Upon return from the Czech Republic in September 2015, the applicant attempted to take the child back from V., but to no avail. On 2 October 2015 she instituted civil proceedings against V., claiming that the child should be immediately returned to her.

9. On 3 November 2015 the Khust court decided that the child should be transferred to the applicant because it had been decided earlier that the child should live with his mother (see paragraph 6 above). The court ordered an immediate enforcement. V. appealed against that judgment (see paragraph 20 below).

10. On 4 November 2015 the State Bailiffs Service ("the bailiffs") started enforcement proceedings in respect of the return order of 3 November 2015. On the same date the bailiffs arrived at V.'s home accompanied by the applicant, the police officers, a childcare officer and two witnesses. According to the bailiffs' report, the transfer of the child failed because the child had refused to approach the applicant.

11. On 6 November 2015 the bailiffs suspended the enforcement proceedings considering that the local court had to explain the modalities of enforcing the court order of 3 November 2015.

12. On 9 November 2015 V. initiated civil proceedings against the applicant seeking to determine anew the child's place of residence given that after the residence order of 27 October 2014 the circumstances had changed substantially.

13. On 30 November 2015 the Chief of the Khust District Bailiffs Office quashed the bailiffs' decision of 6 November 2015 finding that the enforcement proceedings had been suspended groundlessly.

14. On 9 December 2015 the bailiffs visited V. and found that the child had again refused to approach the applicant.

15. On the same day the applicant requested that the bailiffs seek judicial permission to place the child in a specialised institution, in order to allow time for the child to adapt to his mother. The applicant argued that she had not been able to see the child at V.'s home for the last three months. In response to that request, the bailiffs applied to a court seeking the relevant permission. No information was provided as to the outcome of that application.

16. On 7 August 2017 the Khust court allowed V.'s claim and ordered that the child should live with V., having regard to the child's actual situation and his best interests. On 7 September 2018 the Zakarpattya Regional Court of Appeal upheld that judgment. On 18 April 2019 the Supreme Court dismissed the applicant's appeal on points of law.

17. In the meantime, in September 2017, the bailiffs made another attempt to transfer the child to the applicant. The attempt was not successful because the child still refused to have contact with his mother.

18. On 7 and 23 May 2019 the bailiffs imposed a fine on V. for his failure to comply with the return order of 3 November 2015. V. appealed against those decisions, but no information has been provided to the Court as to the outcome of those appeals.

19. In June 2019 the bailiffs requested that the police initiate criminal proceedings against V. for his failure to comply, at the relevant time, with the court order of 3 November 2015. In July 2019 the police, having conducted an investigation, closed the criminal case due to a lack of elements of crime.

20. On 8 August 2019 the Zakarpattya Regional Court of Appeal, having regard to the court findings that the child should live with his father (see paragraph 16 above), quashed the court decision of 3 November 2015 and refused the applicant's claim.

RELEVANT LEGAL FRAMEWORK

21. 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, 17 December 2019).

THE LAW

I. JOINDER OF THE APPLICATIONS

22. Having regard to the subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

23. The applicant complained under Articles 6 and 8 of the Convention that the domestic authorities failed to enforce the court decision of 3 November 2015 ordering a transfer of the child to the applicant.

24. 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

25. The Government submitted that the national authorities took all the reasonable steps in order to enforce the transfer of the child to the applicant. However, it was the child who had constantly refused to stay with the applicant and any further enforcement of the court order would be contrary to the best interests of the child. For those reasons the applicant's complaint was manifestly ill-founded and the applications could be struck out of the list of cases.

26. The applicant disagreed and maintained her complaint.

27. The Court finds no grounds for striking the applications out of the list of cases. It notes that the present 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

28. The applicant contended that the national authorities failed to take the necessary steps to ensure the return of the child from V. to the applicant.

29. The Government submitted that the authorities had taken all the steps necessary to ensure respect for the applicant's family life.

30. The Court reiterates that the mutual enjoyment by a 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* (cited above, §§ 35-37, with further references).

31. 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 November 2015 ordering the transfer of the child to the applicant.

32. After opening the enforcement proceedings, the bailiffs quickly arranged the meeting between the applicant and the child (see paragraph 10 above). However, once they established that the child was unwilling to approach the applicant, they took no further measurers to assist the child in adapting to his mother from whom he apparently became seriously alienated. Furthermore, it remains unclear to what extent the childcare and family services could have been involved in that regard and whether any family mediation could have been employed.

33. 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). However, in the case at hand, when the authorities were faced with the persistent refusal of a very young child to see his mother, they failed to ensure that professional targeted support was effectively provided to the child; such support was critical for him to get used to the idea of living with his mother as well as for V. to come to understand what was in the child's best interests, according to the binding court decisions (see paragraphs 6 and 9 above). Such assistance constituted, given the specific circumstances of this case, part of the necessary measures that the authorities were reasonably required to undertake, in line with their positive obligations under Article 8 (see, for similar approach, *A.V.*, cited above, § 84 and *Gen and others v. Ukraine* ([Committee], nos. 41596/19 and 42767/19, § 66, 10 June 2021).

34. 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 in time by the authorities. The bailiffs' attempts to impose fines or to use a criminal-law remedy (see paragraphs 18 and 19 above) were clearly belated.

35. Apparently, with the lapse of time, the child's situation evolved and eventually the courts reconsidered the question of the child's residence and decided, relying on the child's best interests, that the child should live with his father (see paragraph 16 above). However, the Court must be satisfied that the change of the relevant facts was not brought about by the State's failure to take all measures that could reasonably be expected to facilitate the enforcement of the return order (see *M.R. and D.R. v. Ukraine*, no. 63551/13, § 65, 22 May 2018, with further references). Having regard to the shortcomings of the authorities in the preceding period, as discussed above, the Court considers that by the time the new residence order in favour of the child's father was taken, the domestic authorities had failed in their positive obligation under Article 8 to ensure the applicant's reunification with the child.

36. The Court has repeatedly found in cases against Ukraine that the 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.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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."

39. The applicant claimed 60,500 euros (EUR) in respect of non-pecuniary damage.

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

41. 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.

42. The applicant further claimed EUR 21,609 in respect of costs and expenses.

43. The Government contended that the claim was unsubstantiated.

44. 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 1,500 for costs and expenses, plus any tax that may be chargeable on the applicant.

45. 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. *Decides* to join the applications;

2. *Declares* the applications admissible;

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

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

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

(ii) EUR 1,500 (one thousand five hundred 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;

5. *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