

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

FIFTH SECTION

DECISION

Application no. 17978/09
Dmytro Vladyslavovych MIROSHNICHENKO
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 19 June 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 24 March 2009,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Dmytro Vladyslavovych Miroshnichenko, is a Ukrainian national who was born in 1975 and lives in Lugansk, Ukraine. He was represented before the Court by Ms O. Seredynska, a lawyer practising in the same city. The Ukrainian Government ("the Government") were

represented by their Agent, Mr N. Kulchytskyy, of the Ministry of Justice of Ukraine.

A. The circumstances of the case

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

On 12 July 2003 the applicant married Y. On 18 February 2006 their daughter was born.

On 20 November 2006 the applicant's wife attempted to commit suicide by jumping from a balcony. According to the applicant, on the same date his parents-in-law arrived and took away his nine-month-old daughter, whom the applicant had asked their neighbours to look after shortly before the incident.

On 24 November 2006 the applicant's wife died from her injuries without ever having regained consciousness.

1. First set of child return proceedings and other related events

On 11 January 2007 the applicant instituted proceedings in the Artemivsky District Court in Lugansk seeking to have his daughter returned to him. The applicant's parents-in-law lodged a counterclaim seeking to have full custody of the child. They alleged, in particular, that the applicant had ill-treated Y. and had taken poor care of his daughter.

On 17 October 2007 the court found for the applicant. The court held that both the applicant and his parents-in-law were positively characterised and offered appropriate living conditions but that a father should be given priority over grandparents in determining the residence of a child. The court considered that it could not rely on various witnesses' statements to the effect that the applicant had ill-treated his wife, because the witnesses were his wife's friends, disliked the applicant and had never directly witnessed the events described by them.

On 21 May 2008 the Lugansk Regional Court of Appeal quashed this decision and found against the applicant. It noted that on 16 February, 16 April and 9 October 2007 the Child Care Board for the Artemivsky District Council ("*орган опіки та піклування Виконавчого комітету Артемівської районної у місті Луганську Ради*") had recommended that the applicant's daughter should remain resident with the applicant's parents-in-law as a change of home could lead to her suffering serious psychological trauma. According to the medical records submitted, the applicant's daughter suffered from residual cerebral insufficiency and showed signs of "early childhood nervousness" syndrome. A medical expert assessment performed by the Lugansk Regional Forensic Medical Bureau (*Луганське обласне бюро судово-медичної експертизи*) on 14 November 2007 had concluded that a change of home could aggravate her state of

health. The court also noted that a criminal investigation into whether the applicant had been culpable in Y.'s death (in particular, whether he had caused or contributed to her suicide) was still pending. The first-instance court had also erroneously disregarded the witnesses' statements to the effect that the applicant had had a negative attitude towards his wife and his family.

The applicant appealed, stating, *inter alia*, that his daughter's illnesses had been diagnosed six months after she had been taken to live with his parents-in-law.

On 1 October 2008 the Supreme Court of Ukraine rejected the applicant's appeal in cassation.

On 10 November 2009 the Zhovtnevyy District Court rejected an application by the applicant's parents-in-law, lodged in October 2008, to deprive the applicant of his parental rights and noted that they were preventing him from seeing his daughter. This decision was upheld on 1 February 2010 by the Lugansk Regional Court of Appeal.

2. Criminal proceedings against the applicant

On 19 September 2007 the Leninskyy District Prosecutor's Office, after several refusals, instituted criminal proceedings against the applicant on suspicion that he had caused his wife to commit suicide.

In 2008 the same prosecutor's office twice terminated the proceedings for want of evidence of a crime. It would appear that these decisions were quashed and the case remitted for fresh investigation.

On 9 September 2010 the criminal proceedings against the applicant were finally terminated for want of evidence of a crime. It was concluded that the applicant's wife had been depressed, that she had been under the influence of the teachings of an esoteric sect and that she had jumped from the balcony. According to a medical expert report, Y. had had no injuries other than those resulting from her fall. This decision was not appealed against.

3. Second set of child return proceedings

On 15 January 2009 the applicant instituted proceedings requesting contact with his daughter.

On 15 May 2009 the applicant modified his claims, requesting the award of a residence order regarding his daughter.

Between May 2009 and April 2010 twenty court hearings were scheduled. Nine of them were postponed because the defendants or their lawyers failed to appear or requested additional time to make copies of the case file or to prepare their case. Three hearings were postponed because both parties or their lawyers failed to appear.

In February-April 2010 the defendants did not appear at four subsequent hearings for various reasons. On 15 April 2010 the Artemivskyy District Court decided to consider the case in the defendants' absence finding no serious reason to justify such absence, and found in favour of the applicant.

On 30 June 2010 the Lugansk Regional Court of Appeal quashed this decision and remitted the case for fresh consideration. The court noted that on 15 April 2010 the defendants had requested the postponement of the hearing because their lawyer was ill and the first-instance court had disregarded this request in breach of Article 6 § 1 of the Convention.

Between June 2010 and January 2011 seven hearings were scheduled, only one of which was postponed because the parties failed to appear.

On 25 January 2011 the Artemivskyy District Court found for the applicant and held that his daughter should live with him. According to the medical reports referred to by the court, since 2007 the child had had consultations with a neuropathologist and had been diagnosed with a number of nervous system disorders which had a prenatal origin. However, during 2009-2010 the child's mental and emotional health had improved and her condition was now stable. Therefore, the court concluded that there was no threat that the child's health would worsen because of a change of home. Moreover, it was considered that the absence of contact with her father might aggravate the child's health problems.

On 19 May 2011 the Lugansk Regional Court of Appeal upheld the decision of 25 January 2011. It appears that these decisions were appealed against in cassation and by August 2011 the case was pending before the Supreme Court of Ukraine. The decision of 25 January 2011 became enforceable and there is no evidence that the defendants requested that its enforcement be postponed pending the cassation proceedings. No further information about these proceedings and about the current place of residence of the applicant's daughter was provided by the parties.

B. Relevant domestic law

Family Code of Ukraine, 2002

"Article 163. Parental Right to Take a Minor Child from other Persons

1. The parents enjoy preferential right for their minor child to live with them.

2. The parents have the right to demand taking a minor child from any person who keeps him/her not in accordance with law or judicial decision.

3. The court may refuse to remove a minor child and to give him/her to the parents or one of them if it is established that this is contrary to the child's interest."

COMPLAINTS

The applicant complained that within the first set of proceedings the national courts had failed to make a residence order in his favour regarding his daughter. He also complained that his parents-in-law had not allowed him to see his daughter.

The applicant also complained of unfairness in the court hearings in the first set of proceedings, of the outcome of the first set of proceedings and about the length of all the civil proceedings.

The applicant relied on Articles 6 and 8 of the Convention.

THE LAW

1. The applicant complained that on 21 May 2008 the national court had refused to place his daughter with him. He invoked Article 8 of the Convention which reads in so far as relevant 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."

The Government submitted that the State's interference with the applicant's family life had been lawful and necessary in a democratic society. It had pursued a legitimate aim, namely the preservation of the applicant's child's health. When her health had improved, the child had been returned to the applicant.

The applicant submitted that the medical records which had served as the basis for the court's decision of 21 May 2008 should not have been trusted, as the medical examination of his daughter had taken place in his absence, contrary to his wishes, and had been performed by personnel of a medical centre at which his daughter's health had not previously been assessed. In the applicant's view, the acts of the State authorities had amounted to a breach of Article 8 of the Convention.

The Court notes at the outset that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and is protected under Article 8 of the Convention (see, *Eriksson v. Sweden*, 22 June 1989, § 58, Series A no. 156).

In the sensitive area of family relations, the State is not only bound to refrain from taking measures which would hinder the effective enjoyment of

family life, but, depending on the circumstances of each case, should take positive action in order to ensure the effective exercise of such rights.

In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see *W. v. the United Kingdom,* 8 July 1987, § 59, Series A no. 121, and *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290).

The Court further notes that where the measures in issue concern parental disputes over their children, it is not its task to substitute itself for the competent domestic authorities in regulating contact and residence disputes, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Strömblad v. Sweden*, no. 3684/07, § 78, 5 April 2012). In particular, the Court has constantly emphasised that the national authorities are better placed to evaluate the evidence adduced before them, having the benefit of direct contact with the persons concerned (see, among other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 139, 6 July 2010, concerning child care disputes).

However, the Court is called to examine whether the decision-making process leading to an interference was fair and afforded due respect to the interests safeguarded by Article 8 (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 99, ECHR 2000-I, with further references, and *Tiemann v. France and Germany* (dec.), nos. 47457/99 and 47458/99, ECHR 2000-IV).

To that end, the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution for the child would be (see, *mutatis mutandis*, *Neulinger and Shuruk v. Switzerland* [GC], cited above, § 139 with further references). Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance and in some circumstances it may override those of the parent (see, *Hoppe v. Germany*, no. 28422/95, § 49, 5 December 2002). In particular, a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (see *Sommerfeld v Germany* [GC], no. 31871/96, § 64, ECHR 2003-VIII).

In the present case, the national court refused to order a change of residence in respect of the applicant's two-year old daughter and decided that she should stay with her grandparents with whom she had lived since the age of nine months. In coming to this view it had regard, in particular, to

the child's fragile state of health and to expert evidence that a change of home could lead to the child's suffering serious psychological trauma.

The Court notes that this decision was taken by a competent court and was based on relevant provisions of the Family Code of Ukraine concerning determination of the child's place of residence.

It further notes that the sole reason for refusing to place the applicant's daughter with the applicant was the protection of her health. In particular, the forensic medical report of 14 November 2007 referred to by the court expressly indicated that the applicant's daughter's state of health was fragile to the extent that a change of home could have had a detrimental impact upon her. There is no evidence that the available medical records were procured inappropriately or that the court examined them in an arbitrary manner. Moreover, the Lugansk Regional Court of Appeal's findings of 2 May 2008 were later confirmed by the Artemivskyy District Court decision of 25 January 2011. On the latter date, the court indicated that the applicant's daughter's nervous system disorders had a prenatal origin and that her health had been constantly monitored. There is no evidence that the child's state of health had been compromised because of the living conditions at her grandparents' house, as had been alleged by the applicant.

The Court also notes that when the child was somewhat older and her condition had stabilised, the national courts placed her with the applicant, and that this decision is subject to a pending cassation appeal.

The Court is satisfied from the materials available that the national courts in the present case carefully and correctly balanced the applicant's right for respect for his family life against the best interests of the child at the relevant time.

The Court concludes that the applicant's complaint under Article 8 of the Convention about the domestic court's initial refusal of 21 May 2008 to place his daughter with him is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. The applicant further relied on Articles 6 and 8 of the Convention and complained about the length of the second set of child proceedings.

The Government submitted that the length of these proceedings had been reasonable.

The applicant disagreed.

The Court notes that the second set of proceedings in the applicant's case was initiated on 15 January 2009. However, on 15 May 2009 the applicant amended his claim to the extent of withdrawing his initial claim and lodging a new one. Therefore, the Court will take the later date as the starting date for the calculation of the period in question. The Court further notes that in August 2011 the applicant submitted that the case was pending before the Supreme Court of Ukraine. By the time of the Court's consideration of the present case no further updates have been submitted by the parties. Assuming that these proceedings are still pending, the Court, thus, considers

that the proceedings in the applicant's case have lasted for two years and eleven months (15 May 2009 until the present date) across three levels of jurisdiction.

Having regard to all the information in its possession, the Court considers that, even taking into account the particular diligence required, the length of the proceedings is not currently in breach of the Convention provisions.

It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

3. The applicant finally complained under Article 8 of the Convention that his parents-in-law had not allowed him to see his daughter.

He also complained under Article 6 of the Convention of unfairness in the court hearings in the first set of proceedings, of the outcome of the first set of proceedings and about the length of all other proceedings in his case.

The Court, having examined the remainder of the applicant's complaints, considers that, in the light of all the materials in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. In particular, the applicant has never properly raised on the national level his complaint about lack of access to his child. Having raised it on one occasion, he had later withdrawn it.

It follows that the remainder of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President