CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

CASE OF HUNT v. UKRAINE

(Application no. 31111/04)

JUDGMENT

STRASBOURG

7 December 2006

FINAL

07/03/2007

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 Hunt v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 13 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 31111/04) 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 national of the United States of America, Mr Alexander Hunt ("the applicant"), on 25 August 2004.

2. The applicant was represented by Mr N. Yeremenko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agents, Mrs V. Lutkovska and Mr. Y. Zaytsev, of the Ministry of Justice.

3. On 24 March 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1953 and lives in Riga, Latvia.

5. The applicant was married to Mrs M., a Ukrainian national. They lived in Ukraine. They have a son, N., who was born in 2000. Mrs M. also had another child, M., who was adopted by the applicant in November 2002.

6. In January 2003 the applicant left Ukraine and in April 2003 the applicant and Mrs M. divorced.

7. On 24 June 2003 Mrs M. wrote a letter to the Head of the Department for Combating Organised Crime of the Ministry of the Interior requesting that the applicant be banned from entering Ukraine. Mrs M. complained, in particular, that in June 2003 the applicant had come to Cannes, France, where their son N. had been on holidays with a nurse, and had threatened to take N. away. She further stated that in his previous marriage the applicant had inflicted grievous bodily harm on his wife.

8. On 26 June 2003 the Ministry of the Interior sent a request to the State Committee of Border Control to ban the applicant from entering Ukraine.

9. On 27 June 2003 the State Committee for Border Control informed the Ministry that Mr. Hunt was prohibited from entering Ukraine for five years. The applicant learned about this decision shortly afterwards.

A. Custody proceedings initiated by Mrs M.

10. In November 2003 the applicant was informed by Mr T., his lawyer in another civil case, that his former wife had lodged a claim with the Pechersky District Court of Kyiv seeking to deprive the applicant of his parental rights with respect to his natural son N. The applicant could not be present in the court due to the prohibition on entering Ukraine, but was represented before the court by his lawyer, Mr T.

11. On 5 December 2003 the first-instance court found for Mrs M. and decided to deprive the applicant of his parental rights. The court based its decision on the fact that the applicant did not fulfil his parental duties properly, in particular he did not participate in bringing up the child, did not contact him and had lost any interest towards him. The court also took into consideration that the applicant had not complained to the local tutelage and supervision board that Mrs M. refused him access to the child. The court disregarded the applicant's argument about the impossibility of participating in the up-bringing of the child due to the prohibition on entering the country, stating that the applicant had not met his son since January 2003.

According to the Government, the domestic courts had been aware that the applicant had deliberately indicated false data on his place and date of birth in official documents and that he had been previously criminally prosecuted and had never been formally acquitted.

12. This decision was appealed against by the applicant's representative to the Kyiv City Court of Appeal. In the appeal it was mentioned that the conclusion of the court of first instance that the applicant did not want to meet his son was incorrect, since in her request of 24 June 2003 to the police Mrs M. had clearly mentioned his attempt to see their son in June 2003. It was also mentioned that the applicant had tried to lodge a request with the tutelage and supervision board of the Pechersky Local

Administration of Kyiv, but had been informed that his presence was required in order for the request to be examined. The representative complained that the court of first instance heard only witnesses of the opposing party, who had been employed by Mrs M. He noted that the court had not sought to receive first-hand information from the applicant himself through the international legal assistance instruments.

13. On 5 March 2004, the court of appeal upheld the decision of the first instance court. Having repeated the findings of the first instance court, the court of appeal noted that the applicant's objections had not been supported by any evidence and the arguments of the opposite side had been confirmed by testimonies of two nurses of the child. It further decided that the arguments of the applicant's appeal did not dispose of the findings of the first-instance court and did not influence the correctness of those findings.

14. The applicant appealed in cassation. In his appeal he reiterated his previous arguments and complained that the court of appeal refused to call a witness on his behalf.

15. On 1 June 2004 the panel of three judges of the Supreme Court of Ukraine rejected the applicant's request for leave to appeal in cassation, having found that the lower courts did not violate any substantive or procedural law.

16. By letter of 7 June 2004, the Ministry of Justice of Ukraine informed the applicant's lawyer that the service abroad of judicial documents could be conducted under the relevant international instruments. In relations between them, Ukraine and the United States of America used the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 15 November 1965.

B. Other related proceedings

1. Proceedings about corrections in the applicant's date of birth

17. On 12 May 2003 the Pechersky District Court of Kyiv examined the applicant's request to correct the date of his birth in the civil state register. The court decided for the applicant.

18. On 16 June 2003 the same court quashed its previous decision of 12 May 2003 in the light of newly discovered circumstances and re-opened the proceedings.

19. On 19 December 2003 the court rejected the applicant's request concerning mistake in his date of birth in the register. On 10 March 2004 and 5 July 2004 respectively the Kyiv City Court of Appeal and the Supreme Court upheld the decision of the first instance court.

2. Proceedings on invalidation of the adoption decision

20. On 1 October 2004 the Pechersky District Court of Kyiv considered a claim by the applicant, in which he requested to invalidate the decision on adoption of M., the elder son of Mrs M., and rejected it as unsubstantiated, having found that at the time of adoption the applicant and Mrs M. had genuine and good family relations.

21. On 8 June 2005, the same court invalidated the above-mentioned decision on adoption of M. by the applicant.

3. Proceedings challenging the prohibition of entry

22. On 15 October 2003 the Pechersky District Court rejected the applicant's complaint against the decision about prohibition of his entry in Ukraine.

23. On 11 February 2004 the Kyiv City Court of Appeal upheld the decision of the first instance court.

24. On 1 March 2005 the applicant appealed in cassation. The proceedings are still pending.

II. RELEVANT DOMESTIC LAW

A. The Constitution of 1996

25. The relevant extracts of the Constitution of Ukraine read as follows:

Article 26

"Foreigners and stateless persons who are in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same duties as citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties of Ukraine..."

Article 32

"No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine..."

Article 51

"...The family, childhood, motherhood and fatherhood are under the protection of the State."

B. Code of Civil Procedure of 18 July 1963 (repealed as of 1 September 2005)

26. Article 6 of the Code provided that civil proceedings should be conducted on the grounds of equality of persons regardless, in particular, of their place of residence.

27. Article 103 of the Code provided that the claimant and the defendant had equal procedural rights.

28. Article 423 provided that foreign citizens had equal procedural rights with Ukrainian citizens in civil proceedings. The Ukrainian legislation could foresee restrictions on procedural rights of citizens of other countries, where the procedural rights of Ukrainian citizens were restricted.

C. Marriage and Family Code (repealed as of 1 January 2004)

29. Article 70 of the Code provided that parents could be deprived of their parental rights if it was established that they neglected their duties of bringing up their children, or abused their parental rights, treated the children cruelly, influenced the children harmfully by their immoral, antisocial behaviour, as well as when the parents were chronic alcoholics or drug addicts. The deprivation of parental rights did not preclude the possibility for a person concerned to seek access to the child through the courts.

30. Article 71 established the circle of persons entitled to seek deprivation of parental rights before the courts. It also envisaged participation of guardianship authorities and the prosecutor in the hearing.

D. Family Code (in force since 1 January 2004)

31. This Code replaced the Marriage and Family Code and contains similar provisions as to deprivation of parental rights.

E. Law on Legal Status of Foreigners and Stateless Persons of 4 February 1994

32. Article 18 provides that foreigners can marry and divorce Ukrainian citizens under Ukrainian law. They have equal rights in family relations with Ukrainian citizens.

33. Article 22 provides that foreigners are entitled to seek protection of their individual, property and other rights in the courts and other state bodies. In judicial proceedings foreigners have equal procedural rights with Ukrainian citizens.

34. Article 25 stipulates that entry to Ukraine can be prohibited to a foreigner in the interests of national security and public order, if public

health, the protection of the rights and legitimate interests of Ukrainian citizens and residents require so, if the foreigner violated Ukrainian legislation during his previous stay in Ukraine, etc.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicant complained under Article 8 of the Convention about unjustified interference with his private and family life by prohibiting him from entering Ukraine, where his son resides, and by depriving him of his parental rights. Article 8 of the Convention provides 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

36. The Court notes that the applicant's complaint under this Article raises two distinct issues: the ban on entering Ukraine and the deprivation of his parental rights. It will consider them separately.

1. Ban on entering Ukraine

37. The Government maintained that the applicant had a possibility to challenge the decision of the domestic authorities on the ban to enter the country in the courts, but did so only after his application had been lodged with this Court, and that the relevant judicial proceedings were still pending (see paragraphs 22-24). The Government therefore submitted that this complaint of the applicant should be declared inadmissible for non-exhaustion of domestic remedies.

38. The applicant replied that it was not his only complaint and that he was prevented from his seeing the child as a result of this ban, even though the Government suggested the opposite.

39. The Court considers that to the extent that the applicant meant to complain about the decisions prohibiting him from entering Ukraine as a separate issue, he failed to exhaust remedies available to him under

Ukrainian law since the relevant proceedings are still pending (see paragraph 24 above). It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. Deprivation of parental rights

40. The Court further notes that the Government's above objection does not relate to the complaint concerning the deprivation of the applicant's parental rights. In the Court's view this latter 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

1. Parties' submissions

(a) The Government

41. The Government agreed that the deprivation of parental rights could be considered an interference with the applicant's family life. Nevertheless, they maintained that such interference was justified and proportionate.

42. The Government submitted that the alleged interference was in accordance with the law. In particular, Articles 70 and 71 of the Marriage and Family Code provided for such interference.

43. The Government further maintained that in the present case the interference had been made in order to protect rights of other persons. This necessity was supported by the facts, of which the domestic courts were aware, that the applicant deliberately indicated false data on his place and date of birth in official documents and that he had been previously criminally prosecuted and had never been formally acquitted. The Government also referred to the domestic courts' findings (see paragraph 11 above) as a ground that justified the interference.

44. Having acknowledged the gravity of the interference, the Government maintained that the deprivation of the parental rights was justified by the interests of the child and these interests should prevail over the interests of the parents. Therefore, in the Government's opinion, such interference was necessary in a democratic society and the State authorities acted within their margin of appreciation.

45. They also submitted that the applicant could seek permission to see his son or try to contact him even after the decision depriving him of his parental rights, and the only consequence of the deprivation was that the

applicant could not claim any right to meet or educate his son, but could ask Mrs M. for meetings with his son.

(b) The applicant

46. The applicant contended that the ban on entry into the country could not be found among the grounds for deprivation of parental rights stipulated in Article 70 of the Family and Marriage Code. He further maintained that his relations with his son were sufficiently established and the State was obliged to safeguard such family relations.

47. Taking into account the young age of his son, the necessity to maintain and safeguard their relations were of particular importance. He further maintained that Mrs M. led the public life which presupposed her frequent absence from home and the child was left for care of other people.

48. The applicant finally contended that there was no evidence that he had ever treated badly his son or any other child. He regarded the remainder of the Government's submissions about his personality, as irrelevant to the dispute about his parental rights.

2. The Court's assessment

(a) Whether there was an interference with the applicant's right to respect for his family life under Article 8 of the Convention

49. The Court finds, as it was not disputed by the parties, that the deprivation of the applicant of his parental rights constituted an interference within the meaning of Article 8 § 2 of the Convention with the applicant's right to respect for his family life guaranteed by paragraph 1 of Article 8.

(b) Whether the interference was justified

50. This interference constitutes a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

(i) "In accordance with the law"

51. It was undisputed before the Court that the domestic courts' decisions had a basis in national law, namely, Articles 70 and 71 of the Family and Marriage Code as in force at the relevant time.

(ii) Legitimate aim

52. In the Court's view the court decisions of which the applicant complained were clearly aimed at protecting the "rights and freedoms" of the child. Accordingly they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

(iii) "Necessary in a democratic society"

53. In determining whether the impugned measure was "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what serves best the interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities usually have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see the *Hokkanen v. Finland* judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and, *mutatis mutandis*, the *Bronda v. Italy*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1491, § 59).

54. The Court further recalls that a fair balance must be struck between the interests of the child and those of the parent (see, for example, the *Olsson v. Sweden* judgment (no. 2) of 27 November 1992, Series A no. 250, pp. 35-36, § 90) and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the 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 the *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, pp. 1008-09, § 78).

55. In the present case the Court notes that the competent national courts, when deciding to deprive the applicant of his parental rights, advanced the argument that the applicant lacked interest in his son as suggested by the child's mother and other witnesses on her side.

56. The Court does not doubt that these reasons could be relevant. However, given the Court's well established case-law that Article 8 contains implicit procedural requirements, it must be determined whether, having regard to the particular circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests (*Elsholz v. Germany* [GC], no. 25735/94, § 52, ECHR 2000-VIII, *P., C. and S. v. the United Kingdom*, cited above, § 119, and *Venema v. the Netherlands*, no. 35731/97, § 91, ECHR 2002-X, with references to *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, § 64).

57. Reverting to the circumstances of the instant case, the Court observes that the civil proceedings in questions concerned relations within the applicant's family and the issue on deprivation of the parental rights both

under the relevant law and in the impugned proceedings had to be based on the assessment of the applicant's personal character and his behaviour. The Court finds it difficult to comprehend to what extent the national courts could undertake such an assessment without having heard the applicant in person or at least, in the circumstances of the present case, having sought to obtain first-hand information from the applicant with his account of events and his relations with his son and Mrs M. via international legal assistance instruments.

58. Furthermore, the domestic courts disregarded the fact that the applicant had attempted to see his son in June 2003, and they failed to call a witness proposed by the applicant, and the respective higher courts failed to answer to the applicant's complaints about such actions of the respective lower courts (see paragraphs 12-15 above). Moreover, the fact that the applicant contested the request of Mrs M. for deprivation of his parental rights could also evidence his interest in his son.

59. The Court further recalls that in the present case there were no issue of the applicant having inflicted any bodily harm on the child (see paragraph 48 above). As to the Government's submissions about the domestic courts' awareness of the applicant's unlawful actions and previous criminal records, the Court notes that such arguments could be relevant to the decision on the deprivation of parental rights. These arguments, however, remain mainly unsupported by any materials; more importantly, there is no indication in the judicial decisions and parties' submissions that these arguments were discussed during the hearings or used in the courts' reasoning.

60. The Court thus concludes that the applicant was not involved in the decision-making process to an extent necessary to protect his interests and that the national authorities overstepped their margin of appreciation and failed to strike a fair balance between the interests of the applicant and those of other persons, thereby violating the applicant's rights under Article 8 of the Convention.

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

61. The applicant complained that that he was deprived of the possibility to participate in the court's proceedings and to submit evidence in support of his case in violation of Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

62. The Government maintained that the applicant was represented by the lawyer of his choice in the impugned proceedings and furthermore his restriction to personal participation in the proceedings derived from the ban on his entry in Ukraine and, therefore, had been justified. In the

Government's opinion, the applicant could not complain about violation of the principle of equality of arms in the proceedings since nothing prevented his giving respective instructions to his lawyer as well as to receive from the latter reports on the course of the proceedings and to react to them. Since there were no such complaints in the application to the Court, the Government of Ukraine insisted that the State did not violate the principle of equality of arms.

63. The applicant maintained that his procedural rights were neglected by the courts, since he was not informed about the venue and time of the proceedings and none of the procedural documents, including judgment, had been served on him personally. He further maintained that the domestic courts completely based their decisions on the evidence submitted by Mrs M. and witnesses on her behalf.

64. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

65. It further reiterates the difference in the nature of the interests protected by Articles 6 and 8 of the Convention. While Article 6 affords a procedural safeguard, namely the "right to a court" in the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see for instance *McMichael*, cited above, p. 57, § 91 and *Sylvester*, cited above, § 76).

66. However, in the instant case, the Court finds that the lack of respect for the applicant's family life resulting from the non-involvement of the applicant in the custody proceedings is at the heart of his complaint. Therefore, having regard to its above findings under Article 8 (see paragraphs 58-59 above), the Court considers that it is not necessary to examine the facts also under Article 6 (see *Sylvester*, cited above, § 77).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 120,000 US dollars in respect of non-pecuniary damage.

69. The Government maintained that the applicant did not substantiate this claim. They submitted that finding of a violation if any would constitute sufficient compensation for non-pecuniary damage in the present case. Alternatively, they considered the claimed amount exorbitant and invited the Court to determine the amount of non-pecuniary damage on an equitable basis.

70. The Court notes that the applicant undeniably suffered moral prejudice, nevertheless the Court consider the claimed amount exaggerated and awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicant also claimed UAH 8.50 for the costs and expenses incurred before the domestic courts.

72. The Government maintained that the applicant did not submit any documents in support of this claim.

73. 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 claimed amount, which it will set at EUR 1.40.

C. Default interest

74. 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 complaints under Article 6 § 1 and 8 of the Convention concerning the decision on deprivation of the applicant's parental rights admissible and the remainder of the application inadmissible;

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

3. *Holds* that there is no need to examine separately the complaints under Article 6 § 1 of the Convention;

4. *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 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 1.40 (one euro and forty cents) in respect of costs and expenses, to be converted into US dollars 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;

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

Done in English, and notified in writing on 7 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President