CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

CASE OF HUB v. GERMANY

(Application no. 1182/05)

JUDGMENT

STRASBOURG

9 April 2009

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 Hub v. Germany,

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

Rait Maruste, *President*,
Karel Jungwiert,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 1182/05) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Ingo Hub ("the applicant"), on 4 January 2005.

2. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. On 22 April 2008 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the length of the proceedings to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Background to the case

4. The applicant was born in 1964 and lives in Berlin.

5. The applicant is the father of a son (S.), born on 30 July 1990. In 1997 the applicant and the child's mother (K.) separated. S. remained with his mother. In 1998 the applicant and S.'s mother were divorced.

6. On 21 January 1998 the Pankow District Court awarded K. sole custody of S. and decided that the applicant would be entitled to personal contact with his son every other weekend. In September 1998, however, the applicant ceased to have contact with his son.

2. Proceedings before the District Court

7. On 7 October 1998 the applicant requested the Pankow District Court to impose a coercive fine on the mother to enforce his access rights. The District Court registered his request under file number 11 F 4813/98.

8. Between 9 November 1998 and 10 March 1999 the parties and the Youth Office submitted observations.

9. On 17 May 1999 the applicant withdrew his request and stated that he now wished the court to mediate between the parents with a view to reaching an agreement on the applicant's contact rights according to section 52a of the Non-Contentious Proceedings Act (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* – see "Relevant Domestic Law" below). The District Court pursued the applicant's modified request under the same file number (11 F 4813/98).

10. On 13 August 1999 the District Court heard S., who declared that he wished to see his father only occasionally under the supervision of a third person.

11. At a hearing held on 23 August 1999 the parents agreed on supervised contact for the applicant.

12. On 18 October 1999 the District Court held a further hearing at which the parties declared that the court currently did not need to take any action.

13. On 22 February 2000 the applicant applied for the appointment of a guardian *ad litem* and a contact supervisor (*Umgangsbegleitperson*) arguing that the mediation proceedings had failed.

14. On 10 March 2000 the District Court appointed a guardian *ad litem* and set down the case for hearing on 5 April 2000. However, that hearing was postponed to 15 May 2000 as agreed with the parties.

15. On 5 June 2000 a further hearing was held, and on 14 June 2000 the District Court ordered supervised contact for a period between late June and mid-December.

16. On 6 September 2000 the guardian *ad litem* informed the court that no contact had taken place.

17. On 28 September 2000 the District Court asked the contact supervisor to comment on the failure to have contact established between the applicant and his son. In October and November 2000 the District Court reminded the contact supervisor of its request of 28 September 2000 and unsuccessfully attempted to contact the latter by phone.

18. On 26 November 2000 the applicant asked the court to continue the proceedings.

19. On 11 December 2000 the District Court sent a further reminder to the contact supervisor and requested the parties to comment on the question as to whether the mediation proceedings should be continued.

20. On 5 January 2001 the applicant asked the District Court to continue the mediation procedure.

21. On 20 March 2001 the District Court decided to continue the proceedings after the parties had agreed on a one-off supervised contact.

22. On 6 July 2001 the contact centre informed the District Court that the contact supervisor had been replaced with another person, and on 11 July 2001 the District Court appointed that person as contact supervisor.

23. On 14 August 2001 the District Court received the contact supervisor's report, according to which S. refused to see his father.

24. On 22 September 2001 the applicant asked the District Court to declare that the mediation proceedings had failed and to commission an expert report.

25. On 22 November 2001 the District Court heard S. again, who firmly declared that his father no longer existed for him.

26. On 27 November 2001 the District Court commissioned a psychological expert report on the question of contact. That expert informed the court on 25 February 2002 that he could be biased. Accordingly, the mother's representative challenged the expert for bias on 26 March. On 10 April 2002 the District Court ordered the expert to stop his examinations, and on 6 June 2002 the mother withdrew her challenge of bias. On 13 June 2002 the District Court ordered the expert to continue his examinations.

27. On 11 September 2002 the District Court requested the expert to consider further questions raised by the applicant.

28. On 19 November 2002 the expert informed the court that K. had refused to attend a meeting with the expert until mid-January 2003. Subsequently, the District Court asked K. to ensure that a meeting was held by the end of 2002. On 2 January 2003 the District Court asked all persons involved in the proceedings to support the expert in the preparation of his report. On 16 January 2003 the expert informed the District Court that for the time being K. was unwilling to meet the expert. On 23 January 2003 the District Court ordered K. to cooperate with the expert within two months and announced that further measures would be taken in the event of non-compliance.

29. On 2 April 2003 the expert informed the court that a meeting had been held with K. on 13 March 2003, that the applicant and his son had called each other and that the applicant considered withdrawing his application.

30. On 30 April 2003, at the applicant's request of 11 April 2003, the District Court ordered the expert to swiftly continue his examination. On 30 June 2003 the expert gave his report in which he suggested a suspension of the applicant's contact with S. for a period of two years.

31. On 21 October 2003 the District Court heard S., who insisted that he did not wish to see his father any longer.

32. At an oral hearing held on 22 October 2003 the applicant announced that he would withdraw his application. However, on 19 November 2003 the applicant insisted on a court decision.

33. On 10 December 2003 the District Court, relying on the expert's report, suspended the applicant's rights to access for two years.

3. Appellate proceedings and constitutional complaint

34. On 30 December 2003 the applicant appealed to the Berlin Court of Appeal, and on 18 January 2004 he submitted his statement of grounds of appeal, which the court received on 2 February 2004.

35. On 13 May 2004 the Berlin Court of Appeal upheld the decision of the District Court, arguing that S. had suffered from the persistent conflict between his parents about the applicant's contact rights and from the respective proceedings, which had been pending now for more than five years and which had led to lasting psychological damage to the child. In order to protect himself, the boy refused to expose himself to this conflict, by refusing to see his father.

36. On 30 June 2004 the applicant lodged a constitutional complaint with the Federal Constitutional Court, which the Federal Constitutional Court refused to admit on 14 July 2004.

37. On 19 July 2004 the decision was served on the applicant.

II. RELEVANT DOMESTIC LAW

38. Proceedings in family matters are governed by the Non-Contentious Proceedings Act (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*). Pursuant to section 52a of that Act the family court shall mediate between the parents at the request of one parent if one parent claims that the other parent is obstructing the implementation of a court decision on contact with a child they have in common.

THE LAW

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

39. The applicant complained under Article 6 and 8 of the Convention about the length of the proceedings for contacts to his son.

40. The Court who is the master of the characterisation to be given in law to the facts of the case (see *Kutzner v. Germany*, no. 46544/99, § 56, ECHR 2002-I) considers that the complaint raised by the applicant under Article 8 is closely linked to their complaint under Article 6 and will accordingly be examined solely under 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 ... hearing within a reasonable time by [a] ... tribunal..."

41. The Government contested that argument.

42. The period to be taken into consideration began on 7 October 1998 when the applicant requested the District Court to impose a coercive fine on the mother to enforce his contact rights and ended on 19 July 2004 when the Federal Constitutional Court's decision was served on the applicant. It thus lasted some five years and nine months at three levels of jurisdiction.

A. Admissibility

43. The Court notes that this 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. Submissions made before the Court

44. The applicant acknowledged that he had twice considered withdrawing his application. However, that did not contribute to major delays in the proceedings, as he informed the District Court within only a few weeks that he wished to continue the proceedings. He further maintained that the District Court had failed to make the necessary efforts to ensure a swift termination of the proceedings in that it failed to react adequately to the contact supervisor's inactivity and to K's unwillingness to cooperate with the expert. Furthermore, the District Court failed to set time-limits for the expert for the preparation of his report and for K. when she refused to cooperate with the expert. The applicant emphasised that the

length of the proceedings had had a considerable impact on their outcome as they had contributed to the boy's alienation from him.

45. The Government maintained that the proceedings had been rendered particularly complex by the very difficult relationship between the applicant and his former wife, by K.'s failure to cooperate with the expert and the fact that it was necessary to appoint and involve a guardian *ad litem.*

46. As to the conduct of the parties and the competent authorities, the Government acknowledged that the proceedings before the District Court had been exceptionally long. However, that length was due to the ambivalent conduct of the parties, which made the court believe until November 2003 that it was possible to re-establish contact between the applicant and his son. Furthermore, the District Court could not be held responsible for the delays caused by the inactivity on the part of the contact supervisor in the second half of 2000, by the necessity to replace the contact supervisor by another person in July 2001, by the expert's belated information about his potential grounds for bias and by the mother's failure to cooperate with the expert. According to the Government, the District Court conducted the proceedings with the required diligence as it regularly reminded the parties of their obligation to comply with the court orders, as it inquired as to the reasons for the delays, as it tried to encourage the parties to duly cooperate and as it requested the expert to deliver his report "as soon as possible".

2. The Court's assessment

47. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). In cases relating to civil status, what is at stake for the applicant is also a relevant consideration, and special diligence is required in view of the possible consequences which the excessive length of proceedings may have, notably on enjoyment of the right to respect for family life (see *Laino v. Italy* [GC], no. 3158/96, § 18, ECHR 1999-I).

48. In the present case, the Court places special emphasis on the importance of what was at stake for the applicant, namely the possibility of having further contact with his then eight-year-old son. In situations where a parent is separated from his or her young child, the possibilities of reunification between them will be diminished and eventually destroyed if they are not allowed to see each other. In cases of this kind the domestic courts are under a duty to exercise exceptional diligence, since there is always the danger that any procedural delay will result in the *de facto* determination of the issue before court (see *H. v. the United Kingdom,*

8 July 1987, §§ 89-90, and *Nanning v. Germany*, no. 39741/02, § 44, 12 July 2007). This appears to be particularly true in the present case, where the Court of Appeal, when giving its decision on 13 May 2004, expressly referred to the period of time which had elapsed during the proceedings and which led to the child's objection to contact with his father.

49. The Court accepts that, not least due to the tense relations between the applicant and his former wife and the latter's unwillingness to cooperate with the expert, the contact proceedings in question were quite complex. It was moreover necessary to hear evidence from the parties, S. and the guardian *ad litem* and to obtain a psychological expert report on the question of contact between the applicant and his son.

50. As to the applicant's own conduct, the Court notes that during the mediation proceedings between 18 October 1999 and 22 February 2000 the applicant and K. did not consider it necessary for the District Court to take any action. Furthermore, the applicant twice considered withdrawing his application for contact with S. before he asked the District Court to continue the proceedings, which contributed to delays of not more than two months.

51. Turning to the domestic authorities' conduct, the Court observes at the outset that the applicant's case has been expeditiously processed by the Berlin Court of Appeal and the Federal Constitutional Court.

52. With regard to the Pankow District Court, the Court notes that the proceedings were pending before that court for five years and two months. The Court observes that the District Court appointed a contact supervisor who remained totally inactive during the proceedings. When the court was informed that no supervised contact had taken place, the District Court sent four fruitless reminders to the contact supervisor without taking more serious measures to ensure the latter's cooperation. Furthermore the District Court appointed an expert who delayed the proceedings in that he failed to inform the court in timely fashion about his possible reasons for bias and to speedily finalise his report. It is true that the preparation of the expert report was delayed by K.'s unwillingness to cooperate with the expert. However, in view of the considerable lapse of time with the inherent risk of an ever-growing alienation of the child from his father (see paragraph 48 above), the District Court was under a specific obligation to take special precautions in order to prevent any unnecessary delays, such as adhering to a very tight time schedule and to take adequate measures to ensure swift compliance of the persons involved in the proceedings with the court orders. Having regard to the fact that the proceedings were pending for five years and two months before the District Court, the Court considers that the District Court did not display the required diligence in the conduct of the proceedings before it.

53. It follows that the proceedings in question were not concluded within a "reasonable time".

There has accordingly been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 3,500 euros (EUR) in respect of non-pecuniary damage pointing to the distress and frustration he experienced as a result of the impossibility for him to have contact with his son.

56. The Government left the matter to the Court's discretion.

57. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 2,000 under that head.

B. Costs and expenses

58. The applicant also claimed EUR 1,500 for the costs and expenses incurred before the domestic courts on account of the additional costs caused by the excessive length of the proceedings.

59. The Government contested the claim, arguing that it had not been sufficiently substantiated.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers that the applicant has not established that the costs and expenses claimed for the proceedings before the domestic courts were incurred by him in order to seek prevention or rectification of the specific violation caused by the excessive length of the proceedings. However, seeing that in length of proceedings cases the protracted examination of a case beyond a "reasonable time" involves an increase in the applicants' costs (see, among other authorities, *Sürmeli v. Germany* [GC], no. 75529/01, § 148, ECHR 2006-...), it does not find it unreasonable to make to the applicant an award of EUR 500.

C. Default interest

61. 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 complaint concerning the excessive length of the proceedings admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *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, the following amounts:
      (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable to him on the above amounts;
   (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 9 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Rait Maruste
Registrar	President