



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

FIFTH SECTION

CASE OF BOGATOVA v. UKRAINE

(Application no. 5231/04)

JUDGMENT

STRASBOURG

7 October 2010

FINAL

21/02/2011

*This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.*

In the case of Bogatova v. Ukraine,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 5231/04) 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 Ukrainian national, Ms Lyudmila Bogatova (“the applicant”), on 27 January 2004.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that the domestic courts failed to give sufficient reasons for their decisions in her pension dispute.

4. On 10 November 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1944 and lives in Dniprodzerzhynsk.

6. In July 2003 the applicant instituted proceedings in the Bagliyskyy District Court of Dniprodzerzhynsk against the State of Ukraine, the President, and the local department of the Pension Fund, seeking recovery of pension arrears and compensation for non-pecuniary damage. In her claim the applicant stated, in particular, that under Article 46 of the

Constitution she was entitled to a pension equal to the amount of minimum living standard. However, her pension was lower than that standard effective at the relevant time.

7. On 26 December 2003 the court rejected the applicant's claim as unfounded, stating that the amount of her pension had been determined correctly under the pension legislation. On 5 April 2004 and 8 June 2006 respectively the Dnipropetrovsk Regional Court of Appeal and the Supreme Court upheld the decision of the first-instance court. Neither of the courts considered the applicant's argument under Article 46 of the Constitution in respect of inconsistency of the amount of her pension with the minimum living standard.

II. RELEVANT DOMESTIC LAW

8. The relevant domestic law is set out in the judgment case of *Pronina v. Ukraine* (no. 63566/00, §§ 13-19, 18 July 2006).

THE LAW

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

9. The applicant complained under Articles 6 § 1 and 13 of the Convention that the domestic courts had failed to consider her argument that the amount of her pension had been determined contrary to the requirements of the Constitution.

10. The Court notes that in the present case that the role of Article 6 § 1 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by more stringent requirements of Article 6 § 1 (see, among other authorities, *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 41, Reports of Judgments and Decisions 1997-VIII). Consequently, it will consider the present complaint solely under Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

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

A. Admissibility

11. The Government maintained that the complaint was inadmissible on non-exhaustion grounds. First, they submitted that the applicant should have requested the domestic courts to refer the case to the Constitutional Court to

determine the constitutionality of the legislative acts which were the basis for the judicial decisions. Second, the applicant applied to the Court when the domestic procedure had not been completed.

12. The applicant contended that applying to the Constitutional Court would not be effective. Moreover, she was not fully aware of the relevant procedures. She further claimed that she applied to the Court in 2004, before the termination of the domestic proceedings, as those had been seriously protracted.

13. As to the first Government's objection, the Court notes that the option of applying to the Constitutional Court (which has no power to review the decisions of the domestic courts) is of no relevance to the present complaint, the latter referring to the issue of insufficient reasoning in the court decisions. Moreover, the Court has held that there is no effective domestic remedy to challenge the constitutionality of a statutory provision, since the Ukrainian legal system does not provide an individual with the right of direct individual petition to the Constitutional Court (see *Pronina*, cited above, § 24, and *Sheidl v. Ukraine* (dec.), no. 3460/03, 25 March 2008). In this context the Court reiterates that for the remedy to be effective it must be independent of any action taken at the authorities' discretion and must be directly available to those concerned (see *Gurepka v. Ukraine*, no. 61406/00, § 59, 6 September 2005). The Court notes that the applicant's request to the domestic courts for referral of the case to the Constitutional Court would be dependent on the discretion of the Supreme Court and, therefore, does not comply with the requirements of effective remedy for the purpose of Article 35 § 1 of the Convention. It follows that the Government's objection should be dismissed.

14. As to the second Government's objection, it is true that at the time she lodged her application with the Court the applicant had not exhausted her complaint before the domestic courts. However, in 2006 the domestic proceedings had terminated and the applicant supplemented her application accordingly. It follows that since then the matter raised by the Government has become no more relevant.

15. 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

16. The applicant maintained that the domestic courts failed to give sufficient reasons for their decisions and did not address her arguments in respect of non-compliance of her pension with the requirements of the Constitution.

17. The Government did not comment on the complaint on the merits.

18. The Court notes that the similar complaint has been considered in the case of *Pronina* (cited above). It notes that in the present case the applicant also claimed before the domestic courts that her pension should have been calculated in line with the requirements of Article 46 of the Constitution. However, as in *Pronina*, the domestic courts made no attempt to analyse the applicant's claim from this standpoint, despite the explicit reference to it before every judicial instance. It is not the task of the Court to decide what would have been the most appropriate way for the domestic courts to deal with this argument. It notes, however, that one of the ways to address the applicant's argument could be to raise this issue before the Constitutional Court which would thus have an opportunity to decide on conformity of the relevant provisions of the pension legislation with the Constitution. Still, by mere ignoring the applicant's point altogether, even though it was specific, pertinent and important, the domestic courts fell short of their obligations under Article 6 § 1 of the Convention.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

20. The applicant complained of a violation of Article 2 of the Convention on account of the outcome of the proceedings in her case and of a violation of Article 13 of the Convention, arguing that she did not have an effective remedy in respect of her pension claim.

21. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, 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.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. The applicant claimed 12,873 Ukrainian hryvnias (UAH) or 1,829 euros (EUR) in respect of pecuniary damage. She further claimed that the award in respect of non-pecuniary damage should not be less than EUR 6,000.

25. The Government contested those claims.

26. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

27. The applicant further claimed EUR 100 for legal fees, EUR 30 for translation expenses, and EUR 40 for postal and other communication expenses, all of them having been incurred in connection with the proceedings before the Court.

28. The Government contended that those claims were unsubstantiated.

29. Having examined the evidence submitted by the applicant, the Court awards the sum of EUR 9 to cover postal expenses and rejects the remainder of the claims under this head as unsubstantiated.

C. Default interest

30. 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 under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

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 of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 9 (nine euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable on the date of settlement;
 - (c) 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 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President