



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

FIFTH SECTION

CASE OF MUSHTA v. UKRAINE

(Application no. 8863/06)

JUDGMENT

STRASBOURG

18 November 2010

FINAL

18/02/2011

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

In the case of Mushta v. Ukraine,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 19 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 8863/06) 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 Stanislava Isakivna Mushta (“the applicant”), on 13 February 2006.

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

3. On 1 October 2009 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 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1952 and lives in Letychivka, Cherkasy region.

5. In March 2005 the applicant instituted proceedings in the Monastyryshche Court against her former employer, the Monastyryshche Department of Land Resources, seeking reinstatement as an employee and recovery of salary arrears. In the proceedings, the applicant was represented by a lawyer.

6. On 23 May 2005 the court allowed the applicant's claims in full.

7. The defendant party appealed against that judgment. The applicant submitted comments on the appeal.

8. At a preliminary hearing on 1 July 2005 the Cherkasy Regional Court of Appeal issued a ruling scheduling a hearing on the merits of the appeal for 17 August 2005.

9. According to the Government, a copy of the ruling of 1 July 2005 was delivered to the applicant in person on 15 July 2005. The Government submitted a copy of the acknowledgment of receipt completed and signed by a postman and a copy of a report from the Cherkasy Post Office, indicating that the applicant had received a copy of the ruling in person. In that report the post office mentioned that the register of delivered mail containing the applicant's signature in that connection had been destroyed and that a copy of it was not available.

10. The applicant stated that neither she nor her lawyer had been informed of the hearing on appeal in advance. According to her, the documents submitted by the Government could not prove that she had received a copy of the ruling of 1 July 2005, as the acknowledgment of receipt did not bear the post mark of Post Office No. 16 of Cherkasy, which normally delivered mail to her place of residence.

11. From 10 to 29 August 2005 the applicant underwent treatment at the Monastyrshche Central Hospital.

12. On 17 August 2005 the Cherkasy Regional Court of Appeal heard the case in the absence of the applicant and her lawyer. It found that the applicant's dismissal had been lawful, quashed the judgment of the first-instance court and rejected the applicant's claims in full. According to the judgment of the Court of Appeal, it could be appealed against in cassation to the Supreme Court within one month.

13. According to the applicant, on 7 September 2005 her lawyer learned that the Court of Appeal had decided on the case on 17 August 2005. On the same day he lodged with the Monastyrshche Court a request for a copy of the decision on appeal.

14. On 5 October 2005 the lawyer received a copy of the decision of 17 August 2005.

15. At the applicant's request, a copy of that decision was also provided to her by the Monastyrshche Court on 6 October 2005.

16. On 3 November 2005 the applicant lodged an appeal in cassation with the Supreme Court, challenging the factual findings and application of law by the Court of Appeal. The applicant also requested the Supreme Court to renew the time-limit for lodging her appeal in cassation, stating that she had not been informed of the decision of 17 August 2005 in due time.

17. On 15 November 2005 a judge of the Supreme Court dismissed the applicant's appeal in cassation as lodged out of time, stating, without any further explanation, that the ground on which the applicant had relied in requesting the renewal of the impugned time-limit was not sufficient to justify the requested course of action.

II. RELEVANT DOMESTIC LAW

A. Code of Civil Procedure of 1963 (repealed with effect from 1 September 2005)

18. The relevant extracts from Chapter 7 (Procedural terms) of the Code of Civil Procedure of 1963, as worded at the material time, read as follows:

Article 84. Types of procedural terms

“The terms during which procedural acts are to be performed shall be set by the law or by the court.”

Article 85. Consequence of missing procedural terms

“...Complaints and documents submitted after the expiry of procedural terms shall be left without consideration if the court does not find reasons for extension or renewal of the term.”

Article 87. Expiry of procedural terms

“...

A term [expressed] in months shall expire on the corresponding date of the last month of the term ...

The last day of the term shall run until [midnight]...

The term shall not be considered to be missed if the complaint or other documents or money required by the court have been submitted to the post office before its expiry.”

Article 89. Renewal and extension of procedural terms

“At the request of a party ... the court may renew or extend the terms set by the court.

The court may renew the term set by the law if it has been missed for reasons found by the court to be justifiable.

The question concerning renewal of the expired term shall be decided by the court ... to which a document was due to be submitted. [T]he parties ... shall be summoned to a hearing [on that question] though their failure to appear shall not prevent the court from considering [it]...

A document concerning which the request for renewal of the term has been lodged must be submitted together with the request.

A court's ... ruling refusing to renew the missed term may be appealed against ...”

19. The relevant extracts from Chapter 22 (Court judgments) of the Code of Civil Procedure of 1963, as worded at the material time, read as follows:

Article 216. The [obligation to] issue copies of decisions to parties and third parties

“The court shall send to the parties ... who were not actually present at the court hearing ... copies of the judgment or of the rulings by which the proceedings were suspended or discontinued or the claim was left without consideration, within five days of their pronouncement.”

20. The relevant extracts from Chapter 40 (Appeal procedure) of the Code, as worded at the material time, read as follows:

Article 302. The procedure for consideration of a case by a court of appeal

“Cases shall be considered by a court of appeal under the rules set for consideration of cases by a court of first instance, with the exceptions envisaged in this Chapter.

...”

21. The relevant extracts from Chapter 41 (Cassation procedure) of the Code, as worded at the material time, read as follows:

Article 319. The court of cassation instance

“The court of cassation instance is the Supreme Court of Ukraine.”

Article 320. The right to challenge judicial decisions in cassation

“The parties and other persons taking part in the case ... have the right to challenge in cassation judgments and rulings adopted by the first-instance court which have been considered by the court of appeal, as well as rulings and judgments of the court of appeal.

The grounds for [an appeal] in cassation are wrongful application by the court of norms of substantive law or a violation of norms of procedural law.”

Article 321. The term for lodging an appeal in cassation

“An appeal in cassation ... shall be lodged within one month of the day of the pronouncement of the ruling or judgment of the appeal court.

If the time-limit ... has been missed for reasons which the court recognises as justified, the court may, at the request of the person who lodged the appeal ... renew that time-limit for a period not exceeding one year from the day on which the right to an appeal in cassation arose ...”

B. Code of Civil Procedure of 2004 (in force as of 1 September 2005)

22. The relevant extracts from Chapter 6 (Procedural terms) of Section I (General provisions) of the Code of Civil Procedure of 2004, as worded at the material time, read as follows:

Article 67. Types of procedural terms

“1. The terms during which procedural acts are to be performed shall be set by the law, and if they have not been set by the law [the terms shall be] set by the court.”

Article 69. Start of the running of procedural terms

“1. A procedural term shall start running on the day after the calendar date of the event [to which the term is linked]...”

Article 70. Expiry of procedural terms

“...

2. A term [expressed] in months shall expire on the same date of the last month of the term ...

5. The last day of the term shall run until [midnight] ...

6. The term shall not be considered to be missed if the claim, complaint, other documents or materials, or money have been submitted to the post office or transferred by other means of communication before its expiry.”

Article 73. Renewal or extension of procedural terms

“1. The court shall renew or extend the term ... at the request of a party ... if it has been missed for justifiable reasons.

2. The question concerning renewal or extension of the expired term shall be decided by the court ... to which a document or evidence was due to be submitted. The persons taking part in the proceedings shall be informed of the place and time of consideration of that question. The presence of those persons is not compulsory.

3. A document or evidence concerning which the request [for renewal or extension of the term] has been lodged may be submitted together with the request...”¹

23. The relevant extracts from Chapter 7 (Judicial decisions) of Section III (Procedure for consideration of claims) of the Code, as worded at the material time, read as follows:

Article 222. The [procedure for issuing] copies of decisions to persons who took part in the case

“...

2. At a request of a person who took part in the case copies of a court decision shall be given to him within five days of its pronouncement.

3. Copies of a court decision shall be sent, within five days of its pronouncement, by registered post with acknowledgment of receipt to persons who took part in the case, but who were not present at the court hearing.

...”

24. The relevant extracts from Chapter 1 (Appeal procedure) of Section V (Procedure for review of judicial decisions) of the Code, as worded at the material time, read as follows:

Article 321. The [procedure for issuing] copies of decisions to parties and other persons who took part in the case

“1. Decisions of the court of appeal shall be issued ... in accordance with the procedure envisaged by Article 222 of this Code.

2. Copies of decisions of the court of appeal shall be re-issued by the court of first instance keeping the case-file.”

25. The relevant extracts from Chapter 2 (Cassation procedure) of Section V (Procedure for review of judicial decisions) of the Code, as worded at the material time, read as follows:

Article 323. The court of cassation instance

“1. The court of cassation instance in civil cases is the court which is envisaged by the Judiciary Act as the court of cassation in such cases.”

Article 324. The right to challenge [judicial decisions] in cassation

“1. The parties and other persons taking part in the case ... have the right to challenge in cassation:

1. On 16 March 2006 paragraph 3 of Article 73 was changed to read as follows: “A document or evidence concerning which the request [for renewal or extension of the term] has been lodged must be submitted together with the request...”

1) judgments of the court of first instance, after they have been reviewed on appeal, judgments and rulings of the appeal court adopted [in the course of] the consideration [of the case] on appeal ...

2) rulings of the court of first instance ... after they have been reviewed on appeal and rulings of the appeal court if they obstruct further proceedings in the case.

2. The grounds for [an appeal] in cassation are wrongful application by the court of norms of substantive law or a violation of norms of procedural law.”

Article 325. The term for lodging an appeal in cassation

“1. An appeal in cassation ... may be lodged within two months of the day on which the judgment (ruling) of the appeal court becomes final.

2. If the term ... has been missed for reasons which the court recognised to be justifiable, the court of cassation instance may, at the request of the person who lodged the appeal, renew that term, though for a period not exceeding one year from the day on which the right to an appeal in cassation arose.

3. An appeal in cassation lodged out of time ... shall be returned by the court of cassation to the person who lodged it, if that person does not raise the question of renewal of that term and also if the [request for] renewal is refused.

4. The question of renewal of the term ... shall be determined by a ruling of the court of cassation instance.”

Article 335. Scope of consideration of the case by the court of cassation instance

“1. In the course of consideration of the case in cassation, the court shall verify, within the limits of the cassation appeal, the accuracy of the application of norms of substantive or procedural law by the courts of first or appeal instances, [but it] shall have no power to establish or to hold proven facts which were not established in the judgment or dismissed by it, [or] to decide on the question of reliability ... of [particular] evidence or of the weight to be given to certain evidence ...

2. The court of cassation instance shall [examine the question of] the lawfulness of judicial decisions only within the limits of the claims raised before the court of first instance.

3. The court shall not be limited by the arguments of the cassation appeal if, in the course of the consideration of the case, [it] discerns the wrongful application of norms of substantive law or a violation of the norms of procedural law, constituting grounds for the compulsory quashing of the decision.”

Article 336. Powers of the court of cassation instance

“1. ...[T]he court of cassation instance has the power to:

(1) adopt a ruling dismissing the cassation appeal and leaving the [contested] decision in force;

(2) adopt a ruling fully or partly quashing the decision and referring the case back to the court of first instance or appeal for fresh consideration;

(3) adopt a ruling quashing the decision of the court of appeal and leaving in force the judicial decision which was erroneously quashed by the court of appeal;

(4) adopt a ruling quashing the judicial decisions and terminating the proceedings in the case or leaving the claim without consideration;

(5) quash the judicial decisions and adopt a new judgment or vary the judgment [on the merits of the case], without referring it back for fresh consideration ...”

26. The relevant extracts from Section XI (Final and transitional provisions) of the Code, as worded at the material time, read as follows:

“1. This Code shall enter into force as from 1 September 2005...

3. [The following normative acts] shall be repealed with the entry into force of this Code:

The Code of Civil Procedure of ... 1963...

11. Decisions adopted by courts of appeal before the entry into force of this Code may be appealed against in cassation if the term for [lodging] an appeal in cassation has not expired under the Code of Civil Procedure of 1963.”

THE LAW

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

27. The applicant complained that her right to a fair trial was violated, alleging that she had been unlawfully denied access to the court of cassation. She invoked 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

28. The Government contended that the application was partially based on untrue submissions by the applicant, in particular as regards her having been informed of the date and time of the hearing on appeal (see paragraphs 9-10 above). They requested the Court to strike the application out of its list of cases on the ground that the applicant had abused the right of petition.

29. The applicant disagreed.

30. The Court reiterates that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts (see, for instance, *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X).

31. In the present case, regard being had to the parties' submissions and other material in the Court's possession, the question of whether the applicant was informed of the hearing on appeal remains undetermined. Thus, the Court is unable to conclude that the applicant has knowingly based her allegations of the failure of the Court of Appeal to inform her of that hearing on untrue information (see *Popov v. Moldova (no. 1)*, no. 74153/01, § 45, 18 January 2005; and *Daniliuc v. Moldova*, no. 46581/99, § 32, 18 October 2005). Accordingly, the Court discerns no indication that the applicant abused her right of petition, within the meaning of Article 35 § 3 (a) of the Convention, and dismisses the Government's preliminary objection.

32. The Court notes that the application 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 of the parties

33. The applicant complained of lack of access to a court. She argued that the Supreme Court had disregarded the fact that she had missed the time-limit for lodging an appeal in cassation because of the failure of the Court of Appeal to inform her of the hearing on 17 August 2005 and to send her a copy of its decisions in accordance with Article 216 of the Code of Civil Procedure of 1963, which had been applicable to the proceedings on appeal by virtue of the provisions of Article 302 of that Code.

34. The Government stated that there had been no violation of Article 6 of the Convention in the applicant's case. In particular, they submitted that the applicant had been duly informed of the hearing on appeal on 17 August 2005 and had been able to request the adjournment of that hearing, that her lawyer had also been aware of that hearing, which was confirmed by his request of 7 September 2005, and that after the hearing of 17 August 2005 the decision of the Court of Appeal together with other materials of the case had been available at that court. On these grounds, the Government contended that the applicant and her lawyer had had a real opportunity to submit an appeal in cassation within the time-limit set by the law.

35. The Government further argued that Article 216 of the Code of Civil Procedure of 1963 was applicable to the proceedings before the first-instance courts, and not to the proceedings on appeal.

36. According to the Government, the Supreme Court's refusal to allow the applicant's request to renew the time-limit for lodging her appeal in cassation had been based on the above-mentioned considerations.

2. The Court's assessment

37. The Court reiterates that the right to a court, of which the right of access is one aspect, is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict the exercise of the right in such a way or to such an extent that its very essence is impaired. They must pursue a legitimate aim and there must be a reasonable degree of proportionality between the means employed and the aim sought to be achieved.

38. The rules on time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should themselves correspond to the principle of legal certainty and should not prevent litigants from making use of an available remedy (see *Melnyk v. Ukraine*, no. 23436/03, §§ 22-23, 28 March 2006).

39. The Court notes that, according to its established case-law concerning Ukraine, the above guarantees enshrined in Article 6 are applicable to proceedings before courts of cassation in civil matters (see *Melnyk*, cited above, § 25).

40. Turning to the circumstances of the present case, the Court observes that the applicant had access to a court of cassation, in that her appeal reached the Supreme Court. However, it was not considered because the latter court found that it had been lodged out of time and that the applicant's request for the renewal of the time-limit was unfounded.

41. Although the applicant contended that the decision of the Supreme Court had been unlawful, the Court does not find it necessary to examine whether the relevant rules were accurately applied by that court. The latter was definitely better placed to interpret the domestic rules of procedure, in particular those concerning procedural time-limits. Nevertheless, the Court considers that it is necessary to examine whether their application in the present cases could be regarded as foreseeable from the point of view of the applicants (see *Melnyk*, cited above, § 26).

42. In this context, the Court notes that under the provisions of Article 216 of the Code of Civil Procedure of 1963, read in the light of Article 302 of that Code, the applicant was entitled to be served *ex officio* with a written copy of the decision of the Court of Appeal (see paragraphs 19-20 above). This is indirectly confirmed by the amended provisions of the Code of Civil Procedure of 2004 concerning the same procedural matter (see paragraphs 23-24 above). The Government's submissions to the contrary are not supported by any evidence or persuasive arguments.

43. Therefore, the applicant, who and whose lawyer had not actually been present at the hearing on appeal, had legitimate grounds to expect a copy of the decision on appeal to be sent to her within the five-day time-limit enabling her to prepare and submit an appeal in cassation.

44. In these circumstances, the question of whether the applicant or her lawyer knew about that hearing in advance does not appear to be directly relevant for the examination of the applicant's complaint.

45. The Court further notes that the applicant's lawyer inquired about the decision on appeal within a relatively short period of time (see paragraph 13 above). Although the one-month time-limit had not expired when he learnt of the decision of 17 August 2005, the lawyer and the applicant had to wait for a copy of that decision, which the lawyer immediately requested, in order to prepare a cassation appeal. Having obtained a copy of the impugned decision on 5 October 2005, the applicant could have reasonably expected the one-month time-limit to have been brought forward to 6 November 2005, as there were no specific rules setting a procedure to be followed in such situation.

46. The Court notes that the applicant submitted an appeal in cassation within less than a month and the entire period which lapsed after the delivery of the impugned decision was far from reaching the one-year maximum period set by Article 321 of the Code of Civil Procedure of 1963 and by Article 325 of the Code of Civil Procedure of 2004 (see paragraphs 21 above). In her submissions before the Supreme Court the applicant gave reasons for missing the time-limit and requested its extension.

47. On the whole, the Court finds that the applicant and her lawyer acted with due diligence in the case and that it was not the applicant's fault that she did not submit an appeal in cassation within the original time-limit set by the law. Even assuming that the Government's explanations as to the reasons for the Supreme Court's refusal to renew the time-limit are accurate, the Court considers that in the circumstances of the case the application of procedural limitations by the domestic court was not clear and foreseeable from the applicant's point of view and thus was not in compliance with the principle of legal certainty.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

50. The Government contended that the claim was unsubstantiated.

51. The Court considers that the applicant must have suffered some distress and anxiety on account of the violation of her right of access to a court. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards her EUR 2,000 under this head.

B. Costs and expenses

52. The applicant made no claim as to costs and expenses. Therefore, the Court makes no award under this head.

C. Default interest

53. 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

1. *Declares* the application 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, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 18 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Peer Lorenzen
President