



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

FIFTH SECTION

CASE OF BULANOV AND KUPCHIK v. UKRAINE

(Applications nos. 7714/06 and 23654/08)

JUDGMENT

STRASBOURG

9 December 2010

FINAL

09/03/2011

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

In the case of Bulanov and Kupchik 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 16 November 2010,

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

PROCEDURE

1. The case originated in two applications (nos. 7714/06 and 23654/08) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mr Boris Sergeyevich Bulanov (“the first applicant”) and Mr Valentin Petrovich Kupchik (“the second applicant”), on 1 February 2006 and 13 May 2008 respectively.

2. The first applicant, who had been granted legal aid, was represented by Mr A. Vokhmyanin, a lawyer practising in Sebastopol. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice.

3. On 22 September 2009 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant was born in 1951 and lives in Sebastopol. The second applicant was born in 1961 and lives in Lysychansk.

A. The proceedings instituted by the first applicant

5. On 21 December 2004 the first applicant instituted proceedings in the Zalznodorozhnyi District Court of Sympheropil against the enlistment office, seeking recalculation of his pension.

6. On 4 July 2005 the court rejected the first applicant's claim as unsubstantiated. On 13 December 2005 the Crimea Court of Appeal upheld the judgment of the first-instance court. In the operative part of its decision the Court of Appeal stated that the first applicant could challenge the decision before the Supreme Court within two months.

7. On 20 January 2006 the first applicant lodged a cassation appeal with the Supreme Court.

8. On 6 February 2006 a judge of the Supreme Court ruled that the first applicant's cassation appeal should be referred to the Higher Administrative Court, stating that the latter court was the court of cassation in administrative cases pursuant to Article 210 of the Code of Administrative Justice of 2005.

9. In a ruling of 7 August 2006 a judge of the Higher Administrative Court dismissed the first applicant's cassation appeal as having been lodged out of time. The judge, relying on Article 212 paragraph 2 of the Code of Administrative Justice, held that the first applicant's cassation appeal ought to have been lodged within one month of the date of the decision of the Court of Appeal.

10. In a letter of 29 August 2006 the First Vice-President of the Higher Administrative Court informed the first applicant that he could resubmit his cassation appeal with a request for an extension of the expired time-limit.

11. On 23 September 2006 the first applicant resubmitted his cassation appeal to the Higher Administrative Court.

12. In June 2007 the first applicant received a letter from the Higher Administrative Court, enclosing a copy of a ruling dated 15 March 2007. By that ruling, the Higher Administrative Court declined jurisdiction to consider the first applicant's cassation appeal on the grounds that the case had been determined by the Court of Appeal under the rules of civil procedure subsequent to the entry into force of the Code of Administrative Justice on 1 September 2005, and thus that the Supreme Court was the court of cassation for the first applicant's case.

13. The rulings of 6 February and 7 August 2006 and 15 March 2007 each stated that they were final and not subject to appeal.

B. The proceedings instituted by the second applicant

14. On 8 November 2005 the second applicant instituted proceedings in the Lysychansk Town Court against his former employer, the Lysychansk Town Police Department, seeking recovery of salary arrears.

15. On 16 March 2006 the court rejected the second applicant's claim, doing so partly on the basis that it found the claim to be unsubstantiated and partly as having been lodged out of time. On 22 May 2006 the Lugansk Regional Court of Appeal upheld the judgment of the first-instance court. In the operative part of its decision the Court of Appeal stated that its decision could be appealed against to the Supreme Court by way of a cassation appeal within two months.

16. On 18 July 2006 the second applicant lodged a cassation appeal with the Supreme Court.

17. On 11 September 2006 a judge of the Supreme Court dismissed the second applicant's cassation appeal, holding that it was to be considered by the Higher Administrative Court.

18. On 18 December 2006 the second applicant submitted his cassation appeal to the Higher Administrative Court.

19. On 16 November 2007 a judge of the Higher Administrative Court found that the appeal fell to be dealt with by the Supreme Court, as the case had been considered by the lower courts under the rules of civil procedure after the entry into force of the Code of Administrative Justice on 1 September 2005. The judge ruled that the cassation appeal was to be returned to the second applicant, together with an explanation of the right to lodge a cassation appeal with the Supreme Court. The ruling was final and not subject to appeal.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine of 1996

20. The relevant provisions of the Constitution read as follows:

Article 125

“In Ukraine the system of courts of general jurisdiction is formed in accordance with the principles of territoriality and specialisation.

The Supreme Court of Ukraine is the highest judicial body in the [hierarchy] of courts of general jurisdiction.

The respective higher courts are the higher judicial bodies of specialised courts.

Courts of appeal and local courts shall operate in accordance with the law.

The creation of extraordinary and special courts shall not be permitted.”

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

21. The relevant provisions of the Code of Civil Procedure of 1963, as worded at the material time, read as follows:

Article 1. Legislation on civil court procedure

“... Legislation on civil court procedure shall establish procedures for the consideration of cases concerning disputes arising from legal relations in the civil, family, labour and collective farming spheres, cases concerning administrative legal relations...”

Article 319. The court of cassation

“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 a first-instance court which have been considered by a court of appeal, as well as rulings and judgments of the court of appeal.

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

Article 329. Procedure for consideration of the question of referral of a case for examination by [the entire composition of] the judicial chamber

“The question of referral ... shall be decided by a court composed of three judges ...

In the absence of grounds for referral ... the court shall adopt a ruling dismissing the appeal.

This ruling ... shall not be subject to appeal.

If the court has dismissed the cassation appeal, the case shall be returned to the court of first instance ...”

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

22. The relevant provisions of the Code of Civil Procedure of 2004, as worded at the material time, read as follows:

Article 15. Jurisdiction of the courts as regards civil cases

“1. The courts shall consider, within the framework of civil court procedure, cases ... concerning legal relations in the civil, housing, land, family and labour spheres, as well as other legal relations, provided they do not fall to be considered under the rules of a different type of court procedure...”

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

Article 328. Opening of cassation proceedings in the case¹

“...

2. The reporting judge shall refuse to open cassation proceedings if:

(1) the case does not fall to be examined in cassation within the framework of civil procedure ...

5. A copy of the ruling ... refusing to open cassation proceedings, together with the materials annexed to the appeal, shall be forwarded to the appellant, and the cassation appeal shall remain with the court of cassation.”

Chapter XI. Final and transitional provisions

“...

9. Claims and complaints in cases concerning administrative [matters] ... lodged before the entry into force of this Code ... shall be considered pursuant to [the rules of] the Code of Administrative Justice ...”

1. As amended on 16 March 2006.

D. Code of Administrative Justice of 2005 (in force as of 1 September 2005)

23. The relevant provisions of the Code of Administrative Justice of 2005, as worded at the material time, read as follows:

Article 15. Jurisdiction of the administrative courts as regards administrative cases

“1. The administrative courts shall enjoy jurisdiction over:

(1) disputes between physical persons or legal entities and subjects vested with public powers concerning the latter's decisions ... actions or lack of action;

(2) disputes relating to the recruitment, careers and termination of public service of citizens...”

Article 20. Jurisdiction of the particular administrative courts

“...

3. The Higher Administrative Court of Ukraine shall review in cassation the judicial decisions of local administrative courts and administrative courts of appeal...”

Article 210. The court of cassation instance

“1. The court of cassation instance in administrative cases is the Higher Administrative Court of Ukraine.”

Article 211. 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 judicial decisions of the court of first instance after they have been reviewed on appeal, as well as judicial decisions of the court of appeal in full or in part...

3. A violation by a court of norms of substantive or procedural law shall constitute a ground for [an appeal] in cassation.”

Article 214. Admissibility of an appeal in cassation¹

“...

3. The reporting judge shall refuse to open cassation proceedings in the case if:

(1) the case does not fall to be examined in cassation within the framework of administrative procedure...

1. As amended on 16 March 2006.

5. A copy of the ruling ... refusing to open cassation proceedings, together with the materials annexed to the appeal, shall be forwarded to the appellant, while the cassation appeal shall remain with the court of cassation.”

Article 236. The right to appeal against court decisions in the light of exceptional circumstances

“1. Parties ... may challenge, in the light of exceptional circumstances, court decisions in administrative cases after their review in cassation and decisions of the court of cassation before the Supreme Court of Ukraine.

2. Decisions of the Supreme Court of Ukraine in administrative cases may also be challenged in the light of exceptional circumstances [on the basis] set out in subparagraph 2 of Article 237 of this Code.

...”

Article 237. Grounds for [an appeal] made in the light of exceptional circumstances

“1. Court decisions in administrative cases may be reviewed in the light of exceptional circumstances by the Supreme Court of Ukraine, if they are challenged on the [following] grounds:

(1) dissimilar application of the same provision of law by courts of cassation instance;

(2) a finding by an international judicial body that the courts' decisions [in a case] are infringing Ukraine's international obligations.”

Article 238. The term for lodging an appeal in the light of exceptional circumstances

“1. An appeal shall be lodged within a month of the discovery of the circumstances capable of serving as grounds for [appeal] in the light of exceptional circumstances.

2. An appeal lodged after the expiry of [that] term ... shall be left without consideration, if, upon a request by the appellant, the Supreme Court of Ukraine finds no grounds to renew [the term]...”

Article 239. Admissibility of an appeal made in the light of exceptional circumstances

“1. A panel of at least five judges of the judicial chamber of the Supreme Court dealing with administrative cases ... shall decide on the admissibility of an appeal made in the light of exceptional circumstances within fifteen days of its receipt and without summoning the persons taking part in the case. At the same time, [the panel] may decide on [the question of] the extension of the term for lodging an appeal made in the light of exceptional circumstances.

2. An appeal shall be considered admissible ... if at least three judges have reached [such a conclusion].

...”

Article 242. Powers of the Supreme Court in relation to an [appeal made] in the light of exceptional circumstances

“1. ...[A] panel of judges ... shall adopt, by a majority vote, one of the following decisions...

(1) allowing the appeal in full or in part;

(2) dismissing the appeal.

...

3. The decision of the Supreme Court of Ukraine [concerning an appeal made in the light of exceptional circumstances] is final and may not be appealed against, save for in the circumstances envisaged by Article 237 paragraph 2 of this Code.”

Article 243. A decision of the Supreme Court allowing an appeal

“1. The Supreme Court of Ukraine shall allow an appeal if it discovers a dissimilar application of the same provision of law by courts of cassation instance.

2. If the Supreme Court of Ukraine establishes that the contested court decision is unlawful, it shall quash it in full or in part and remit the case for fresh consideration to the court of first, appeal or cassation instance, as appropriate, depending on which court was the first to infringe a provision of substantive or procedural law resulting in the incorrect determination of the case. The Supreme Court of Ukraine may also quash decisions of courts of appeal or cassation and leave wrongfully quashed decisions of courts of first or appeal instance in force.

...

4. The decision of the Supreme Court of Ukraine allowing an appeal shall be reasoned.”

Chapter VII. Final and transitional provisions

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

5. Before the district administrative courts and administrative courts of appeal start to operate, cases falling within their jurisdiction shall be decided by the respective local and appeal courts of general jurisdiction ... pursuant to the rules of the Code of Administrative Justice of Ukraine...

7. After the entry into force of this Code, claims and complaints in cases concerning administrative [matters] ... as well as appeals and appeals in cassation ... in such cases, which were lodged, but not determined, before the entry into force of the Code of Administrative Justice of Ukraine, shall be considered pursuant to [the rules of] this Code.

Such claims or complaints ... may not be left without further action or returned pursuant to this Code, if they were lodged in compliance with the relevant requirements and jurisdictional rules established by the Code of Civil Procedure of Ukraine of 1963 ...

10. Appeals in cassation against judgments of the courts of first instance in the situations envisaged in paragraph 7 of this Chapter which were lodged before the entry into force of this Code and which have not been considered by the Supreme Court of Ukraine shall be referred to the Higher Administrative Court of Ukraine ...”

E. Judiciary Act of 21 June 2001 (repealed with effect from 30 July 2010)

24. The relevant provisions of the Judiciary Act of 21 June 2001, as worded at the material time, read as follows:

Section 47. The Supreme Court of Ukraine - the highest judicial body

“1. The Supreme Court of Ukraine is the highest judicial body within the [hierarchy] of courts of general jurisdiction ...

2. The Supreme Court of Ukraine:

(1) ... shall consider cases in cassation in the situations envisaged by law ...”

Chapter VII. Final and transitional provisions

“...

(9) ... The chamber of the Supreme Court of Ukraine which hears civil cases shall consider civil cases in cassation until such time as another court [vested with functions] of a court of cassation in civil cases is determined by legislation.”

III. RELEVANT COUNCIL OF EUROPE MATERIAL

25. Relevant extracts from the Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), read, in so far as relevant, as follows (emphasis added in the original text):

“4.1.4. The Supreme Court

...

28. ...[T]hree different orders of jurisdiction, topped by three courts of cassation that are independent of each other, may well lead to numerous and often complex

conflicts of jurisdiction. The least that one would expect in such a situation, is that there would be an efficient system for the solution of such conflicts, *e.g.* through a special “conflicts” court. ... The Supreme Court should fit that purpose ...

31. ... [T]he idea of a supreme court generally interpreting the law in an authoritative way and thus paving the way for a uniform interpretation of the law by all courts, even before contradictions have arisen.

...

14. Conclusion

125. ... The Supreme Court's jurisdiction should ... reflect[s] its constitutional status as the highest judicial body in the system of courts of general jurisdiction ...

129. Recommendations for improvement of the Law include *inter alia*:

...

2. The Supreme Court should be allowed to exercise its jurisdiction to resolve conflicts between the high specialised courts also in matters of procedural law and the Court should be able to decide itself on the admissibility of cases involving a conflict in the interpretation of the law. It should also be made competent to resolve conflicts of jurisdiction between the three sorts of jurisdiction (civil and criminal, commercial and administrative).

...”

THE LAW

I. JOINDER OF THE APPLICATIONS

26. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common legal background.

II. THE COMPLAINTS OF LACK OF ACCESS TO COURT

27. The applicants complained that they had been unlawfully denied access to a court of cassation in their cases. They relied on Articles 6 and 13 of the Convention.

28. The Court notes that the applicants' complaints fall to be examined 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

29. The Government submitted that the applicants had not exhausted the domestic remedies available to them, as they had failed to lodge with the Supreme Court requests for review of the decisions of the Higher Administrative Court of 15 March (in the first applicant's case) and 16 November 2007 (in the second applicant's case) in the light of exceptional circumstances pursuant to Article 237 of the Code of Administrative Justice of 2005. According to the Government, the issue concerned the conflicting application of procedural law by the Supreme Court and the Higher Administrative Court in the applicants' cases, falling within the ambit of the first sub-paragraph of that provision of domestic law.

30. The applicants disagreed.

31. The Court reiterates that the only remedies to be exhausted by an applicant are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in both theory and practice at the relevant time (see, for instance, *Miroshnik v. Ukraine*, no. 75804/01, § 53, 27 November 2008).

32. The Court has already found in a case against Ukraine that requests for review of court decisions made in the light of exceptional circumstances, as envisaged by the Code of Administrative Justice of 2005, are akin to requests for the re-opening of the proceedings (see *Karuna v. Ukraine* (dec.), no. 43788/05, 3 April 2007). In this context, the Court reiterates that the Convention does not guarantee a right to have a case re-opened by means of an extraordinary remedy (see, *mutatis mutandis*, *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002). Having regard to the parties' submissions on this aspect of the case, and, in particular, given the Government's failure to submit any examples of cases in which the present issue of access to a court of cassation was resolved through the impugned procedure, the Court discerns no grounds to depart from the findings it reached in *Karuna* (cited above). Moreover, the Court notes that such findings are consistent with its practice concerning the extraordinary review procedure in the civil law matters in the Ukrainian legal system (see *Nesterova v. Ukraine*, no. 10792/04, § 36, 28 May 2009). Therefore, the Court holds that the applicants were not required to pursue the procedure suggested by the Government, as it was not a remedy within the meaning of Article 35 § 1 of the Convention.

33. Accordingly, the Court dismisses the Government's objection. It finds that the applicants' complaints of lack of access to court are not manifestly ill-founded within the meaning of Article 35 § 3 of the

Convention. The Court further finds that they are not inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

34. The applicants maintained their complaints that they had not had access to a court of cassation in violation of Article 6 § 1 of the Convention.

35. The Government did not submit observations on the merits of the case.

36. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the “right to court”, which, according to the Court's case-law, includes not only the right to institute proceedings but also the right to obtain a “determination” of the dispute by a court (see, for instance, *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II).

37. 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 both civil and administrative matters, regardless of their Ukrainian classification (see *Melnyk v. Ukraine*, no. 23436/03, § 25, 28 March 2006, and *Karuna*, cited above).

38. In the present cases, the applicants had access to a court of cassation, in that their appeals reached both the Supreme Court and the Higher Administrative Court. However, the appeals remained unexamined as firstly the Supreme Court and then the Higher Administrative Court declined jurisdiction over the applicants' cases.

39. The Court does not find it necessary in the circumstances to examine whether the Supreme Court or the Higher Administrative Court had jurisdiction to determine the merits of the applicants' appeals. What is important is that the applicants did not obtain a “determination” of their appeals because the Higher Administrative Court refused to follow the rulings of the Supreme Court determining jurisdiction over their cases. Such refusals not only deprived the applicants of access to court but also undermined the authority of judicial power. Having obtained final rulings of the Supreme Court, which has a constitutional position as the highest judicial body and which interprets the law in an authoritative way, the applicants had legitimate expectations that those rulings would not be challenged. In this context, the Court notes that Article 6 of the Convention requires the States to provide procedural means for effective and expedient resolution of jurisdictional conflicts (see *Loyen v. France* (dec.), no. 46021/99, 6 April 2000, and, *mutatis mutandis*, *Didu v. Romania*, no. 34814/02, § 29, 14 April 2009). The Court further notes that the observations of the Venice Commission and the Council of Europe

Directorates are particularly relevant to this aspect of the case (see paragraph 25 above).

40. In the light of the foregoing and given that there is nothing in the case materials to suggest the applicants' failure to comply with the relevant procedural requirements, the Court finds that their genuine and effective enjoyment of the right of access to court was not secured. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. THE REMAINING COMPLAINTS

41. The first applicant complained under Articles 6 and 13 of the Convention of the outcome and unfairness of the proceedings, alleging that the courts had misinterpreted the law in his case and that they had been biased. He also complained under Article 14 of the Convention that he had suffered discrimination on account of the outcome of the proceedings.

42. The second applicant complained under Articles 6 and 13 of the Convention of the outcome and unfairness of the proceedings, alleging that the courts had wrongly assessed evidence.

43. Having carefully examined the applicants' remaining complaints under Articles 6, 13 and 14 of the Convention in the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention and must be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The first applicant claimed 12,000 euros (EUR) in respect of pecuniary damage and also claimed the same amount for non-pecuniary damage. The second applicant did not submit a claim for just satisfaction.

46. The Government contested the first applicant's claims.

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged by the first applicant; it therefore rejects the claim. On the other hand, ruling on an equitable basis, as is

required by Article 41 of the Convention, it awards the first applicant EUR 2,000 in respect of non-pecuniary damage.

48. The Court further considers that there is no call to award the second applicant any sum for just satisfaction.

B. Costs and expenses

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

C. Default interest

50. The Court considers it appropriate that 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. *Decides* to join the applications;
2. *Declares* the applicants' complaints under Article 6 § 1 of the Convention of lack of access to court admissible and the remainder of the applications inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the first 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, which sum 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;
5. *Dismisses* the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President