



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

FIFTH SECTION

**CASE OF ANDRIY RUDENKO v. UKRAINE**

*(Application no. 35041/05)*

JUDGMENT

STRASBOURG

21 December 2010

**FINAL**

*21/03/2011*

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



**In the case of Andriy Rudenko 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 30 November 2010,

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

## PROCEDURE

1. The case originated in an application (no. 35041/05) 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, Mr Andriy Ivanovych Rudenko (“the applicant”), on 12 September 2005.

2. The applicant was represented by Ms O. Chekotovska, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice.

3. On 8 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 1941 and lives in Kyiv.

#### **A. The proceedings concerning the applicant's title to part of a flat**

5. On 30 July 2003 the applicant instituted proceedings in the Shevchenkivsky District Court of Kyiv against his former wife and

mother-in-law, Ms R. and Ms I., seeking division of their jointly owned property, a three-room flat. In particular, the applicant requested the court to rule that one room be separated from the flat and to grant him title to that room. He submitted that the defendants did not allow him to enter the flat and that he had been forced to reside elsewhere.

6. The defendants lodged a counterclaim, asking the court to grant them joint title to the applicant's part of the flat and to fix the amount of compensation they would have to pay the applicant. They argued that, due to personal conflicts with the applicant, they could not all live together in one flat.

7. On 28 May 2004 the court ruled in favour of the defendants. It found, relying on an expert's report, that it was not technically possible to separate a single room from the flat. Relying on Article 115 of the Civil Code of 1963, the court granted the defendants title to the entire flat and ordered them to pay the applicant 121,747.60<sup>1</sup> Ukrainian hryvnias (UAH) in compensation.

8. The applicant appealed, stating in particular that he had been deprived of his property against his will and in violation of the law, and that the defendants had failed to transfer the money to the deposit account of the court in order to prove their ability to pay the amount awarded to him in compensation.

9. On 14 September 2004 the Kyiv City Court of Appeal partially changed the judgment of the first-instance court. It ruled that the latter court had wrongly relied on Article 115 of the Civil Code of 1963, instead of Articles 364 and 365 of the Civil Code of 2003, which were applicable in the case. The Court of Appeal rejected the applicant's appeal, holding, *inter alia*, that the defendants' ability to pay the award had been confirmed by a bank statement, according to which the applicant's former wife had a balance of 23,000<sup>2</sup> United States dollars (USD) on her deposit account.

10. The applicant appealed in cassation, alleging that the lower courts had misinterpreted the law. According to him, the courts had failed to take into account the fact that he had not given his consent for compensation pursuant to Article 364 of the Civil Code of 2003 and that they had failed to ensure that the requirement laid down in paragraph 2 of Article 365 of the Civil Code of 2003 had been fulfilled by the defendants.

11. On 16 June 2005 a panel of three judges of the Supreme Court dismissed the applicant's appeal, finding no grounds on which to transfer the case for consideration by the chamber of the Supreme Court.

12. The applicant did not institute enforcement proceedings in order to recover the sum awarded to him by the courts. According to the applicant, he did not receive the compensation awarded in the judgment of 28 May

---

1. About 19,185 euros (EUR).

2. About EUR 18,776.

2004 because the debtors refused to pay it as they did not have sufficient funds.

### **B. The proceedings concerning the applicant's registration at the flat**

13. By a judgment of 11 July 2006, the Shevchenkivskyy District Court ruled to discontinue the applicant's registration at the flat. On 23 August 2006 an appeal by the applicant against that judgment was rejected as lodged out of time. The applicant did not appeal in cassation.

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### **A. Constitution of Ukraine of 28 June 1996**

14. Relevant extracts from the Constitution read as follows:

#### **Article 41**

“Everyone has the right to own, use and dispose of his property ...

No one shall be unlawfully deprived of the right of property. The right of private property is inviolable.

The expropriation of objects of the right of private property may be applied only as an exception for reasons of public necessity, on the grounds and through the procedure established by law, and on the condition of advance and full compensation of their value. The expropriation with subsequent full compensation of their value is permitted only in the conditions of martial law or a state of emergency.

...”

### **B. Civil Code of 2003 (entered into force on 1 January 2004)**

15. The relevant provisions of the Civil Code of 2003 read as follows:

#### **Article 364. Separation of a part of a jointly owned property with determined shares [of each co-owner]**

“1. An individual co-owner is entitled to the physical separation of a part of a jointly owned property with determined shares [of each co-owner].

2. If [such] a separation ... is not permitted by the law or is impossible (paragraph 2 of Article 183 of this Code), the individual co-owner ... is entitled to receive monetary or other pecuniary compensation for his part from the other co-owners.

Compensation may only be provided with his consent ...”

**Article 365. Termination of title to a part of a jointly owned property upon a request from other co-owners**

“1. The right to a part of a jointly owned property may cease to exist pursuant to a court decision [taken] further to a claim by other co-owners, if:

- 1) the part is minor and cannot be physically detached;
- 2) the object is indivisible;
- 3) joint possession and use of the property is impossible;
- 4) the cessation of the right will not cause substantial damage to the interests of the co-owner or members of his or her family.

2. The court shall take a decision terminating a person's title to a part of a joint property on the condition that the claimant makes an advance payment of the cost of that part to the court's deposit account.”

**C. Judicial practice of the Supreme Court in cases concerning the application of paragraph 2 of Article 365 of the Civil Code of 2003**

16. By decision of 23 May 2007, the Supreme Court quashed the judgment of the lower court in a dispute between private persons concerning division of their jointly owned flat and remitted the case for fresh consideration for the following reasons:

“...

The Court of Appeal terminating the right of [a party] to part of the flat did not comply with the condition set in paragraph 2 of Article 365 of the Civil Code which led to the incorrect determination [of the dispute].

[The opposing party] was not present at the hearing before the Appeal Court and that court did not check the conditions of payment of compensation...

Given the above breach of the law, the judgment of the Court of Appeal concerning the division of the flat shall be quashed ...”

17. The Supreme Court's decision of 17 February 2010, by which it quashed the lower courts' decisions in a dispute concerning division of the property jointly owned by private individuals, was *inter alia* based on the similar ground. In particular, the relevant parts of the Supreme Court's decision read as follows:

“...

By the decision of the Court of Appeal, [a party's] title to part of joint property was terminated, though in the case material there is no information concerning advance payment by [the opposing party] of the cost of that part into the court's deposit account.

In such circumstances the challenged court decisions do not comply with the requirements of lawfulness and reasonableness ... and must be quashed with the referral of the case for new consideration...”

18. In that decision the Supreme Court also noted that:

“...

The legal nature of the provisions [of Articles 364 and 365] of the Civil Code of Ukraine differs; each of the provisions is a separate ground for lodging a claim; the first provides for the right of a owner, who withdraws [from joint ownership], to a part of a joint property, whereas the second provides for the possibility of terminating the right of a person to a part of a joint property upon a claim of other co-owners.

In this context, monetary or other type of pecuniary compensation under Article 364 of the Civil Code of Ukraine may be paid to a co-owner, who withdraws [from joint ownership], only with his consent. Whereas, under Article 365 of the Civil Code of Ukraine no consent to obtain compensation ... by a person whose right to a part of a joint property is being terminated is necessary (the claimant is only required to pay the cost of the part of property, the right to which is being terminated, to the court's deposit account).

... [Articles 364 and 365 of the Civil Code] are mutually exclusive and cannot be applied at the same time ...”

## THE LAW

### I. SCOPE OF THE CASE

19. The Court notes that, after the communication of the application to the respondent Government, the applicant relying on Article 6 § 1 of the Convention alleged that the courts had not been impartial and that they had not respected the principle of equality of arms.

20. The applicant further raised complaints of an infringement of the right to vote and the right to free medical assistance of an adequate standard on account of his inability to be registered at the flat in which he used to live.

21. In the Court's view, the new complaints are not an elaboration of the applicant's original complaint under Article 1 of Protocol No. 1, on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take the matter up separately (see, *mutatis mutandis*, *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005). It will be dealt with in a separate application.

## II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

22. The applicant complained that he had been deprived of his property, part of a flat, in a manner which was not in accordance with the domestic law. He relied on Article 1 of Protocol No. 1, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

### A. Admissibility

#### *1. Alleged abuse of the right of petition*

23. The Government submitted that the applicant had failed to submit itemised particulars of his claims for just satisfaction together with any supporting documents. Stating that the claims should not serve a basis for unjustified enrichment, the Government 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.

24. At the outset, the Court notes that a question of substantiation of a claim for just satisfaction normally falls to be examined under Article 41 of the Convention – not in the context of the substance of an application.

25. In any event, regard being had to the parties' submissions and other material in the Court's possession, it does not find that the right of petition was abused in the present case, within the meaning of Article 35 § 3 (a) of the Convention (see, for instance, *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X). The Government's objection is wholly unsubstantiated and must be dismissed.

#### *2. The applicant's victim status*

26. The Government submitted that applicant could not claim to be a victim of a violation of Article 1 of Protocol No. 1, as he had not been deprived of his property and the interference with his right had been based on the law. On that ground, they invited the Court to declare the application incompatible *ratione personae* with the provisions of the Convention.

27. The applicant disagreed.

28. The Court considers that, in so far as they concern the questions of existence and lawfulness of the interference, the Government's submissions fall to be dealt with in the context of the merits of the case.

29. In so far as the Government's objection can be understood as based on the fact that the opposing party was ordered by the courts to pay compensation to the applicant, the Court considers that the award of compensation did not deprive the applicant of victim status. Although this measure was undeniably favourable to the applicant, it was not directly related to his complaint regarding the lawfulness of the interference with his right to property. Moreover, the national authorities have not acknowledged, either expressly or in substance, the breach of Article 1 of Protocol No. 1 (*Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V). Accordingly, the Government's objection as to the applicant's victim status must be dismissed.

### *3. Conclusion as to the admissibility of the application*

30. 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*

31. The applicant complained of unlawful deprivation of his property. He submitted that the domestic courts had not accurately established the facts and subject-matter of the case, that they had misapplied the substantive law, that they had not examined the possibility of separating his share of the flat, and that they had disregarded the fact that the defendants had failed to transfer the money to the deposit account of the first-instance court, as required by paragraph 2 of Article 365 of the Civil Code of 2003.

32. The Government stated that the case had not concerned a deprivation of the applicant's property. Rather, it was a matter of the “transformation of the applicant's possessions from one form [a share in] the flat [into] another form – [the] money.”

33. The Government submitted that, in any event, there had been no violation of Article 1 of Protocol No. 1, as the courts had accurately assessed the evidence, correctly applied the law, and balanced the interests of all the persons involved in the dispute. According to the Government, despite the fact that the amount of compensation had not been transferred by the defendants to the first-instance court's bank account, the courts had decided that the defendants were able to pay the sum required to enforce the

judgment. The Government further submitted that the amount of compensation for the applicant's property was adequate and based on an expert's report.

34. They also argued that, as the applicant had raised the matter before the domestic courts and had not complained of a violation of Article 6 of the Convention, he had confirmed that the dispute had been settled in accordance with the law.

## *2. The Court's assessment*

### **(a) Whether there was an interference with the right of property**

35. Having regard to the principles established in its case-law (see, for instance, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 78, ECHR 2005- VI), the Court notes that there was an interference with the applicant's right of property. According to the Government, it did not however constitute a “deprivation” of the applicant's possessions.

36. The Court observes that pursuant to the decisions of the domestic courts in the context of a dispute between private parties the applicant lost his title to part of a flat. The fact that by the same decisions he was awarded compensation for that loss does not have a bearing on the question of the existence of a particular type of interference. Compensation terms are however material to the assessment of whether the contested measure respects the requisite fair balance under Article 1 of Protocol No. 1 (see, for instance, *Ukraine-Tyumen v. Ukraine*, no. 22603/02, § 57, 22 November 2007).

37. Accordingly, the Court finds that the interference in the applicant's case amounted to a “deprivation” of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. The Court must therefore examine whether the interference was justified under that provision.

### **(b) Whether the interference was justified**

38. The Court reiterates that to be compatible with Article 1 of Protocol No. 1 any interference with the peaceful enjoyment of possessions should be lawful and not arbitrary (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). In particular, the second sentence of the first paragraph authorises a deprivation of possessions only “subject to the conditions provided for by law” and the second paragraph recognises that the States have the right to control the use of property by enforcing “laws” (see *Ukraine-Tyumen*, cited above, § 49).

39. The Court notes that its jurisdiction to verify compliance with the domestic law is limited and that it is not its task to take the place of the

domestic courts (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 95, ECHR 2002-VII).

40. In the present case the Court is not entitled to call into question the decisions reached by the Ukrainian courts. Its role is instead to verify whether the consequences of their interpretation and application of the domestic law were compatible with the principles laid down in the Convention.

41. The Court observes that in the decision terminating the applicant's title to a part of the flat the Court of Appeal relied on Articles 364 and 365 of the Civil Code of 2003 (see paragraph 9 above). However, as confirmed by the interpretation given by the Supreme Court, these provisions may not be applied together in the same circumstances as they concern different legal matters (see paragraph 18 above). In particular, the possibility of terminating one's title to a part of a joint property without consent is envisaged in Article 365 of the Code, whereas Article 364 deals with the situation when a co-owner wishes to withdraw from joint ownership and is not against obtaining compensation for his part of a joint property.

42. Even assuming that, despite the above ambiguity in the decision of the Court of Appeal, Article 365 of the Code was the legal provision applicable in the applicant's case and that the conditions set out in its first paragraph were met, the Court observes that under paragraph 2 of Article 365 the opposing party had to make an advance payment of the cost of the applicant's part of the flat into the first-instance court's deposit account. This was, and remains, a precondition for a court decision on termination of title to a part of a jointly owned property (see paragraph 15 above). In the applicant's case, the opposing party failed to make such a payment. The applicant's specific and pertinent submissions concerning the opposing party's failure to make the requisite payment remained unaddressed by the domestic courts.

43. In this context, the Court notes that the impugned provision of the Civil Code of 2003 is sufficiently precise and does not give grounds for diverging interpretations. Furthermore, this provision reflects the constitutional guarantee of prior compensation for any deprivation of property, except in the conditions of martial law or a state of emergency (see paragraph 14 above). As it appears from the relevant domestic judicial practice, though subsequent to the events at issue, the requirement of advance payment is not a mere technical element in the procedure of taking of property established by law. It is the core condition on which a court decision depriving a person of property, without his or her consent, should be based (see paragraphs 16 and 17 above).

44. In the present case, the Court of Appeal merely stated that the opposing party had the money to pay for the applicant's part of the flat. Having regard to the significance of the prior compensation requirement in the national legal system, the Court considers that the domestic courts'

decisions lacked a legal basis because the courts deviated from the written law in an arbitrary manner without giving reasons.

45. In the light of the foregoing, the Court concludes that the requirements of the second sentence of the first paragraph of Article 1 of Protocol No. 1 were not satisfied in relation to the contested deprivation of possessions suffered by the applicant.

46. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed USD 23,000 for the value of the property he had lost and 3,700 euros (EUR) for loss of income for the period during which he had not been able to use the property, calculated on the basis of an average monthly rate for renting a dwelling of a similar size in the same area.

49. The Government contended that the claims were unsubstantiated. They also argued that the applicant had failed to take all reasonable steps to obtain the compensation awarded to him by the courts.

50. The Court notes that the applicant's claims for pecuniary damage stem from the unlawful deprivation of property found to be in breach of Article 1 of Protocol No. 1 (see paragraphs 45 and 47 above). In determining compensation for pecuniary damage in such cases the Court would normally adopt an approach based on the total elimination of the consequences of the impugned interference, taking account of the current value and potential of the lost property (see *Scordino (no. 1)*, cited above, §§ 250-254).

51. However, the Court considers that a different approach has to be taken in this case, given its particular circumstances. The Court observes that the applicant's claim in respect of the value of the part of the flat of which he had been deprived is fully covered by the amount of compensation awarded to him by the domestic courts (see paragraph 7 above). While it is true that as a result of the proceedings the applicant has a claim for compensation instead of a pre-deposited amount, which may entail some negative economic consequences for the applicant, he failed to specify

damage on their account and it is not for the Court to speculate in that respect. Furthermore, the applicant did not do everything feasible in the circumstances to avoid such damage or at least to limit it to the minimum, in particular by instituting enforcement proceedings in respect of the claim. As regards the applicant's claim for loss of income for the period during which he had not been able to use the property, the Court notes that he did not submit any documents in its support. On these grounds, the Court rejects the applicant's claim for just satisfaction as unsubstantiated.

**B. Costs and expenses**

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

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Peer Lorenzen  
President