



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

FIFTH SECTION

CASE OF ZHELTYAKOV v. UKRAINE

(Application no. 4994/04)

JUDGMENT

STRASBOURG

9 June 2011

FINAL

09/09/2011

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

In the case of Zheltyakov v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Isabelle Berro-Lefèvre,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 4994/04) 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, Mr Oleg Oleksandrovych Zheltyakov (“the applicant”), on 27 January 2004.

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

3. The applicant alleged, in particular, a breach of the principle of legal certainty on account of the reopening of the proceedings and quashing of a final judgment and complained about lengthy partial non-enforcement of that judgment and about the length of the court proceedings.

4. On 15 April 2009 the Court 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

5. The applicant was born in 1955 and lives in Vinnytsya.

A. Background of the case

6. In March 1988 the local authorities decided to allocate to the Podilskprommontazh Association, a State company (“the Association”), a plot of land, on which the applicant’s father’s house stood, in order to build a block of flats on that land. In July 1991 the domestic courts rejected, as unsubstantiated, the Association’s claim against the applicant’s father, who had refused to vacate the house in return for compensation.

7. In May 1992 the applicant’s father died and the applicant and his relatives (Mrs D., Mrs M. and Mr Z.) inherited the house. According to the applicant, in November 1992, despite the above-mentioned court decision, the Association partially destroyed the house and he could no longer live in it.

B. The first set of proceedings

8. In September 1994 the applicant instituted court proceedings against the Association, seeking compensation for the partial destruction of the house and reimbursement of the cost of renting a flat due to the impossibility of living in the damaged house.

9. On 19 November 1996 the Leninskyy District Court of Vinnytsya partially granted the applicant’s action. On 3 April 1997, following an objection (*npomecm*) lodged by a local prosecutor, the Presidium of the Vinnytsya Regional Court quashed that judgment and remitted the case for fresh consideration.

10. On 5 April 2000 the Leninskyy Court partially granted the applicant’s action, awarded him 167,847¹ Ukrainian hryvnias (“UAH”) for pecuniary damage and UAH 5,000² for non-pecuniary damage and rejected, as unsubstantiated, his claim for reimbursement of rental fees. The court based its pecuniary-damage award on a report of 5 August 1999, prepared upon a request it made on 1 June 1999, by the experts of the Kherson State Technical Inventory Bureau (“the Bureau”). As no appeal was lodged, the judgment became final.

1. About 31,360 euros (EUR)

2. About EUR 934

11. On 22 June 2000 the Presidium of the Vinnytsya Regional Court rejected, as unsubstantiated, a local prosecutor's objection against the judgment.

12. Between 5 April 2000 and 28 September 2007 the Association repeatedly challenged the initiation of the enforcement proceedings, sought their suspension or variation of the manner of the enforcement of the judgment. According to the Government, the judgment was enforced in the amount of UAH 8,856.77¹.

13. On 10 April 2006 the Association requested the Leninskyy Court to reopen the proceedings in the light of newly-discovered circumstances. It argued that the expert report had been prepared not by the Bureau but, instead, by its experts acting in a private capacity. It stated that it had learned about that from letters of the Bureau and the local department of the State Security Service issued, respectively, on 13 and 14 March 2006. The applicant filed his comments challenging the request.

14. On 30 May 2006 the local police rejected, as unsubstantiated, a criminal complaint by the Association's chairman of 26 May 2006 against the above experts, based on the same submissions as the Association's request to the court, for lack of *corpus delicti* in the experts' actions.

15. On 28 September 2007 the court granted the request, quashed the judgment of 5 April 2000 and ordered a fresh examination of the case. Referring to the aforementioned letters of the Bureau and the State Security Service, it found that the experts of the Bureau, who had prepared the impugned report, had acted in a private capacity and not on behalf of the Bureau. In this respect, it noted that the report had borne no stamp and no registration number of the Bureau. The court thus concluded that its ruling of 1 June 1999 had not been complied with, and found this to constitute a "newly-discovered fact".

16. On 25 March 2008 the same court returned the applicant's claim unexamined on account of his alleged failure to attend several hearings.

17. On 26 June 2008 the Vinnytsya Regional Court of Appeal quashed that ruling on the ground that the applicant had not been duly informed of those hearings and remitted the case for fresh consideration.

18. The proceedings are still pending before the Pecherskyy District Court of Kyiv, which on 29 July 2008 joined them to the second set of proceedings (see below).

19. In the course of the proceedings seven hearings were adjourned at the applicant's request or due to his failure to appear and five hearings were adjourned due to both parties' failure to appear. This protracted the proceedings to approximately ten months. Thirteen hearings were adjourned at the respondent's request, due to its or third parties' failure to appear, due to the absence or illness of a judge or due to the applicant's absence from

3. About EUR 1,655

several hearings of which he was not duly informed (see paragraph 17 above). Two forensic examinations lasted in total for about three and a half months.

C. The second set of proceedings

20. In October 1994 the applicant instituted court proceedings against Mrs M. and Mr Z., seeking separation of the inherited property.

21. On 11 July 1995 the Leninskyy Court endorsed the friendly settlement reached by the parties.

22. On 13 December 2000 the Supreme Court, following an objection lodged by its Deputy Head, quashed the ruling of 11 July 1995 and remitted the case for fresh consideration. Subsequently, the case was transferred to the Popilnya Court.

23. On 26 November 2001 the Association instituted proceedings in that court against the applicant, Mrs M. and Mr Z., challenging the validity of the inheritance certificate issued to them.

24. On 16 April 2002 the court suspended the proceedings for separation of the inherited property pending the outcome of the proceedings brought by the Association.

25. On 26 July 2002 the court transferred the case to the Polonne Court, which on 2 August 2004 joined both proceedings.

26. On 12 January 2005 the court returned the claims of the applicant and the Association unexamined on account of their alleged failure to attend several hearings.

27. On 18 April 2005 the Khmelnytsk Regional Court of Appeal quashed that ruling on the ground that the parties had not been duly informed of those hearings and remitted the case for fresh consideration.

28. On an unspecified date the applicant lodged an additional claim against Mrs D. for separation of the inherited property.

29. On 21 July 2005 the case was transferred to the Pecherskyy Court, which on 19 October 2005 joined that claim to the proceedings.

30. On 15 November 2007 the same court, at the request of the Association, returned the latter's claim unexamined.

31. Between 16 May and 29 July 2008 the proceedings were suspended at the applicant's request pending the outcome of the first set of proceedings (see paragraphs 16-17 above).

32. On 29 July 2008 the court joined the first set to the second set of proceedings, which are still pending before it.

33. In the course of the proceedings twelve hearings were adjourned at the applicant's request or due to his failure to appear and eleven hearings were adjourned due to both parties' failure to appear. This protracted the proceedings for approximately one year and three months. Sixteen hearings were adjourned at the other parties' requests, due to those parties' or

experts' failure to appear, due to the absence or illness of a judge or due to the parties' absence from several hearings of which they were not duly informed (see paragraph 27 above). Three forensic examinations lasted in total for about one year and eight months.

II. RELEVANT DOMESTIC LAW

34. The relevant provisions of the domestic legislation concerning the ordering of a forensic examination and reopening of the proceedings in the light of the newly-discovered circumstances read as follows:

A. Code of Civil Procedure of 1963 (repealed on 1 September 2005):

Article 57. Ordering forensic examination

"... A forensic examination shall be carried out by experts of relevant establishments or by other specialists appointed by the court. Any person who has the necessary knowledge for giving an expert opinion may be appointed as an expert".

B. Forensic Expert Examination Act of 25 February 1994 (as worded at the material time)

Article 7. Organisation of forensic expert activities

"... Forensic expert activities shall be carried out on an entrepreneurial basis under special permission (licence), as well as by the citizens on the basis of [individual] contracts..."

C. Code of Civil Procedure of 2004 (entered into force on 1 September 2005):

Article 361. Grounds for review

"1. Judgments or rulings which have come into force as well as court orders may be reviewed on the basis of the newly-discovered circumstances.

2. The grounds for review ... shall be as follows:

1) important circumstances which were not and could not have been known to a party who requests review;

2) a knowingly erroneous expert conclusion ... as established by a final court verdict, which entailed the adoption of an unlawful or ungrounded judgment ..."

Article 365. Examination of requests

“...

2. Having examined a request, the court, by its ruling, may either grant the request and quash the judgment, ruling or court order or dismiss the request if it is unsubstantiated ...”

Article 366. Appeals against the ruling of the court

“1. A court decision by which an application for review of a ... judgment ... in the light of newly-discovered circumstances is granted shall not be subject to appeal ...”

THE LAW**I. REOPENING OF THE CASE AND QUASHING OF THE JUDGMENT**

35. The applicant complained that the reopening of the first set of proceedings and the quashing of the final judgment of 5 April 2000 had been in breach of the principle of legal certainty. This complaint falls to be examined under Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

Article 6 § 1

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

A. Admissibility

36. The Government contended that the applicant had not complied with the formal requirements for lodging an application with the Court, as he had raised the complaint in a letter of 13 January 2008, rather than in a separate application form, and had not referred to any provision of the Convention.

37. The applicant disagreed, stating that in the above-mentioned letter he had asked the Court to examine his complaint about the breach of the principle of legal certainty along with his original application and that this had been sufficient.

38. The Court considers that the applicant did not need to submit a separate application form in respect of his complaint; in the circumstances, requiring him to do so would be too formalistic. Nor was he required to cite

any provision of the Convention (see *Guzzardi v. Italy*, 6 November 1980, § 61, Series A no. 39). Accordingly, it rejects the Government's objection.

39. The Court finds 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

40. The Government contended that there had been no violation of the principle of legal certainty, as the quashing of the judgment of 5 April 2000 and the reopening of the proceedings in the light of the newly-discovered circumstances had been aimed at rectifying the court's mistake.

41. The applicant disagreed, stating that the report had been thoroughly examined by the court, while the Association could have requested the appointment of another expert examination or could have appealed against the judgment. He insisted that there had been no newly-discovered circumstance warranting the reopening of the proceedings.

42. The Court reiterates that the right to a fair hearing by a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII).

43. That principle presupposes respect for the finality of judgments and insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-X).

44. The present case concerns a decision to reconsider a case completed by a final judgment in the light of the newly-discovered circumstances upon a request by a party to the proceedings. Such a procedure does not in itself contradict the principle of legal certainty as long as it is used to correct miscarriages of justice (see *Pravednaya v. Russia*, no. 69529/01, §§ 27-28, 18 November 2004, and *Popov v. Moldova (no. 2)*, no. 19960/04, § 46, 6 December 2005). However, the Court must determine whether it was applied in a manner compatible with Article 6 of the Convention.

45. The Court notes that the judgment of 5 April 2000 was not appealed against and became final. More than seven years later the same court quashed it on the ground that the expert report on which it was based had been prepared by experts who had acted in a private capacity. The court

concluded that the Association, a party to the proceedings, had not been aware of that fact back in 2000 and could not have known it before 2006.

46. Although it is primarily for the domestic courts to assess the facts and evidence before them (see, for instance, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I), the Court considers that such a conclusion is open to doubt. In particular, it observes that the fact that the report of 5 August 1999 did not bear the Bureau's stamp or registration number was not hidden from the court or the parties during the first consideration of the case.

47. In any event, the Court considers that the situation did not warrant such a harsh interference with the final judgment. There is nothing to suggest that it concerned a serious violation of procedural rules. Nor was it argued that the report had been "knowingly erroneous". To the contrary, the local police rejected, as unsubstantiated, the criminal complaint brought by the Association's chairman against the experts who had prepared it (see paragraph 14 above).

48. Therefore, the Court finds that the quashing of the judgment of 5 April 2000 was not justified and that there has, therefore, been a violation of Article 6 § 1 of the Convention.

II. LENGTHY PARTIAL NON-ENFORCEMENT OF THE JUDGMENT

49. The applicant complained under Articles 6 § 1, 8 and 13 of the Convention and Article 1 of Protocol No. 1 about the lengthy partial non-enforcement of the judgment of 5 April 2000. The Court considers that this complaint falls to be examined solely under Article 6 § 1 of the Convention and under Article 1 of Protocol No. 1. The latter provision reads, in so far as relevant, as follows:

Article 1 of Protocol No. 1

"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 ..."

A. Admissibility

50. The Government contended that, after the judgment of 5 April 2000 had been quashed on 28 September 2007, the applicant had lost victim status within the meaning of Article 34 of the Convention. Accordingly,

they invited the Court to reject the complaint as incompatible *ratione personae*.

51. The Court considers that the quashing of the impugned judgment was clearly unfavourable to the applicant and it thus did not deprive him of victim status in respect of the issue of the delayed enforcement of that judgment (see *Nikolayev v. Russia*, no. 37927/02, § 31, 2 March 2006). This objection should, therefore, be dismissed.

52. The Court considers that the 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

53. The Government maintained that there had been no breach of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, as the State Bailiffs had taken all the necessary and possible measures in order to enforce the judgment, which could not be fully enforced mainly due to the conduct of the Association and due to its lack of funds.

54. The applicant maintained his complaint.

55. The Court notes that the judgment of 5 April 2000 was enforceable until 28 September 2007, when it was quashed, and that it was incumbent on the Association, a State company, to abide by its terms (see *Velskaya v. Russia*, no. 21769/03, § 18, 5 October 2006). However, it had remained unenforced for the most part. The Court further notes that the quashing of a judgment in a manner which was found to have been incompatible with the principle of legal certainty cannot be accepted as justification for the failure to enforce it (see *Sukhobokov v. Russia*, no. 75470/01, § 26, 13 April 2006, and *Prisyazhnikova and Dolgoplov v. Russia*, no. 24247/04, § 35, 28 September 2006).

56. The Court has frequently found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in similar circumstances (see, for instance, *Borshchevskiy v. Russia*, 14853/03, §§ 62-65, 21 September 2006; *Murzatin v. Russia*, 26338/06, §§ 38-42, 27 March 2008; and *Yerogova*, cited above, §§ 48-53).

57. Having examined the material submitted to it, the Court notes that the Government did not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court finds that by failing for a substantial period of time to comply with the enforceable judgment in the applicant's favour the domestic authorities violated his rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1. There has accordingly been a violation of those provisions.

III. LENGTH OF PROCEEDINGS

58. The applicant complained under Articles 6 § 1 and 13 of the Convention about the length of the first and second sets of proceedings. The Court considers that this complaint falls to be examined solely under Article 6 § 1 of the Convention.

A. Admissibility

59. The Court finds that the 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

60. The Government maintained that there had been no violation of Article 6 § 1 of the Convention as the cases had been complex, the parties had not attended several hearings, and the applicant had supplemented his claim and lodged various procedural petitions, while there had been no substantial delays attributable to the domestic courts.

61. The applicant did not comment on the above.

62. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case and the conduct of the applicant and the relevant authorities (see, for instance, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

63. The Court notes that the applicant's complaint concerns two sets of proceedings instituted by him with the aim of protecting his right to the peaceful enjoyment of his property. The two sets were joined by the courts and the proceedings are currently pending. In these circumstances, the Court considers that it is appropriate to examine the length of both sets together. The Court further notes that the periods to be taken into consideration began only on 11 September 1997, when the recognition by Ukraine of the right of individual petition took effect. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time. The proceedings have thus lasted for about twelve years and eight months at two levels of jurisdiction, excluding the period between 5 April and 13 December 2000, when no proceedings were pending.

64. The Court considers that although the case might have been somewhat complicated by the examination of several claims, all of them having been eventually joined, that fact alone cannot explain the overall length of the proceedings. Nor does the conduct of the applicant, who

somewhat delayed the proceedings (see paragraphs 19 and 33 above), explain such length. Indeed, the Court notes that the major delays were caused by the lengthy consideration of the cases by the first-instance courts and by their repeated adjournments of the hearings (see paragraphs 9, 10, 19, 25, 26, 29, 30, 32 and 33 above). It concludes that the responsibility for the protracted length of the proceedings rests with the State.

65. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, for instance, *Pavlyulynets v. Ukraine*, no. 70767/01, § 53, 6 September 2005; *Moroz and Others v. Ukraine*, no. 36545/02, § 62, 21 December 2006; and *Golovko v. Ukraine*, no. 39161/02, § 65, 1 February 2007).

66. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject and to the overall length of the proceedings, the responsibility for which to a large extent rests with the State, the Court considers that in the instant case such length has been excessive and failed to meet the “reasonable time” requirement laid down in Article 6 § 1 of the Convention. There has accordingly been a breach of that provision.

IV. THE REMAINDER OF THE COMPLAINTS

67. The applicant complained under Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1 about and on account of the quashing of the ruling of 11 July 1995; under Articles 6 § 1 and 13 of the Convention that the judges in the second set of proceedings had been biased and lacked independence and that he had not been informed of the hearing of 12 January 2005; and under Articles 8 and 13 of the Convention on account of the damage to his house caused by the Association.

68. Having carefully examined the applicant’s submissions 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.

69. 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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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

71. In respect of pecuniary damage, the applicant claimed UAH 167,847, representing the amount awarded to him as pecuniary damage by the judgment of 5 April 2000 increased to take into account inflation, as well as UAH 140,910¹ for the cost of renting a flat due to the impossibility of living in the damaged house. He also claimed EUR 30,000 for non-pecuniary damage.

72. The Government contested these claims as unsubstantiated.

73. Having regard to the circumstances of the case, the Court finds it appropriate to award the applicant EUR 30,640, representing the outstanding sum he had legitimately expected to obtain under the judgment of 5 April 2000, plus any tax that may be chargeable.

74. The claim for losses as a result of inflation is unsubstantiated and unsupported by any documents; the Court, therefore, rejects it. It also rejects the claim for reimbursement of rental payments, as there is no causal link between the violations found and the sum claimed.

75. The Court further considers that the applicant must have suffered distress as a result of the violations found. Ruling on the equitable basis, it awards him EUR 6,200 for non-pecuniary damage.

B. Costs and expenses

76. The applicant claimed EUR 2,000 for the expenses incurred in the domestic proceedings and the proceedings before the Court, without providing any supporting documents.

77. The Government challenged these claims as unsubstantiated and unsupported by documents.

78. Regard being had to the information in its possession, the Court makes no award under this head.

C. Default interest

79. 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.

1. About 11,566 EUR

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 6 § 1 of the Convention about the quashing of the judgment of 5 April 2000, under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 about the lengthy partial non-enforcement of that judgment, and under Article 6 § 1 of the Convention about the length of the court proceedings admissible and the remaining complaints inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the quashing of the judgment of 5 April 2000;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of the lengthy partial non-enforcement of the judgment of 5 April 2000;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the court proceedings;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the moment when the judgment becomes final, EUR 30,640 (thirty thousand six hundred and forty euros) in respect of pecuniary damage and EUR 6,200 (six thousand two hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on the above amounts, to be converted into its national currency 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President