



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

FIFTH SECTION

CASE OF FELDMAN v. UKRAINE (no. 2)

(Application no. 42921/09)

JUDGMENT

STRASBOURG

12 January 2012

FINAL

12/04/2012

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

In the case of Feldman v. Ukraine,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Angelika Nußberger, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 76556/01) 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 Boris Mordukhovich Feldman (“the applicant”), on 14 November 2000.

2. The applicant was represented by Mr V. N. Ageyev, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs V. Lutkovska, from the Ministry of Justice.

3. On 11 August 2009 it was decided to sever the applicant’s complaints concerning the refusals to authorise visits by his relatives and a rabbi and the refusal to allow him to attend his father’s funeral during his pre-trial detention, and to register them as a separate application.

4. On 8 February 2010 the President of the Fifth Section decided to give notice of application no. 42921/09 to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber decided to appoint Mr Mykhaylo Buromenskiy to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Dnipropetrovsk.

6. The applicant was the Vice-President, founder and majority shareholder of the Bank Slavyansky (*hereinafter* – the Bank). On 2 February 2000 the State Tax Police instituted criminal proceedings into tax evasion by the management of the Bank and on 10 March 2000 the State Tax Administration instituted another set of criminal proceedings for abuse of office by the management of the Bank (for more details see *Feldman v. Ukraine*, nos. 76556/01 and 38779/04, 8 April 2010).

7. On 13 March 2000 the applicant was arrested and from that date he was detained as a criminal suspect until his conviction by the Artemivskiy Court on 19 April 2002.

8. On 4 May 2000 the applicant asked the investigator to arrange a visit by the Rabbi of the Dnipropetrovsk Region. On the same date the rabbi also made a request to see the applicant for religious conversations.

9. On 6 May 2000 the investigator refused the requests on the ground that a meeting between the applicant and the rabbi might impair the establishment of truth in the case.

10. On 19 May 2000 the applicant asked the investigator to allow him visits by his wife and sister. The request was refused on same day on the ground that such a visit might impair the establishment of truth in the case.

11. On 7 and 11 August 2000 the applicant's sister requested leave to visit the applicant. By letters of 15 August 2000 these requests were refused, on the ground that the investigation was pending and the visit might impair the establishment of truth in the case.

12. On 9 August 2000 the applicant's lawyer asked the investigator to transfer the applicant to Dnipropetrovsk to attend his father's funeral. On 11 August 2000 the investigator refused this request on the ground that domestic law did not provide for escorting suspects for such purposes.

II. RELEVANT DOMESTIC LAW

13. Under section 12(1) of the Pre-Trial Detention Act 1993, permission for relatives or other persons to visit a detainee (in principle, once a month for one to two hours) can be given by the authorities of the place of detention, but only with the written approval of an investigator or a court dealing with the case, depending on whether it is at the investigation or the trial stage.

14. The relevant provisions of the Code of Criminal Procedure 1960 read:

Section 162

Visiting a detainee

“Visits of relatives or other persons to a detainee may be allowed by the person or institution that deals with the case. The duration of the visits shall be fixed from one to two hours. Visits may be allowed, as a rule, not more than once a month.”

15. In their observations the Government further referred to the penitentiary instructions concerning the procedure for holding detainees in SIZOs, issued on 20 September 2000.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

16. The applicant complained about the refusal by the domestic authorities to grant him family visits during his pre-trial detention, and also that he was not allowed to attend his father’s funeral. He relied on Article 3 of the Convention.

17. The Court has previously found that restrictions of this kind do not attain a minimum level of severity to fall within the scope of Article 3 (see, *mutatis mutandis*, *Sannino v. Italy* (dec.), no. 72639/01, 3 May 2005; and *Lind v. Russia*, no. 25664/05, § 88, 6 December 2007). In a number of cases it considered complaints about the rejection of a detainee’s request for permission to be visited by a relative or attend a relative’s funeral under Article 8 of the Convention (see, respectively, *Shalimov v. Ukraine*, no. 20808/02, § 83, 4 March 2010; and *Płoski v. Poland*, no. 26761/95, §§ 26-39, 12 November 2002). Accordingly, the applicant’s complaints fall to be examined under Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his ... family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

18. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It

further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Refusal of family visits

19. The applicant submitted no observations within the fixed time-limit.

20. The Government admitted that there had been an interference with the applicant's family life. However, they considered that such interference was justified. They maintained that the issue of authorisation for family visits was foreseen by the domestic law, namely Article 162 of the Code of Criminal Procedure. The refusal to allow such family visits during the investigation stage was in the interests of public safety and was necessary in a democratic society.

a. Whether there has been an interference

21. The Court considers, and this was not disputed by the parties, that there was "an interference by a public authority" within the meaning of Article 8 § 2 of the Convention with the applicant's right to respect for his family life, guaranteed by paragraph 1 of Article 8.

b. Whether the interference was justified

22. The cardinal issue that arises is whether the above interference is justifiable under paragraph 2 of Article 8. In particular, if it is not to contravene Article 8, the interference must be "in accordance with the law", pursue a legitimate aim and be necessary in a democratic society in order to achieve that aim (see *Silver and Others v. the United Kingdom*, 25 March 1993, Series A no. 61, § 84, and *Petra v. Romania*, 23 September 1998, *Reports* 1998-VII, § 36).

23. The Court must first consider whether the interference was "in accordance with the law". This expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see *Kruslin v. France* and *Huvig v. France*, 24 April 1990, Series A no. 176-A, § 27, and Series A no. 176-B, § 26, respectively).

24. In contending that these requirements were met, the Government referred in their written observations to the provisions of Article 162 of the Code of Criminal Procedure and section 12(1) of the Pre-Trial Detention Act 1993, which provide that a detainee may be allowed family visits during pre-trial detention. They further referred to the penitentiary instructions

concerning the procedure for holding detainees in SIZOs, issued on 20 September 2000.

25. The Court first notes that the applicant's complaint concerns events that took place in May-August 2000, that is, before the instructions of 20 September 2000 were issued. Thus, the Court fails to see the relevance of these instructions to the present application.

26. The Court further notes that Article 162 of the Code of Criminal Procedure and section 12(1) of the Pre-Trial Detention Act 1993 provide that an investigator or a judge can authorise family visits during pre-trial detention, but that these provisions do not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities in respect of restrictions on detainees' contacts with their families. Indeed, the above provisions do not require them to give any reasons for their discretionary decision or even to take any formal decision that could be appealed against, and therefore contain no safeguards against arbitrariness or abuse. In the applicant's case the investigator simply mentioned that the requested visits might impair the establishment of truth in the case.

27. The Court finds that in these circumstances it cannot be said that the interference with the applicant's right to respect for his family life was "in accordance with the law" as required by Article 8 § 2 of the Convention (see *Shalimov v. Ukraine*, cited above, §§ 88 and 89).

28. In view of the above finding, the Court considers it unnecessary to examine whether the interference in the present case was necessary in a democratic society for one of the legitimate aims within the meaning of Article 8 § 2 of the Convention.

29. There has therefore been a violation of Article 8 of the Convention in this respect.

2. Refusal to allow the applicant to attend the funeral of his father

30. The applicant submitted no observations within the fixed time-limit.

31. The Government submitted that the investigator refused the applicant's request for a transfer to Dnipropetrovsk to attend his father's funeral, since domestic law did not provide for escorting suspects for such purposes. They concluded that the domestic authorities had not been able, within their competence and in accordance with the domestic legislation, to provide the applicant with a possibility to attend his father's funeral.

a. Whether there has been an interference

32. With respect to this complaint, the Government did not express their position on whether there had been "an interference by a public authority" within the meaning of Article 8 § 2 of the Convention with the applicant's right to respect for his family life as guaranteed by paragraph 1 of Article 8. The Court has already found that the refusal to a detainee of leave to attend

a relative's funeral constituted an interference with the right to respect for family life (see *Schemkamper v. France*, no. 75833/01, § 31, 18 October 2005; *Sannino* (dec.), cited above; and *Płoski*, cited above, § 32). The Court does see no reason to depart from this case-law in the present case. Accordingly, the refusal to transfer the applicant so that he could attend the funeral of his father interfered with the applicant's rights under Article 8 of the Convention.

b. Whether the interference was justified

33. The Court reiterates that any interference with an individual's right to respect for his private and family life will constitute a breach of Article 8, unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought to be achieved (see, among other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII).

34. In accordance with the Court's case-law, Article 8 of the Convention does not guarantee a detained person an unconditional right to leave to attend a relative's funeral. At the same time the Court emphasises that even if a detainee by the very nature of his situation must be subjected to various limitations of his rights and freedoms, every such limitation must be nevertheless justifiable as necessary in a democratic society (see *Lind v. Russia*, cited above, § 94). The State can refuse an individual the right to attend the funerals of his parents only if there are compelling reasons and if no alternative solution can be found (see *Płoski*, cited above, § 37).

35. In the instant case, the applicant's individual situation was not assessed at all by the domestic authorities and he was denied the right to attend the funeral of his father only on the ground that the domestic law did not provide for such a possibility. In the Court's opinion such an unconditional denial to the applicant of compassionate leave or another solution to enable him to attending his father's funeral is not compatible with the State's duty to assess each individual request on its merits and to demonstrate that the restriction on the individual's right to attend a relative's funeral was "necessary in a democratic society".

36. In the light of the above, the Court finds that there has been a violation of Article 8 of the Convention in this respect also.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

37. The applicant complained that while in pre-trial detention he had not been allowed to see a rabbi. He relied on Article 3 of the Convention, but the Court considers that this complaint falls within the ambit of Article 9 of the Convention, which provides:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”.

38. The parties made no observations as to the admissibility of this complaint. In particular, the Government did not submit any observations on the question of the six-month rule. In this respect the Court reiterates that the six-month rule, in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, serves the interests not only of the respondent Government but also of legal certainty as a value in itself. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible. It is therefore not open to the Court to set aside the application of the six-month rule solely because a Government have not made a preliminary objection based on it (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

39. The Court observes that in the initial submissions the exact date of the impugned refusal to authorise a rabbi's visit was not specified. From the documents available at this stage, it appears that the disputed refusal by the investigator dated back to 6 May 2000. There were no allegations by the applicant that there had been any other instances of interference with his religious beliefs.

40. The Court notes that restrictions on visits by either relatives or other persons are governed by the same legislative provisions, which, as the Court has established above, do not require the relevant authorities to take any formal decision that could be appealed against (see paragraph 26 above). The Court reiterates that where no effective remedy is available to an applicant, the six-month period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). In this respect, the impugned refusal took place on 6 May 2000 and there are no allegations that the applicant was informed of it with undue delay. Given that the application was lodged on 14 November 2000 and this particular complaint was raised for the first time in the letter of 16 December 2000, it was introduced out of time and must therefore be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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.”

42. The applicant did not submit a claim for just satisfaction within the fixed time-limit. Accordingly, the Court considers that there is no call to award him any sum under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applicant’s complaints under Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention concerning the refusal to authorise family visits;
3. *Holds* that there has been a violation of Article 8 of the Convention concerning the refusal to authorise the applicant to attend his father’s funeral.

Done in English, and notified in writing on 12 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President