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

SECOND SECTION

CASE OF VOYTENKO v. UKRAINE

(Application no. 18966/02)

JUDGMENT

STRASBOURG

29 June 2004

FINAL

29/09/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Voytenko v. Ukraine,

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

Mr J.-P. Costa, *President*,
Mr A.B. Baka,
Mr L. Loucaides,
Mr K. Jungwiert,
Mr V. Butkevych,
Mrs W. Thomassen,
Mr M. Ugrekhelidze, *judges*,
and Mr T.L. Early, *Deputy Section Registrar*,

Having deliberated in private on 8 June 2004,

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

PROCEDURE

1. The case originated in an application (no. 18966/02) 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 Anatoliy Pavlovych Voytenko ("the applicant"), on 26 March 2002.

2. The Ukrainian Government ("the Government") were represented by their Agents – Mrs V. Lutkovska, succeeded by Mrs Z. Bortnovska.

3. On 10 April 2003 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant, Mr Anatoliy Pavlovych Voytenko, is a Ukrainian national who was born in 1961 and resides in the village of Nova Vodolaga, in the Kharkiv Region, Ukraine.

5. In September 1999, the applicant retired from the army. Upon retirement, the applicant was entitled to compensation for his uniform and to reimbursement of his travel expenses. As this compensation remained unpaid for three months, the applicant instituted proceedings in the Donetsk Garrison Military Court against the Donetsk Regional Military Registration

Department (*Донецкий Областной Военный Комиссариат*), seeking recovery of the debt.

6. On 12 January 2000, the court found for the applicant (*Решение Военного суда Донецкого гарнизона*) and awarded him UAH 2,576.72[1] for the uniform and UAH 128.77[2] for travel expenses. The court decision was not appealed and therefore came into force on 22 January 2000. The execution writs were sent to the Voroshylovsky District Bailiffs' Service of Donetsk *(Отдел Государственной исполнительной службы Ворошиловского районного управления юстиции Донецкой области)* and the enforcement proceedings started on 16 March 2000.

7. The debtor was given time to execute the judgment voluntarily, until 23 March 2000. After the debtor had failed to execute the judgment, the Bailiffs' Service sent the execution writs and payment orders to the Donetsk Regional Treasury Department to withdraw the amount of the award from the debtor's account, which revealed a lack of funds for such payments.

8. On 10 April 2000, the payment order and execution writ were returned to the Bailiffs' Service without execution due to the debtor's lack of funds.

9. On 17 May 2000, the enforcement proceedings in the applicant's favour were joined to other enforcement proceedings against the debtor.

10. On 24 October 2000, the debtor transferred to the Bailiffs' Service the amount of UAH 128.77 (the reimbursement of the travel expenses) to be paid to the applicant. However, this sum was only transferred to the applicant on 20 July 2001 (4 October 2001 according to the applicant). The delay, according to the Government, was caused by a lack of information about the applicant's banking details.

11. On 7 November 2000 and 20 July 2001, the execution writ and the payment order for the remaining amount (the compensation for the uniform) were twice re-sent to the Treasury Department. They were returned without enforcement on the same grounds as before – a lack of funds on the designated account.

12. On 9 September 2001 the Bailiffs' Service checked and attached the debtor's accounts. The Bailiffs also checked and found that the debtor had no vehicles or real estate in its possession.

13. On 22 February and 6 August 2002 the execution writ for the remaining amount and the payment order were twice re-sent to the Treasury Department. They were returned without enforcement on the same grounds. The Treasury Department also noted that the payment order had expired on 6 September 2002.

14. In response to the applicant's inquiry, he was informed by the Bailiffs' Service in August 2002 that the debtor's accounts had been frozen

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1. Around 420 euros (" EUR").
2. Around 20 EUR.

and that the execution of his judgment would take place as soon as State budgetary money could be transferred to it.

15. On 25 November 2002, joint enforcement proceedings against the debtor, including the applicant's judgment, were initiated by the Bailiffs' Service for a total amount of UAH 32,680.80[1].

16. On 16 December 2002, the Bailiffs' Service attached the debtor's account in the "Aval" Bank.

17. On 5 May 2003, the Bailiffs' Service also ordered an attachment of the debtor's funds which had accumulated in 26 accounts.

18. On 10 January 2004, the judgment given in the applicant's favour was enforced in full.

19. On 12 January 2004, the amount awarded was transferred to the applicant's bank account.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Constitution of Ukraine, 1996

20. Article 124 of the Constitution provided as follows:

> "... Judicial decisions are adopted by the courts in the name of Ukraine and are mandatory for execution throughout the entire territory of Ukraine."

2. Law of Ukraine of 21 April 1999 "on Enforcement Proceedings"

21. Under Article 2 of the Law, the enforcement of judgments is entrusted to the State Bailiffs' Service. Under Article 85 of the Law, the creditor may file a complaint against actions or omissions of the State Bailiffs' Service with the head of the competent department for that Service or with a local court. Article 86 of the Law entitles the creditor to institute court proceedings against a legal person, entrusted with the enforcement of a judgment, for inadequate enforcement or non-enforcement of a judgement, and to receive compensation.

3. Law of Ukraine of 24 March 1998 "on the State Bailiffs' Service"

22. Article 11 of the Law provides for the liability of bailiffs for any inadequate performance of their duties, as well as compensation for damage caused by a bailiff when enforcing a judgment. Under Article 13 of the Law, acts and omissions of the bailiff can be challenged before a superior official or the courts.

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1. Around 5,335 EUR.

4. Law of Ukraine of 21 September 1999 "on the Economic Activities of the Armed Forces of Ukraine"

23. According to Article 5 of the Law, accounts other than the one designated for a particular payment, as well as the property of the Armed Forces, cannot be used to enforce a court decision.

5. Regulations of the State Treasury of Ukraine of 5 October 2001 "on the procedure for the forced recovery of funds from the accounts of institutions and organisations, opened by the bodies of the State Treasury"

24. Under clause 3.6 of the regulations, the forced recovery of funds must be executed from the same account as that of ordinary payments.

6. Law of Ukraine of 17 February 2000 "on Certain Measures for Budget Savings"

25. The law suspended certain provisions of the Law of Ukraine "on the social welfare and legal protection of military personnel and their families", in particular with regard to compensation for clothing and travel expenses.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. According to the applicant, the length of the enforcement proceedings was in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which provides as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. Admissibility

(a) Exhaustion of domestic remedies

27. The Government submitted that the applicant had not exhausted domestic remedies as he did not lodge a claim with the domestic courts to challenge the inactivity of the Bailiffs and the Treasury, or to seek compensation for material and moral damage.

28. The applicant contested this submission, stating that he had no effective remedies to exhaust in his particular situation, since the non-enforcement of the judgment given in his favour had been caused by the lack of State budgetary appropriations and not by the actions of the authorities responsible for the execution of judgments.

29. The Court recalls that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court. However, the only remedies to be exhausted 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 theory and in practice at the relevant time (see *Khokhlich v. Ukraine*, no. 41707/98, § 149, 29 April 2003).

30. The Government invoked the possibility for the applicant to challenge any inactivity or omissions on the part of the Bailiffs' Service and the Treasury, and to seek compensation for pecuniary and non-pecuniary damage caused by them. In the present case, however, the debtor is a State body and the enforcement of judgments against it, as it appears from the case file, can only be carried out if the State foresees and makes provision for the appropriate expenditures in the State Budget of Ukraine by taking the appropriate legislative measures. The facts of the case show that, throughout the period under consideration, the enforcement of the judgment in question was prevented precisely because of the lack of legislative measures, rather then by a bailiff's misconduct. The applicant cannot therefore be reproached for not having taken proceedings against the bailiff (see *Shestakov v. Russia,* decision, no. 48757/99, 18 June 2002). Moreover, the Court notes that the Government maintained that there were no irregularities in the way the Bailiffs' Service and the Treasury had conducted the enforcement proceedings.

31. In these circumstances, the Court concludes that the applicant was absolved from pursuing the remedy invoked by the Government and has therefore complied with the requirements of Article 35 § 1. Accordingly, the Court dismisses the Government's preliminary objection.

(b) The applicant's victim status

32. Following the full enforcement of the judgment of the Donetsk Garrison Military Court of 12 January 2000, given in favour of the applicant, the Government submitted under Article 34 that the applicant can no longer claim to be a victim of a violation, and that the case should therefore be rejected as being incompatible *ratione personae* with the provisions of the Convention, or struck out of the list of applications (see *Marchenko v. Ukraine*, no. 63520/01, decision of 17 September 2002).

33. The applicant disagreed.

34. The Court notes that, under Article 34 of Convention, it "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto ...". According to the Court's established case-law, the term "victim" denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice. Consequently, a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged the violation, either expressly or in substance, and then afforded redress for it (see, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999–VI).

35. The Court agrees with the Government that the enforcement of the judgment awarded in the applicant's favour rectified the issue of non-enforcement, as such. However, this belated enforcement of the judgment has not replied to the allegation of the undue length of that procedure, for which no acknowledgment or reparation were offered by the authorities. The Court considers therefore that the applicant may still claim to be a victim of an alleged violation of the rights guaranteed by Article 6 § 1 of the Convention in relation to the period during which the judgment remained unenforced (see *Skubenko v. Ukraine,* no. 41152/98, decision of 6 April 2004).

(c) Conclusion

36. The Court considers that the complaint under Article 6 § 1 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further considers that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. As to the merits

37. The Government acknowledged the need to enforce the judgment given in favour of the applicant. They maintained that the judgment had remained unenforced due to a lack of budget funding and legislative measures. The Government underlined, however, that the State did not refuse to honour its financial obligations and recalled that the judgment given in the applicant's favour was partly enforced in 2001. The Government maintained that there had been no violation of Article 6 § 1 of the Convention in the applicant's case.

38. The applicant questioned the willingness of the State to honour its financial obligations to him promptly. He further alleged that the only way to pay him the awarded amount was to foresee the appropriate expenditures in the State Budget of Ukraine.

39. The Court reiterates that effective access to court includes the right to have a court decision enforced without undue delay (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 66, ECHR 1999-V). However, a stay in the execution of a judicial decision, until such time as is strictly necessary to enable a satisfactory solution to be found to public-order problems, may be justified in exceptional circumstances (ibid. § 69).

40. In previous, similar cases against Ukraine, the Court has held that a periods of eight months (the aforementioned *Kornilov and Others v. Ukraine* decision), and even of two years and seven months (see *Krapyvnitsky v. Ukraine*, no. 60858/00, decision of 17 September 2002), were not so excessive as to raise an arguable claim under Article 6 § 1 of the Convention.

41. However, in the instant case, the Court is presented with a delay of four years. The amount awarded to the applicant consisted of two payments that fell into different categories of the State budgetary classification. Therefore, full recovery of one payment by the applicant, as occurred in 2001, did not mean that there was any gradual progress in the recovery of the other payment. This latter period of four years, as mentioned above, was due to the failure of the State to foresee the appropriate expenditures in the State Budget of Ukraine.

42. The Court accepts that appropriations for the payment of State debts may cause some delay in the enforcement of judgments from the Government's budget. Nevertheless, the Court considers that, by failing to make such appropriations for three consecutive years, the respondent State fell short of its obligations under Article 6 § 1 of the Convention.

43. The foregoing considerations lead the Court to conclude that the enforcement in full of the judgment given in favour of the applicant was not carried out within a reasonable time. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

44. The applicant next complained that he had no effective remedies in respect of his complaint under Article 6 § 1 of the Convention. He invoked Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

45. The Court refers to its reasoning under Article 6 § 1 of the Convention in relation to Article 35 § 1 (paragraphs 27-31 above), which is equally pertinent to the applicant's Article 13 claim. Consequently, the Court finds that this complaint is not manifestly ill-founded or indeed inadmissible on any other ground cited in Article 35 of the Convention. It must therefore be declared admissible.

B. As to the merits

46. The Government maintained that the applicant had at his disposal effective remedies explicitly provided for by domestic legislation in order to challenge the non-enforcement of the court judgment given in his favour. The Government referred to their earlier arguments on exhaustion of domestic remedies.

47. The applicant challenged these submissions, stating that the remedies could not be effective in his case since no fault for the delay in the enforcement proceedings could be attributed to the bailiffs or the Treasury, who were entrusted with the enforcement of the judgment.

48. The Court refers to its findings (at paragraphs 30-31 above) in the present case concerning the Government's argument regarding domestic remedies. For the same reasons, the Court concludes that the applicant did not have an effective domestic remedy, as required by Article 13 of the Convention, to redress the damage created by the delay in the present proceedings. Accordingly, there has been a breach of this provision.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

49. Finally, the applicant alleged that there had been an unjustified interference with his property rights, in breach of 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

50. The Court refers to its reasoning under Article 6 § 1 of the Convention in relation to Articles 34 and 35 § 1 (paragraphs 27-35 above), which is equally pertinent to the applicant's claim under Article 1 of Protocol No. 1. Consequently, the Court finds that this complaint is not manifestly ill-founded or indeed inadmissible on any other ground cited in Article 35 of the Convention. It must therefore be declared admissible.

B. As to the merits

51. The Government in their submissions confirmed that the amount awarded to the applicant by the domestic court in compensation for his uniform expenses constituted a possession within the meaning of Article 1 of Protocol No. 1. Nevertheless, the Government maintained that the provision had not been violated since the applicant's entitlement to the award was not disputed and he was not deprived of his property. The Government further noted that the delay in payment was due to insufficient budgetary allocations for the Armed Forces.

52. The applicant submitted that there had been a substantial delay in payment which had therefore deprived him of the actual possession of his property, in violation of Article 1 of Protocol No. 1.

53. The Court recalls its case-law that the impossibility for an applicant to obtain the execution of a judgment in his or her favour constitutes an interference with the right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 45, 6 March 2003).

54. In the instant case the Court is therefore of the opinion that the impossibility for the applicant to obtain execution of his judgement for a period of four years constituted an interference with his right to the peaceful enjoyment of his possessions, within the meaning of the first paragraph of Article 1 of Protocol No. 1.

55. By failing to comply with the judgment of the Donetsk Garrison Military Court, the national authorities prevented the applicant, for a considerable period of time, from receiving in full the money to which he was entitled. The Government have not advanced any justification for this interference, and the Court considers that a lack of budget funds cannot justify such an omission. Accordingly there has also been a violation of Article 1 of Protocol No. 1.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed USD 30,000 (EUR 24,963.28) in respect of pecuniary and non-pecuniary damage.

58. The Government maintained that the applicant had not specified the nature of the damage caused to him and had not substantiated the amount claimed. The Government submitted that the finding of a violation would constitute sufficient just satisfaction in the present case.

59. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court takes the view that the applicant has suffered some non-pecuniary damage as a result of the violations found which cannot be made good by the Court's mere finding of a violation. Nevertheless, the particular amount claimed is excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 2,000 in respect of moral damage.

B. Costs and expenses

60. The applicant also claimed USD 40 (EUR 33.29) for the postal expenses incurred in the Convention proceedings. The Government did not comment on this specific point. Having regard to the information in its possession, the Court awards the applicant the sum requested.

C. Default interest

61. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, to be converted into the national currency of the respondent State on the date of payment, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 33.29 (thirty-three euros and twenty-nine cents) in respect of costs and expenses, plus any tax that may be chargeable;
(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 29 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President