



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

SECOND SECTION

CASE OF SHMALKO v. UKRAINE

(Application no. 60750/00)

JUDGMENT

STRASBOURG

20 July 2004

FINAL

20/10/2004

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 Shmalko 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 Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 29 June 2004,

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

PROCEDURE

1. The case originated in an application (no. 60750/00) 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 Afanasiyovych Shmalko (“the applicant”), on 21 October 1999.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Ms Valeria Lutkovska, succeeded by Ms Zoryana Bortnovska.

3. On 6 May 2003 the Court decided to communicate the applicant’s complaint concerning the non-execution of a judgment given in his favour. It declared the remainder of the applicant’s complaints inadmissible. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the communicated complaints at the same time as their admissibility. The case was given priority under Rule 41 of the Rules of the Court.

4. The applicant and the Government each filed observations on the admissibility and merits of the case (Rule 59 § 1).

THE FACTS

5. The applicant, Mr Anatoliy Afanasiyovych Shmalko, is a Ukrainian national, who was born in 1930 and currently resides in Dnepropetrovsk. He is a disabled pensioner and a veteran of the Second World War. He suffers from myasthenia.

I. THE CIRCUMSTANCES OF THE CASE

6. In March 1999 the applicant instituted proceedings in the Babushkinsky District Court of Dnepropetrovsk against the Dnepropetrovsk City Health Protection Department (“HPD”) and the Dnepropetrovsk City Hospital No. 1 (the “Hospital”), seeking compensation for moral and material damage caused by their refusal between 1996 and 1998 to provide him with the prescription drug Kalimin-60. He alleged that the State authorities had failed to provide him with this drug free of charge, contrary to Resolution No. 1303 of the Cabinet of Ministers of 17 August 1998. He further complained that because this drug was not provided to him, he had to buy it in Moscow, Germany and the United Kingdom. He requested reimbursement of the costs incurred.

7. On 29 September 2000 the Babushkinsky District Court of Dnepropetrovsk (the “Babushkinsky Court”) rejected the applicant’s claims as being unsubstantiated. It found that the HPD and the Hospital could not be held responsible for the failure to provide a drug simply because it was not available in the Dnepropetrovsk Region.

8. On 13 November 2000 the Dnepropetrovsk Regional Court allowed the applicant’s appeal, quashed the decision of 29 September 2000 and remitted the case for fresh consideration.

9. On 22 February 2001 the Babushkinsky Court rejected the applicant’s claims as being unsubstantiated.

10. On 26 March 2001, following an appeal filed by the applicant, the Dnepropetrovsk Regional Court quashed the decision of 22 February 2001 and again remitted the case for fresh consideration.

11. On 13 July 2001 the Babushkinsky Court rejected the applicant’s claims as being unsubstantiated.

12. On 10 October 2001 the applicant lodged an appeal with the Dnepropetrovsk Regional Court of Appeal under the new appeal procedure introduced by the Code of Civil Procedure on 21 June 2001. On 29 November 2001 the Dnepropetrovsk Regional Court of Appeal allowed the applicant’s claims in part. The court ordered HPD to pay the applicant UAH 722.70 and UAH 750 (a total of UAH 1,509.95 [EUR 237.37]) in compensation for material and moral damage, respectively. It also ordered the Hospital to pay the applicant UAH 393.65, UAH 750 and UAH 22.25 (a total of UAH 1,165.9 [EUR 183.28]) in compensation for material and moral damage, costs and expenses.

13. On 19 April 2002 the Bailiffs’ Service of the Babushkinsky District Department of Justice (the “Bailiffs’ Service”) instituted enforcement proceedings in respect of the judgment of 29 November 2001.

14. On 15 May 2002 the Bailiffs’ Service ordered that the funds awarded by the judgment of 29 November 2001 be transferred to the applicant’s bank account.

15. On 27 May 2002 a panel of three judges of the Supreme Court rejected the cassation appeal lodged by the Chief Doctor of the Hospital against the judgment of 29 November 2001 for want of substantiation. The institution of the cassation proceedings did not suspend the enforcement of the judgment of 29 November 2001.

16. On 17 October 2002 the writ of execution and the payment request were returned to the applicant because of the Hospital's lack of funds.

17. On 21 October 2002 the Bailiffs' Service requested the Dnepropetrovsk Regional State Treasury to inform it about the possibility of obtaining funds from the Hospital in order to enforce the judgment.

18. On 26 November 2002 the Bailiffs' Service terminated the enforcement proceedings after UAH 1,165.9 had been transferred to the applicant's bank account. The judgment was fully executed in so far as it concerned the Hospital.

19. On 25 December 2002 the Bailiffs' Service requested the HPD to comply with the judgment of 29 November 2001 and to transfer the amount due to the applicant to his bank account.

20. On 16 January 2003 the HPD paid UAH 862.75 [EUR 135.63] to the applicant.

21. On 20 January 2003 the Bailiffs' Service received the payment request and the writ of execution back from the HPD, with a statement that the judgment could not be fully enforced due to the HPD's lack of funds.

22. On 21 January 2003 the Bailiffs' Service requested the HPD to pay the applicant the remainder of the judgment debt.

23. On 7 February 2003 the HPD transferred the remainder of the funds (UAH 647.2 [EUR 101.74]) to the applicant's account. The Bailiffs' Service terminated the enforcement proceedings.

24. On 19 May 2003 the Babushkinsky Court rejected for lack of substantiation the applicant's claims against the Dnepropetrovsk Regional Department of the State Treasury for an award of compensation for the moral damage he had allegedly suffered due to the lengthy period of non-enforcement of the judgment of 29 November 2000. This judgment was not appealed and thus became final.

II. RELEVANT DOMESTIC LAW

1. Constitution of Ukraine, 1996

25. 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”

26. 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”

27. 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.

4. 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”

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

29. The applicant complained about the authorities’ failure to execute, in due time, the judgment of 29 November 2001 of the Dnepropetrovsk Regional Court of Appeal. He relied on Article 6 § 1 of the Convention, which in so far as relevant provides:

“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

1. *The applicant's victim status*

30. The Government maintained that, in accordance with the Court's case-law, an applicant who has obtained reparation at the national level for an alleged violation of the Convention can no longer be considered a victim for the purposes of Article 34 of the Convention (see, *Marchenko v. Ukraine* (dec.), no. 63520/01, 17 September 2002). Accordingly, as the judgment of the Dnepropetrovsk Regional Court of Appeal of 29 November 2001 had been executed, the applicant can no longer be considered a victim of a violation of his rights under Article 6 § 1 of the Convention. They therefore proposed that the application be declared inadmissible or struck out of the Court's list of cases.

31. The applicant disagreed.

32. The Court notes that, under Article 34 of the 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...”.

33. According to the Court's established case-law, the word "victim" in the context of Article 34 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, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *Dalban c. Roumanie* [GC], no. 28114/95, § 44, ECHR 1999–VI).

34. The Court agrees with the Government that the execution of the judgment awarded in the applicant's favour redressed the issue of non-execution as such. However, the delayed execution of the judgment has not replied to the applicant's complaint about the unreasonable length of that procedure, and in respect of which no acknowledgment or reparation has been forthcoming from 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 the Article 6 § 1 in relation to the period during which the judgment remained unexecuted (see, *Skubenko v. Ukraine* (dec.), no. 41152/98, 6 April 2004).

2. *The objections as to the exhaustion of domestic remedies*

35. 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.

36. The applicant replied that he had no effective remedies to exhaust since the non-enforcement of the judgment had been caused by the lack of State budgetary appropriations for the healthcare system and not by the actions of the authorities responsible for the execution of judgments. In support of his statement, he submitted a copy of the judgment of 19 May 2003 of the Babushkinsky District Court of Dnepropetrovsk rejecting the complaints he had lodged against the State Bailiffs.

37. 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).

38. The Government have invoked the possibility for the applicant to challenge any inactivity or omissions 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 secured 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 absence of the relevant budgetary measures, rather than by the misconduct of a bailiff. 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). At all events, the Court notes that the Government have maintained that there were no irregularities in the way the Bailiffs' Service and the Treasury had conducted the enforcement proceedings.

39. 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, it dismisses the Government's preliminary objection.

3. Conclusion

40. 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. Merits

1. The submissions of the parties

41. The Government stressed that they had taken all measures provided for by the domestic legislation to enforce the judgment given in the applicant's favour. Moreover, they maintained that the period from 19 April 2002 (the date of the institution of the enforcement proceedings) until 21 November 2002 (the date of receipt by the applicant of UAH 1,165.9 in execution of the judgment) did not violate the applicant's right under Article 6 § 1. This delay was caused by the difficult financial situation in the healthcare system of Ukraine. Moreover, from 29 November 2002 until 7 February 2003 the applicant received in instalments the whole amount of the judgment debt. The judgment given in the applicant's favour was therefore fully executed.

42. The applicant maintained that the execution proceedings had lasted a very long time.

2. The Court's assessment

43. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (see *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 510, § 40).

44. It is not open to a State authority to cite lack of funds as an excuse for not honouring a final judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6 § 1 (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V). In the instant case, the applicant should not have been prevented from benefiting from the outcome of his litigation, which was of major importance to him, on the ground of the State's alleged financial difficulties. This litigation concerned compensation for the authorities' failure between 1996 and 1998 to comply with their legislative obligation to provide, free of charge, medication which the applicant required on a daily basis. The Court considers, therefore, that the applicant's situation, in particular his age, state of health and the nature of his disability, required that the authorities enforce the judgment and earmark the necessary funds to that end without any undue delay.

45. The Court notes that the Dnepropetrovsk Regional Court of Appeal judgment of 29 November 2001 remained unenforced, wholly or in part, at least until 7 February 2003, when the debt owed to the applicant was paid in full. It also notes that the enforcement proceedings were instituted only on 19 April 2002, i.e. almost five months after the judgment was adopted and became final.

46. By failing for 1 year, 2 months and 8 days to take the necessary measures to comply with the final judicial decision in the present case, the Ukrainian authorities deprived the provisions of Article 6 § 1 of all useful effect. This was due to the failure of the State to make provision for the necessary appropriate expenditures in the relevant State Budget.

47. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

A. Admissibility

48. 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.”

49. The Government repeated that the judgment of 29 November 2001 had been executed in full. They also reiterated their view that the applicant had failed to exhaust all the domestic remedies available to him under Ukrainian law. They further maintained that the complaints under this heading were inadmissible as there was no appearance of a violation of Article 1 of Protocol No. 1.

50. The applicant disagreed.

51. The Court refers to its reasoning under Article 6 § 1 of the Convention in relation to Articles 34 and 35 § 1 (paragraphs 31-40 above), which is equally valid for rejecting the Government’s preliminary objections to the admissibility of the applicant’s claim under Article 1 of Protocol No. 1.

52. The Court finds that this complaint is not manifestly ill-founded or inadmissible on any other ground referred to in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

53. The Government accepted that the amount awarded to the applicant by the domestic court constituted a “possession” within the meaning of Article 1 of Protocol No. 1. Nevertheless, they maintained that that provision had not been violated since the applicant’s entitlement to the amount awarded was not disputed and he was not deprived of his property. They further noted that the delay in paying the award was due to the insufficiency of the budgetary allocations for health expenditure. The Government maintained that the applicant could at any moment lodge a claim with a domestic court for compensation for any devaluation in his award.

54. The applicant submitted that he had had to wait a long time to obtain the awarded amount in full and he was therefore deprived of the actual possession of his property, in violation of Article 1 of Protocol No. 1.

55. 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).

56. In the instant case the Court is of the opinion that the impossibility for the applicant to obtain execution of his judgement for a period of fifteen months 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.

57. The Court considers that, taking into account the particular situation of the applicant, by failing to comply with the judgment of the Dnepropetrovsk Regional Court, the national authorities prevented the applicant, for a considerable period of time, from receiving in full money to which he was entitled. The Government have not advanced any justification for this interference, and the Court considers that a lack of budgetary funds for the health care system cannot justify such an omission. Accordingly there has also been a violation of Article 1 of Protocol No. 1 in the applicant's case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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 and costs and expenses

59. The Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the [Court] may reject the claim in whole or in part.”

60. The applicant was invited by the Registry to submit his claims for just satisfaction. He submitted his claims on 29 March 2004. However, he did not provide any documents in support of them. Nevertheless, he claimed pecuniary damage in the amount of UAH 44,787.88 [EUR 7,043.71]. He also complained that that amount consisted of his savings in the State Savings Bank and the low pension that he receives. He further alleged that his non-pecuniary damage amounted to UAH 18,993.94 [EUR 2,987.14]. The applicant claimed, without providing any proof, that he should also receive compensation for costs and expenses in the amount of UAH 4,800 [EUR 754.32].

61. The Government stated that the applicant's claims were unsubstantiated.

62. The Court does not discern any causal link between the violation found and the pecuniary damage alleged by the applicant. It makes no award in this respect. However, it considers that the applicant may be considered to have suffered some non-pecuniary damage as a result of the violations found which cannot be compensated by the Court's finding of a

violation alone. The particular amount claimed is, however, excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of 1,000 euros ("EUR").

63. As to the costs and expenses claimed by the applicant, the Court considers them excessive. However, it considers that the applicant had incurred some expenses in relation to the proceedings before it. It also considers that some expenses were incurred in the domestic proceedings in which the applicant unsuccessfully attempted to secure redress for his Convention complaints and which led to the judgment of 19 May 2003 of the Babushkinsky District Court of Dnepropetrovsk.

64. Regard being had to the information in its possession and to the above criteria, the Court considers it reasonable to award the sum of EUR 300 to the applicant.

B. Default interest

65. 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 complaints concerning the non-enforcement of the final judgment in the applicant's case 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 1 of Protocol No. 1 the Convention;
4. *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, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage and EUR 300 (three hundred euros) for costs and expenses, plus any tax that may be chargeable, these amounts to be converted into the currency of the respondent State at the rate applicable on 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President