



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

SECOND SECTION

CASE OF TREGUBENKO v. UKRAINE

(Application no. 61333/00)

JUDGMENT

STRASBOURG

2 November 2004

FINAL

30/03/2005

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 Tregubenko v. Ukraine,

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

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 21 October 2003 and 12 October 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 61333/00) 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 Leonid Tregubenko (“the applicant”), on 23 March 1999.

2. The applicant was represented by Mrs Anne-Marie Neu, a lawyer practising in Strasbourg. The Ukrainian Government (“the Government”) were represented by their Agents – Mrs V. Lutkovska, succeeded by Mrs Z. Bortnovska.

3. The applicant alleged, in particular, that the quashing of the final and binding court decision given in his favour in supervisory review proceedings violated his rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 21 October 2003, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1947 and lives in the city of Toronto, Canada.

8. As of 1988 the applicant ran a business in the city of Yalta, Ukraine, keeping a part of his profit in cash.

9. By the Presidential Decree of 22 January 1991, the bank-notes of 50 and 100 Soviet roubles issued in 1961 ceased to circulate and had to be exchanged for the notes of the same nomination issued in 1991. The Decree of the Cabinet of Ministers of the same date specified the procedure of exchange, providing, *inter alia*, that a special sub-commission (hereinafter the exchange commission) should be created within the executive committees of the City or District Councils to decide on the exchange of bank-notes. The exchange commissions were empowered to allow or refuse exchanges fully or in part, depending on the legality of the source of income being proved.

10. In January 1991 the applicant put the amount of 230,000 Soviet roubles in 50 and 100 notes into an account at the Yalta Branch of the USSR State Bank. At the same time the applicant applied to the Yalta exchange commission for an exchange of that sum. On 25 March 1991 the commission (*Решение комиссии Ялтинского Городского Совета народных депутатов по обмену денежных знаков*) refused to exchange the full amount because of an alleged lack of proof as to the legality of the source of income, and limited the exchange to 2,462 roubles. The remaining sum of 227,538 roubles was not compensated.

11. The applicant challenged that decision before the higher exchange commission of the Republic of Crimea. On 6 May 1991 the latter upheld the decision of the Yalta exchange commission.

12. The Government submit that, in accordance with the resolution of the Cabinet of Ministers of the USSR no. 2 of 22 January 1991, which regulated the procedure for the exchange of bank-notes, this decision of 6 May 1991 was final.

13. At the same time the State Security Service checked the legality of the applicant's business and found no irregularities.

14. On 19 July 1991 the applicant instituted proceedings in the Yalta City Court against the exchange commission for its refusal to exchange the full sum of 230,000 roubles.

15. On 22 July 1991 the Yalta City Court (*Определение Ялтинского городского народного суда*) rejected the claim for lack of jurisdiction.

16. The applicant appealed to the Crimean Regional Court against the judgment of the Yalta City Court. On 26 August 1991 the former quashed the judgment of the latter and remitted the case for further consideration.

17. On 16 October 1991 the Yalta City Court (*Решение Ялтинского городского народного суда*) found for the applicant and ordered the executive committee of the Yalta City Council to exchange all the money deposited by the applicant (230,000 roubles).

18. On 8 April 1992 the Crimean Regional Court (*Определение Крымского областного суда*) upheld this judgment.

19. On 17 April 1992 the judgments of 16 October 1991 and 8 April 1992 were quashed by the Presidium of the Crimean Regional Court (*Постановление Президиума Крымского областного суда*).

20. On 14 April 1993 the Civil Chamber of the Supreme Court of Ukraine (*Ухвала Верховного Суду України*) quashed the latter judgment and upheld the judgments of 16 October 1991 and 8 April 1992 in the applicant's favour. This judgment was final.

21. The judgment was not fully enforced for several years. On various occasions the applicant lodged claims to have the awarded sum adjusted to the inflation rate. On 23 May 1996, 10 December 1996, 27 May 1997 and 23 June 1998, the Yalta City Court granted the claims due to the longstanding non-enforcement of the judgment in the applicant's favour. The latter court decision increased the amount to UAH 349,387.82¹.

22. By letter of 26 June 1998, the Yalta City Mayor requested the Deputy Prosecutor General to intervene by lodging an appeal for supervisory review (*protest*) against the judgment of the Supreme Court of Ukraine given in favour of the applicant.

23. On 30 June 1998 the Chairman of the Court ordered the suspension of any further enforcement of the judgement until the supervisory review appeal had been considered.

24. On 9 September 1998 the Deputy Chairman of the Supreme Court of Ukraine lodged a supervisory review appeal with the Plenary of the Supreme Court (*Постанова Пленуму Верховного Суду України*) against the judgments in the applicant's favour.

25. On 25 September 1998 the Plenary allowed the appeal and quashed the said judgments, upholding the initial judgment of the Yalta City Court of 22 July 1991 to reject the applicant's claim for lack of jurisdiction. The Plenary decided that, since the exchange of banknotes was regulated by the Government Decree of 1991 (paragraph 9) which provided for the non-judicial review of the decisions of exchange commissions, the dispute was outside the courts' jurisdiction under the legislation in force in 1991.

26. The Yalta Mayor then requested the Yalta City Court to reverse the enforcement of the quashed judgment and to recover from the applicant the

¹ Around 53,573 euros ("EUR")

money which had been already paid to him (15% of the sum originally awarded). According to the Government, the court did not examine that request because, under an agreement between the parties, the applicant returned the money which had been paid to him.

27. By a letter of 25 November 1998, the Constitutional Court of Ukraine informed the applicant that it had no jurisdiction to review the decisions of the ordinary courts.

28. By a resolution of 9 December 1998, the proceedings on the applicant's case were closed due to the quashing of the judgment of 16 October 1991 by the Plenary of the Supreme Court.

II. RELEVANT DOMESTIC LAW

29. At the material time, Chapter 42 of the Code of Civil Procedure subjected final and binding judgments to a possible supervisory review. When a final judgment was given by the Supreme Court of Ukraine, it could be appealed under the supervisory review procedure by the Chairman of the Supreme Court of Ukraine, the Prosecutor General of Ukraine and his or her Deputies (Article 328), and had to be considered by the Plenary of the Supreme Court (Article 329). The judgments of the Plenary were not subject to any further review.

30. The supervisory review procedure was repealed in June 2001.

THE LAW

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

31. The applicant complained under Article 6 § 1 of the Convention that the final and binding judgment in his favour had been quashed following the supervisory review and that the procedure before the Plenary of the Supreme Court of Ukraine had been “unfair”. The applicant further complained that, by the Plenary's judgment, he had been denied access to a court in the determination of his civil rights. Article 6 § 1 provides as relevant:

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

A. Supervisory review procedure: substantive issues

1. *The submissions of the parties*

32. The Government stated that the supervisory review procedure had existed in Ukrainian civil procedural legislation until 21 June 2001. In the Government's opinion, this procedure was aimed at the “strengthening of legality and the legal order, the protection of the rights and legitimate interests of citizens and organisations, and the observance of legal principles in the administration of justice.” The Government argued that, unlike in the *Brumărescu v. Romania* case ([GC] no.28342/95, judgment of 28 October 1999), in the instant application the protest had been lodged not by the prosecutor but by the Deputy Chairman of the Court. The Government further submitted that the supervisory review procedure had been actively used by citizens and had been considered by them to be an effective remedy. In the instant case, in the Government's view, the judgment of the Plenary of the Supreme Court of Ukraine had corrected the wrong application of the law in force in 1991. Therefore, there had been no violation of the applicant's right to fair hearing under Article 6 § 1 of the Convention.

33. The applicant disagreed, stating that, by quashing the final and binding court decision given in his favour, the Supreme Court had violated the principle of legal certainty and his right to a fair hearing.

2. *The Court's assessment*

34. The Court observes that at the material time the Deputy Chairman of the Supreme Court of Ukraine had the power under Article 328 of the Code of Civil Procedure to lodge an application for the supervisory review of a final judgment. The exercise of that power was not subject to any time-limit, so that judgments were liable to challenge indefinitely.

35. The Court notes that, by allowing the application lodged under that power, the Supreme Court of Ukraine set at naught an entire judicial process which had ended in a final and binding judicial decision and thus *res judicata*, and which had, moreover, been partially executed.

36. In so far as the Government argued that the instant case differed from the *Brumărescu v. Romania* judgment ([GC] no.28342/95, 28 October 1999), since the application for supervisory review was lodged not by a prosecutor, who is a member of the executive, but by a judge, the Court notes that the supervisory review procedure existed in a number of Contracting States and had common features, including the range of persons authorised to lodge an application for such review: prosecutors and chairmen of the courts and their deputies. This Court has previously considered cases involving supervisory review initiated by both prosecutors and judges. As in the *Ryabykh v. Russia* judgment (no. 52854/99,

24 July 2003), where the application for supervisory review was also lodged by a judge, the Court is of the opinion that the issue should be regarded as one of legal certainty and not just an interference by the executive.

37. The Court considers that, by using the supervisory review procedure to set aside the judgment of 14 April 1993, the Plenary of the Supreme Court of Ukraine infringed the principle of legal certainty and the applicant's "right to a court" under Article 6 § 1 of the Convention.

38. There has accordingly been a violation of that Article.

B. Supervisory review procedure: procedural issues

1. The submissions of the parties

39. The Government further maintained that the supervisory review procedure had been explicitly provided for by law and had contained considerable guarantees, as well as the necessary guarantees of the independence and impartiality of the courts.

40. The applicant called into question the purported procedural guarantees. He submitted in particular that he had not been present before the court, and that the review had been limited to an examination of the appeal lodged by the Deputy Chairman of the Supreme Court.

2. The Court's assessment

41. The Court finds that, having concluded that there has been an infringement of the applicant's "right to a court" by the very use of the supervisory review procedure, it is not necessary to consider separately whether the procedural guarantees of Article 6 of the Convention were respected during those proceedings (see *Ryabykh v. Russia*, no. 52854/99, § 59, 24 July 2003).

C. Access to a court

1. The submissions of the parties

42. The Government maintained that the Plenary of the Supreme Court aimed to secure the correct application of the legislation which was in force in 1991. That legislation did not envisage a judicial control of the decisions of the exchange commissions, but provided for a different (non-judicial) appeal procedure. They further maintained that the Plenary of the Supreme Court had simply revived the ruling of the Yalta City Court of 22 July 1991, and that there had been no violation of the applicant's right of access to a court.

43. The applicant in his reply contended that the Supreme Court of Ukraine had misinterpreted the legislation and had given priority to the specific norms of the Decree of the Cabinet of Ministers of 22 January 1991 (paragraphs 9 and 12 above) over the general norms of the Constitution and laws, even though the latter had higher force.

2. *The Court's assessment*

44. The Court notes that the *ratio decidendi* of the judgment of the Plenary of the Supreme Court of Ukraine was that the courts had no jurisdiction whatsoever to decide particular types of civil disputes such as the action for recovery of the value of the possessions in the instant case. It considers that such an exclusion is in itself contrary to the right of access to a tribunal guaranteed by Article 6 § 1 of the Convention (see, *mutatis mutandis*, the *Vasilescu v. Romania* judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1075-76, §§ 39-41; *Brumărescu v. Romania*, cited above, § 65).

45. There has thus been a violation of Article 6 § 1 in this respect also.

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

46. The applicant complained that his right to the peaceful enjoyment of his possessions had been violated as a result of the quashing of the final and binding court decision in his favour. He invoked Article 1 of Protocol No. 1 which provides as relevant:

“Every natural ... 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.”

A. Whether there was a possession

47. Both parties agreed that the final and binding judgment of 14 April 1993 in the applicant's favour conferred a “possession” on him within the meaning of Article 1 of Protocol No. 1 to the Convention. The Court, in the light of its consistent case-law, shares this view.

B. Whether there was interference

1. The submissions of the parties

48. The Government agreed that the quashing of the judgment of 14 April 1993 in the applicant's favour constituted an interference with the applicant's right to the peaceful enjoyment of his possessions. Nevertheless, the Government maintained that such interference had originally taken place in 1991, when the exchange commission refused to exchange the applicant's money, and that the Supreme Court had only corrected previous mistakes and highlighted the impossibility of challenging the decision of the exchange commission before the courts in 1991.

49. The applicant maintained that it was the quashing of the final and binding judgment given in his favour that deprived him of his property.

2. The Court's assessment

50. The Court recalls that the issue before it in the present case is the quashing of the final and binding judgment given in favour of the applicant (paragraph 20 above) and not the property dispute in 1991 between the applicant and the Yalta exchange commission (paragraph 10 above). Moreover, the latter dispute is outside the Court's competence *ratione temporis* (see the admissibility decision of 21 October 2003).

51. The Court notes that, under its constant case-law, the quashing of a final and binding judgment that conferred a "possession" on the applicant constitutes an interference with the applicant's right to that property. The Court finds in the instant case that there was interference with the applicant's rights in the form of a deprivation of property, within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1.

C. Whether the interference was justified

1. The submissions of the parties

52. The Government submitted that the interference complied with the law, was aimed at securing the correct application of the law, and served the general interest, since payment of the debt by the Yalta City Council would have rendered the expenditures for social and other needs of the city impossible.

53. The applicant submitted in reply that, by quashing the final and binding judgment in his favour, the State failed to strike a "fair balance" between the general interests and his property rights. The applicant maintained that the Government's social programme argument was unsound,

since there could have been other ways and resources to enforce the judgment in his favour.

2. *The Court's assessment*

The Court reiterates that a deprivation of property can only be justified if it is shown, *inter alia*, to be “in the public interest” and “subject to the conditions provided for by law”. Moreover, any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a “fair balance” must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent throughout the Convention. The Court further observes that the requisite balance will not be struck where the person concerned bears an “individual and excessive burden” (see the *Brumărescu* judgment cited above, § 78).

54. The Government offered two justifications for the interference with applicant's property rights: In so far as the Government submit that the interference aimed to secure the correct application of the law, the Court notes that this argument is similar to those submitted by them under Article 6 § 1 of the Convention. Having found a violation of Article 6 § 1 of the Convention, the Court concludes that, although the correct application of the law is undeniably a “public interest”, in the circumstances of the present case it was pursued in violation of the fundamental principles of legal certainty and access to court. Therefore, this argument must be dismissed. In so far as the Government submit that the payment of the State's debt to the applicant under the quashed judgment would endanger the social programmes of local government, the Court reiterates that it is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt (see *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III). Nor could the alleged inability of the State to honour its debt under a final and binding judgment serve as justification for quashing that judgment.

55. In the circumstances, therefore, the Court finds that the “fair balance” was upset and that the applicant bore and continues to bear an individual and excessive burden. There has accordingly been and continues to be a violation of Article 1 of Protocol No. 1.

III. 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. Pecuniary damage

57. The applicant maintained that the direct damage caused by the violation of his rights amounted to 319,891 euros (EUR), corresponding to the 230,000 Soviet roubles of which he was deprived in 1991. The applicant further estimated his loss of profit from 1991 until 2004 at EUR 2,000,000. Thus the applicant claimed a total of EUR 2,319,891 euros in respect of pecuniary damage.

58. The Government denied the existence of any causal link between the violation at issue and the pecuniary damage claimed. The Government maintained that, if a violation of Article 1 of Protocol No.1 were found, the applicant could claim only UAH 349,387.82 (EUR 53,657.81), the sum to which he had been entitled when the alleged violation occurred.

59. The Court recalls that the issue before it in the present case is the quashing in 1998 of the final and binding judgment awarding the applicant UAH 349,387.82, and not the interference with the applicant's property rights in 1991.

60. Like the Government, the Court does not discern any causal link between the violation found and the extensive pecuniary damage alleged. However, in respect of the violation of Article 1 of Protocol No. 1 which the Court has found, the Court considers it appropriate to award the applicant EUR 53,657.81, which is the equivalent of the amount awarded to him by the domestic courts under the quashed judgment.

B. Non-pecuniary damage

61. The applicant claimed EUR 3,198,903 in respect of non-pecuniary damage

62. The Government asserted that this claim was excessive and that a finding of a violation would constitute sufficient just satisfaction under this head.

63. 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 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 5,000 in respect of moral damage.

C. Costs and expenses

1. *Domestic proceedings*

64. The applicant did not submit any claim under this head within the set time-limit; the Court therefore makes no award in this respect.

2. *Convention proceedings*

65. The applicant claimed EUR 15,696.27 for costs and expenses incurred in the Convention proceedings. He presented an invoice for that sum from his lawyer.

66. The Government maintained that the applicant had failed to submit details of the work performed by his lawyer, the hourly rates, etc. Moreover, the applicant did not submit any contract confirming that he was under a legal obligation to pay the invoice submitted to the Court. The Government invited the Court to reject the applicant's claim for costs and expenses as he had not furnished any sustainable evidence to support this claim.

67. The applicant submitted that, given the length of the proceedings, his claim was reasonable.

68. The Court reiterates that, in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

69. The Court considers that these requirements have not been met in the instant case. It notes that the case is not particularly complex. Moreover, it appears from the documents in its possession that the lawyer's activities were limited to submitting the application form on the applicant's behalf and forwarding his correspondence, including his observations and just satisfaction claim, prepared by the applicant himself. Finally, the Court agrees with the Government regarding the absence of any detailed breakdown and justification for this claim. However, it is clear that the applicant incurred some costs and expenses for his representation before the Court.

Regard being had to the information in its possession and to the above considerations, the Court awards the applicant EUR 1,000 for costs and expenses.

C. Default interest

70. 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. *Holds* that there has been a violation of Article 6 § 1 of the Convention by reason of the quashing of the final judgment in the applicant's favour by way of a supervisory review;
2. *Holds* that it is not necessary to consider separately the allegation of procedural unfairness in the supervisory review proceedings;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention by reason of a denial of access to court;
4. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
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, the following amounts:
 - (i) EUR 53,657.81 (fifty-three thousand six hundred and fifty seven euros and eighty-one cents) in respect of pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
 - (iii) EUR 1,000 (one thousand euros) in respect of costs and expenses;
 - (iv) any tax that may be chargeable on the above amounts;
 - (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 2 November 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President