



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

SECOND SECTION

CASE OF IVANOVA v. UKRAINE

(Application no. 74104/01)

JUDGMENT

STRASBOURG

13 September 2005

FINAL

13/12/2005

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 Ivanova 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 I. CABRAL BARRETO,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 25 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 74104/01) 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, Ms Ninel Andriyivna Ivanova (“the applicant”), on 22 March 2001.

2. The applicant was represented by Mr Y. Zaytsev, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agents, Mrs Valeria Lutkovska and Mrs Zoryana Bortnovska.

3. On 15 June 2004 the Court declared the application partly inadmissible and decided to communicate to the Government the applicant's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 concerning the challenge to a final and binding court decision under the extraordinary appeal procedure. 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 was born in 1930 and lives in Kyiv.

5. In December 1998 the applicant brought proceedings against Mr S. (her neighbour), alleging that he had unlawfully seized and re-designed a corridor (measuring approximately 4 square meters) in their shared house.

6. On 28 December 1998 the Podilskyy District Court of Kyiv (hereafter “the District Court”) allowed the applicant's claim. She was awarded the ownership of the disputed corridor and Mr S. was ordered to restore its original design.

7. On 17 May 1999 the District Court, at the applicant's request, quashed its decision of 28 December 1998 due to new circumstances (namely, that the shared house had historical value) and reopened the proceedings.

8. On 19 August 1999 the District Court allowed the applicant's claim, declared the corridor in question to be the applicant's property and ordered Mr S. to remove the unauthorised changes in the corridor's design. No appeal was lodged against the judgment and it became final ten days later, on 29 August 1999.

9. Enforcement proceedings commenced in October 1999.

10. On 8 February 2001, while the enforcement proceedings were in progress, the Deputy President of the Supreme Court lodged a supervisory *protest* (an extraordinary appeal) against the judgment of 19 August 1999 on the ground that the first instance court had erred in its assessment of evidence and in the application of the law.

11. The *protest* was examined on 26 February 2001 by the Presidium of the Kyiv City Court. Having accepted the reasons advanced by the Deputy President of the Supreme Court, the Presidium quashed the judgment 19 August 1999 and remitted the case for fresh consideration.

12. On 3 July 2002 the District Court dismissed the applicant's claim due to her failure to pay in full the State tax for the introduction of the complaint. The applicant did not appeal against this decision.

II. RELEVANT DOMESTIC LAW

13. The relevant parts of the Code of Civil Procedure in force at the material time and of the Law on the Introduction of Changes to the Code of Civil Procedure of 21 June 2001 are set out in the judgment of 9 November 2004 in the case of *Svetlana Naumenko v. Ukraine* (no. 41984/98, §§ 65- 66).

THE LAW

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

14. The applicant complained that the courts' decisions were unfair. In particular she complained that her right to a fair hearing was violated by the

quashing of the final and binding judgment in her favour. She relied on Article 6 § 1 of the Convention, which in so far as relevant provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

15. The Government contested these arguments.

A. Admissibility

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other ground. The application must therefore be declared admissible.

B. Merits

1. Arguments of the parties

17. The Government stated that in the present case the *protest* was lodged by the Deputy President of the Supreme Court and the supervisory hearing was conducted before the Presidium of the Kyiv City Court. That, according to the Government, provided effective safeguards against partiality and bias. They further maintained that the supervisory review was expressly regulated by the Code of Civil Procedure. It contained guarantees to ensure a fair hearing; it was used by Ukrainian citizens to defend their rights and was aimed at correcting judicial errors. In the present case this procedure was applied to remedy the first instance court's evidently erroneous assessment of the facts and interpretation of domestic law.

18. The Government stressed that the instant case was distinguishable from that of *Brumărescu v. Romania* ([GC], no. 28342/95, ECHR 1999-VII), as the decision of 26 February 2001 did not terminate the proceedings; instead, the Kyiv Regional Court, having quashed the decision of the District Court, remitted the case for a further examination on the merits.

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

2. The Court's assessment

20. As regards the Government's argument that the supervisory instance did not render a final decision in the case, the Court notes that the applicant's complaint under Article 6 § 1 concerns the quashing of an earlier final judgment in her favour. The issue is, therefore, whether such a

procedure, permitting a final judgment to be quashed, is compatible with Article 6 and, in particular, whether the principle of legal certainty was thereby infringed (see *Volkova v. Russia*, no. 48758/99, § 32, 5 April 2005).

21. The Court finds that the fact that the applicant's case was remitted for a rehearing by the decision of the supervisory court cannot be said to be of any consequence regarding the issue of the State's compliance with the principle of legal certainty.

22. The Court considers that this case is similar to that of *Ryabykh v. Russia* (no. 52854/99, ECHR 2003-IX), where it was said that the use of the supervisory review procedure, without limit in time, by a State official who was not a party to the proceedings, to set aside a final, binding judgment, infringed the principle of legal certainty and the applicant's "right to a court" under Article 6 § 1 of the Convention (see also the Court's judgments in *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 77, ECHR 2002-VII and the aforementioned *Brumărescu* case, §§ 61-62).

23. As regards the present application, the Court notes that in February 2001 the Deputy President of the Supreme Court lodged a supervisory *protest* against the judgment of the Podilskyy District Court of Kyiv of 19 August 1999 that had become final and binding, and in respect of which enforcement proceedings were pending. On 26 February 2001 this decision was quashed by the Presidium of the Kyiv City Court and the case was remitted to the first instance court for re-consideration. In the light of these factual elements, the Court does not find any reason to depart from its previous case law, cited above (paragraph 22).

24. It concludes, therefore, that there has been a violation of Article 6 § 1 in respect of the quashing of the final and binding judgment given in the applicant's case.

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

25. The applicant complained that the extraordinary review of her case and the quashing of the judgment in her favour had violated Article 1 of Protocol No. 1. That provision, insofar as relevant, 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 ...”

26. The Government contested that argument.

A. Admissibility

27. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. Whether there was a possession

28. The parties agreed that the final and binding judgment of 19 August 1999 in the applicant's favour constituted a “possession” 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.

2. Whether there was interference

29. The Government conceded that the quashing of a final and binding judgment that conferred a “possession” on the applicant constituted an interference with her right to that property. However, they stated that the interference did not take the form of a “deprivation” of property as the impugned proceedings did not alter the applicant's share in the ownership of the house and no nationalisation of the applicant's property has ever taken place.

30. The applicant disagreed with this argument, stating that her title had been recognised in a final court judgment. The quashing of that judgment resulted in her losing the ownership of the disputed part of the house to Mr. S.

31. The Court recalls that quashing a court judgment after it has become final and unappealable will constitute an interference with the judgment beneficiary's right to the peaceful enjoyment of that possession (see *Brumărescu*, cited above, § 74). The Court further recalls that in determining whether there has been a deprivation of possessions, it is necessary not only to consider whether there has been a formal taking or expropriation of property, but also to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are “practical and effective”, it has to be ascertained whether the situation amounted to a *de facto* expropriation (see

the *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, pp. 24-25, § 63). Moreover, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a deprivation of property (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 30, § 38).

32. The Court notes that, in the present case, the judgment of the first instance court, awarding the applicant ownership of the disputed corridor, became final and irrevocable and that, in accordance with that judgment, the bailiffs commenced enforcement proceedings. The Court observes that the effect of the judgment of the Kyiv City Court was to deprive the applicant of the fruits of the final judgment in her favour, in particular the applicant's share in the house was reduced to its pre-litigation level. In these circumstances, the Court finds that the effect of the judgment of the Kyiv City Court was to deprive the applicant of her possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (see the *Brumărescu* judgment, cited above, § 77, and *Tregubenko v. Ukraine*, no. 61333/00, § 51, 2 November 2004).

3. *Whether the interference was justified*

33. The Government submitted that the interference complied with the law and served the general interest, i.e. in securing the correct application of the law. The Government stated that the applicant's case was not terminated by the supervisory court but was remitted to the first instance court for an examination of the merits. They further maintained that the size of the disputed part of the house was miniscule and thus the interference did not place an excessive burden on the applicant.

34. The applicant submitted in reply that, by quashing the final and binding judgment in her favour, the State failed to strike a “fair balance” between the general interest and her property rights. She indicated, *inter alia*, that the average price per square meter of housing in the Podolsky District of Kyiv was approximately USD 1,000, and that the current design of the corridor impeded her access to the room in the house which she occupied.

35. 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, 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 (see the *Brumărescu* judgment cited above, § 78).

36. As regards the Government's claims that the interference was aimed to secure the correct application of the law and that the decision of the supervisory court did not terminate the proceedings, the Court notes that

these arguments are similar to those submitted by them under Article 6 § 1 of the Convention. Having found a violation of Article 6 § 1, the Court reiterates 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 (see the *Tregubenko* judgment, cited above, § 54). The Court further recalls that the issue before it in the present case is limited to the quashing of the final and binding judgment given in favour of the applicant. Accordingly, the remittal of the case for a rehearing does not change the fact that the applicant has been deprived of the ownership of property without compensation. Therefore, the Government's arguments must be dismissed.

37. To the extent that the Government contended that the Kyiv City Court's decision represented a minor interference in the applicant's property rights, the Court, without speculating on the potential market value of the disputed property, notes that the constantly rising prices of housing in the central parts of Kyiv hardly support this allegation. Moreover, the value of the District Court's judgment to the applicant was not limited to the declaration that the corridor was her property. The first instance court also found it necessary to instruct Mr. S. to remove the changes he had made to the shape of the corridor. It thus accepted the applicant's statement that its current design impeded her use of her part of the property. The Court finds no reason to disagree with this conclusion and, accordingly, rejects the Government's argument as being inconsistent with the facts of the case.

38. 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

39. 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

40. The applicant claimed 2,057 euros (EUR) in respect of pecuniary and EUR 5,000 in respect of non-pecuniary damage.

41. The Government found the applicant's claims excessive and unjustified.

42. Making its assessment on equitable basis, as required by Article 41 of the Convention, the Court considers it reasonable to award the applicant a global sum of EUR 3,000 in respect of damages.

B. Costs and expenses

43. The applicant claimed EUR 480 for the work of a lawyer who entered the proceedings after the case had been communicated to the Government for observations.

44. The Government did not contest this amount.

45. The Court recalls that, in order for costs and expenses to be reimbursed under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII). In the present case the Court finds the claim to be reasonable and justifiable. The Court therefore awards EUR 480 under this head.

C. Default interest

46. 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 remainder of the application admissible;
2. *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;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to 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, the following sums, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,000 (three thousand euros) in respect of pecuniary and non-pecuniary damage,

- (ii) EUR 480 (four hundred and eighty euros) in respect of costs and expenses;
- (iii) plus any tax that may be chargeable on these amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 13 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President