CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF BITKIVSKA v. UKRAINE

(Application no. 5788/02)

JUDGMENT

STRASBOURG

4 October 2005

FINAL

04/01/2006

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 Bitkivska v. Ukraine,

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

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 13 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 5788/02) 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, Mrs Nataliya Dmytrivna Bitkivska ("the applicant"), on 16 January 2002.

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

3. On 19 September 2003 the Court decided to communicate the applicant's complaints about non-enforcement of the judgment in her favour 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 was born in 1965 and lives in the village of Krichka, the Ivano-Frankivs'k region of Ukraine.

5. In 1987 the applicant's family was placed on the waiting list to receive an apartment from the State. By 1990 the applicant was first on the housing list. Nevertheless, the Executive Committee of the Dzvinyach Village Council, by a decision of 12 October 1990, gave an available apartment to another person. The applicant instituted proceedings in the Ivano-Frankivs'k

Regional Court against the executive committee of the Village Council, challenging its decision.

6. On 30 August 1991, the Ivano-Frankivs'k Regional Court found for the applicant and ordered the Village Council to assign the disputed apartment to the applicant. On 30 October 1991, the Supreme Court of Ukraine upheld the decision of the Regional Court.

7. In 1996, as the judgment in her favour remained unenforced, the applicant requested the Bogorodchansky District Court to change the manner of enforcement and to order the Village Council to build her a house. On 7 October 1996, the court satisfied the applicant's request and changed the manner of execution accordingly.

8. In 1997, as the judgment was still unenforced, the applicant requested the same district court to change the manner of execution again and to award her the pecuniary equivalent of the disputed apartment. On 16 June 1997, the Bogorodchansky District Court satisfied the applicant's request and awarded her UAH 29,600[1] in compensation.

9. On 28 December 2000, the Head of the Bogorodchansky District Department of the State Bailiffs' Service issued an order to freeze all the current bank accounts of the Village Council in order to secure the payment of the judgment debt in the applicant's favour.

10. On 26 January 2001, the Dzvinyach Village Council challenged the order of 28 December 2000 in the Bogorodchansky District Court. The enforcement proceedings were accordingly suspended.

11. On 12 February 2001, the Bogorodchansky District Court found in part for the Village Council and quashed the order of the Bailiffs' Service with respect to two principal accounts containing the budget funds for social payments, salaries, etc. By the same decision the court allowed the other accounts of the debtor to be frozen.

12. The applicant lodged a protest with the Deputy Chairman of the Ivano-Frankivs'k Regional Court to challenge this decision. The Deputy Chairman rejected her protest by his letter of 20 April 2001. On 8 October 2001, the panel of three judges of the Civil Chamber of the Supreme Court of Ukraine rejected the applicant's request for leave to appeal under the new cassation procedure.

13. On 21 November 2002 the court decision of 16 June 1997 was enforced in full and the Bailiffs ended the enforcement proceedings.

II. RELEVANT DOMESTIC LAW

14. The relevant domestic law is summarised in the judgment of *Romashov v. Ukraine* (no. 67534/01, §§ 16-18, 27 July 2004).

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[1] Around 4,780 euros (“EUR”)

THE LAW

15. The applicant complained under Article 6 § 1 of the Convention that the proceedings before the Bogorodchansky District Court in 2001 had been unfair and that their outcome had voided the enforcement proceedings, since the debtor continued its financial operations through the unfrozen accounts and avoided the fulfilment of its financial obligations towards the applicant. She further complained that the higher courts had failed to quash this decision under the extraordinary appeal procedure. She finally complained about the lengthy non-enforcement of the judgment in her favour, invoking in substance Articles 6 § 1 and 13 of the Convention, and Article 1 of Protocol No. 1. These provisions, in so far as relevant, read as follows:

Article 6 § 1

"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. ..."

Article 13

"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."

Article 1 of Protocol No. 1

"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."

I. ADMISSIBILITY

A. The Government's preliminary objections

1. The applicant's victim status

16. The Government considered that the applicant could no longer claim to be a victim of a violation of the Convention as she had received full payment of the judgment debt. They submitted copies of documents in

confirmation, including a certificate with the dates and amounts of the instalments paid to the applicant and the Bailiffs' decision to terminate the enforcement proceedings. The applicant challenged this contention, stating that an amount of UAH 227 (around EUR 36) from the judgment of 16 June 1997 remained unpaid. She also submitted a letter from the Bailiffs in support of her allegation. In reply, the Government maintained that their information was accurate. They further suggested that, if the applicant had disagreed with the Bailiffs' decision to terminate the enforcement proceedings, she could have challenged it before the domestic courts.

17. Having regard to the above submissions, the Court notes that, by not having challenged the Bailiffs' decision confirming the full enforcement of the judgment of 16 June 1997, the applicant has implicitly acknowledged this fact and cannot now raise it before this Court. The Court therefore concludes that the enforcement proceedings were completed on 21 November 2002, as evidenced by the official documentation.

18. However, this belated enforcement of the judgment does not meet the applicant's complaint concerning the undue length of the 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 *Voytenko v. Ukraine*, no. 18966/02, § 35, 29 June 2004).

2. Non-exhaustion of domestic remedies

19. The Government contended that the applicant had not exhausted domestic remedies regarding the Bailiffs' Service and the expedition of proceedings. They submitted examples of domestic case-law in which people had successfully obtained compensation from the Bailiffs for delays in enforcement proceedings.

20. The applicant disagreed.

21. The Court notes that a similar point has already been dismissed in a number of Court judgments (see the aforementioned *Romashov* judgment, §§ 30-32). In such cases the Court has found that applicants were absolved from pursuing the remedies invoked by the Government. The domestic case-law presented by the Government does not demonstrate such sufficient consistency as might enable the Court to reach a different conclusion as to the effectiveness of the domestic remedies in cases of non-enforcement of judgments.

3. Conclusion

22. In the light of the above considerations, the Court dismisses the Government's preliminary objections.

B. The applicant's complaint of an unfair hearing in 2001

23. The applicant complained under Article 6 § 1 of the Convention about an unfair hearing before the Bogorodchansky District Court in 2001 (paragraph 11 above) that had prevented her from enforcing the judgment against the debtor's bank accounts.

24. The Court notes that the applicant was not a party to the proceedings complained of, though she could arguably claim that they were decisive for the enforcement proceedings in her favour. The Court observes that the decision of the Bogorodchansky District Court was given on 12 February 2001 and became final on 22 February 2001. The applicant learned of this decision on an unknown date prior to 20 April 2001, when she received the rejection of her extraordinary appeal from the Ivano-Frankivs'k Regional Court. This was more than six months before the introduction of the application to the Court on 16 January 2002. The applicant's appeals to the Ivano-Frankivs'k Regional Court and the Supreme Court of Ukraine cannot be taken into account, as these procedures are not remedies within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis,* no. 41974/98, *Kucherenko v. Ukraine*, dec. 4 May 1999 and *Prystavska v. Ukraine* (dec.), no. 21287/02, ECHR 2002-X). It follows that this complaint has been lodged out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

C. The applicant's complaint of the courts' refusals to review the case

25. The applicant further complained under Article 6 § 1 of the Convention that the Regional Court and Supreme Court of Ukraine failed to review and quash the decision of 12 February 2001 (paragraphs 11 and 12 above).

26. The Court reiterates that the Convention, as such, does not guarantee the right to have a case re-opened (see, *mutatis mutandis*, *Reyhan v. Turkey*, no. 38422/97, decision of 3 July 2003). It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

D. The applicant's complaints about the lengthy non-enforcement of the judgment in her favour

27. The applicant finally complained about the lengthy non-enforcement of the judgment in her favour, invoking in substance Articles 6 § 1 and 13 of the Convention, and Article 1 of Protocol No. 1.

28. The Government maintained that part of the events of which complaint is made took place prior to the entry of the Convention into force in respect of Ukraine.

29. The Court notes that the period to be taken into consideration only began on 11 September 1997, when the recognition by Ukraine of the right of individual petition took effect. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time.

30. In the light of the parties' submissions, the Court concludes that the complaint of delayed enforcement between 11 September 1997 and 21 November 2002 raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It finds no ground for declaring this part of the application inadmissible. For the same reasons, the applicant's complaints under Article 13 of the Convention and Article 1 of Protocol No. 1 cannot be declared inadmissible.

II. MERITS

A. The applicant's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1

31. In their observations, the Government put forward arguments similar to those in the cases of *Romashov v. Ukraine* and *Voytenko v. Ukraine*, contending that there was no violation of Article 6 § 1 of the Convention or Article 1 of Protocol No. 1 (see, the *Romashov* judgment, cited above, § 37; and the *Voytenko* judgment, cited above, § 37).

32. The applicant disagreed.

33. The Court notes that the judgment of the Bogorodchansky District Court of 16 June 1997 remained unenforced for more than five years and two months.

34. The Court recalls that it has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases raising issues similar to the present application (see, for instance, *Sokur v. Ukraine*, no. 29439/02, §§ 30-37, 26 April 2005; and the aforementioned *Voytenko* judgment, §§ 53-55).

35. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. There has, accordingly, been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

B. The applicant's complaint under Article 13 of the Convention

36. The Court refers to its findings (at paragraph 21 above) concerning the Government's argument regarding domestic remedies. For the same reasons, the Court finds 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 enforcement proceedings. Accordingly, there has also been a breach of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed UAH 227 (around EUR 36) in respect of pecuniary damage and UAH 450,000 (around EUR 72,000) in respect of non-pecuniary damage.

39. The Government maintained that the claim for pecuniary damage was unsubstantiated (see paragraph 16 above). They considered that the claim for non-pecuniary damage was exorbitant and unsubstantiated. They suggested that the finding of a violation would be sufficient just satisfaction in the present case.

40. In view to its findings in the instant case (see paragraph 17 above), 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 2,500 in respect of moral damage.

B. Costs and expenses

41. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

42. 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 length of the enforcement of the judgment of 16 June 1997 admissible, and the remainder of the application inadmissible;

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 in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage;
   (b) that the above amount shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (c) 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 4 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President