CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF KECHKO v. UKRAINE

(Application no. 63134/00)

JUDGMENT

STRASBOURG

8 November 2005

FINAL

08/02/2006

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 Kechko v. Ukraine,

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

Mr A.B. BAKA, *President*,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 5 April and 11 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 63134/00) 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 Aleksandr Kechko ("the applicant"), on 27 June 2000.

2. The applicant was represented by Mr S. V. Osyka, a lawyer practising in Donetsk. The Ukrainian Government ("the Government") were represented by their Agents, Mrs V. Lutkovska and Mrs Z. Bortnovska.

3. The applicant alleged that the refusal to pay him benefits, to which he was entitled by law, for the period 1997-1999, constituted a violation of his property rights.

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 5 April 2005 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1945 and resides in the city of Donetsk, Ukraine.

8. The applicant has worked as an English teacher in a secondary school since 1984.

9. On 23 March 1996 the Ukrainian Parliament adopted a new wording for the Education Act that provided for, in particular, the payment of certain benefits to teachers.

10. On 2 April 1999 the applicant instituted civil proceedings in the Leninsky District Court of Donetsk against the Leninsky District Department for Education, claiming entitlement to those benefits. The applicant maintained that he had more than 10 years' of service and was thus entitled to a 20% increase in his salary as from 1 January 1997. However, the defendant had not paid him this increase. He further maintained that the defendant had not paid him annual bonuses for excellent work and recreation. The defendant stated that the claimed amounts could not be paid because the State budgets for 1997-1999 did not make any provision for such expenditures.

11. On 5 October 1999 the court found in part for the applicant. The court rejected the applicant's claim for an excellent work bonus as such a payment required an assessment of the applicant's work which was outside the court's competence. The court also rejected the applicant's claim for unpaid benefits in 1997 and 1998 as being out of time, according to the law on employment disputes. The court further rejected the applicant's claim for benefits after 1 June 1999 as the Secondary Education Act, adopted in May 1999, had suspended them. The court, however, awarded the applicant the claimed increase in salary for the period between 1 January and 1 June 1999.

12. The applicant appealed against this decision to the Donetsk Regional Court.

13. On 4 November 1999 the regional court quashed the decision of the first instance court and remitted the case for a fresh consideration. The court noted, in particular, that the Secondary Education Act had entered into force on 23 June 1999; therefore the first instance court had erroneously overlooked the period between 1 and 23 June 1999.

14. On 24 February 2000 the Leninsky District Court of Donetsk ruled against the applicant. The court found that, under the transitional clauses of the Secondary Education Act, the provision entitling the applicant to benefits would only resume force on 1 September 2001. Thus, at the time of the examination of the claim, there was no legal basis for it.

15. On 30 March 2000, the Donetsk Regional Court upheld the decision of the first instance court. It observed that the claims of the applicant for the periods prior to the adoption of the Secondary Education Act could not be satisfied, since at the time of the consideration of the case the relevant provisions of the Education Act had been suspended by the Secondary Education Act. This decision was final.

II. RELEVANT DOMESTIC LAW

16. At the material time, Article 233 of the Labour Code of Ukraine provided that employees could institute proceedings in respect of an employment dispute within three months from the date on which they learned or could have been expected to learn that there had been an infringement of their rights. By an Act of 11 July 2001, this article was supplemented by a provision repealing time-limits for disputes concerning salary arrears.

17. Article 57 of the Education (Amendment) Act 1996 provided for a 20% increase in salary for teachers who had worked in the education system for more than 10 years. The same article provided for an annual payment for recreation and an annual bonus for the performance of excellent work.

Between 23 June 1999 and 1 September 2001 these provisions were suspended by the Secondary Education Act mentioned below.

18. The second paragraph of Article 43 of the Secondary Education Act of 13 May 1999 provided that teachers of State and municipal secondary schools would be paid their salaries and benefits under Article 57 of the Education Act out of the State Budget of Ukraine. The transitional clause of the former Act stipulated that Article 43 would enter into force on 1 September 2001.

THE LAW

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

19. The applicant complained that the refusal to pay him the benefits to which he was entitled by law, for the period 1997-1999, constituted a violation of his property rights. 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."

20. The Government stated that the applicant's complaint concerned neither an "existing possession" nor a "legitimate expectation". They further maintained that there was no unjustified interference with the applicant's property rights, since the national courts had not recognised the applicant's entitlement to a 20% increase in salary or annual bonuses, as the effect of the relevant legislative provision had been suspended. They further maintained that there was a conflict between two Acts - the Education Act and the State Budget Act - for the relevant year, but the provisions of the latter prevailed, being a *lex specialis*.

21. The applicant disagreed.

22. The Court reiterates that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning, which is not limited to ownership of physical goods and is independent of the formal classification in domestic law. Certain other rights and interests, for instance debts, constituting assets, can also be regarded as "property rights", and thus "possessions" for the purposes of this provision. The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant an entitlement to a substantive interest protected by Article 1 of Protocol No. 1 (see *Broniowski v. Poland* (dec.) [GC], no. 31443/96, § 98, ECHR 2002-X).

23. The Court considers that it is within the State's discretion to determine what benefits are to be paid to its employees out of the State budget. The State can introduce, suspend or terminate the payment of such benefits by making the appropriate legislative changes. However, once a legal provision is in force which provides for the payment of certain benefits and the conditions stipulated have been met, the authorities cannot deliberately refuse their payment while the legal provisions remain in force.

24. In the instant case, the provisions entitling the applicant to a 20% salary increase and certain annual bonuses were introduced in 1996 and then suspended in June 1999. The applicant's claims for these benefits should be divided into two parts, and the Court will consider them separately.

A. Periods prior to 1 January 1999 and after 23 June 1999

25. The Court notes that the decisions of the domestic courts to reject the applicant's claims for benefits for these periods were based on the domestic law. The courts could not examine the merits the applicant's claims for benefits for the period from 1997 to 1998 because they were time-barred (see paragraphs 11 and 16). The courts also rejected the applicant's claims for the period after 23 June 1999 as his entitlement had been suspended by the Secondary Education Act (see paragraphs 11 and 18). The Court does not discern any arbitrariness in the courts' decisions regarding these periods.

There has accordingly been no violation of Article 1 of Protocol No. 1 in respect of this part of the application.

B. Period between 1 January and 23 June 1999

26. The Court observes that the applicant's claim before the domestic authorities regarding the period between 1 January and 23 June 1999 was based on the express and effective provisions of domestic law at the material time (see paragraph 17 above). The salary increase was payable with reference to a single, objective condition – the length of time served by the applicant as a teacher. As the applicant fulfilled the 10 year condition, he can be said to have had a reasonable expectation, if not a right, to receive the payment in question. However, the payment of an excellent work bonus was dependent on more subjective factors, and required an assessment to be made of the applicant's performance. The Court does not accept the Government's budgetary argument, since it is not open to a State authority to cite a lack of funds as an excuse for not honouring its obligations (see, *mutatis mutandis*, *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III).

27. The Court notes that the domestic courts, during the second examination of the case, retroactively applied the Secondary Education Act to this period. The Court reiterates that civil legislation which has a retroactive effect is not expressly prohibited by the Convention, and in certain circumstances could be justified (see, *mutatis mutandis*, application no. 8531/79, Commission decision of 10 March 1981, Decisions and Reports (DR) 23, pp. 203-211). However, the Secondary Education Act itself does not contain any retroactive provisions and therefore the Court fails to comprehend the grounds on which the domestic courts applied this Act to the applicant's claim for the 20% salary increase for the period of 1 January to 23 June 1999. In sum, the ultimate denial by the domestic authorities of the applicant's entitlement to this benefit for the period in question appears to be arbitrary and not based on the law.

28. Therefore, there has been a violation of Article 1 of Protocol No. 1 as regards the period between 1 January and 23 June 1999.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant claimed UAH 5,000 (the equivalent of about 830 euros – "EUR") in respect of pecuniary damage and EUR 25,000 in respect of non-pecuniary damage.

31. The Government maintained that the applicant had no entitlement to any payment and no accurate calculation of his pecuniary damage had been presented. As to non-pecuniary damage, the Government considered that this claim was exorbitant, wholly unsubstantiated and unrelated to his complaint.

32. 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 1,500 in respect of damages.

B. Costs and expenses

33. The applicant claimed EUR 6,000 and UAH 240 (around EUR 38) for the costs and expenses incurred before the domestic courts and in the Convention proceedings.

34. The Government invited the Court only to award the applicant his postal costs which were confirmed by receipts. They maintained that the rest of the claim was unsubstantiated.

35. 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).

36. The Court considers that these requirements have not been entirely met in the instant case. However, it is clear that the applicant incurred some costs and expenses for his representation before the Court.

37. Regard being had to the information in its possession and to the above criteria, the Court considers it reasonable to award the applicant EUR 200 for costs and expenses.

C. Default interest

38. 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 no violation of Article 1 of Protocol No. 1 regarding the periods prior to 1 January 1999 and after 23 June 1999;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 regarding the period between 1 January and 23 June 1999;

3. *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 1,500 (one thousand five hundred euros) in respect of pecuniary and non-pecuniary damage, and EUR 200 (two hundred euros) in respect of costs and expenses;
   (b) that the above amounts 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;

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

Done in English, and notified in writing on 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President