CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF SMIRNOVA v. UKRAINE

(Application no. 36655/02)

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 Smirnova 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 11 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 36655/02) 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 Lidiya Vasilyevna Smirnova ("the applicant"), on 29 May 2002.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mrs Valeria Lutkovska.

3. On 23 November 2004 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1937 and lives in Kyiv.

5. In May 1997 the applicant instituted proceedings in the Bagaleysky District Court of Dneprodzerzhynsk (hereafter "the District Court") against Mr M. (her brother) for the division of their late parents' estate.

6. The first court hearing was held on 11 June 1997, when the defendant filed a counterclaim. The next sitting before the District Court was scheduled for 25 June 1997 but was adjourned at the defendant's request.

7. According to the Government, the hearing fixed for 22 July 1997 was cancelled on account of the applicant's failure to appear. The applicant

contested this submission, stating that she was present in court and that the hearing took place as scheduled.

8. On 9 September 1997 the applicant lodged a successful request for the removal of the judge.

9. At a hearing on 27 November 1997, the applicant obtained an adjournment.

10. On 18 December 1997 the defendant unsuccessfully challenged the participation of the trial judge and obtained an adjournment to summon witnesses. The adjournment was extended until 19 February 1998 at the applicant's request.

11. During February 1998 the court held three hearings and questioned a number of witnesses.

12. The Government stated that on 19 March 1998 the applicant sought, and was granted, a two-month adjournment. The applicant did not deny this but, in her observations, she mentioned two hearings that were held during this period.

13. According to the Government, on 20 May 1998 the court, at the defendant's request, ordered an assessment of the estate by a building expert and adjourned the hearing until 21 July 1998. The applicant enumerated, however, six hearings, allegedly fixed for this period, four of which were cancelled due to the defendant's failure to appear.

14. On 21 July 1998 the defendant unsuccessfully challenged the trial judge and the expert.

15. On 21 August 1998 the hearing was adjourned until October 1998 due to the defendant's failure to appear.

16. On 26 October 1998 the hearing was cancelled, according to the Government, due to the failure of the applicant's lawyer to appear; according to the applicant, it was because the defendant did not show up.

17. On 4 November 1998, the court, following the defendant's application, ordered an additional expert examination of the disputed property.

18. The applicant stated that on 21 December 1998 and 27 January 1999 the hearings were adjourned due to the defendant's absence in court. The Government did not mention any hearings having been fixed during this period.

19. On 15 January 1999 the expert institution informed the court that the requested examination was impossible due to a lack of relevant documentation and the deficiency of the questions posed to them. The institution requested that further documents be provided and the questions reformulated.

20. On 3 February 1999 the court reformulated its questions to the experts, ordered the defendant to pay the costs of the expert opinion and made an interim injunction to preserve the *status quo*.

21. On 20 August 1999 the expert opinion was delivered.

22. On 1 September 1999 the hearing was cancelled due to the applicant's failure to appear.

23. On 9 November 1999 the court adjourned the hearing on its own motion.

24. Between 11 November 1999 and 5 January 2000, the hearings were adjourned on four occasions due to the defendant's failure to appear. On 16 November 1999 the court issued a warrant to compel the defendant's presence. On 26 November 1999 a local constable informed the court that the warrant could not be executed as Mr M. was absent from his place of residence.

25. From 5 January to 5 June 2000 the court adjourned hearings on five occasions due to the applicant's absence in court.

26. On 5 June 2000 the defendant unsuccessfully challenged the judge.

27. Between 13 June and 18 October 2000 six hearings were cancelled due to the failure of the applicant (on one occasion), the defendant (on two occasion) and both parties (on three occasions) to appear in court.

28. From 18 October to 1 December 2000 the court held five hearings.

29. On 1 December 2000 the court allowed the applicant's claim, awarding her 77/100 of the disputed estate. In its judgment the court referred to the testimonies of eighteen witnesses and a wide range of documentary and expert evidence.

30. The defendant appealed. On 12 February 2001 the Dnipropetrovsky Regional Court quashed the judgment of 1 December 2000 and remitted the case for fresh consideration.

31. On 10 April 2001 the District Court remitted the case for trial.

32. On 26 April and 28 May 2001 the hearings were adjourned on account of the applicant's failure to appear.

33. At hearings on 15 August 2001 and 11 September 2001, the applicant sought and obtained adjournments to amend her claims.

34. On 18 September 2001 the applicant filed an appeal under the new cassation procedure against the decision of 12 February 2001. The applicant was refused leave to appeal and was given time to rectify the procedural defects of that cassation appeal.

35. On 17 October 2001 the applicant lodged an amended claim and the defendant applied for an adjournment to familiarise himself with it.

36. On 18 October 2001 the hearing was adjourned at the applicant's request.

37. Between 8 November 2001 and 4 February 2002, the hearings were cancelled on four occasions due to the applicant's failure to appear.

38. On 4 February 2002 the judge granted an adjournment at the applicant's request pending the examination of her cassation appeal.

39. On 15 March 2002 the Supreme Court rejected the applicant's appeal in cassation.

40. On 10 May 2002 the District Court resumed the consideration of the case; however it had to adjourn the hearing due to the applicant's absence. From then onwards until 25 December 2002 the applicant failed to appear for eight sittings.

41. From 31 January to 1 December 2003 the court held five and cancelled three hearings (one hearing was cancelled due to the applicant's failure to appear, one because the judge was occupied with another case and the last one due to a third person's illness).

42. Between 1 December 2003 and 2 February 2004 three sittings were adjourned because of the applicant's failure to appear and her illness.

43. On 3 February 2004 the applicant asked the court to hear the case in her absence.

44. On 10 February 2004 the court heard witnesses.

45. The hearings fixed for 26 February and 9 March 2004 were cancelled due to a third person's failure to appear. On 25 March 2004 the court decided to hear the case in that person's absence. The court, at the defendant's request, ordered a further expert opinion on the disputed property.

46. On 29 April 2004 the District Court delivered a judgment, partly granting the applicant's claim. However, Mr M.'s share in the estate was increased to 28 %.

47. The defendant appealed against this judgment. The District Court invited the applicant to comment on the appeal. Having received the applicant's comments, on 16 June 2004 the court referred the case to the Court of Appeal of the Dnipropetrovsk Region.

48. On 7 September 2004 the Court of Appeal quashed the judgment of 29 April 2004 and remitted the case for fresh consideration.

49. The case resumed on 23 October 2004, however the court had to adjourn this hearing as well as the next one due to the applicant's failure to appear. On 7 December 2004 the applicant asked the court to proceed with the case in her absence.

50. On 10 December 2004 the defendant (apparently unsuccessfully) challenged the participation of all judges of the District Court and requested that the case be remitted to another court.

51. The case is still pending before the District Court.

II. RELEVANT DOMESTIC LAW

52. Section V of the Code of Civil Procedure regulates the review of judicial decisions. It envisages the following principal remedies:

- an appeal which, under Articles 290 and 291, can be brought against judgments and certain interlocutory decisions of the first instance courts;
- a cassation appeal which, under Article 320, can be lodged with the Supreme Court against judgments and decisions of the first instance

courts, which have previously been examined by the appellate courts and the judgments and decisions of the appellate courts; and

- a review of final judgments and decisions on the grounds of new or extraordinary circumstances.

There is no specific provision in the Code providing for remedies against the inactivity on the part of the judiciary in the course of civil proceedings.

53. Article 172 of the Code provides that if the duly summoned defendant repeatedly fails to appear in courtroom the court may, of its own motion, decide to proceed with the case in his/her absence. If the defendant's repetitive failure to appear had no valid reasons, the court may fine him/her three times the monthly minimum wage (see *Sukhovetskyy v. Ukraine* (dec.) no. 13716/02, 1 February 2005).

THE LAW

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

54. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, provided in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

55. The Government contested the claim.

56. The Court notes that the applicant instituted the proceedings in May 1997. However, the period to be taken into consideration began only in September 1997, when the Convention entered into force in respect of Ukraine. The period in question has not yet ended. It has thus lasted over eight years.

A. Admissibility

57. The Government maintained that the applicant had not exhausted the domestic remedies available to her, in that she had failed to lodge with the Supreme Court a cassation appeal against the Court of Appeal's decision of 7 September 2004 (paragraph 48 above).

58. The applicant did not comment on this argument.

59. The Court recalls that the purpose of Article 35 § 1 of the Convention is to afford 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 (see, among many others, *Voytenko v. Ukraine*,

no. 18966/02, § 29, 29 June 2004). To be effective the remedy must be capable of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see, *mutatis mutandis*, *Krasuski v. Poland*, no. 61444/00, § 66, ECHR 2005–...).

60. The Court notes that in the present case recourse to the cassation procedure could neither afford the applicant compensation for any alleged breach of the right to a hearing within a reasonable time nor speed up the examination of the case. If anything, it would have contributed to the further prolongation of the case, for months (cf. paragraphs 34 and 39 above) or even years (see *Pavlyulynets v Ukraine*, no. 70767/01, § 19, 6 September 2005).

61. 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.

62. The Court concludes that the application 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 grounds. It must therefore be declared admissible.

B. Merits

63. The Government were of the view that the case, while posing no specific difficulties regarding the law, had a certain factual complexity, as it was necessary to establish the exact contents of the estate over several decades. The Government stated that the domestic courts had displayed due diligence in the conduct of the proceedings by scheduling hearings at regular intervals. The Government further observed that the applicant was primarily responsible for the length of the proceedings by failing to appear in court on a number of occasions.

64. The applicant maintained that the proceedings were not conducted with sufficient diligence. She further pointed out that she was responsible for a small number of adjournments of the hearings compared to those caused by the defendant. The applicant also alleged that her ability to appear in court was affected by the fact that she permanently resided in Kyiv, which is several hundreds kilometres from Dneprodzerzhynsk, where the hearings were conducted.

65. The Court first notes that the parties disagreed somewhat over the order and dates of the proceedings that took place in the period July 1997 to January 1999 (paragraphs 12, 13, 16 and 18 above). The Court finds it unnecessary to determine this issue since the disputed facts partly fall outside its jurisdiction *ratione temporis*, and, in any case, they do not significantly affect the general picture of the progress of the case.

66. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case

and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

67. The Court finds no reason to disagree with the Government that the present case disclosed a certain factual complexity as it concerned the development of real estate since the 1960s, which required the court to order an expert examination of the disputed property and to question a number of witnesses.

68. The Court observes that the applicant was undoubtedly responsible for a number of delays. It notes that during the examination of the case, which is still pending, the applicant requested five adjournments and did not appear for at least thirty sittings. The Court finds unpersuasive the applicant's argument that the proceedings were conducted in a city situated far from her current place of residence. It notes that, when lodging her claim, the applicant was well aware of the normal obligations and inconveniences that are associated with participation in civil litigation.

69. However, the Court considers that the domestic authorities have also heavily contributed to the protraction of the proceedings. This particularly concerns the authorities' failure to effectively constrain the defendant's deliberate obstruction of the progress of the case. In this respect the Court, unlike the Government, cannot attribute to the applicant the delays associated with the defendant's challenge to the trial judge on four occasions, his request for a new expert examination on two occasions and his failure to appear in court on a number of occasions. The Court notes that, whilst domestic law provided no specific remedy against these delaying tactics, the courts had at their disposal ample machinery to ensure the defendant's presence in the courtroom (paragraph 53 above). However, it does not appear from the case file that the authorities ever considered the possibility of imposing a fine on Mr M. or of proceeding with the case in his absence. It was not until November 1999 (that is to say, two years and six months after the beginning of the litigation) that the court issued a warrant for the defendant's compulsory presence, which, subsequently, went unenforced as his whereabouts were unknown.

The Court notes that, while it is true that the applicant never objected to the extensions and adjournments requested or caused by the defendant, this does not exempt the courts from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the competent authorities (see *Mitchell and Holloway v. the United Kingdom*, no. 44808/98, § 56, 17 December 2002).

70. The Court observes that the protracted length of the proceedings was also to a large extent due to the re-examinations of the case. However, the case (according to the Government's own submissions) was not legally

complex. The Court considers that a two and a half year trial, which culminated in the judgment of 1 December 2000 and involved questioning eighteen witnesses and the examination of a wide range of documentary and expert evidence, appears sufficient to establish all relevant facts. Nonetheless, the case was, thereafter, considered in the first instance on two more occasions. Although the Court is not in a position to analyse the quality of the adjudication by the domestic courts, it considers that, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system (see *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003).

71. Having regard to its case-law on the subject, the Court considers that, in the instant case, the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

72. There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

73. The applicant also complains about the length of the proceedings under Article 1 of Protocol No. 1.

74. The Court considers that, whilst this complaint is clearly admissible, it does not give rise to any separate issue (see, for example, *Zanghì v. Italy,* judgment of 19 February 1991, Series A no. 194-C, § 23, and *Di Pede v. Italy,* judgment of 26 November 1996, *Reports* 1996-IV, no. 17, § 35).

75. Consequently, no issues arise under that provision requiring the determination of the Court.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed 22,464 euros (EUR) in respect of pecuniary and non-pecuniary damage.

78. The Government contested the claim.

79. 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 considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards award her EUR 1,000 under that head.

B. Costs and expenses

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

C. Default interest

81. 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that no separate issues arise under Article 1 of Protocol No. 1;

4. *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 1,000 (one thousand euros) in respect of non-pecuniary damage, to 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;
   (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 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President