



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

SECOND SECTION

CASE OF MELNYK v. UKRAINE

(Application no. 23436/03)

JUDGMENT

STRASBOURG

28 March 2006

FINAL

28/06/2006

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 Melnyk 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 Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 7 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 23436/03) 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 Galyna Ivanivna Melnyk (“the applicant”), on 10 July 2003.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs V. Lutkovska.

3. On 24 March 2005 the Court decided to communicate the complaint under Article 6 § 1 of the Convention concerning lack of access to court 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 1954 and lives in the village of Bilashky, the Vinnitsa region of Ukraine.

5. In 2001 the applicant instituted proceedings in the Staromiskiy Local Court of Vinnitsa against her former employer – the “Vinnitska Kondyterska Fabryka” Open Joint Stock Company – to be reinstated in her position and to receive compensation.

6. On 12 November 2001 the court discontinued proceedings in the applicant's case on the ground that she had failed to appear before the court.

7. On 27 February 2002 the Vinnitsa Court of Appeal upheld the ruling of 12 November 2001. On 26 April 2002 the applicant appealed in cassation.

8. On 29 April 2002 the Staromiskiy Local Court rejected the applicant's request for a cassation appeal as having been submitted too late. The court stated that, under the new wording of Article 321 of the Code of Civil Procedure (hereinafter - "the CCP"), which had entered into force on 4 April 2002, the time-limit for lodging an appeal in cassation was one month, and that the applicant had exceeded that time-limit by only lodging her appeal on 26 April 2002. No reference was made in the decision to the actual deadline which had not been complied with.

9. On 9 September 2002 the Vinnitsa Court of Appeal upheld the ruling of 29 April 2002.

10. On 5 February 2003 the panel of three judges of the Supreme Court rejected the applicant's request for leave to appeal in cassation against the rulings of 29 April and 9 September 2002.

II. RELEVANT DOMESTIC LAW

1. Constitution of Ukraine of 1996

11. The first paragraph of Article 58 of the Constitution provides that laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person.

2. The Code of Civil Procedure of 1963 (with amendments)

12. At the time of the second instance appellate decision, the first paragraph of Article 321 of the CCP provided that a cassation appeal should be lodged within three months of the appellate decision or within a year of the decision of the first instance court, if the latter decision was not appealed under the normal appellate procedure.

13. On 7 March 2002 the Ukrainian Parliament passed a law amending the CCP (hereinafter – "the Amendment Law"), including the Article in question. It came into force on 4 April 2002. The new wording of Article 321 created a one month time-limit for lodging a cassation application against the decision of an appellate court.

THE LAW

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

14. The applicant complained that by the decision on discontinuation of her labour dispute case, and by the refusal to admit her cassation appeal against that decision, she was deprived of access to the court in violation of Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

1. The Government’s preliminary objection

15. The Government maintained that the applicant did not request the domestic courts to extend the deadline for lodging a cassation appeal and, therefore, she did not exhaust the remedies available to her. They considered that such a request is an effective remedy to be used.

16. The applicant replied that she had not missed the deadline for lodging her cassation appeal and therefore she did not need to request any extension. She maintained that she had exhausted all effective domestic remedies by challenging the refusal of the first instance court to accept her cassation appeal before the higher courts.

17. The Court notes that the applicant’s complaints about a lack of access to court are twofold. Insofar as the applicant raises this complaint with respect to the decision of the Staromiskiy Local Court of 12 November 2001 to discontinue the proceedings in her case, the remedy invoked by the Government could be relevant to the original proceedings since the applicant failed to appeal to the Supreme Court. This aspect of the complaint must therefore be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

18. However, insofar as the applicant complains about a lack of access to the court of cassation, the Court notes that the applicant challenged the decision refusing her such access before all instances. Accordingly, the Government’s objection to this complaint should be rejected as being irrelevant.

2. Conclusion on admissibility

19. The Court notes that the complaint about a lack of access to the court of cassation 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 and the remainder of the complaints under Article 6 § 1 be declared inadmissible.

B. Merits

20. The Government maintained that the applicant's right to a court was not infringed since her case was considered at two instances. The Government considered that the issue raised by the applicant is similar to that considered by the Court in the case of *Brualla Gómez de la Torre v. Spain* (judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII). The Government maintained that the procedural changes took immediate effect, that the access to the cassation instance could be stricter and that the changes were foreseeable since they logically continued the judicial reform started in June 2001.

21. The applicant maintained that the old procedural rules had to apply in her case, since the decision against which she appealed had been taken prior to the entry into force of the Amendment Law.

22. The Court reiterates that the right to a court, of which the right of access is one aspect (see the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 18, § 36), is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict the exercise of the right in such a way or to such an extent that its very essence is impaired. They must pursue a legitimate aim and there must be a reasonable degree of proportionality between the means employed and the aim sought to be achieved (see the *Guérin v. France* judgment of 29 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 1867, § 37).

23. The rules on time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy (see the *Pérez de Rada Cavanilles v. Spain* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3255, § 45). The Court underlines that, since the issue concerns the principle of legal certainty, it raises not only a problem of the interpretation of a legal provision in the usual way, but of an unreasonable construction of a procedural requirement which may prevent a claim being examined on the merits, thereby entailing a breach of the right to the effective protection of the courts (see, *mutatis mutandis*, the *Miragall Escolano and others v. Spain*

judgment, no. 38366/97, § 37, ECHR 2001-I; *Zvolský and Zvolská v. the Czech Republic* judgment, no. 46129/99, § 51, ECHR 2002-IX).

24. Moreover, the manner in which Article 6 applies to courts of appeal or cassation must depend on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them (see, for instance, the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, p. 22, § 56, and the *Helmers v. Sweden* judgment of 29 October 1991, Series A no. 212-A, p. 15, § 31); the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal (*Levages Prestations Services v. France* judgment of 23 October 1996, *Reports* 1996-V, p. 1544, § 45).

25. The Court notes that, in the instant case, the applicant appealed in cassation after her case had been considered by the first instance and appellate courts. The Court recalls that, as it has previously held, an appeal in cassation in the Ukrainian civil procedure may be considered an effective remedy, within the meaning of Article 35 § 1 of the Convention, for lower court decisions taken after 29 June 2001, and therefore has to be exhausted (see *Vorobyeva v. Ukraine* (dec.), no. 27517/02, 17 December 2002). This was the applicant's situation when the decision of the appellate court was adopted on 27 February 2002.

26. The Court further notes that the applicant's request for leave to lodge an appeal was declared inadmissible on the ground that it had not been filed within the time-limit provided by Article 321 of the CCP. In the Court's opinion, as with the case of *Osu v. Italy* (no. 36534/97, judgment of 11 July 2002), it is necessary to examine whether the calculation of the period for the running of the time-limit could be regarded as foreseeable from the point of view of the applicant.

27. The Court does not question the generally recognised principle of the immediate effect of procedural changes to pending proceedings (see *Brualla Gómez de la Torre v. Spain*, cited above, § 35). This principle was also confirmed in the case of *Vorobyeva v. Ukraine* (cited above), where the applicant failed to exhaust the remedy which was introduced whilst the judicial proceedings were still pending.

28. The Court notes in the present case that, in the absence of any transitional or retroactive specification in the amended provisions, the applicant could reasonably have expected the new deadline to have been brought forward to 4 May 2002 (a month after the Amendment Law came into force). The Court considers that such a deadline was foreseeable for the applicant, as she would still have had a month to lodge her appeal after the amendments had been promulgated, even though this new deadline curtailed the original time-limit under the old provisions of the CCP (i.e. 27 May 2002, three months after the decision of the Vinnitsa Court of Appeal, against which the cassation appeal was made).

29. However, the Court observes that neither of the aforementioned deadlines was exceeded by the applicant, who lodged her appeal in cassation on 26 April 2002. Nevertheless, the Staromisky Local Court rejected the applicant's request on 29 April 2002 as having been lodged out of time on the basis of the new law of 4 April 2002. This suggests that the provisions of the latter were to be applied retroactively in the applicant's case, requiring her to have lodged a cassation appeal within a month of the court of appeal decision (i.e. on 27 March 2002) even before the Amendment Law had come into force. The Court doubts whether, in these circumstances, the decision of the first instance court on 29 April 2002, as upheld by the appellate and cassation courts, could be considered foreseeable under the relevant domestic legislation.

30. The Court reiterates that retrospective civil legislation is not expressly prohibited by the provisions of the Convention and in certain circumstances may be justified (see, *mutatis mutandis*, no. 8531/79, Commission decision of 10 March 1981, Decisions and Reports 23, pp. 203-211). Nevertheless, where the issue of an effective remedy is concerned, the remedy in question must already exist with a sufficient degree of certainty (see, *Vorobyeva v. Ukraine*, cited above). In this regard, the Court takes the view that the retroactive application of civil procedural law would undermine the principle of legal certainty and would be contrary to the rule of law when it deprives a person of access to a remedy which is deemed to be effective for the purposes of Article 35 § 1 of the Convention.

31. The Court finally notes that the essence of the procedural changes in the present case was to speed up civil proceedings and, accordingly, to reduce their overall length. There is nothing to suggest that it was aimed, like in the *Brualla Gómez de la Torre* case (cited above), at limiting access to the third instance court to any particular category of cases. Nevertheless, despite their clearly legitimate aim, in the Court's opinion the refusal of the applicant's cassation appeal was not proportionate to the purpose of these procedural changes.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

32. The applicant also invoked Articles 1 and 13 of the Convention in relation to the same complaint, without any further specification. The Court considers that this aspect of the complaint is wholly unsubstantiated. It follows that it is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant requested the Court to award her damages, without any substantiation or quantification of her claim.

35. The Court, on an equitable basis, awards the applicant EUR 500 in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

37. 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 complaint concerning the lack of access to the court of cassation under Article 6 § 1 of the Convention 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*
 - (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 500 (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 amount 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 28 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President