CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FORMER SECOND SECTION

CASE OF EFIMENKO v. UKRAINE

(Application no. 55870/00)

JUDGMENT

STRASBOURG

18 July 2006

FINAL

11/12/2006

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 Efimenko v. Ukraine,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr V. BUTKEVYCH,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 13 December 2005 and on 27 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 55870/00) 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, Mrs Svetlana Aleksandrovna Efimenko ("the applicant"), on 1 September 1999.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska and Mr Yu. Zaytsev, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that the domestic courts failed to decide her property dispute in due time and that she had no effective remedy in respect of these complaints.

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 13 December 2005, the Court declared the application partly admissible.

6. On 1 April 2006 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Second Section.

7. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1964 and lives in the city of Zaporizhzhya, Ukraine.

9. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background of the case

10. From November 1994 until September 1996 the applicant worked as a lawyer in the Avers Ltd. auditing company (hereinafter – the "Company"), of which she was a shareholder. Her share in the Company's capital was 30 %.

11. On 2 September 1996, the applicant handed an application attested by a notary and dated 12 August 1996 to Mrs. N., director and holder of 70 % of shares in the Company's capital, notifying the latter of her decision to withdraw from the Company. The same day, Mrs N. together with Mrs L. and Mrs K. held a general meeting of shareholders and decided to admit Mrs L. and Mrs K. to the Company and to expel the applicant. On 12 September 1996, the Executive Committee of the Ordzhenikidzevsky District Council of Zaporizhzhya (hereinafter – the Executive Committee) passed decision no. 756-P about registration of the changes to the statutory documents of the Company by which the applicant was expelled from the Company on the basis of her application of 2 September 1996 and of the minutes of the general meeting of shareholders of the same day.

12. On 31 January 1997 the Company decided that the value of the applicant's share was UAH 2,629.20[1]. The applicant maintained that according to the accounting documents her share had to be UAH 294,180[2].

13. On 6 November 1997 the Executive Committee passed decision no. 143 on termination of the State registration of the Company on the basis of the decision of the meeting of shareholders of the Company of 28 October 1997.

14. On 23 March 1998 the liquidation commission issued an act on termination of the liquidation procedure of the Company.

1. Around 405 euros ("EUR").
2. Around EUR 45,259.

B. First set of proceedings

15. On 20 November 1996, the applicant lodged a claim with the Ordzhenikidzevsky District Court of Zaporizhzhya against the Company to receive compensation for her share in the Company's assets.

16. On 25 November 1996 the court gave a ruling on attachment of the defendant's car and bank accounts to secure the claim.

17. On 11 August 1997 the court also ordered the seizure of the vehicle VAZ 21099 that belonged to the defendant.

18. Between December 1996 and 3 April 2003, the first instance court scheduled the applicant's case for hearing twenty-five times. During the said period only four hearings in the case were held and on twenty-one occasions the hearings were postponed on different grounds. Four times the case was transferred from one judge to another following motions of the applicant or the defendant, or due to expiry of the judge's term of office. The case was also transferred from one first instance court to another at the request of the applicant. The proceedings were suspended on several occasions at the applicant's request.

19. On 18 December 1997 the director of the Company informed the court that by the order of the Executive Committee the Company had been liquidated.

20. On 29 December 1997 the court ordered seizure of office equipment of the Company.

21. In January 1998 the bailiff informed the court that there was no property in the Company because it had been liquidated.

22. On 26 August 1998 Judge S. upon the applicant's request sent letters of inquiry concerning the Company's debtors.

23. On 21 February 2003 the tax authorities, in reply to the inquiry of Judge M.B., informed the latter that the Company's registration had been cancelled in 1999.

24. On 28 February 2003 Judge M.B. issued a ruling obliging the applicant to inform the court about the successors of the Company.

25. On 3 April 2003 Judge M.B. discontinued the proceedings in the case due to the failure of the applicant to appear before the court and to submit the requested information. The applicant maintained that she had learned about this decision only from the Government's observations on her application before the Court.

26. On 20 February 2004, when the applicant changed her original claim by replacing the defendant Company by the members of the liquidation commission of the Company, the proceedings were resumed.

27. On 5 November 2005 the Leninsky District Court rejected the applicant's claim on the ground that the liquidation commission could not be held responsible for the debts of the Company that it had liquidated.

28. On 22 December 2005 the Zaporizhzhya Court of Appeal rejected the applicant's appeal for failure to pay the court fee in full. The applicant appealed to the Supreme Court. The proceedings are still pending.

C. Second set of proceedings

29. On 14 January 1997[1] the applicant lodged a claim with the Ordzhenikidzevsky District Court of Zaporizhzhya against the Company and the Executive Committee to invalidate the decisions of 2 and 12 September 1996 and to restore her status as a shareholder of the Company.

30. From 17 October 1997, the first instance court scheduled the applicant's case for hearing seventeen times. During the said period only two hearings in the case were held and on fifteen occasions the hearings were postponed on different grounds. Four times the case was transferred from one judge to another following motions of the applicant or the defendant, or due to expiry of the judge's term of office. The case was also transferred from one first instance court to another at the request of the applicant. The proceedings were suspended on several occasions at the applicant's request.

31. On 6 January 1998 the applicant supplemented her original claim by requesting the court to invalidate the decision of the Company of 28 October 1997 and the decision of the Executive Committee of 6 November 1997 on termination of the State registration of the Company.

32. On 18 February 1998 Judge S. summoned the head of the Company's liquidation committee to appear at the hearing on 24 March 1998.

33. On 24 March 1998 the court hearing was adjourned because the Company's lawyer requested that certain documents be demanded and a witness be summoned.

34. On 31 March 1998, when the Company was still in the State register of enterprises, the Ordzhenikidzevsky District Court issued a ruling prohibiting the Executive Committee from issuing orders to liquidate the Company.

35. On 4 June 1998 the court held a hearing in the absence of both parties and decided in favour of the applicant and quashed the decisions of both the shareholders' meetings and the Executive Committee.

36. On 19 February 1999 the Presidium of the Zaporizhzhya Regional Court quashed the decision of 4 June 1998 under the supervisory review

1. The Government maintained that the applicant lodged her claim only on 17 October 1997, even though the applicant's information is supported by the materials, in which 14 January 1997 is indicated as a date of lodging of her claim.

procedure and remitted the case to the Ordzhenikidzevsky District Court for a fresh consideration.

37. On 15 September 1999 the case was referred to the Leninsky District Court of Zaporizhzhya following the applicant's request. In the absence of any further information from the parties, it appears that these proceedings are still pending.

D. Third set of proceedings

38. On 28 August 1997 the applicant lodged a claim with the Ordzhenikidzevsky District Court of Zaporizhzhya against Mr L.A.F. (a son-in-law of the director of the Company) to invalidate the sales contract for the car (mentioned in the first set of the proceedings), concluded between the Company and Mr L.A.F. The same day the court started the proceedings and ordered the seizure of the impugned vehicle.

39. Since 28 August 1997, the first instance court has scheduled the applicant's case for hearing seventeen times, but all of the hearings were postponed on different grounds. Three times the case was transferred from one judge to another following motions of the applicant or the defendant, or due to expiry of the judge's term of office. The case was also transferred from one first instance court to another at the request of the applicant.

40. On 17 March 1998 the court passed a ruling on the assignment of the car to the applicant's charge pending delivery of a judgment in the case.

41. On 15 September 1999 the case was referred to the Leninsky District Court of Zaporizhzhya following the applicant's request.

42. On 17 March 2003 the tax administration informed the court that the Company registration had been cancelled as from 1999.

43. On 4 March 2004 the Leninsky District Court invalidated the sales contract and awarded the car to the applicant. This decision became final on 5 May 2004.

II. RELEVANT DOMESTIC LAW

1. Constitution of 1996

44. Relevant provision of the Constitution reads as follows:

Article 9

"International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."

2. Judicial System Act

45. Relevant provisions of the Act read as follows:

Article 73. The status of the qualifications commission of judges

"... The tasks of the qualifications commission shall be ... the examination of issues concerning the disciplinary liability of judges ..."

Article 96. General conditions of the disciplinary liability of judges

"A judge may incur disciplinary liability in compliance with the disciplinary procedure on the grounds specified by the Law of Ukraine "on the status of judges"."

Article 97. Disciplinary proceedings against judges

"...2. The right to initiate disciplinary proceedings against a judge shall belong to the following persons: the people's deputies of Ukraine; the Ombudsman for Human Rights of the Verkhovna Rada [Parliament] of Ukraine; the Minister of Justice of Ukraine; the chairman of a higher specialized court – against a judge of a relevant specialized court where the judge holds a post, except the initiation of dismissal of a judge; the chairman of a relevant council of judges, also members of the Council of Judges of Ukraine."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

46. The Government maintained that, in so far as the applicant complained about the length of the court proceedings, she could introduce a complaint concerning the delay in the proceedings with the Regional Court, relying directly on Article 6 of the Convention, and the court would have to react to it. As an example, the Government furnished a separate ruling given by a Regional Court within a set of civil proceedings, where the court, with reference to the provisions of Article 6 of the Convention, decided to inform the Regional Qualifications Commission about delays in proceedings caused by a judge of a first instance court. In the Government's opinion, such a decision could entail the disciplinary liability of the judge who was responsible for the delay in the proceedings.

47. The applicant observed that direct appeal to the provisions of the Convention before the domestic courts in Ukraine was not a usual practice, and that the decision of the Mykolaiv Regional Court submitted by the Government in support of their objection could be considered as an exception rather than a rule.

48. The Court notes that under Ukrainian law the Convention is part of the domestic legislation and could be invoked by physical and legal persons within domestic judicial proceedings. However, in the Court's opinion, the mere possibility of raising a complaint under the Convention before the

domestic courts is not sufficient to reach a conclusion about the effectiveness of a particular domestic remedy. The relevant domestic authorities in such situations should be competent to take measures which can either prevent or compensate for the alleged violation (see, *mutatis mutandis*, *Glova and Bregin v. Ukraine*, nos. 4292/04 and 4347/04, §§ 13-14, 28 February 2006).

49. The Court notes that the Government made a general remark about the domestic courts' competence and obligation to react to a complaint about the length of the proceedings. They did not, however, give any other explanations, except to refer to the possibility of having the case judge's disciplinary liability established by informing the Qualifications Commission. The Court, therefore, will proceed with an examination of this particular remedy. It observes that, as it appears from the relevant legislation (see paragraph 45 above), neither the parties to the proceedings nor even the courts themselves are competent to initiate disciplinary proceedings against a judge. Therefore, leaving aside the issue of whether such disciplinary proceedings in themselves may be said to meet other criteria of an effective remedy within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Kormacheva v. Russia*, no. 53084/99, § 61-62, 29 January 2004), this remedy is not independent of discretionary action by the authorities and is not directly available to those concerned (see *Kucherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999). It could not, therefore, be considered effective for Convention purposes.

50. 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. Accordingly, the Court dismisses the Government's preliminary objection.

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

51. The applicant's complaint relates to the length of the three sets of proceedings. The first set of the proceedings began on 20 November 1996 and is still pending. The second set of proceedings began on 14 January 1997 and is still pending. The third set of the proceedings began on 28 August 1997 and ended on 5 May 2004. The first set of the proceedings has therefore already lasted eight years and eight months (the period between 3 April 2003 and 20 February 2004 not being taken into account as the proceedings had been discontinued), of which seven years and ten months falls within the Court's competence *ratione temporis* (from 11 September 1997 to date). The second set of proceedings has already lasted nine years and five months, of which eight years and eight months falls within the Court's competence *ratione temporis* (from 11 September 1997 to date). The third set of proceedings lasted six years and eight

months, of which six years and seven months falls within the Court's competence *ratione temporis* (from 11 September 1997 until 5 May 2004).

52. According to the applicant, the length of the proceedings is in breach of the "reasonable time" requirement of Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

53. The Government maintained that the length of the proceedings was caused by the applicant's behaviour. The Government submitted that the applicant instituted several sets of proceedings with mutually exclusive claims, objected to holding the hearings in the absence of the defendant, and made several requests for suspension of the proceedings and for substitution of the case judge.

54. The applicant maintained that the second and third sets of proceedings were aimed at securing her claim in the first set of proceedings. She further maintained that she had never objected to holding court hearings in the absence of the defendant and even requested the court to hold the hearings despite such absence.

55. The Court notes the dispute between the parties concerning the extent to which the applicant contributed to the length of the proceedings. Nevertheless, the fact remains that during the main part of the first set of proceedings, which lasted well over six years from 20 November 1996 until 3 April 2003, the domestic courts held only four hearings, at none of which were all the parties present or the necessary documents available. Moreover, it appears from the case file that between 1999 and 2003 the proceedings before the first-instance court were pending although the principal defendant in the case had ceased to exist. These elements are sufficient for the Court to find a violation under this head.

56. These arguments are equally pertinent, *mutatis mutandis*, to the second and third sets of proceedings.

57. The Court recalls that it has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the present application (see *Svetlana Naumenko v. Ukraine*, no. 41984/98, §§ 77-87, 9 November 2004).

58. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present case.

There has accordingly been a breach of Article 6 § 1 with respect to all three sets of proceedings.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

59. The applicant complained under Article 13 of the Convention of the alleged lack of an effective remedy in respect of her complaint about a violation of Article 6 of the Convention.

60. Article 13 of the Convention provides:

> "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."

61. The Government maintained that no separate issue arose under Article 13 of the Convention and that the applicant had effective domestic remedies which she had failed to exhaust. In particular, the applicant could challenge before the Regional Court any procedural step taken by the first-instance court which in her opinion contributed to the delay in the proceedings. They also referred to the remedies invoked in their preliminary objection.

62. The applicant pointed out that she had filed numerous complaints with different institutions, including higher courts, about the proceedings, but to no avail.

63. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI).

64. The Court notes that the reasoning for rejection of the Government's preliminary objection is equally pertinent to this complaint of the applicant. As to the other remedies invoked by the Government, the Court notes that the circumstances of the present case clearly demonstrated that any challenge to procedural decisions and to the case judges led to further delays in the proceedings, and the overall delay was never acknowledged or compensated. The Court therefore concludes that in the present case there has been a violation of Article 13 of the Convention.

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

65. The applicant complained that the domestic courts, by taking an unreasonably long time to consider her claims, failed to protect her property rights. She invoked Article 1 of Protocol No. 1 which provides as relevant:

> "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."

66. The Government maintained that the applicant's claims before the domestic courts were so contradictory that the State could not be blamed for

failure to protect her property rights as the applicant could not formulate with sufficient precision which aspect of her property rights should be protected.

67. The applicant contended that the steps which she took in the judicial proceedings had been logical and could be explained by her wish to secure her property rights to a share in the property and the profits of the Company.

68. However, having regard to its finding under Article 6 § 1 (see paragraph 58 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 1 of Protocol No. 1 (see *Zanghì v. Italy*, judgment of 19 February 1991, Series A no. 194-C, p. 47, § 23).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed USD 137,506.00 (the equivalent of EUR 106,697) in respect of pecuniary damage and USD 60,000.00 (the equivalent of EUR 46,560.00) in respect of non-pecuniary damage.

71. The Government contested these claims.

72. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, ruling on an equitable basis, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

73. The applicant also claimed UAH 2,080, which was approximately equal to USD 1,040.00 at the material time (the equivalent of about EUR 807), for the costs and expenses incurred before the domestic courts.

74. The Government maintained that the applicant could not claim before the Court any expenses incurred in the domestic proceedings. They further noted that the applicant had submitted supporting documentation only in the amount of UAH 2,120, and that one of the receipts for UAH 500 is not stamped and therefore should be disregarded. Nevertheless, the Government left the matter to the Court's discretion.

75. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers that the sum claimed should be awarded in full.

C. Default interest

76. 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. *Dismisses* the Government's preliminary objection;

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 is no need to examine separately the complaint under Article 1 of Protocol No. 1 to the Convention;

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 3,000 (three thousand euros) in respect of non-pecuniary damage and EUR 807 (eight hundred and seven euros) in respect of costs and expenses, 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 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 18 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President