



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

FIFTH SECTION

**CASE OF SOKURENKO AND STRYGUN v. UKRAINE**

*(Applications nos. 29458/04 and 29465/04)*

JUDGMENT

STRASBOURG

20 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 Sokurenko and Strygun v. Ukraine,**

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

Mr P. LORENZEN, *President*,

Mrs S. BOTOUCHAROVA,

Mr V. BUTKEVYCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr R. MARUSTE,

Mr J. BORREGO BORREGO,

Mrs R. JAEGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 29 May and 26 June 2006,

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

## PROCEDURE

1. The case originated in two applications (nos. 29458/04 and 29465/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mr Mykola Ivanovych Sokurenko and Mr Anatoliy Mykhaylovych Strygun (“the applicants”), on 30 June 2004.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Mrs V. Lutkovska and Mr Yu. Zaytsev.

3. On 22 September 2005 the Court decided to communicate the applications to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the applications at the same time as their admissibility.

4. On 1 April 2006 this case was assigned to the newly constituted Fifth Section (Rule 25 § 5 and Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicants live in the village of Samgorodok, the Cherkassy region, Ukraine.

6. In February 2002 the “Agro-Ros” Ltd company instituted two sets of proceedings against the Smilyanskiy District Council and each of the

applicants, challenging the decision of the Council to provide the applicants with certain plots of land.

7. By two decisions of 12 August 2003, the Cherkassy Regional Commercial Court found against the applicants. On 18 November 2003 the Kyiv Commercial Court of Appeal dismissed the applicants' appeals and upheld the decisions of the first-instance court.

8. On 16 March 2004 the Higher Commercial Court of Ukraine, upon the applicants' appeals, quashed the decisions of the lower courts and remitted the case for a fresh consideration.

9. On 25 May 2004 the Supreme Court of Ukraine, upon appeal of the "Agro-Ros" Ltd company, quashed the resolutions of the Higher Commercial Court (*постанови Вищого господарського суду*) on the ground that the findings of the Higher Court had not corresponded to the factual circumstances and had been unfounded and erroneous, and upheld the resolutions of the Kyiv Commercial Court of Appeal.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### *1. The Constitution (1996)*

10. The relevant extract of the Constitution of Ukraine reads as follows:

#### **Article 6**

"State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power.

Bodies of legislative, executive and judicial power exercise their authority within the limits established by this Constitution and in accordance with the laws of Ukraine."

#### **Article 124**

"Justice in Ukraine is administered exclusively by the courts...

The jurisdiction of the courts extends to all legal relations that arise in the State.

Judicial proceedings are performed by the Constitutional Court of Ukraine and courts of general jurisdiction..."

#### **Article 125**

"In Ukraine the system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation.

The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction..."

**Article 129**

“...The main principles of judicial proceedings are:

1) legality...”

**2. *Judiciary Act***

11. The relevant provisions of the Act (in the wording of 18 March 2004) read as follows:

**Article 47. The Supreme Court of Ukraine – the highest judicial body**

“1. The Supreme Court of Ukraine is the highest judicial body within the system of courts of general jurisdiction...”

2. The Supreme Court of Ukraine shall:

1) review ... the cases under the cassation procedure in the situations established by law...

7) exercise other powers pursuant to the law.”

**3. *Code of Commercial Procedure***

12. The Code of Commercial Procedure (formerly Arbitration Procedure) was significantly reworded on 21 June 2001. At that time the fourth level of jurisdiction was introduced in the Commercial Procedure. According to the relevant provisions of the Code, a cassation appeal to the Higher Commercial Court, similar to the one found in other member States of the Council of Europe, and a second (or repeated) cassation appeal to the Supreme Court are now available to the parties in a commercial case. The Commercial Procedure is the only judicial procedure of Ukraine where the fourth level of jurisdiction exists and where the Supreme Court acts as a second cassation instance (in criminal and civil procedures it acts as an ordinary court of cassation and in administrative and administrative offences’ procedures, it performs only extraordinary review).

The relevant provisions of the Code of Commercial Procedure (in the wording of 15 May 2003) read as follows:

**Article 80****Nullification of the proceedings**

“A commercial court shall nullify proceedings in the case, if

1) a dispute is not subject to examination in the commercial courts of Ukraine;...”

**Chapter XII-2<sup>1</sup>****Review of judicial decisions of the Higher Commercial Court of Ukraine by the Supreme Court of Ukraine****Article 111-14****The right to appeal in cassation against the judicial decisions of the Higher Commercial Court of Ukraine**

“The parties to a case as well as the Prosecutor General of Ukraine have the right to appeal in cassation to the Supreme Court of Ukraine against the resolution of the Higher Commercial Court of Ukraine adopted following the review of a decision of a first instance commercial court, that has entered into force, or a resolution of the Commercial Court of Appeal, [as well as the ruling of the Higher Commercial Court of Ukraine on return of the appeal (request for review) in cassation].”

**Article 111-15****The grounds for appeal to the Supreme Court of Ukraine against a resolution [or ruling] of the Higher Commercial Court of Ukraine**

“The Supreme Court of Ukraine reviews in cassation the resolutions [or rulings] of the Higher Commercial Court of Ukraine if they are appealed against:

1) on the basis of the application by the Higher Commercial Court of Ukraine of a law or normative act which contravenes the Constitution of Ukraine;

2) where a decision contravenes decisions of the Supreme Court of Ukraine or of a higher court of a different specialisation on the issue of the application of the norms of substantive law;

3) where it is revealed that the Higher Commercial Court of Ukraine has applied the same provision of the law or any other normative act differently in similar cases;

[3-1) due to the inconsistency of the resolutions or rulings with the international treaties of Ukraine agreed as binding by the Verkhovna Rada of Ukraine;]

4) where an international judicial body whose jurisdiction is recognised by Ukraine finds that a resolution [or ruling] has violated the international obligations of Ukraine.”

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1. Words in brackets show amendments of 15 May 2003, introduced by the Law on the Introduction of Changes and Amendments to the Code of Commercial Procedure of Ukraine.

**Article 111-17****The procedure for review in cassation of the resolutions [and rulings] of the Higher Commercial Court of Ukraine**

“...The resolution [or ruling] of the Higher Commercial Court of Ukraine shall be reviewed in cassation on the basis of the rules for consideration of the case in the first-instance commercial court, save for procedural actions to establish and prove the actual circumstances of the case.”

**Article 111-18****The jurisdiction of the Supreme Court of Ukraine in the course of a cassation review of the resolutions [or rulings] of the Higher Commercial Court of Ukraine**

“The Supreme Court of Ukraine, following consideration of an appeal in cassation, or a request for review in cassation lodged by the Prosecutor General of Ukraine against a resolution [or ruling] of the Higher Commercial Court of Ukraine, shall be entitled to:

- 1) leave the resolution [or ruling] unchanged and dismiss the appeal (request);
- 2) quash the resolution and remit the case to the first-instance court for further consideration [or quash the ruling and remit the case for further consideration to the Higher Commercial Court];
- 3) quash the resolution [or ruling] and nullify the proceedings in the case.”

**Article 111-19****The grounds for quashing the resolutions [or rulings] of the Higher Commercial Court**

“The resolutions [or rulings] of the Higher Commercial Court of Ukraine shall be quashed if they contravene the Constitution of Ukraine, international treaties agreed as binding by the Verkhovna Rada of Ukraine, or if the substantive law has been misapplied otherwise.”

**Article 111-20****Resolutions of the Supreme Court**

“... A resolution of the Supreme Court of Ukraine shall be final and shall not be subject to appeal.”

**Article 111-21****The binding nature of the instructions adopted in the resolution of the Supreme Court**

“Instructions, contained in the resolution of the Supreme Court of Ukraine, shall be binding for the first-instance court during a new consideration of the case [and for the Higher Commercial Court of Ukraine during consideration of the materials of the appeal in cassation or the request for review in cassation].

The resolution of the Supreme Court of Ukraine, following a re-examination of the case on the basis of an appeal in cassation against the resolution [or ruling] of the Higher Commercial Court of Ukraine shall not include instructions as to the admissibility or inadmissibility of evidence, the superiority of one type of evidence over another, the norms of substantive [or procedural] law which shall be applicable or the kind of decision that shall be adopted as a result of the further consideration of the case.”

**THE LAW****I. JOINDER OF THE APPLICATIONS**

13. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

**II. SCOPE OF THE CASE**

14. The Court notes that, after the communication of the applications to the respondent Government, the applicants introduced new complaints under Articles 6 § 1 (no hearing before the Supreme Court) and 13 of the Convention, as well as Article 1 of Protocol No. 1, referring to the same events.

15. In the Court’s view, the new complaints are not an elaboration of the applicants’ original complaint under Article 6 of the Convention about the alleged unlawfulness of the Supreme Court decisions lodged one and a half years earlier and on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

### III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

16. The applicants complained that the Supreme Court could not be considered “a tribunal established by law” in the circumstances of their cases, since its decisions were not in accordance with law and violated Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

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

#### A. Admissibility

17. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

#### B. Merits

##### *1. Parties submissions*

18. The Government maintained that under the Constitution of Ukraine the Supreme Court was the highest judicial body in the system of courts of general jurisdiction and given that the constitutional provisions had direct effect, the Supreme Court could adopt decisions on the ground of the principle of legality.

19. They further maintained that quashing of resolutions of the Higher Commercial Court of Ukraine and upholding of the resolutions of first and second instance courts, even though the latter was not explicitly provided by the Code of Commercial Procedure, constituted a general practice of the Supreme Court in commercial cases. With a view to this practice, the applicants could not claim to be subject to a special treatment. For the same reason, the decisions of the Supreme Court in the applicants’ cases had been foreseeable and had not violated the principle of legal certainty.

20. The Government finally maintained that the Supreme Court had not exceeded its competence envisaged by the Ukrainian legislation since its actions had been aimed at the fulfilment of the principle of legality, one of the main principles of administration of justice in Ukraine, and, accordingly, at preventing delays in the impugned proceedings. They concluded that the Supreme Court of Ukraine had not violated the applicants’ rights under Article 6 § 1 of the Convention.

21. The applicants disagreed. They maintained that the Supreme Court was not a legislative body; therefore, it could not introduce a practice which would have force of law.

## 2. Court's assessment

22. The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with (see *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 37).

23. According to the Court's case-law, the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament" (see *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978, *Decisions and Reports* (DR) 15, pp. 70 and 80). Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII).

24. The Court further reiterates that, as it has previously held, the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it. In the *Zand* case (cited above), the Commission expressed the opinion that the term "a tribunal established by law" in Article 6 § 1 envisages "the whole organisational set-up of the courts, including ... the matters coming within the jurisdiction of a certain category of courts..."

25. In the *Coëme and Others v. Belgium* (cited above, §§ 107-109), the Court came to the conclusion that the domestic court did not have jurisdiction to try some of the applicants on the basis of practice not established by law and, therefore, it could not be considered a tribunal "established by law".

26. In the instant case, the Court notes that under Article 111-18 of the Code of Commercial Procedure the Supreme Court, having quashed the resolution of the Higher Commercial Court, could either have remitted the case for a fresh consideration by the lower court or nullified the proceedings (see paragraph 12 above). Instead it upheld the decision of the Court of Appeal and such course of action was not provided for under the Code of Commercial Procedure, as the Government admitted in their observations (see paragraph 19). The Court further notes that there was no other provision extending the Supreme Court's competence to this type of decision. Finally, the Court considers that the general provisions of the

Constitution of Ukraine, relied on by the Government (see paragraph 10 above) could not serve as a sufficient legal basis for a very specific competence not existing in the relevant procedural legislation.

27. The Court reiterates that in some situations it accepted that the highest judicial body, which is competent to interpret the law, could take a decision, which was not strictly provided by the law. Such application of law, however, had had an exceptional character and the court in question had given clear and plausible reasons for the exceptional departure from its usual competence (see *Julio Bou Gibert and El Hogar Y La Moda J.A. v. Spain* (dec.), no. 14929/02, 13 May 2003). In the present case, however, the Supreme Court did not give any reasons for taking a decision, exceeding its jurisdiction in deliberate breach of the Code of Commercial Procedure, and taking such type of decisions, as the Government maintained, became a usual practice for the Supreme Court of Ukraine.

28. In the Court's view, having overstepped the limits of its jurisdiction, which were clearly laid down in the Code of Commercial Procedure, the Supreme Court could not be considered the "tribunal established by law" within the meaning of Article 6 § 1 of the Convention in respect of the impugned proceedings.

29. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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**

31. The applicants claimed 1,600 euros (EUR) each in respect of pecuniary damage and EUR 7,000 each in respect of non-pecuniary damage.

32. The Government maintained that the applicants did not submit all necessary documents in support of their claims and that the amounts of non-pecuniary damage were exorbitant and unsubstantiated.

33. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects these claims. On the other hand, on equitable basis, it awards each of the applicants EUR 500 in respect of non-pecuniary damage.

## **B. Costs and expenses**

34. The applicants also claimed EUR 1,400 each for the costs and expenses incurred before the Court.

35. The Government noted that these claims were based on the assumption of the applicants that they would have to travel to Strasbourg. Since it was not the case, the Government maintained that these claims should be rejected as unsubstantiated.

36. According to the Court's case-law, an applicant is entitled to reimbursement of his 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. The Court notes that the applicants were not represented and were granted leave to use Ukrainian language in the proceedings before the Court. Therefore, the Court considers it reasonable to award each of the applicants the sum of EUR 50 for the postal expenses incurred in the proceedings before the Court.

## **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**

1. *Decides* unanimously to join the applications;
2. *Declares* unanimously the applications admissible;
3. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* by five votes to two
  - (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - to Mr Sokurenko, EUR 500 (five hundred euros) for non-pecuniary damage and EUR 50 (fifty euros) for costs and expenses;
    - to Mr Strygun, EUR 500 (five hundred euros) for non-pecuniary damage and EUR 50 (fifty euros) for 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;

5. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 20 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK  
Registrar

Peer LORENZEN  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint dissenting opinion of Mr Lorenzen and Mr Maruste;
- (b) dissenting opinion of Mrs Jaeger.

P.L.

C.W.

## JOINT DISSENTING OPINION OF JUDGES LORENZEN AND MARUSTE

In the present case the majority voted for finding a violation of Article 6 § 1. For the following reasons we are not able to share the opinion of the majority.

The requirement that a tribunal must be “established by law” is one of several requirements in the Convention and its Protocols that acts of national authorities shall have a sufficient basis in domestic law, cf. for example Article 5 § 1 (“in accordance with a procedure prescribed by law” and “lawful” arrest or detention), Article 8 § 2 (“in accordance with the law”), Articles 9 § 2, 10 § 2 and 11 § 2 (“prescribed by law”), Article 2 §§ 2 and 4 of Protocol No. 4 (“in accordance with law”) and Article 4 § 1 of Protocol No. 7 (“in accordance with the law and penal procedure of that State”).

The wording “**established** by law” seems clearly to indicate that the scope of this requirement is more limited than a requirement that a tribunal shall act “in accordance with the law” or in a manner “prescribed by law”. A literal interpretation of that expression leads in our opinion to the result that what is required is a legal basis for the existence and organisation of a tribunal, including a determination of what matters come within the jurisdiction of that court. The term cannot be understood in the sense that a tribunal in order to be considered “established by law” must also comply with all national requirements concerning the carrying out its functions. Had this been the intention, there would have been no reasons to draft Article 6 § 1 differently in this respect from other Articles.

In the case-law of the Convention organs Article 6 § 1 has been applied in accordance with this interpretation. Thus in *Zand v. Austria* (cited in paragraph 23) the Commission observed that the clause envisages “the whole organizational set-up of the courts, including not only the matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction” and held that its “object and purpose” requires that the “judicial organisation” cannot depend on the Executive. This interpretation was confirmed by the Court in *Coëme and others v. Belgium* (cited in paragraph 23). The Court has also found that a court is not established by law where the rules governing the composition of a court have not been respected (as, for example, in *Posokhov v. Russia*, no. 63486/00, ECHR 2003-IV, judgment of 4 March 2003, and *Fedotova v. Russia*, no. 73225/01, 13 April 2006). However, there is no case-law finding that where a court has jurisdiction to hear a case and is lawfully composed, the mere fact that it has not complied with domestic law concerning the exercise of its judicial functions violates the said requirement. It may lead to other violations of Article 6, such as the right to access to court or the right to a

fair trial, but cannot justify the conclusion that the court was not “established by law”. To hold otherwise would in reality imply that the Court would have to act as a fourth instance in respect of any alleged violation of national procedural rules, which it has constantly held is not its function (see, for example, *Buscarini v. San Marino* (dec.), no. 31657/96, 4 May 2000). Accordingly we cannot agree with the majority that the term “established by law” also covers “compliance by the tribunal with the particular rules that govern it” (cf. paragraph 24).

In the present case it is undisputed that the Supreme Court had jurisdiction to hear the case in a cassation review and that it was lawfully composed. Under the Code of Commercial Procedure it could either dismiss an appeal or quash a ruling of the Higher Commercial Court, and in the latter case either remit the case for further consideration by the first instance court or the Higher Commercial Court or nullify the proceedings. However, as the Supreme Court agreed with the decision of the first instance court upheld by an appeal court, it did – in accordance with a practice developed in its case-law – not remit the case for further consideration by another court, but upheld the decision of the first instance court. Even assuming that this practice could not be considered “lawful” under domestic law as found by the majority, we are not able to agree that it deprived the Supreme Court of being “a tribunal established by law”. Accordingly there has in our opinion been no violation of that requirement in Article 6 § 1 of the Convention.

## DISSENTING OPINION OF JUDGE JAEGER

I fully agree with the dissenting opinion of Judges Lorenzen and Maruste. The majority oversteps the limits set out in the Convention in examining national procedural law with the scrutiny of a fourth instance court and setting aside a well established jurisprudence of the competent national Supreme Court.

While the Court's duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed the rights and freedoms protected by the Convention (see among many other authorities *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 45 and *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II). Nothing in the present case leads to the conclusion that infringements of that kind are occasioned by the Supreme Court in applying Article 111-18 of the Code of Commercial Procedure.

Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, *mutatis mutandis*, *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 541, § 59).

Turning to the present case in my view the Supreme Court interpreted and applied Article 111-18 of the Code of Commercial Procedure in a logical and convincing way. If a Cassation Court is given the competence (i) to quash judgments and to remit the case to the first instance court or to the Higher Commercial Court (under Article 111-18(2)), and in addition (ii) to leave a resolution or ruling unchanged (under Article 111-18(1)), it would need strong arguments to find this court lacking competence to uphold a lawful judgment of the first instance court. None are to be seen in this respect. After quashing the resolution of the Higher Commercial Court the decisions of the lower courts were valid again. As the Supreme Court found them to be in accordance with the relevant law there was no reason to quash them, too. Without quashing them there was no need for a remittal because the case was already decided. Any further remittal would be pointless. Thus I cannot agree on the majority's finding of an unlawful extension of competences.