



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

FIFTH SECTION

CASE OF DONICHENKO v. UKRAINE

(Application no. 19855/03)

JUDGMENT

STRASBOURG

5 April 2007

FINAL

05/07/2007

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 Donichenko 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 13 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 19855/03) 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, Mr Ivan Petrovych Donichenko (“the applicant”), on 30 May 2003.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 3 April 2006 the Court decided to give notice of the application 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. It also decided to give priority to the case under Rule 41 of the Rules of Court in view of the applicant's age.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1919 and lives in the village of Lebedyn.

A. Court proceedings

5. On 16 August 2000 the applicant instituted proceedings in the Boryspil Town Court against the Boryspil Town Police Department and the

State Treasury, seeking compensation. The applicant alleged that Messrs K. and M. had unlawfully attempted to enter and search his flat and insulted him in the presence of his neighbours. Messrs K. and M. took part in the proceedings as third parties. On 30 August 2000 the court found against the applicant. On an unspecified date the Kyiv Regional Court of Appeal quashed that decision and remitted the case for a fresh consideration.

6. On 11 September 2001 the Boryspil Town Court found in part for the applicant and awarded him UAH 12,125.09¹ in compensation for non-pecuniary damage and court expenses. On an unspecified date the Kyiv Regional Court of Appeal quashed that decision and remitted the case for a fresh consideration.

7. On 24 May 2002 the Boryspil Town Court ruled in part for the applicant. It found that two acting police officers, Messrs K. and M., had been ordered by the Boryspil Town Police Department to check the applicant's flat. On 25 April 2000, in the course of execution of the above order, they had unlawfully attempted to enter the applicant's flat and had made abusive statements in his respect. The court held that the State authorities were responsible for the acts of the police officers and ordered the State Treasury to pay the applicant UAH 2,393.09² in compensation for non-pecuniary damage and court expenses. The court, referring to Article 25 of the Police Act (see paragraph 18 below), further ordered Messrs K. and M. to apologise for their unlawful actions in the presence of the applicant and his neighbours who had witnessed the incident.

8. On 1 July 2002 the same court rejected the applicant's request for leave to appeal for failure to pay court fees and to comply with other procedural formalities. On 9 August 2002 and 2 January 2003, respectively, the Kyiv Regional Court of Appeal and the Supreme Court of Ukraine upheld the decision of 1 July 2002.

B. Enforcement proceedings

9. On 26 April 2003 the Pechersky District Bailiffs' Service initiated enforcement proceedings in respect of the monetary award of 24 May 2002.

10. On 27 August 2003 the applicant was paid the full amount of the award.

11. On 5 September 2003 the applicant submitted to the Boryspil Town Bailiffs' Service a writ of execution for the non-pecuniary part of the judgment.

12. On 8 September 2003 the Bailiffs' Service initiated enforcement proceedings in respect of the obligation of Mr K. to apologize to the applicant.

1. Around 1,994 euros – “EUR”.

2. Around EUR 389.

13. On 3 and 14 October 2003 the Bailiffs' Service fined Mr K. for his failure to comply with the judgment of 24 May 2002.

14. On 22 October 2003 the Bailiffs discontinued the enforcement proceedings against Mr K., no reasons having been given for this decision.

15. On 23 March 2004 Mr K. retired. His present place of residence is unknown.

16. On 25 April 2006 Mr M. together with two other police officers visited the applicant's place of residence. According to the Government, the applicant and his daughter received the apologies from Mr M. for the events of 25 April 2000. The applicant stated that he had been absent during that visit.

17. On 14 September 2006 the *Trudova Slava* local newspaper (*gazeta "Трудова Слава"*) published an announcement which read as follows:

“...[Mr M.], an employee of the MIA [Ministry of Internal Affairs], officially apologizes to [Mr] Donichenko, Ivan Petrovych, for the moral damage caused to him by the police officer in the course of exercise of his duties in 2001.”

II. RELEVANT DOMESTIC LAW

A. The Police Act of 20 December 1990

18. Article 25 of the Police Act regulates the questions of legal responsibility of the police officers.

19. Paragraph 1 of that Article provides that police officers shall act in accordance with the Police Act, shall make decisions on their own, and that they shall be disciplinary or criminally liable for their unlawful acts or inactivity.

20. Pursuant to paragraph 2, if a police officer violates citizen's rights or lawful interests, the police shall adopt measures necessary for restoration of these rights and for payment of compensation for pecuniary damage. The police shall also publicly apologise upon the citizen's request.

21. Paragraph 3 releases the police officer from a responsibility to compensate damages, if he carried out his duties in accordance with law. The damage shall be compensated at the expense of the State.

22. Under paragraph 4, the lawfulness of the acts of a police officer may be challenged before the police, prosecutors or courts.

23. Paragraph 5 provides that a person serving in the police, who violated the law or failed to carry out his duties, shall be liable in accordance with the law.

B. The Constitution of Ukraine

24. The above provisions of the Police Act are applied in the light of the Constitution, adopted on 28 June 1996, and, in particular, the following provisions:

Article 56

“Everyone shall have a right to compensation from public or municipal bodies for losses sustained as a result of unlawful decisions, acts or omissions by public or municipal bodies or civil servants in the performance of their official duties.”

THE LAW

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

25. The applicant complained about the State authorities' failure to enforce the judgment of the Boryspil Town Court of 24 May 2002 in full and in due time. He invoked Article 6 § 1 of the Convention which provides, insofar as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

26. The applicant argued that, while the money awarded by the above judgment was paid to him with a substantial delay, the non-pecuniary part of the judgment remained unenforced.

27. The Court notes that this aspect of the application concerns two parts of the judgment at issue, namely the monetary award and the non-pecuniary obligation, the length of the non-enforcement of which vary considerably. Therefore, the Court will examine the complaints concerning the two parts of the impugned judgment separately.

A. Admissibility

1. The applicant's complaint about the length of the non-enforcement of the monetary award of 24 May 2002

28. The Government contended that the delay in the payment of the monetary award to the applicant did not exceed the “reasonable time”

requirement contained in Article 6 § 1 of the Convention. They therefore proposed that this part of the application be declared inadmissible.

29. The applicant disagreed.

30. The Court observes that the enforcement proceedings in respect of the award of 24 May 2002 commenced on 26 April 2003 and were completed by the Bailiffs' Service on 27 August 2003. Therefore, the period during which the enforcement proceedings were pending lasted around four months. The Court notes that, given its findings in previous, similar cases against Ukraine (see, for instance, *Kornilov and Others v. Ukraine* (dec.), no. 36575/02, 7 October 2003), this period is not so excessive as to disclose any appearance of a breach of the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant's complaint about the failure of the State authorities to enforce the non-pecuniary obligation under the judgment of 24 May 2002

a. Responsibility of the State

31. The Government contended that the obligation to apologise under the judgment of 24 May 2002 was imposed on Messrs M. and K. as private persons and the State therefore could not be held responsible for their failure to fulfil it in due time.

32. The applicant disagreed.

33. The Court notes that under the domestic law in force at the material time, in particular Article 25 of the Police Act, the police bore responsibility for implementation of measures necessary to remedy a violation of citizen's rights because of the acts of its employees (see paragraph 20 above). The same provision envisaged several remedies for such violation, including restoration of the citizen's rights, compensation for damages, and public apologies. The above provisions of the Police Act were further reinforced by Article 56 of the Constitution which guaranteed everyone a right to compensation from public authorities for losses sustained as a result of unlawful decisions, acts or omissions of these authorities or their agents in the performance of their official duties (see paragraph 24 above).

34. The Court further notes that, in its judgment of 24 May 2002, the Boryspil Town Court found that the applicant's right to a good reputation had been infringed by the police officers, acting in their official capacity. The court held the domestic authorities responsible for the acts of these officers. It further decided that the non-pecuniary damage caused to the applicant was to be compensated at the expense of the State Budget.

35. In the Court's view, the fact that the two police officers were mentioned personally in the operative part of the judgment at issue, and not the police station to which they were attached or the Ministry of Interior, did

not release the police, and, accordingly, the State, from their responsibility to remedy the faults of their agents.

36. In these circumstances the State must be held responsible for the full enforcement of the judgment of 24 May 2002, including its non-pecuniary part.

b. The applicant's victim status

37. The Government submitted that, given that Mr M. had presented his apologies to the applicant personally and through a newspaper, the judgment of 24 May 2002 had been enforced in full. The applicant could therefore no longer claim to be a victim of a violation of his rights under Article 6 § 1.

38. The applicant argued that he had not received apologies from Messrs M. and K. in the presence of his neighbours. Thus, the former had not fulfilled their obligations under the judgment of 24 May 2002.

39. The Court, assuming that the judgment may be regarded as enforced once Mr M. has published his apologies in September 2006, recalls that the fact that the judgment in the applicant's favour was enforced does not deprive him of his victim status in relation to the period during which it remained unexecuted (see *Voytenko v. Ukraine*, no. 18966/02, §§ 34-35, 29 June 2004). Accordingly, the Court rejects the Government's preliminary objection as to the applicant's lack of victim status.

c. Conclusion

40. The Court concludes that the applicant's complaint under Article 6 § 1 of the Convention about the delay in the enforcement of the non-pecuniary part of the judgment of the Boryspil Town Court of 24 May 2002 raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It finds no ground for declaring it inadmissible.

B. Merits

41. In their observations, the Government submitted that the Bailiffs' Service took all necessary measures aimed at ensuring compliance of Messrs K. and M. with their obligations under the judgment at issue. The Government further maintained that the State had no other means at its disposal to make the latter apologize to the applicant.

42. The applicant disagreed.

43. The Court recalls that it has already found violations of Article 6 § 1 of the Convention in cases in which the State has failed to honour its obligations under the final and binding judgments for a considerable period of time (see, among others, *Romashov v. Ukraine*, no. 67534/01, § 42-46, 27 July 2004).

44. As to the present case, the Court observes that Messrs M. and K. have not done exactly what the Boryspil Town Court had ordered them to do in its judgment of 24 May 2002. The Court also observes that Mr K. has resigned from the police service in 2004 and that the Government is not aware of his current whereabouts. The Court notes that on 14 September 2006 Mr M., who still serves in the police, has published his apologies to the applicant in a local newspaper. Although Mr M. has made a reference to the year other than the one in which the incident at issue took place, the Court considers that in the particular circumstances of the instant case the police must be regarded as having fulfilled its obligation to publicly apologize for the incident, as envisaged in the domestic legislation (see paragraph 20 above). Accordingly, the Court finds that the non-pecuniary part of the judgment was complied with on the latter date, the delay in its enforcement having been approximately three years.

45. The Court further notes that the measures adopted by the Bailiffs' Service in the course of the enforcement proceedings and referred to by the Government appeared ineffective. The Court considers that it is not its task to decide what would have been the most appropriate way for the State to ensure the full enforcement of the judgment. Nonetheless, having regard to its finding concerning the State's responsibility for enforcement of the judgment at issue (see paragraphs 35-36 above), the Court finds that the domestic authorities, including the police, by failing for such a considerable period of time to comply with the obligation under the final and binding judgment to apologize to the applicant for the unlawful conduct of their agents, fell short of their obligations under Article 6 § 1 of the Convention.

46. 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 that the delay in the execution of the non-pecuniary part of the judgment was justified in the present case.

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

II. OTHER COMPLAINTS

48. The applicant complained under Article 6 § 1 of the Convention about the outcome and unfairness of the proceedings, disagreeing with the amount of the compensation awarded by the judgment of the Boryspil Town Court of 24 May 2002.

49. He also complained about a violation of the right to respect for his home on account of the unlawful attempts of Messrs K. and M. to enter and search his flat. The applicant invoked Article 8 § 1 of the Convention.

50. As concerns the latter complaint, the Court notes that the applicant raised it before the national courts. Although he disagreed with the judgment of the Boryspil Town Court of 24 May 2002, by which the court

acknowledged the violation of the applicant's rights to respect for his home and to good reputation and awarded him compensation, the applicant failed to contest it before the higher courts in accordance with procedural requirements prescribed by law due to his own interpretation of these requirements.

51. Accordingly, the applicant cannot be regarded as having exhausted domestic remedies available to him under Ukrainian law in respect of both complaints. It follows that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed EUR 6,000 in respect of non-pecuniary damage.

54. The Government maintained that the applicant had not substantiated the amounts claimed and submitted that the finding of a violation would constitute sufficient just satisfaction.

55. The Court, making its assessment on an equitable basis, as required by Article 41 of the Convention, awards the applicant the amount of EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

57. 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 under Article 6 § 1 of the Convention concerning the length of the non-enforcement of the non-pecuniary part of the judgment of the Boryspil Town Court of 24 May 2002 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 according to Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable on the date of settlement;
 - (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;
4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 5 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President