



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

FIFTH SECTION

**CASE OF PONOMARENKO v. UKRAINE**

*(Application no. 13156/02)*

JUDGMENT

STRASBOURG

14 June 2007

**FINAL**

*14/09/2007*

*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 Ponomarenko v. Ukraine,**

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

Mr P. LORENZEN, *President*,

Mrs S. BOTOCHAROVA,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr R. MARUSTE,

Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 22 May 2007,

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

**PROCEDURE**

1. The case originated in an application (no. 13156/02) 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, Mr Albert Ivanovich Ponomarenko (“the applicant”), on 29 June 2001.

2. The applicant, who had been granted legal aid, was represented by Ms L. V. Opryshko, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 10 July 2003 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.

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

4. The applicant was born in 1930 and lives in the town of Gola Prystan.

### **A. Background of the case**

5. The applicant's relatives owned a house in the same town which stood on a plot of land belonging to the municipality. The applicant's relatives had a right to use this plot of land. The entrance to the plot was situated on the Kirova Street and the house was registered at the address of 14 Kirova Street. By the decision of the Gola Prystan Town Council ("the Council") of 10 December 1975, a part of this plot was allocated to a third party for construction of a house, which was completed in 1976. As a result, the original entrance was destroyed and the applicant's relatives ceased to have a direct access to their house from any neighbouring street.

6. In 1989 the applicant inherited his relatives' house. He also obtained the right to use the land on which it stood.

7. On an unspecified date, he requested the Council to designate a new passage and entrance to that land. On 12 December 1989 the Council decided that the new passage and entrance should be from the Gorkogo Street through the yard of the neighbouring multi-storey apartment house. The address of the applicant's house (14 Kirova Street) remained unchanged.

8. The applicant disagreed and lodged several complaints with the local authorities, alleging that he experienced difficulties in accessing his house. In particular, he argued that he could not bring large items to the land and that visitors encountered difficulties in locating his house at its actual address. By letter of 16 September 1994, the Council informed the applicant that he could freely pass through the neighbouring building's yard in order to enter his house and that he could request amendments to the address of the house, if he so wished.

### **B. First set of court proceedings**

9. In March 1991 the applicant lodged with the Gola Prystan Town Court a claim against the Council. He alleged that the latter had unlawfully reduced the size of the land on which his house stood and that he had difficulties in accessing his house. The applicant sought recovery of the part of land which had been taken away from his relatives in 1975.

10. On 18 April 1991 the court refused to consider the applicant's claim on the merits. It found that the applicant in fact contested the lawfulness of the Council's decision of 10 December 1975 and, thus, his claim was not to be considered by the courts since he had not exhausted non-judicial remedies available in 1975. Furthermore the applicant was not the owner of the land on which his house stood.

11. On 29 May 1991 the Kherson Regional Court upheld in cassation the ruling of the first instance court.

### **C. Second set of court proceedings**

12. In 2001 the applicant lodged with the Gola Prystan Town Court a new claim against the Council. He again alleged that the latter had unlawfully taken away a part of the land on which his house stood in 1975 and that it had not paid compensation for the damage which the applicant's family had allegedly sustained as a result of this. The applicant also alleged that he experienced difficulties in accessing and using his house and that the Council unlawfully refused to resolve his problem. The applicant requested the court to order the Council to grant him an official right of passage over his neighbours' land and to set up a five-meter wide passage and entrance to his plot from the Kirova Street. The applicant also sought compensation.

13. On 20 February 2001 the court refused to consider the applicant's claim on the merits. It put forward the same reasons as in its ruling of 18 April 1991.

14. The applicant appealed in cassation, alleging that the first instance court had erred in establishing the subject-matter of his claim. On 11 April 2001 the Kherson Regional Court reiterated the findings of the first instance court and rejected the applicant's appeal in cassation.

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### **A. Constitution of Ukraine, adopted on 28 June 1996**

15. The relevant provisions of the Constitution read as follows:

#### **Article 8**

“... The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court for protection of the constitutional rights and freedoms of the individual and citizen directly on the basis of the Constitution of Ukraine are guaranteed.”

#### **Article 55**

“Human and citizens' rights and freedoms are protected by the courts.

Everyone is guaranteed the right to challenge in court the decisions, actions or omissions of bodies of State power, bodies of local self-government, public servants...”

#### **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...”

**B. Code of Civil Procedure of 1963 (“the Code”) (repealed as of 1 September 2005)**

16. The relevant provisions of Article 136 of the Code read as follows:

“... The judge shall refuse to accept a claim:

...

1) if it is not to be considered by the courts;

2) if the interested person who applied to the court did not have recourse to non-judicial means of settlement of the case established by the law...

3) if there is a final judgment of the court or its final decision allowing withdrawal of the claim or the friendly settlement in a case concerning the same subject-matter and between the same parties...”

**C. Judgment of the Constitutional Court of 25 November 1997 in the case of G. P. Dziuba concerning the right to challenge unlawful acts of public servants before the courts**

17. The relevant extracts from the operative part of the Constitutional Court's judgment read as follows:

“Article 55 § 2 of the Constitution shall be construed to guarantee everyone ... the right to challenge decisions, acts or inactivity of every public and municipal authority, public servant before the court...”

Such complaints shall be considered directly by the courts, irrespective of whether the law enacted before [the Constitution] provided for a different procedure of their consideration...”

**D. Resolution no. 7 of the Plenary Supreme Court of 4 October 1991 concerning application of legislation on citizens' ownership titles to houses by the courts**

18. The relevant extracts from paragraph 2 of the Resolution read as follows:

“...The courts shall have jurisdiction over disputes which have relation to ownership titles to houses, in particular:

- concerning ... remedies for any interference with the ownership title [to a house or its part], even if such interferences were not connected with dispossession...”

- concerning compensation for diminished value of a house caused by the activities of enterprises, organisations ...”

**E. Resolution no. 9 of the Plenary Supreme Court of 1 November 1996 concerning application of the Constitution of Ukraine by the courts**

19. The relevant extracts from paragraph 8 of the Resolution read as follows:

“... Further to the provisions ... [of Article 124 of the Constitution], the courts shall have jurisdiction over all disputes concerning the citizens' rights and freedoms. The court shall not refuse to entertain a claim or a complaint on the sole ground that it can be examined in the course of a non-judicial procedure established by law.

Article 55 of the Constitution of Ukraine envisages that every person is guaranteed the right to challenge the actions or inactivity of the public authorities, local self-government or civil servants; ... the court cannot refuse to entertain a claim on the basis of a law that limits this right ...”

**F. Resolution no. 13 of the Plenary Supreme Court of 25 December 1996 concerning application of land legislation by the courts (repealed as of 16 April 2004)**

20. The relevant extracts from paragraph 2 of the Resolution read as follows:

“... [The] courts shall have jurisdiction over applications for, in particular:

...

- protection and restoration of the rights of land owners and tenants, removal of obstacles to use of lands...”

## THE LAW

### I. ADMISSIBILITY

21. The applicant complained that he had been unlawfully deprived of the right of access to a court concerning his claim lodged with the domestic courts in 2001. He invoked Article 6 § 1 of the Convention which provides, in so far as relevant, as follows:

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

22. The applicant further complained under Article 1 of Protocol No. 1 about a violation of his right to peaceful enjoyment of his possessions, alleging the State authorities' continuous failure to remove the obstacles to his access to the land on which his house stood. He also alleged that the municipal authorities had not followed the relevant domestic procedure when they had allocated to a third party a part of the land which had been in his relatives' possession. Thus, the applicant contended that he had a right to that part of the land, protected by Article 1 of Protocol No. 1 which reads as follows:

“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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

#### **A. The Government's preliminary objections**

23. The Government submitted that the application had been introduced outside the period of six months prescribed by Article 35 § 1 of the Convention and, moreover, concerned events which had taken place before the Convention entered into force in respect of Ukraine. In particular, they argued that the applicant, by lodging his new claim with the domestic courts in 2001, in fact sought a disguised reopening of the first set of proceedings, since it concerned the same facts which had been already considered by the Gola Prystan Town Court on 18 April 1991 and by the Kherson Regional Court on 29 May 1991. The latter decisions were adopted before 11 September 1997, the date on which the Convention entered into force in respect of Ukraine and more than six months before the application was lodged with the Court.

24. The applicant disagreed, stating that the courts' decisions adopted in 1991 did not represent a final resolution of his case, since the courts had not considered its merits. Furthermore, the domestic courts, having rejected his claim in 2001, did not find it to be the same as his claim of 1991. The applicant also maintained that his complaint under Article 1 of Protocol No. 1 concerned a continuing violation of his property rights.

25. At the outset, the Court notes that the decision of the Kherson Regional Court of 29 May 1991, which was the object of the applicant's previous application (no. 44543/98) declared inadmissible on 14 September 1999, is outside the scope of the present application and. It

remains to be ascertained whether the applicant's case was finally determined in 1991.

26. The Court observes that the applicant brought proceedings concerning his property related complaints before the domestic courts in 1991 and 2001. However, none of his claims were considered on the merits. Furthermore, although these claims largely had the same background, the remedies sought by the applicant were different. In 1991 the applicant requested the courts to order the Council to provide him with a plot of land, while in 2001 he sought an official right of passage over his neighbours' land and the construction of a new entrance to the land on which his house stood. The Court also notes that the domestic courts did not find that the applicant's claim of 2001 had already been determined by a final judgment and did not reject it on such grounds (see paragraphs 13, 14, and 17 above). In these circumstances, the Court finds no basis to agree with the Government in that the applicant's case was finally determined in 1991 and that his claim of 2001 represented an attempt of disguised reopening of the earlier set of proceedings.

#### **B. Admissibility of the applicant's complaints under Article 1 of Protocol No. 1**

27. The Court recalls that it generally has no temporal jurisdiction over a complaint about an interference which pre-dates ratification of the Convention by the respondent State, even if the refusal to remedy it post-dates ratification (see *Blečić v. Croatia* [GC], no. 59532/00, § 79). This rule does not apply to cases which concern a continuing situation against which no domestic remedy is available (see, for instance, *Loizidou v. Turkey*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, §§ 46-47).

28. In the present case the applicant complained about the alleged violation of his property rights and his alleged inability to protect these rights in the domestic courts. His submissions under Article 1 of Protocol No. 1 consist of two arguments. The first one concerns the applicant's inability to use the plot which was taken from his relatives in 1975. The second relates to the alleged refusal of the municipal authorities to grant him an official servitude over his neighbours' land and to provide him with a specific passage and entrance to his house and the land on which it stands. According to the applicant, such state of affairs has the effect of a continuing violation of his right to freely access and use his house.

29. As regards the first assertion, the Court notes that it concerns the taking of land which occurred in 1975. It was clearly an instantaneous act which did not create any continuous situation (see *Papuk Trgovina d.d. v. Croatia*, no. 2708/03, § 44, 6 October 2005).

30. Concerning the second argument, the Court notes that the alleged difficulties in the applicant's access to his property were a result of the allocation of a part of the land, which his family had been entitled to use, to a third party in 1975 and by the construction of a neighbouring building in 1976.

31. However, the consequences over time of the past events – such as the alleged difficulties for the applicant to access his property – did not create a continuing situation extending the Court's temporal jurisdiction. The reluctance of the municipal authorities to grant the applicant's request for an improved passage and entrance to his house which existed before 1975 (see paragraphs 8 and 12) was closely related to the Council's decision of 10 December 1975 to allocate land to a third party. Divorcing the latter event from its consequences would amount to giving retroactive effect to the Convention which would be contrary to general principles of international law (see, *mutatis mutandis*, *Papuk Trgovina d.d. v. Croatia*, no. 2708/03, § 45, 6 October 2005). Accordingly, the subsequent failure of remedies, to which the applicant had recourse in 2001 and which were aimed at redressing that interference, cannot bring it within the Court's temporal jurisdiction.

32. The Court therefore finds that the applicant's complaints under Article 1 of Protocol No. 1 do not relate to a continuing situation, but concern the events which took place in 1975-1976, before the Convention and Protocol No. 1 entered into force in respect of Ukraine (11 September 1997). For that reason, the Court rejects this part of the application for being incompatible *ratione temporis* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4 of the Convention.

### **C. Admissibility of the applicant's complaint under Article 6 § 1 of the Convention**

33. The Court notes that the applicant made a separate complaint under Article 6 § 1 of the Convention about the alleged lack of access to domestic courts in 2001. The impugned proceedings took place after the entry into force of the Convention in respect of Ukraine. In such circumstances, the Court cannot reject this complaint for lack of temporal jurisdiction (see *Malhous v. the Czech Republic* (dec.), no. 33071/96, ECHR 2000-XII, and *Kerimov v. Azerbaijan* (dec.), no. 151/03, 28 September 2006).

34. The Court considers that the applicant's complaint about the lack of access to courts 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.

## II. MERITS

35. As regards the merits of the applicant's complaint under Article 6 § 1 of the Convention, the Government submitted that by lodging his claim in 2001 the applicant had challenged the lawfulness of the decision of the Gola Prystan Town Council of 10 December 1975 and had sought recovery of the part of land which had been taken from his relatives in 1975. The Government argued that under Ukrainian law the courts did not enjoy jurisdiction over the applicant's claim, since he was not the owner of the plot of land on which his house stood.

36. The Court reiterates that, under its case-law, Article 6 § 1 embodies the “right to a court”, which includes not only the right to institute proceedings but also the right to obtain a “determination” of the dispute by a court (see, *mutatis mutandis*, *Multiplex v. Croatia*, no. 58112/00, § 45, 10 July 2003). For this right to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his or her rights (see *Bellet v. France*, judgment of 4 December 1995, Series A no. 333-B, p. 42, § 36).

37. The Court observes that in his submissions before the domestic courts the applicant complained about the interference with his right of access to his house and the land which he possessed. He argued that the interference was of a continuous nature and that the municipal authorities unlawfully refused to resolve the problem. Although the applicant alleged that the decision of the Gola Prystan Council of 10 December 1975 was unlawful, he did not seek its annulment. The applicant requested the courts to order the Council to adopt certain practical measures in order to resolve his problems of access to his property. The courts found that they did not enjoy jurisdiction over the applicant's claim.

38. The Court's task is not to examine whether or not, in particular in the light of Ukrainian law, the domestic courts had jurisdiction to determine the merits of the applicant's claim. Nonetheless, it observes that neither the courts' decisions in the case nor the Government's submissions contain references to the domestic laws in force at the material time which excluded such claims from the courts' jurisdiction. Moreover, the Court notes that, according to the interpretation given by the Constitutional Court and the Supreme Court, the relevant domestic law and procedural rules must not be construed as to limit a citizen's right of direct access to the courts in respect of his complaints about the alleged omissions or inactivity of public or municipal authorities (see paragraphs 17-20 above). In any event, the Court finds that no acceptable justification for the refusal to entertain the applicant's claim at the domestic level was submitted before it.

39. In the Court's view, that situation amounts to a denial of justice which impaired the very essence of the applicant's right of access to a court

as secured by Article 6 § 1 of the Convention. There has accordingly been a violation of that provision.

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

40. 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

41. The applicant claimed USD 30,000 in compensation for pecuniary damage. The applicant further claimed USD 100,000 in respect of non-pecuniary damage.

42. The Government maintained that the applicant's claims were exorbitant and unsubstantiated.

43. The Court does not discern a causal link between the breach of Article 6 § 1 of the Convention and the alleged pecuniary damage. There is, therefore, no ground for an award under this head.

44. As to compensation in respect of non-pecuniary damage, the Court considers that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction in the circumstances (see, *mutatis mutandis*, *Mežnarić v. Croatia*, no. 71615/01, § 44, 15 July 2005).

#### B. Costs and expenses

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

### FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint 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* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK  
Registrar

Peer LORENZEN  
President