



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

FIFTH SECTION

CASE OF OSTAPENKO v. UKRAINE

(Application no. 17341/02)

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.

In the case of Ostapenko v. Ukraine,

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

Mr P. LORENZEN, *President*,

Mrs S. BOTOCHAROVA,

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 22 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 17341/02) 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 Mykola Grygorovych Ostapenko ("the applicant"), on 18 March 2002.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mr Yuriy Zaytsev.

3. On 25 November 2004 the Court decided to communicate the complaint concerning the non-enforcement of the judgment given in the applicant's favour 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 1947 and lives in the town of Novyy Bug, Mykolayiv region. He is a farmer.

5. On 22 July 1993 and 23 June 1995 the Novyy Bug City and District Councils, respectively, rejected the applicant's requests for an additional plot of land for his farm.

6. On 6 December 1999 the applicant applied to the Novyy Bug City and District Councils in order to obtain a plot of land of 22 hectares from public lands reserved for farming.

7. By letters of 5 and 20 January 2000, without examination of these requests by the sessions of respective Councils, the applicant was informed that his requests were rejected on the ground that there was no available land designated for that purpose.

8. On 11 February 2000 the applicant challenged the above-mentioned Councils' refusals before the Mykolayiv Arbitration Court.

9. The court issued a ruling prohibiting the distribution of the public reserved lands before examination of the applicant's claim on the merits.

10. On 11 February and 24 March 2000 the Novyy Bug City Council and the Novyy Bug District Council, respectively, rejected the applicant's request of 6 December 1999.

11. On 4 April 2000 the Mykolayiv Arbitration Court found in favour of the applicant and ordered to provide him with a plot of land of 22 hectares indicated on the plan of the public reserved lands of the Novyy Bug City Council. The court ordered the Mykolayiv Department of the Institute of the Land Tenure (*Миколаївська філія Інституту землеустрою*) to provide the applicant in kind with that plot. The Novyy Bug City Council was ordered to issue the act for permanent use of the mentioned plot by the applicant. By the same judgment, the decisions of the Novyy Bug City Council and the Novyy Bug District Council of 11 February and 24 March 2000 were found null and void. The court also ordered to issue the execution writ, thus the judgment became final and binding immediately upon its adoption.

12. On 14 April 2000 the Novyy Bug District Council issued land certificates to K.R.P. and S.M.A. (private persons) in respect of the plot of 22 hectares, which had been allocated to the applicant under the judgment of 4 April 2000.

13. On 2 July 2000 the Deputy President of the Mykolayiv Arbitration Court rejected as unsubstantiated the Novyy Bug City and District Councils' request for supervisory review of the judgment of 4 April 2000.

14. On 14 November 2000 the President of the Mykolayiv Arbitration Court quashed the decisions of 4 April 2000 and 2 July 2000 on the ground of new circumstances and remitted the case for fresh consideration.

15. On 11 June 2001 the Higher Arbitration Court quashed this decision of the President of the Mykolayiv Arbitration Court and upheld the judgment of 4 April 2000.

16. On 13 November 2001 the Supreme Court rejected the appeal of the Novyy Bug City Council lodged under the new cassation procedure. On 5 February 2002 the Odessa Commercial Court of Appeal rejected the Novyy Bug City Council's appeal against the judgment of 4 April 2000 as having been lodged out of time.

17. On 19 July 2001 the Novy Bug City Bailiffs' Service (hereafter "the Bailiffs"), following the decision of the Higher Court of Arbitration, instituted enforcement proceedings.

18. On 3 September 2001 the Head of the Bailiffs' Service drew up a report in which was certified the lack of public reserved lands designated for farming, and on 10 October 2001 terminated the enforcement proceedings.

19. On 22 March 2002 the Mykolayiv Commercial Court found the decision to terminate the enforcement proceedings unlawful. In particular, the court established that the bailiff had not duly verified the lack or availability of public reserved lands. The court gave notice to the Prosecutor's Office to the effect that criminal proceedings should be brought against the bailiff.

20. On 18 October 2002 the Mykolayiv Regional Prosecutor's Office (hereafter "Regional Prosecutor") rejected the Mykolayiv Commercial Court's request to institute criminal proceedings against the Bailiffs for failure to enforce the above-mentioned judgment.

21. By a letter of 28 January 2003 the Regional Prosecutor informed the applicant that the decision of 18 October 2002 had been quashed as being premature and that the case had been remitted for a further preliminary investigation.

22. In a letter of 11 March 2004 the Regional Prosecutor stated that the Bailiffs had unlawfully terminated the enforcement proceedings without taking all relevant and appropriate measures to ensure the execution of the court judgment given in the applicant's favour. In particular, the Bailiffs had failed to fine the officials of the Novyy Bug City and District Municipal Councils for having impeded the enforcement proceedings and to request the court to clarify the procedure for enforcement of the judgment. On the basis of these considerations, the prosecutor challenged the Bailiff's decision to terminate the proceedings.

23. On 9 April 2004 the Head of the Bailiffs Service rejected the applicant's complaint about the termination of the enforcement proceedings due to the applicant's failure to respect the time-limit for challenging the relevant decision of 10 October 2001.

24. On 21 April 2004 the Novyy Bug State Administration instituted proceedings seeking the eviction of K.R.P. and S.M.A. from the land allocated by the decision of the Novyy Bug District Council of 14 April 2000.

25. On 8 June 2004 the Mykolayiv Commercial Court rejected this claim on the ground that neither the decision of the Novyy Bug District Council of 14 April 2000 nor the respective land certificates were found null and void.

26. On 21 July 2004 the Odessa Commercial Court of Appeal rejected the appeal of the Regional Prosecutor lodged in the interest of the applicant on the ground that such a request for eviction was not based on law.

27. On 12 May 2005 the Mykolayiv Commercial Court rejected the request of the Regional Prosecutor to review the decision of 8 June 2004 in the light of newly disclosed circumstances.

28. On 6 January and 28 February 2006 the Novyy Bug Court left without consideration the applicant's complaints against the alleged inactivity of the Regional Prosecutor.

29. The judgment of 4 April 2000 of the Mykolayiv Arbitration Court given in the applicant's favour remains unenforced until present.

Administrative proceedings instituted against the applicant

30. On 1 March 2002 the applicant wanted to attend the session of the Novyy Bug District Council. The applicant alleged that the Head of the Council prevented him from doing so and that the police officer, who was called to take him out from the session room, caused him bodily injuries.

31. On 13 March 2002 the Novyy Bug Department of the Interior instituted administrative liability proceedings against the applicant as to his allegedly hooligan behaviour during the session of the Novyy Bug District Council.

32. On 6 April 2002 the Novyy Bug Court acquitted the applicant.

II. RELEVANT DOMESTIC LAW

33. The relevant domestic law is summarised in the judgment of *Romashov v. Ukraine* (no. 67534/01, §§ 16-18, 27 July 2004).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

34. The applicant complained under Article 6 § 1 of the Convention about the lengthy non-enforcement of the judgment of 4 April 2000 and about a violation of his right to the peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1. The Articles invoked, in so far as relevant, provide as follows:

Article 6 § 1

“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...”

Article 1 of Protocol No. 1

“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. Admissibility

35. The Government contended that the applicant had not exhausted domestic remedies as he had not re-instituted court proceedings against the Bailiffs' Service and had not requested the domestic courts to modify the modalities of enforcing the judgment of 4 April 2000. They submitted examples of domestic case-law according to which positive court decisions were successfully obtained in comparable cases.

36. The applicant disagreed.

37. The Court notes that a similar point has already been dismissed in a number of Court judgments (see the aforementioned *Romashov* judgment, §§ 30-32). In such cases the Court has found that applicants were absolved from pursuing the remedies invoked by the Government. The domestic case-law presented by the Government does not demonstrate such sufficient consistency as might enable the Court to reach a different conclusion as to the effectiveness of the domestic remedies in cases of non-enforcement of judgments.

38. In the light of the above considerations, the Court dismisses the Government's preliminary objections.

B. Merits*1. Article 6 § 1 of the Convention*

39. The parties did not comment on the merits of the complaint under Article 6 § 1 of the Convention.

40. The Court notes that the judgment of 4 April 2000 of the Mykolayiv Arbitration Court remains unenforced for almost seven years and two months.

41. The Court recalls that it has already found violations of Article 6 § 1 of the Convention in cases raising issues similar to the present application

(see, for instance, *Sokur v. Ukraine*, no. 29439/02, §§ 30-37, 26 April 2005; and the aforementioned *Voytenko* judgment, §§ 53-55).

42. Having examined all the material before it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

43. The Government submitted that the plot of land claimed by the applicant could not be viewed as his “possessions” for the purposes of Article 1 of Protocol No. 1 because the judgment of 4 April 2000 ordered the provision of land for permanent use and not for ownership. The applicant disagreed.

44. In this connection, the Court points out that the Convention institutions have consistently held that “possessions” within the meaning of Article 1 of Protocol No. 1 can be either “existing possessions” (see *Van der Mussele v. Belgium*, 23 November 1983, Series A no. 70, p. 23, § 48) or assets, including claims, in respect of which an applicant can argue that he has at least a “legitimate expectation” that they will be realised (see, for example, *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 21, § 31, and *Ouzounis and Others v. Greece*, no. 49144/99, 18 April 2002, § 24).

45. The Court outlines that pecuniary assets, such as debts, by virtue of which the applicant can claim to have at least a “legitimate expectation” of obtaining effective enjoyment of a particular pecuniary asset (see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51; *Pressos Compania Naviera S.A. and Others*, cited above, and, *mutatis mutandis*, *S.A. Dangeville v. France*, no. 36677/97, §§ 44-48, ECHR 2002-III) may also fall within the notion of “possessions” contained in Article 1 of Protocol No. 1. In particular, the Court has consistently held that a “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable (see *Burdov v. Russia*, no. 59498/00, 7 May 2002, § 40, and *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 59).

46. Turning to the facts of the present case, the Court notes that by virtue of the judgment of 4 April 2000 the authorities were to provide the applicant in kind with a specifically identified plot from the public lands reserved for farming and to issue the act for permanent use of the mentioned plot by the applicant.

47. Accordingly, from the time of the judgment of 4 April 2000 the applicant had an established “legitimate expectation” to acquire a pecuniary asset. The judgment was final and enforcement proceedings were instituted.

48. The Court is therefore satisfied that the applicant's claim was sufficiently established to constitute a "possession" falling within the ambit of Article 1 of Protocol No. 1.

49. However, the judgment of 4 April 2000 was not executed, and the non-execution could be attributed solely to the authorities. It follows that the impossibility for the applicant to obtain the execution of the judgment constitutes an interference with his right to peaceful enjoyment of his possessions (see the aforementioned *Burdov* judgment, § 40, *Jasiuniene v. Lithuania*, no. 41510/98, 6 March 2003, §§ 45-46), for which the Government have not advanced any justification (see paragraph 41 above).

50. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

II. OTHER COMPLAINTS

51. The applicant also alleged that his treatment by the local authorities as well as administrative liability proceedings instituted against him caused him moral suffering, contrary to Article 3 of the Convention.

52. The Court notes that the applicant failed to raise the above complaints before the domestic courts. Accordingly, he cannot be regarded as having exhausted domestic remedies available to him under Ukrainian law in respect of both complaints. It follows that they must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

53. The applicant finally alleged that the local authorities' refusal in 1995 to provide him with land violates Article 17 of the Convention.

54. The Court notes that this complaint is incompatible *ratione temporis* with the provisions of the Convention, since it took place before the Convention entered into force in respect of Ukraine, and should be rejected pursuant to Article 35 § 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed, without further substantiation, UAH 95,963¹ in respect of pecuniary and UAH 120,000² in respect of non-pecuniary damage caused by the loss of earnings and opportunities in connection with the inability to recover the plot he was granted by the judgment of 4 April 2000.

57. The Government maintained that the claim for pecuniary and non-pecuniary damage was exorbitant and unsubstantiated. They suggested that the finding of a violation would be sufficient just satisfaction in the present case.

58. The Court notes that the applicant failed to substantiate his claim for pecuniary damage in respect of the value of permanent use of the plots of land in question to the extent which would enable the Court to calculate its amount. Moreover, taking into consideration the circumstances of the present case, the Court is not in a position to order the execution of the judgment of 4 April 2000 as the plots of land in question were irrevocably transferred to third persons. However, it would appear that the applicant remains entitled to claim in the course of domestic proceedings compensation in lieu of execution of the said judgment.

59. The Court further considers that the applicant must have sustained non-pecuniary damage as a result of the violations found (see *Kryachkov v. Ukraine*, no. 7497/02, § 30, 1 June 2006). Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the amount of EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

60. The applicant also claimed UAH 3,600³ for costs and expenses incurred during the domestic judicial and enforcement proceedings.

61. The Government considered the claims to be unjustified.

62. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum. In addition, legal costs are only recoverable in so far as they relate to the violation found (see *Former King of Greece and Others v. Greece* (just satisfaction) [GC], no. 25701/94, 28 November 2002, § 105).

1. EUR 14,663.

2. EUR 18,336.

3. EUR 550.

63. It is noted that in the present case violations of Article 6 of the Convention and Article 1 of Protocol No. 1 were found in connection with the non-execution of the judgment of 4 April 2000. However, the applicant did not submit any proof to justify his expenses incurred during the enforcement proceedings. The Court therefore makes no award under this head.

C. Default interest

64. 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 and Article 1 of Protocol No. 1 to it concerning the length of the non-enforcement of the judgment of the Mykolayiv Arbitration Court of 4 April 2000 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 there has been a violation of Article 1 of Protocol No. 1;
4. *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 2,000 (two thousand euros) in respect of non-pecuniary damage, 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *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