



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

FIFTH SECTION

CASE OF VASILYEV v. UKRAINE

(Application no. 11370/02)

This version was rectified on 10 December 2007
under Rule 81 of the Rules of Court

JUDGMENT

STRASBOURG

21 June 2007

FINAL

24/09/2007

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 Vasilyev 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 29 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 11370/02) against Ukraine lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Oleg Pavlovich Vasilyev (“the applicant”), on 8 February 2002.

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

3. On 7 July 2005 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 1937 and currently lives in Leipzig, Germany.

5. On 16 August 1996 the applicant's apartment in the city of Odessa, Ukraine, was sold by Mr O. (the applicant's nephew), who allegedly acted under a written authority issued by the applicant, to Mrs S. (a private person). The applicant continued to live in the flat until an unknown date in 1999, when he left Ukraine and took up residence in Germany.

6. On an unspecified date the applicant filed a criminal complaint against Mr O., stating that he had stolen his passport and forged his signature on the written authority to sell the apartment.

7. On 1 October 1996 an investigator of the Malinovsky District Police Station of Odessa (*Малинівський районний відділ внутрішніх справ*, hereafter “the Police Station”) instituted criminal proceedings against Mr O. for forgery and fraud.

8. On the same date Mrs S. sued the applicant before the Malinovsky District Court of Odessa (hereafter “the Malinovsky Court”) seeking his eviction from the apartment at issue.

9. On 4 October 1996 the applicant filed with the Malinovsky Court a counterclaim against Mrs S. seeking to have the sales contract for the flat declared null and void for fraud.

10. On 18 November 1996 an expert with the Criminalistic Expert Unit of the Odessa Police Department (*Експертно-Криміналістичне Управління УМВС України в Одеській області*, hereafter “the Expert Unit”), in the course of the criminal investigation against Mr O., issued an opinion in which he stated that the signature on the written authority had been executed by a person other than the applicant.

11. On 22 November 1996 the Malinovsky Court requested from the Police Station a copy of the expert's report of 18 November 1996.

12. On 17 January 1997 the Malinovsky Court held the first hearing, which was adjourned because of the failure of Mr O. (a witness in this case) failure to appear.

13. On 6 February 1997 the Malinovsky Court requested the Odessa Institute of Forensic Expert Examinations (*Одеський Науково-Дослідний Інститут Судових Експертиз*, hereafter “the Institute”) to carry out an expert examination of the applicant's signature on the authority.

14. On 23 April 1997 the applicant amended his statement of claim, adding a claim for compensation for non-pecuniary damage.

15. On 8 May 1997 an expert with the Institute submitted her report, stating that there was a possibility that the authority had been signed by the applicant with a disguised handwriting.

16. The hearing scheduled for 19 May 1997 was adjourned on account of Mrs S.'s lawyer failure to appear.

17. On 21 May 1997 the applicant challenged the presiding judge before the President of the Malinovsky Court. On 25 May 1997 this challenge was accepted and another judge was appointed to hear the case.

18. Of the eighteen hearings listed between 2 July 1997 and 29 December 1998 six were adjourned due to Mrs S. and her lawyer's failure to appear, and one due to the applicant's absence. On an unspecified date during this period the applicant's case was transmitted from the Malinovsky Court to the Illichevsky District Court of Odessa (hereafter “the Illichevsky Court”).

19. On 29 December 1998 the Illichevsky Court decided to suspend the proceedings pending the outcome of the criminal proceedings against Mr O. The applicant appealed against this decision.

20. On 23 February 1999 the Odessa Regional Court (hereafter “the Regional Court”) found that the appeal had been lodged out of time and invited the Illichevsky Court to determine the admissibility of the applicant's appeal.

21. On 3 March 1999 the Illichevsky Court granted the applicant leave to appeal out of time.

22. On 23 March 1999 the Regional Court allowed the applicant's appeal, quashed the decision of 29 December 1998 and ordered a different judge of the Illichevsky Court to examine the merits of the case.

23. On 6 April 1999 an expert of the Expert Unit, following an additional examination carried out as a part of the criminal investigation, found that the signature on the authority form had not been made by the applicant.

24. The proceedings before the Illichevsky Court resumed on 4 June 1999.

25. On 22 June 1999 the Illichevsky Court, following a request of Mrs S., ordered a further expert examination of the signature.

26. On 12 August 1999 the Institute informed the Illichevsky Court that the examination could not be carried out as Mrs S. had failed to pay the expert's fee.

27. The proceedings resumed on 21 December 1999, but were adjourned due to the applicant's and his lawyer's absence. As the applicant failed to appear for the hearings scheduled for 4 and 10 January 2000, on the latter date the Illichevsky Court dismissed his claims and, noting that Mrs S. had withdrawn her eviction action as by that time the applicant had moved out of the disputed flat (see paragraph 5 above), discontinued the proceedings. The applicant filed an appeal against this decision and asked for leave to appeal out of time.

28. On 10 January 2000 the Illichevsky Court granted the applicant leave to appeal out of time.

29. On 29 February 2000 the Regional Court allowed the applicant's appeal and ordered that the proceedings before the first instance court be continued.

30. The proceedings resumed on 22 June 2000. The applicant asked the Illichevsky Court to hear his case in his absence. The court decided that the applicant's presence was indispensable for the determination of the case and adjourned the proceedings until 14 September 2000.

31. Between 14 September and 17 November 2000 the Illichevsky Court fixed seven hearings, one of which was cancelled due to the applicant's lawyer's failure to appear. During this period the applicant's lawyer made four unsuccessful challenges to the impartiality of the presiding judge.

32. On 17 November 2000 the Illichevsky Court, basing its reasoning principally on the expert's report of 8 May 1997, rejected the applicant's claim as unsubstantiated. The applicant appealed.

33. On 13 March 2001 the Civil Division of the Regional Court (hereafter "the Civil Division") granted the applicant's appeal and quashed the judgment of 17 November 2000, holding that the Illichevsky Court had failed to attach due weight to the evidence collected in the course of criminal investigation against Mr O. and had overestimated the importance of the expert's report of 8 May 1997.

34. On 20 June 2001 the President of the Regional Court lodged a *protest* (an extraordinary appeal) with the Presidium of the Regional Court (hereafter "the Presidium") against the ruling of 13 March 2001. He considered that the judgment of 17 November 2000 had been quashed by the Division unreasonably and that the first instance court had correctly established the relevant facts, and had given cogent reasons for its decision.

35. The *protest* was examined on 27 June 2001 by the Presidium under the chairmanship of the President of the Regional Court. Having accepted the reasons set out in the *protest*, the Presidium quashed the ruling of 13 March 2001 and upheld the judgment of 17 November 2000, which became final and binding immediately. Neither the applicant nor his representative was invited to comment upon the *protest* or to participate in the hearing before the Presidium.

36. On 20 August 2001 the decision of the Presidium, together with the case-file, was sent to the Illichevsky Court.

37. On 13 August 2001 the applicant sent a letter to the Regional Court requesting it to account for the delay in the proceedings. On 28 August 2001 the Regional Court informed the applicant about its Presidium's decision and sent him a copy.

38. On 19 September 2001 the applicant lodged an appeal against the decision of 27 June 2001 under the new cassation procedure.

39. On 13 November 2001 the Supreme Court decided not to deal with the appeal because the applicant had failed to meet the relevant procedural requirements, namely clearly to specify which law he alleged to have been breached by the lower courts and in what way.

40. On 25 January 2002 the Illichevsky Court adjourned consideration of the applicant's cassation appeal and suggested that he remedy its shortcomings by 11 February 2002.

41. On 18 February 2002 the Illichevsky Court dismissed the applicant's cassation appeal because he had failed to comply with the relevant procedural requirements.

42. The outcome of the criminal proceedings against Mr O. is unknown.

II. RELEVANT DOMESTIC LAW

43. The parts of the Code of Civil Procedure (as in force at the material time) relating to the supervisory review and of the Law on the Introduction of Changes to the Code of Civil Procedure of 21 June 2001 are set out in the judgment of 9 November 2004 in the case of *Svetlana Naumenko v. Ukraine* (no. 41984/98, §§ 65- 66).

44. Article 321 of the Code of Civil Procedure, as in force at the relevant time, provided that the rulings of the courts of appellate instance were not subject to appeal and became final and binding upon their issuance.

THE LAW

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

A. Admissibility

45. According to the applicant, the length of the proceedings in his case was unreasonable. He also complained that the proceedings were unfair. He referred in this respect to Article 6 § 1 of the Convention, which provides as relevant:

“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.”

1. The alleged unfairness of the proceedings

46. The Government maintained that the six-month time-limit provided by Article 35 § 1 of the Convention with respect to the applicant's complaint about the unfairness of the reversal of the appellate decision by way of supervisory review started running on 27 June 2001, when the Presidium's decision was taken. They stated that this complaint should be declared inadmissible as being lodged more than six months after the final domestic decision.

47. The applicant submits in reply that it was not until his enquiry of 13 August 2001 concerning the state of the proceedings in his case, that he was informed by a letter of 28 August 2001 about the above-mentioned decision of the Presidium.

48. The Court recalls its constant case-law according to which the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment in cases where the applicant is entitled, pursuant to domestic law, to be served *ex officio* with a written copy of the final domestic decision, irrespective of whether that judgment was previously delivered orally (see *Worm v. Austria*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, § 33; *Venkadajalasarma v. the Netherlands* (dec.), no. 58510/00, 9 July 2002; *Sukhorubchenko v. Russia* (dec.), no. 69315/01, 15 January 2004).

49. The Court notes that the Government did not produce any evidence showing that a copy of the decision of 27 June 2001 had been made available to the applicant or his representative before 28 August 2001. As this date falls within the six months preceding the introduction of the present application on 8 February 2002, the Court dismisses the Government's objection.

50. The Court next notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds.

2. The allegedly unreasonable length of the proceedings

a. Period to be taken into account

51. The proceedings in the applicant's case commenced in October 1996, when Mrs. S.'s claim and the applicant's counterclaim were brought. However, the period to be taken into account began on 21 September 1997, when the Convention entered into force in respect of Ukraine.

52. As indicated above, the final decision in the applicant's case was taken on 27 June 2001, but the applicant was not informed of it until 28 August 2001, which is the date marking the end of the period under consideration (see, *mutatis mutandis*, *Worm*, cited above, § 33). The subsequent new cassation proceedings before the Supreme Court cannot be taken into account as they were extraordinary review proceedings (see *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002) and did not, in the event, determine civil rights or obligations.

53. The proceedings in the applicant's case lasted, therefore, a total of three years and eleven months.

b. The reasonableness of the length of the proceedings

54. The Government were of the view that the case was of a certain complexity as it involved several expert examinations and ran parallel with the criminal proceedings against Mr O. They stated that the domestic courts had displayed due diligence in the conduct of the proceedings by scheduling

hearings at regular intervals. They further observed that the applicant was primarily responsible for the length of the proceedings by failing to appear in court on several occasions and by filing numerous requests for replacement of the presiding judge.

55. The applicant disagreed.

56. The Court agrees with the Government that the case was made more complex by the need to obtain the relevant expert evidence and the parallel criminal proceedings. Moreover, the repeated challenges of the presiding judge by the applicant's representative, the applicant's failure to appear in court, and his repeated lodging of appeals out of time substantially delayed the proceedings. Moreover, the Court does not discern any substantial periods of inactivity which are attributable to domestic courts.

57. In the light of the above considerations and taking into account the overall duration of the proceedings, the Court finds that the “reasonable time” requirement laid down in Article 6 § 1 of the Convention was complied with in the present case.

58. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and therefore must be rejected in accordance with Article 35 § 4.

B. Merits (the alleged unfairness of the proceedings)

1. The parties' submissions

59. The Government stressed that the instant case was distinguishable from the case of *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII), as the *protest* was lodged by the President of the Regional Court and not by the prosecutor and concerned an interim procedural decision, not the final judgment in the case. The supervisory review procedure was expressly regulated by the Code of Civil Procedure. It contained guarantees to ensure a fair hearing and was aimed at correcting judicial errors. The supervisory review did not contradict the principles of the rule of law and legal certainty. The procedure represented an effective legal mechanism created to correct erroneous judicial decisions. The Government considered that the applicant's case was examined by an independent and impartial tribunal in adversarial proceedings.

60. The applicant contested the Government's submissions. He stated that the President of the Regional Court lacked impartiality when lodging his *protest* against the ruling of 13 March 2001 and subsequently chairing its examination by the Presidium. The applicant also considered that the Presidium's decision of 27 June 2001 was incompatible with the principles of equality of arms and rule of law guaranteed by Article 6 of the Convention.

2. *The Court's assessment*

a. *Supervisory review*

61. The applicant complained that the Presidium of the Regional Court's decision of 27 June 2001, which set aside the appellate ruling in his favour, had violated Article 6 § 1 of the Convention. The Court notes in this respect that, when dealing with extraordinary judicial proceedings, its case-law, with very few exceptions, assessed them from the angle of their compatibility with the principle of legal certainty. In the *Brumărescu* case (cited above, § 61) the Court stated, *inter alia*, that:

“the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question.”

The Court then stated that the Procurator-General's power, untrammelled by any time-limits, to apply for a final judgment to be quashed and the manner in which the Supreme Court dealt with such an application infringed the principle of legal certainty (see *Brumărescu*, cited above, § 62).

The above findings were reinforced in the Court's subsequent case-law on the matter. In the judgment of 24 July 2003 in the case of *Ryabykh v. Russia* (no. 52854/99, § 52, ECHR 2003-IX) the Court stated that:

“Legal certainty presupposes respect for the principle of *res judicata* (...) that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.”

62. In the context of a supervisory review of a procedural decision in a criminal case, the Court assessed the fairness of the proceedings as a whole (see *Salov v. Ukraine*, no. 65518/01, §§ 93-97, ECHR 2005-... (extracts)).

63. The present case is different from the cases of *Brumărescu* and *Ryabykh* because, in each of those cases, the decision which had been quashed by way of supervisory review was the decision which finally disposed of the case. The decision of 13 March 2001 of the Civil Division of the Regional Court which remitted the present case to the first instance was clearly not a final decision in that sense, because the case had not ended. It was, however, a final decision in the sense that it was not subject to any appeal, and had entered into force (paragraph 44 above). The principle of legal certainty applies to a decision of this kind in the same way

as it applies to a final determination of the case: the applicant in the present case was entitled to expect that the decision of 13 March 2001 would be “executed” in the sense that the case would proceed to a further round before the first instance.

64. In the event, however, the applicant's expectation was thwarted by the Presidium's decision of 27 June 2001, which re-instated the first instance judgment as the final judgment in the case.

65. The Court considers that there has been a violation of Article 6 § 1 of the Convention in respect of the quashing of the decision of 13 March 2001.

b. Lack of independence and impartiality

66. The applicant also complained that he had not been able to participate in the supervisory review proceedings, and that the presiding judge was the very judge who had made the *protest*. In the light of its finding that the quashing of the decision of 13 March 2001 in supervisory review proceedings was incompatible with Article 6 of the Convention, the Court does not consider it necessary to deal with these issues.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 1 of Protocol No. 1

67. The applicant complained that the rejection of his claim for rescission of the contract of sale of his former apartment had led to a violation of his property rights, guaranteed by Article 1 of Protocol No. 1.

68. In the instant case the applicant brought proceedings before the domestic courts for the recovery of possession of the property. In bringing that action he sought to establish a right of ownership which, at the time of lodging the claim was no longer his. Consequently, the proceedings did not relate to an “existing possession” of the applicant (see *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, § 48).

69. Moreover, at no stage of the proceedings was the applicant's ownership of his former apartment recognised by the domestic courts. Therefore, the applicant did not have a “possession” within the meaning of Article 1 of Protocol No. 1 read in the light of *Brumărescu* (cited above, § 70).

70. It remains to be examined whether he could have a “legitimate expectation” of securing the return of the property. This could have happened if the courts had decided, in assessing the circumstances of the case, that his apartment had been purchased by Mrs S. fraudulently. It falls first and foremost to the domestic courts to determine that question. Since the Court cannot speculate as to what the outcome of the proceedings would

have been if the first instance court had re-examined the applicant's case in accordance with the instructions of the appellate court, it follows that the applicant has failed to establish that he had a “legitimate expectation” regarding ownership of the property claimed.

71. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and rejects it in accordance with Article 35 § 4 of the Convention.

B. The remainder of the complaints

72. The applicant complained of a violation of Articles 8, 17 and 18 of the Convention. The Court finds no indication whatsoever in the case file which might disclose any appearance of a violation of these provisions and, therefore, rejects this part of the application in accordance with Article 35 §§ 3 and 4 of the Convention as being manifestly ill-founded.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. The applicant claimed 2,000,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

75. The Government considered this amount exorbitant and unfeasible.

76. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

77. The applicant did not submit any claim under this head within the set time-limit; the Court therefore makes no award in this respect.

C. Default interest

78. 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 concerning the alleged unfairness of the proceedings (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 on account of the quashing of the ruling of 13 March 2001 by way of supervisory review;
3. *Holds* that it is not necessary to consider the allegation of procedural unfairness in the supervisory-review proceedings;
4. *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 2,000 (two thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable¹;
 - (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 21 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President

1. Rectified on 10 December 2007. The words “to be converted into Ukrainian hryvnias at the rate applicable on the of settlement” have been deleted.