



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

FIFTH SECTION

CASE OF PONOMARYOV v. UKRAINE

(Application no. 3236/03)

JUDGMENT

STRASBOURG

3 April 2008

FINAL

29/09/2008

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 Ponomaryov v. Ukraine,

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

Peer Lorenzen, *President*,

Snejana Botoucharova,

Volodymyr Butkevych,

Rait Maruste,

Renate Jaeger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and of Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 11 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 3236/03) 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 Viktor Vasylyovych Ponomaryov (“the applicant”), on 17 January 2003.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs V. Lutkovska, and the Head of the Government Agent’s Office Mrs I. Shevchuk, of the Ministry of Justice.

3. On 21 January 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. On 11 October 2005 the Court put additional questions to the parties.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant, Mr Viktor Vasylyovych Ponomaryov, is a Ukrainian national who was born in 1953 and lives in the village of Rogan, Kharkiv region, Ukraine.

5. On 18 February 1991 the applicant was dismissed from the State-owned farm KhTZ.

6. After numerous unsuccessful attempts to receive salary and other payments arrears due to him from the farm, in February 1999 the applicant lodged a civil claim against the farm seeking the above payments and compensation for the delay in their payment.

7. In January 2001 the defendant was transformed into the Sad Joint-Stock Company (hereafter “the Company”) in which 25% of shares belonged to the State.

8. On 5 October 2001 the Chuguyiv Town Court (hereafter “the Chuguyiv Court”) awarded the applicant 42,086¹ Ukrainian hryvnas (UAH) in salary arrears, compensation and other payments from the Company. The judgment was not appealed against within the one-month statutory time-limit and became final on 5 November 2001.

9. On 30 November 2001 the Company lodged an appeal against the judgment of 5 October 2001.

10. On 10 December 2001 the bailiff service initiated enforcement proceedings.

11. By a ruling of 10 December 2001 the Chuguyiv Court left the appeal of the Company unexamined for failure to comply with procedural requirements, namely having been lodged outside the statutory time-limit without a request for renewal, failure to pay a court fee and shortcomings in the form and content of the appeal. The Company was given ten days to bring its appeal into compliance with relevant procedural law.

12. By a ruling of 10 January 2002, following the Company’s failure to comply with the court’s ruling of 10 December 2001, the Chuguyiv Court returned its appeal unexamined.

13. On 18 November 2002 the enforcement proceedings were suspended due to the insolvency proceedings against the Company initiated by the Commercial Court of Kharkiv on 25 October 2002.

14. On 12 December 2002 the State’s share in the Company was reduced from 25 % to 19.99 %.

15. By a letter of 18 December 2002, the Ordzhonikidzevsky District Bailiffs’ Service informed the applicant that the defendant Company had no funds in its account and that the procedure for the forced sale of assets belonging to the debtor was blocked by the Forced Sale of Property Moratorium Act of 26 November 2001.

16. On 4 March 2003 the Commercial Court of Kharkiv region approved a friendly settlement between the Company and its creditors and discontinued the insolvency proceedings.

17. On 24 March 2003 the enforcement proceedings were resumed.

18. On 30 January 2004, on a complaint by the applicant, the Ordzhonikidzevsky Prosecutor’s Office instituted criminal proceedings

¹ Around EUR 5,780

against bailiff V. for fraud in relation to the enforcement of the judgment in the applicant's favour.

19. On 10 February 2004 the defendant Company again lodged an appeal against the judgment of 5 October 2001. It also requested that the time-limit for the appeal be renewed, on the ground that at the time of the impugned judgment of the first-instance court it had been in a difficult economic situation and had been using all its funds to pay off debts to avoid insolvency and, therefore, it had not been able to afford the court fees for an appeal.

20. On 20 February 2004 the Chuguyiv Court allowed the Company's request for renewal of the time-limit and issued a ruling in which it repeated the Company's grounds for the request and added that "the court considers it necessary to renew the time-limit for appeal". The court also noted that its ruling of 20 February 2004 was not subject to appeal.

21. On 1 April 2004, on the basis of the ruling of 20 February 2004, the Ordzhonikidzevskiy Bailiffs' Service returned the writ of execution to the Chuguyiv Court.

22. On 21 April 2004 the Kharkiv Court of Appeal reviewed the judgment of 5 October 2001, found in part against the applicant and in the other part reviewed the calculation of the requested compensation and awarded the applicant UAH 3.09.

23. On 29 April 2004 the debtor transferred to the bailiff service the amount awarded from it under the decision of 21 April 2004. According to the Government, on 22 June 2004 the applicant was informed that this amount was available for him. According to the applicant he did not receive any such information at that time.

24. On 7 September 2004 the criminal proceedings against bailiff V. were discontinued for lack of proof of a crime.

25. On 15 October 2004 the applicant lodged a cassation appeal against the decision of 21 April 2004 and requested that the time-limit for lodging an appeal be renewed on the ground that he had not been present before the Court of Appeal and he had learned about the above decision only on 6 October 2004. By a ruling of 29 October 2004, the Chuguyiv Court allowed the applicant's request and renewed the time-limit for lodging a cassation appeal.

26. On 9 November 2005 the Supreme Court quashed the decision of 21 April 2004 on the ground that the court of appeal had considered the case in the applicant's absence and remitted the case to the court of appeal for a fresh consideration.

27. On 1 March 2006 the Kharkiv Court of Appeal issued a new decision along the same lines as its previous decision of 21 April 2004.

28. On 12 May 2006 the Supreme Court refused the applicant's request for leave to appeal in cassation.

II. RELEVANT DOMESTIC LAW

A. Legislation concerning enforcement proceedings

1. Forced Sale of Property Moratorium Act of 29 November 2001

29. The Act (Закон України “Про введення мораторію на примусову реалізацію майна”) aims at protecting State interests in the sale of assets belonging to undertakings in which the State holds at least 25% of the share capital. A moratorium on the enforcement of judgment debts has been introduced until such time as the mechanism for the forced sale of the property of such undertakings has been improved. No time-limit has been set. Section 2 of that Act provides that the prohibition on the forced sale of property includes the execution of writs by the State Bailiffs’ Service on property belonging to such companies. The Act therefore stays the execution of all writs by the State Bailiffs’ Service against the assets of undertakings in which the State holds at least 25% of the share capital.

2. Enforcement Proceedings Act of 21 April 1999

30. Under section 2 of the Act (Закон України “Про виконавче провадження”), the enforcement of judgments is entrusted to the State Bailiffs’ Service. Under section 85 of the Act, a creditor may make a complaint against actions or omissions of the State Bailiffs’ Service with the head of the competent department of that Service or with a local court. Section 86 of the Act entitles a creditor to institute court proceedings against a legal person, entrusted with the enforcement of a judgment, for the inadequate enforcement or non-enforcement of that judgment, and to receive compensation.

3. State Bailiffs’ Service Act of 24 March 1998

31. Section 11 of the Act (Закон України “Про державну виконавчу службу”) provides for the liability of bailiffs for any inadequate performance of their duties, and compensation for damage caused by a bailiff when enforcing a judgment. Under section 13 of the Act, acts and omissions of the bailiff can be challenged before a superior official or the courts.

B. Legislation concerning time-limits

1. The Code of Civil Procedure, 1963 (replaced by a new Code on 1 January 2005)

32. Article 68 of the Code provided for delayed payment of the court fees or their payment by instalments. These methods of court fee payment could be allowed by a judge with regard to the property status of a party. Such an extension or delay in payment could be granted for a maximum period of three months.

33. Article 89 of the Code provided that the procedural time-limits could be extended or renewed if the court found valid reasons for such an extension or renewal. A refusal to renew a time-limit was subject to appeal.

34. Article 292 of the Code provided for a one-month period for lodging appeals against decisions of the first-instance court and a fifteen-day period for appeal against its rulings. It further provided that these periods could be renewed if the court found valid reasons for their renewal.

2. Other procedural codes

35. The new Code of Civil Procedure, as well as the Code of Criminal Procedure and the Code of Administrative Justice provide similar provisions as to the renewal of the procedural time-limits. The Code of Commercial Procedure, however, limits the possibility of renewal to three months.

THE LAW

I. THE REOPENING OF THE JUDICIAL PROCEEDINGS AND QUASHING OF THE JUDGMENT

36. The applicant complained under Article 6 § 1 of the Convention that the renewal of the time-limit for an ordinary appeal after a considerable lapse of time and the consecutive quashing of the judgment of 5 October 2001 had violated the principle of legal certainty and unlawfully prolonged the judicial proceedings. He further complained under Article 1 of Protocol No. 1 to the Convention of an interference with his right to the peaceful enjoyment of possessions. The relevant parts of these provisions read as follows:

Article 6 § 1

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

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...”

A. Admissibility

37. The Court 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. It must therefore be declared admissible.

B. Merits*1. Arguments by the parties*

38. The Government maintained that the ruling of 20 February 2004 had not changed the judgment of 5 October 2001 but only allowed a review of it. They further submitted that the decision of 21 April 2004 by the court of appeal quashing the judgment of 5 October 2001 was subsequently quashed by the Supreme Court.

39. The applicant disagreed. He maintained that the reasons for renewal advanced by the defendant Company had been unfounded, since the financial situation of the defendant at the end of 2001 had been more than satisfactory, which could be proved by relevant documents. He further noted that the defendant Company had previously used its right to appeal against the judgment of 5 October 2001. The applicant considered that by renewing the time-limit for a repeated appeal after a considerable lapse of time the domestic court had violated the principle of legal certainty and unlawfully prolonged the judicial proceedings.

*2. The Court's assessment***(a) Article 6 of the Convention**

40. The Court reiterates 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 declares, in its relevant part, 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 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 (see, *mutatis mutandis*, *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-X).

41. The Court notes that the present case concerns not an extraordinary review of the final and binding judgment under supervisory review proceedings or in the light of newly discovered circumstances (see among other authorities, *Tregubenko v. Ukraine*, no. 61333/00, §§ 34-38, 2 November 2004; and *Pravednaya v. Russia*, no. 69529/01, §§ 27-34, 18 November 2004), but the reopening of the proceedings after a considerable lapse of time by renewing the time-limit for an ordinary appeal. The Court notes that the legal systems of many member States provide for a possibility to extend procedural time-limits if there are valid reasons to do so. At the same time, if the time-limit for ordinary appeal procedure is renewed after a considerable lapse of time and for reasons which do not appear to be particularly persuasive, like in the present case an allegedly difficult economic situation preventing the defendant from paying the court fees (see paragraphs 19 and 20 above), such a decision can infringe the principle of legal certainty, in a similar way to the extraordinary review proceedings. The Court acknowledges that it is primarily within the domestic courts' discretion to decide on the renewal of the time-limit for an appeal, but such discretion is not unlimited. The courts shall be required to indicate the reasons. One of such reasons could be, for instance, a failure by the State authorities to inform parties of decisions taken with respect to their cases. Even then, however, the possibility of renewal would not be unlimited, since the parties should take steps within reasonable intervals to learn about the state of judicial proceedings of which they are aware (see, *mutatis mutandis*, *Aleksandr Shevchenko v. Ukraine*, no. 8371/02, § 27, 26 April 2007 and *Trukh v. Ukraine* (dec.), no. 50966/99, 14 October 2003). In every case, the domestic courts should verify whether the reasons for renewal of a time-limit for appeal could justify the interference with the principle of *res judicata*, especially, as in the present case, when the domestic legislation does not limit the courts' discretion either on the time or on the grounds for the renewal of the time-limits.

42. The Court notes that the renewal of the time-limit for the opposing party in the proceedings had been granted although the Company had been aware of the judgment of 5 October 2001 shortly if not immediately after its adoption. It had lodged a first appeal in November 2001, but it was not considered for a number of reasons, a failure to pay a court fee being only

one of them (see paragraph 11 above). Two years later, the Company lodged a new appeal, maintaining that it could not afford the court fees at the time the decision of the first-instance court was open to appeal under the law. The Court notes that the Company did not refer to lack of funds, but to lack of free funds to pay the court fees. Furthermore, there is no indication that the Company ever asked for delay of payment of the court fees or for payment by instalments, which it could have done under domestic law (see Relevant domestic law above). In such a situation, allowing the Company to lodge a repeated appeal after a considerable lapse of time and after execution of judgment had started for reasons which, in the Court's opinion, are not exercised for correction of serious judicial errors and miscarriages of justice, but merely for the purpose of a rehearing and a fresh decision of the case, the domestic courts infringed the principle of legal certainty and the applicant's "right to a court" under Article 6 § 1 of the Convention. There has accordingly been a violation of that Article.

(b) Article 1 of Protocol No. 1

43. The Court reiterates that the existence of a debt confirmed by a binding and enforceable judgment furnishes the judgment beneficiary with a "legitimate expectation" that the debt will be paid and constitutes the beneficiary's "possessions" within the meaning of Article 1 of Protocol No. 1. Quashing such a judgment amounts to an interference with his or her right to peaceful enjoyment of possessions (see, among other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 74).

44. The Government agreed that the judgment of 5 October 2001 constituted a "possession", but maintained that there had been no violation of Article 1 of Protocol No. 1, since the decision of the Kharkiv Court of Appeal, quashing the above judgment, had in its turn been quashed by the Supreme Court.

45. The applicant disagreed.

46. The Court finds that in the present case as a result of the reopening of the proceedings the amount of the judgment award was considerably reduced. The quashing of the enforceable judgment frustrated the applicant's reliance on a binding judicial decision and deprived him of an opportunity to receive the money he had legitimately expected to receive (see paragraphs 20 and 27 above).

47. In these circumstances, the Court considers that the reopening of the proceedings and the quashing of the judgment of 5 October 2001 placed an excessive burden on the applicant and was therefore incompatible with Article 1 of Protocol No. 1. There has therefore been a violation of that Article.

II. THE LENGTH OF THE ENFORCEMENT PROCEEDINGS

48. The applicant complained that the State authorities had not enforced the judgment of 5 October 2001 in due time. He relied on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

49. The Government maintained that the State could not be held responsible for the debts of the Company, since the latter was a separate legal entity and the State had a minor share in it. Moreover this share had been reduced from 25% to 19.99% in December 2002. Therefore, the Forced Sale of Property Moratorium Act no longer protected the debtor's funds from the enforcement proceedings. They further maintained that the applicant had not exhausted the remedies available to him under the domestic law.

50. The applicant maintained that he had worked for the State-owned farm and that its consequent transformation into a joint-stock company did not relieve the State of the obligation to pay off its debts to him.

51. The Court notes that at the time the judgment in the applicant's favour was adopted the State was only a minor shareholder (25%) of the defendant Company. After the judgment of 5 October 2001 had become final the debtor Company had been protected by the law on moratorium for a relatively short period of time – about thirteen months – until the State's share had been reduced to 19.99 %. After this period the responsibility of the State extended no further than the involvement of State bodies in enforcement proceedings (see *Shestakov v. Russia* (dec.), no. 48757/99, 18 June 2002).

52. The applicant challenged the bailiff's actions under the criminal law but the investigation established no fault of the bailiff in the non-enforcement of the judgment. Nevertheless, the applicant has failed to challenge the decision of 7 September 2004 on termination of criminal proceedings against the bailiff before the courts. Neither has he lodged a civil claim seeking damages from the bailiff service for non-enforcement of the judgment in his favour.

53. The Court reiterates that, as it has already held in similar cases, Ukrainian legislation provides for a possibility to challenge before the courts the lawfulness of actions and omissions of the State Bailiffs' Service in enforcement proceedings and to claim damages from that Service for delays in payment of the amount awarded (see, for instance, *Kukta v. Ukraine* (dec.), no. 19443/03, 22 November 2005). In the present case, the applicant failed to do so and, accordingly, cannot be regarded as having exhausted the domestic remedies available to him under Ukrainian law.

54. It follows that this complaint must be rejected pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

IV. OTHER COMPLAINTS

55. In so far as the applicant complained under Article 6 § 1 of the Convention that he was absent from the hearing at the court of appeal, the Court notes that the decision of the Court of Appeal of 21 April 2004 was quashed by the Supreme Court for that very reason. Therefore, the applicant could no longer claim to be a victim with respect to this complaint. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

56. The applicant also relied on Articles 8 and 14 of the Convention with respect to the enforcement proceedings. The Article 8 complaint was based on the applicant's allegation that the judgment debt could have been used by him to ensure better treatment for his son, who had been suffering from leukaemia and had subsequently died, in March 2003. The Court notes that the applicant did not raise these complaints before the domestic courts. In any event, his allegations are unsubstantiated and do not lay a basis for an arguable claim of a breach of this provision. It follows that this part of the application is manifestly ill-founded too and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed UAH 103,110 (equivalent to 14,133 euros (EUR), which corresponded to UAH 42,086.06 plus inflation losses, in respect of pecuniary damage. He also claimed EUR 100,000 in respect of non-pecuniary damage, stating that his son had died of cancer because the applicant lacked the awarded sum for better medical treatment for his son.

59. The Government found these claims groundless and irrelevant.

60. As to the pecuniary damage claimed, the Court notes that the amount awarded to the applicant by the domestic court on 1 March 2006 is negligible in comparison with the originally awarded amount under the judgment of 5 October 2001. The Court considers it appropriate to award the applicant EUR 5,780, which is the equivalent of the amount awarded to him by the domestic court under the quashed judgment.

61. As to non-pecuniary damage claimed, the Court takes the view that the applicant has suffered some non-pecuniary damage as a result of the

violations found which cannot be made good by the Court's mere finding of a violation (*Tregubenko v. Ukraine*, cited above, § 63). Nevertheless, the amount claimed is excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

62. 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

63. 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 of the reopening of the proceedings and the quashing of the judgment of 5 October 2001 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1;
3. *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 5,780 (five thousand seven hundred and eighty Euros) in respect of pecuniary damage;
 - EUR 1,000 (one thousand 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 amounts 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 claim for just satisfaction.

Done in English, and notified in writing on 3 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President