



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

FIFTH SECTION

CASE OF KOLESNIK v. UKRAINE

(Application no. 20824/02)

JUDGMENT

STRASBOURG

10 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 Kolesnik v. Ukraine,
The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Peer Lorenzen, *President*,
Karel Jungwiert,
Volodymyr Butkevych,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
and of Claudia Westerdiek, *Section Registrar*.
Having deliberated in private on 18 March 2008,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 20824/02) 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 Viktor Vasilyevich Kolesnik (“the applicant”), on 24 April 2002.
2. The applicant was represented by Mr I. Pogasiy, a lawyer practising in Kirovograd. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs Valeriya Lutkovska.
3. On 9 September 2004 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 1959 and currently resides in Kirovograd.

A. Proceedings concerning retirement benefits

5. In January 2001 the applicant, a former military serviceman brought proceedings against A-0981 military unit, where he had served before

retirement, seeking recovery of redundancy pay and compensation for his uniform. On 12 February 2001 the Military Court of Cherkassy Garrison (*Військовий суд Черкаського гарнізону*) found for the applicant and awarded him a total of 2,935 Ukrainian hryvnias (UAH)¹.

6. On 20 March 2001 the military unit concerned paid the applicant UAH 2,420².

7. On 17 May 2001 the Bailiffs' Service of the Leninskiy District of Kirovograd (*Відділ державної виконавчої служби Ленінського районного управління юстиції м. Кіровограда*, hereafter "the Leninskiy Bailiffs' Service") instituted enforcement proceedings in respect of UAH 515³, the outstanding amount of the court award.

8. Although the property and accounts of the military unit were frozen by the Leninskiy Bailiffs' Service the funds obtained were insufficient for the payment of the amount due to the applicant.

9. On 26 March 2003 the Leninskiy Bailiffs' Service forwarded the applicant's writ of execution together with the enforcement case-file to the Bailiffs' Service of the Oleksandrivskiy district of Kirovograd region (*Відділ державної виконавчої служби Олександрівського районного управління юстиції Кіровоградської області*, hereafter "the Oleksandrivskiy Bailiffs' Service").

10. According to a bank transfer order produced by the Government, on 30 November 2004 the Oleksandrivskiy Bailiffs' Service sent UAH 2,073⁴ via postal transfer to an unspecified recipient or recipients. This sum corresponds to the total amount of the remaining debts owed to the applicant and Mr Mayadnnyk, the applicant in case no. 20826/02.

11. On 1 December 2004 the Oleksandrivskiy Bailiffs' Service terminated the proceedings in the applicant's enforcement case on the grounds that the judgment of 12 February 2001 had been executed in full. The applicant stated that he had not been informed of the transfer and had not received any money as a result of it.

12. On 21 June 2007 the Oleksandrivskiy Bailiffs' Service made a postal transfer in the applicant's name of the remaining amount. On the same day the applicant collected this money.

B. Proceedings concerning compensation for bailiffs' inactivity

13. On 4 March 2003 the applicant brought proceedings against the Leninskiy Bailiffs' Service claiming moral damages for its alleged inactivity and compensation for the devaluation of the sum awarded to him. On 28 July 2003 the Leninsky District Court of Kirovograd (*Ленінський*

1. Approximately 574 Euros (EUR).

2. Approximately EUR 502

3. Approximately EUR 100

4. Approximately EUR 415

районний суд м. Кіровоград, hereafter “the Leninskiy Court”) granted this claim in part and awarded the applicant UAH 1,000¹ in compensation for non-pecuniary damage incurred as the result of the Leninskiy Bailiffs’ Service’s failure to perform in time its duties set forth in the Law of 21 April 1999 “on Enforcement Proceedings”.

14. On 30 October 2003 the Leninskiy Court granted the Leninskiy Bailiffs’ Service leave to appeal out of time against this judgment. On 13 November 2003 the Leninskiy Bailiffs’ Service filed an appeal. Having sought and received the applicant’s written comments on this appeal, on an unspecified date the Leninskiy Court referred it to the Kirovograd Regional Court of Appeal (*Апеляційний суд Кіровоградської області*).

15. On 9 February 2004 the Leninskiy Bailiffs’ Service opened the enforcement proceedings in respect of the judgment of 28 July 2003 and immediately terminated them on the ground that appeal proceedings were under way in respect of the judgment concerned. Despite several requests of the Court, neither the applicant nor the Government furnished any information on the course or the outcome of these proceedings.

II. RELEVANT DOMESTIC LAW

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

17. Article 40-1 of the Law of Ukraine of 21 April 1999 “on Enforcement Proceedings” provides the following:

“The writ of execution, which has been accepted by the bailiff for processing, shall be returned to the court which had issued it if the court has granted a request for appeal out of time against the judgment in respect of which this writ had been issued... The decision to return the writ of execution can be appealed against to a court.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1

18. The applicant complained about the non-execution of the judgments of 12 February 2001 and 28 July 2003 given in his favour. He relied on Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1, which provide, in so far as relevant, as follows:

1. Approximately EUR 166

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 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

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”

A. Admissibility*1. Alleged non-enforcement of the judgment of 12 February 2001*

19. The Government argued that the applicant lost his victim status after the execution of the Military Court of Cherkassy Garrison’s judgment of 12 February 2001.

20. The applicant disagreed.

21. The Court notes that this objection is similar to that which the Court has already dismissed in a number of judgments (see, for example, *Voytenko v. Ukraine*, no. 18966/02, §§ 27-35, 29 June 2004 and *Romashov v. Ukraine*, no. 67534/01, §§ 26-27, 27 July 2004). The Court considers that the present objection must be rejected for the same reasons.

22. The Court notes that the applicant’s complaints concerning the non-enforcement of the Military Court of Cherkassy Garrison’s judgment of 12 February 2001 are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds.

2. Alleged non-enforcement of the judgment of 28 July 2003

23. The Government maintained that as the Leninskiy Bailiffs’ Service, the defendant in these proceedings was granted leave to appeal out of time

against the judgment at issue, there was no obligation on the State to ensure the enforcement of this judgment.

24. The applicant disagreed.

25. The Court notes that on 30 October 2003 the Leninskiy Court granted the Leninskiy Bailiffs' Service's request for leave to appeal out of time. Pursuant to Article 40-1 of the Law "on Enforcement Proceedings", a bailiff dealing with the applicant's enforcement case decided to return the writ of execution to the Leninskiy Court. The applicant did not appeal against this decision.

26. The Court, theretofore, finds that the applicant has failed to show that there was a final and binding court judgment, the lengthy non-enforcement of which could give rise to a breach of Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1. This part of the application, therefore, should be rejected in accordance with Article 35 §§ 1 and 4 of the Convention as being manifestly ill-founded.

B. Merits

27. In their observations, the Government contended that there had been no violation of Articles 6 § 1 and 13 of the Convention or Article 1 of Protocol No. 1 (as in the cases of *Romashov*, cited above, § 37, and *Voytenko*, cited above § 37). They also maintained that the overall length of the proceedings was reasonable in the circumstances.

28. The applicant disagreed

29. The Court observes that, according to the Government, the judgment in the applicant's favour was enforced in full on 30 November 2004, when the outstanding amount of the award was sent to the applicant via postal transfer. However, the applicant stated that he was not informed of any such transfer, nor did he receive any money thus sent.

30. The Court notes in this respect that apart from a copy of a bank order, which does not bear any name of the recipient or recipients of the transferred amount, the Government did not produce any document to prove that the alleged transfer was actually made to the applicant or that the applicant was informed of it. The Court, therefore, considers that the debt to the applicant was paid to him in full on 21 June 2007 when he received the outstanding amount via the postal transfer.

31. Accordingly, the final judgment of the Military Court of Cherkassy Garrison of 12 February 2001 remained unenforced for six years and three months.

32. The Court recalls that it has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases raising issues similar to the present application (see, for example *Voytenko*, cited above, §§ 43, 48, 55 and *Vodopyanovy v. Ukraine*, no. 22214/02, § 37, 17 January 2006).

33. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present case. There has, accordingly, been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

34. The Court does not find it necessary in the circumstances to examine the same complaint under Article 13 of the Convention (see *Derkach and Palek v. Ukraine*, nos. 34297/02 and 39574/02, § 42, 21 December 2004).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant claimed 435.69 Euros (EUR) in respect of pecuniary and EUR 8,000 in respect of non-pecuniary damage. As regards the former he referred to the statutory default interest and loss of income.

37. The Government contended that the applicant's claim for pecuniary damage was not supported with any documents and that his claim for non-pecuniary damage was unsubstantiated and exorbitant.

38. The Court makes no award in respect of pecuniary damage as the applicant has not substantiated any such loss. However, it considers 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 finding of a violation alone. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 2,000.

B. Costs and expenses

39. The applicant also claimed EUR 261.5 for the costs and expenses incurred before the domestic courts and EUR 383.1 for those incurred before the Court.

40. The Government maintained that the applicant has failed to show that the claimed amounts were actually incurred and that these costs were necessary.

41. The Court reiterates that, in order for costs and expenses to be included in an award under Article 41, it must be established that they were

actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

42. The Court considers that these requirements have not been met in the instant case. In particular, it notes that the case was not particularly complex and the applicant was dispensed from the general obligation to be legally represented. However, the applicant may have incurred some costs and expenses for his representation and the proceedings before the Court.

43. Regard being had to the information in its possession and to the above considerations, the Court awards the applicant EUR 300 for costs and expenses.

C. Default interest

44. 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 non-enforcement of the Military Court of Cherkassy Garrison's judgment of 12 February 2001 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* that there is no need to examine the complaint under Article 13 of the Convention;
5. *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 and EUR 300 (three hundred Euros) in respect of costs and expenses, plus any tax that might be chargeable to the applicant;
 - (b) that the aforementioned sums shall be converted into the national currency of Ukraine at the rate applicable at the date of settlement;

(c) 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;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President