



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

FIFTH SECTION

CASE OF NIKONENKO v. UKRAINE

(Application no. 14089/03)

JUDGMENT

STRASBOURG

29 May 2008

FINAL

29/08/2008

This judgment may be subject to editorial revision.

In the case of Nikonenko v. Ukraine,

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

Peer Lorenzen, *President*,
Rait Maruste,
Volodymyr Butkevych,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 14089/03) 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, Ms Olena Volodymyrivna Nikonenko (“the applicant”), on 10 April 2003.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 7 April 2006 the Court decided to communicate the complaint concerning the length of the proceedings to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1957 and lives in Makiyivka.

5. On 1 December 1997 the applicant instituted civil proceedings in the Tsentralno-Misky District Court of Makiyivka (*Центрально-міський суд м. Макіївка*) against the Makiyivka Municipal Medical Association (*Макіївське міське медичне територіально-педіатричне об'єднання*), seeking reinstatement in the position of a speech therapist and compensation for the loss of income.

6. On 21 January 1999 the court found against the applicant. The applicant appealed in cassation.

7. On 11 March 1999 the Donetsk Regional Court (*Донецький обласний суд*)¹ quashed this judgment and remitted the case for a fresh consideration on the grounds that the first-instance court had failed to examine all the material circumstances of the case.

8. On 18 January 2000 the case-file was destroyed by fire in the court building. In April 2000 the proceedings were renewed.

9. Between April 2000 and January 2001 the Tsentralno-Misky Court scheduled some twenty-four hearings. Three of these hearings were adjourned on account of the defendant's failure to appear, two on account of the applicant's absences and six hearings were adjourned on account of the absence of witnesses, mostly the defendant's employees. On some five occasions the court adjourned the hearings following the court's decision to allow the applicant's demands to summon witnesses and request additional documents from the defendant.

10. On 12 January 2001 the Tsentralno-Misky Court found against the applicant. The applicant appealed in cassation.

11. On 15 February 2001 the Donetsk Regional Court quashed the judgment of 12 January 2001 and remitted the case for a fresh consideration, having found that the first-instance court had failed to comply with a number of procedural requirements, in particular, those concerning renewal of the proceedings after the loss of the case-file. Further, the court held that still not all relevant circumstances had been explored.

12. Between April and December 2001 the first-instance court scheduled eleven hearings, some seven of them being adjourned following the court's decision to allow the applicant's demands that the defendant provides additional documents.

13. By letter of 24 September 2001 the court reprimanded Mrs M., the defendant's chief officer (*головний лікар*), for repetitive failures of its representative to provide the documents needful for the resolution of the case. In particular, the court noted that the defendant had been repeatedly providing incomplete, inaccurate or irrelevant records, causing the court to adjourn the hearings, and obliged her to ensure the provision of a number of missing documents. The court further requested the chief officer to ensure the appearance of the defendant's employees summoned by it as witnesses.

14. In October and November 2001 Mrs M. submitted to the court clarifications concerning various inaccuracies in the records provided earlier.

¹ Since July 2001 the Donetsk Regional Court of Appeal (*Апеляційний суд Донецької області*).

15. On 5 December 2001 the Tsentralno-Misky Court rejected the applicant's claims, having found that she had been dismissed in accordance with applicable law. On 21 December 2001 the court provided expanded reasoning for its conclusions, responding to the applicant's arguments, which it had not dealt with in its previous judgments. The applicant appealed.

16. On 18 February 2002 the Regional Court upheld the judgment of 5 December 2001. The applicant appealed in cassation.

17. On 4 January 2003 the Supreme Court of Ukraine rejected the applicant's request for leave to appeal in cassation.

THE LAW

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

18. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

19. The period to be taken into consideration began on 1 December 1997 and ended on 4 January 2003. It thus lasted five years and one month for three levels of jurisdiction.

A. Admissibility

20. 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

21. The Government submitted that the length of the proceedings in the applicant's case was not unreasonable. They maintained that primary factors delaying the final resolution of the case were the fire in the court building, which was a *force majeure*, and the applicant's own conduct, in particular, her repetitive demands to summon witnesses and provide additional documents.

22. The applicant disagreed. She maintained that the proceedings concerning her reinstatement were of paramount importance to her, in particular, since she was a single mother with no other sources of income. She further submitted that the fire happened on account of the authorities' negligence and that her demands for documents were triggered by the defendant's repetitive failures to provide what was necessary for resolution of her claims.

23. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). The Court reiterates that special diligence is necessary in employment disputes (*Ruotolo v. Italy*, judgment of 27 February 1992, Series A no. 230-D, p. 39, § 17).

24. Turning to the facts of the present case, the Court does not find that loss of the applicant's case-file by fire can be attributed to the Government in absence of any evidence that it had been caused by negligence of the court personnel. It further notes that the trial court regularly scheduled hearings in the applicant's case.

25. On the other hand, the Court observes that significant delays in the proceedings were caused by repetitive remittals of the case for a fresh consideration on account of the failures of the trial court to explore all relevant circumstances and to comply with the rules of procedure. As regards adjournments of hearings, the Court notes that, although on a number of occasions it was the applicant who requested them demanding additional documents or presence of witnesses, the final discretion as to whether to grant such requests always remained with the judicial authorities, who bear ultimate responsibility for management of their proceedings so that they are expeditious and effective (see e.g. *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 183, ECHR 2006-...). Additionally, regard being had to the reasons adduced by the appellate court for remittals of the case for a fresh consideration and the correspondence between the Tsentralno-Misky Court and the defendant's chief officer (see paragraphs 13-14 above), it appears that before September 2001 little had been done to ensure submission of comprehensive information by the defendant, who was a State entity, as well as employer of most of the witnesses.

26. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see e.g. *Karnaushenko v. Ukraine*, no. 23853/02, §§ 59, 30 November 2006; and *Moroz and Others v. Ukraine*, no. 36545/02, § 60, 21 December 2006 and *Golovko v. Ukraine*, no. 39161/02, § 63, 1 February 2007).

27. Having examined all the material submitted to it and having regard to its case-law on the subject, the Court considers that, on balance, in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

28. There has accordingly been a breach of Article 6 § 1.

II. OTHER COMPLAINTS

29. The applicant further complained under Article 6 § 1 of the Convention that the proceedings in her case were unfair, particularly, as the domestic judicial authorities erred in assessment of facts and application of the law.

30. Having carefully examined the applicant’s submissions in the light of all the material in its possession and insofar as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. Particularly, the Court observes that the applicant enjoyed the right to adversarial proceedings. Within the framework of the proceedings she was able to introduce all necessary arguments defending her interests, and the judicial authorities gave them due consideration.

31. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 12,000 hryvnyas (UAH) in compensation for the loss of income allegedly sustained in connection with the delay in the proceedings by way of compensation for pecuniary damage. She further claimed 88,000 hryvnyas in respect of non-pecuniary damage.

34. The Government contested these claims.

35. 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, the Court considers that the applicant must have sustained

non-pecuniary damage. Ruling on an equitable basis, it awards her EUR 800 under that head.

B. Costs and expenses

36. The applicant did not submit any separate claim under this head; the Court therefore makes no award in this respect.

C. Default interest

37. 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 excessive length of the proceedings 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*
 - (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 800 (eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency at the rate applicable at 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 amount 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 29 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President