



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

FIFTH SECTION

CASE OF VERITAS v. UKRAINE

(Application no. 39157/02)

JUDGMENT

STRASBOURG

13 November 2008

FINAL

13/02/2009

This judgment may be subject to editorial revision.

In the case of Veritas v. Ukraine,

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

Rait Maruste, *President*,
Karel Jungwiert,
Volodymyr Butkevych,
Renate Jaeger,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 39157/02) 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 legal entity “Veritas” (“the applicant company”), on 30 September 2002.

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

3. On 11 September 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant company is registered in Dnipropetrovs’k.

5. On 22 August 2001 the applicant company lodged a claim with the Dnipropetrovs’k Regional Commercial Court against the Commercial Bank P. (“the Bank”) seeking compensation for damages because of the latter’s failure to withdraw a sum of money from the account of a third party, S., in the framework of enforcement proceedings against S.

6. By decision of 13 September 2001, the court found against the applicant company. On 6 November 2001 the Dnipropetrovs’k Regional

Commercial Court of Appeal dismissed an appeal lodged by the applicant company and upheld the decision of the first-instance court.

7. By decision of 18 February 2002, the Higher Commercial Court, on the applicant company's appeal, quashed the decisions of the lower courts and found for the applicant company.

8. On 4 June 2002 the Supreme Court of Ukraine, upon appeal by the Bank, quashed the resolution of the Higher Commercial Court on the ground that that court's findings had been unfounded and erroneous, and upheld the decisions of the first-instance and the appellate courts.

II. RELEVANT DOMESTIC LAW

1. Constitution of Ukraine of 1996

9. The relevant provisions read as follows:

Article 6

"State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power.

Bodies of legislative, executive and judicial power exercise their authority within the limits established by this Constitution and in accordance with the laws of Ukraine."

Article 124

"Justice in Ukraine is administered exclusively by the courts...

The jurisdiction of the courts extends to all legal relations that arise in the State.

Judicial proceedings are performed by the Constitutional Court of Ukraine and courts of general jurisdiction..."

Article 125

"In Ukraine the system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation.

The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction..."

Article 147

"The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine.

The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine, and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine.”

2. Code of Commercial Procedure

10. Article 111-18 of the Code of Commercial Procedure (at the material time) provided as follows:

Chapter XII-2

Review of judicial decisions of the Higher Commercial Court of Ukraine by the Supreme Court of Ukraine

Article 111-18

The jurisdiction of the Supreme Court of Ukraine in the course of a cassation review of the resolutions of the Higher Commercial Court of Ukraine

“The Supreme Court of Ukraine, following consideration of an appeal in cassation, or a request for review in cassation lodged by the Prosecutor General of Ukraine against a resolution of the Higher Commercial Court of Ukraine, shall be entitled to:

- 1) leave the resolution unchanged and dismiss the appeal (request);
- 2) quash the resolution and remit the case to the first-instance court for further consideration;
- 3) quash the resolution and nullify the proceedings in the case.”

11. Other relevant domestic law is summarised in the case of Sokurenko and Strygun (see *Sokurenko and Strygun v. Ukraine*, nos. 29458/04 and 29465/04, §§ 10-12, 20 July 2006).

THE LAW

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

12. The applicant company complained that the Supreme Court had exceeded its competence in upholding the decision of the appellate court and, therefore, could not be considered “a tribunal established by law”. In its view, the Supreme Court had violated the principle of equality of arms by depriving the applicant company of a possibility to present its arguments anew had the case be remitted for fresh consideration to the lower courts.

Moreover, it contended that the Supreme Court had erroneously applied substantive law and had not been impartial and independent. It relied on Article 6 § 1 of the Convention, which reads in so far as relevant as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. Admissibility

13. The Court notes that the issue whether in the circumstances of the case the Supreme Court could be considered “a tribunal established by law” 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.

14. The Court has examined the remainder of the applicant company’s complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of were within its competence, they do not disclose any appearance of a violation of Article 6 § 1 of the Convention. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Merits

1. Submissions of the parties

a. Government

15. The Government referred to the dissenting opinions in the case of *Sokurenko and Strygun v. Ukraine* (cited above). They maintained that the scope of the requirement “established by law” was more limited than a requirement that a tribunal should act “in accordance with the law” or in a manner “prescribed by law”. In their view, the term could not be understood to mean that a tribunal, in order to be considered “established by law”, should also comply with all national requirements concerning the carrying out of its functions.

16. The Government further maintained that according to the Court’s case-law a court could not be considered as a tribunal in the sense of the Convention if it was deprived of the competence “to resolve a dispute” as required by Article 6 § 1.

17. The Government considered that, as the highest judicial body in the system of courts of general jurisdiction, the Supreme Court of Ukraine was competent to assess all judicial decisions in a commercial case and to express its agreement or disagreement with each court decision in the case.

Therefore, in the applicant company's case the Supreme Court, having found that the Higher Commercial Court had erred in its decision, had no other choice under the law than to remit the case for fresh consideration to the court of first instance, irrespective of whether the decision of the first-instance court was correct or not.

18. The Government considered that upholding the first-instance court's decision in the present case was in substance equivalent to remitting the case for fresh consideration, but was time-saving. Therefore, the Supreme Court had also avoided unnecessary delay in the proceedings. Furthermore, according to the Government a fresh consideration of the case in such circumstances would be a pure formalism, given that the commercial courts of all instances would have to follow the position of the Supreme Court as to correct resolution of the dispute, which it would express in its decision on the remittal of the case under Article 111-18 of the Code of Commercial Procedure.

19. The Government maintained that the Code of Commercial Procedure did not provide the Supreme Court directly with the wherewithal to decide the applicant company's case, that is to say, to fulfil its primary function which was inherent in the very notion of a "tribunal" under the Convention.

20. The Government stressed that in delivering the decision in the applicant company's case the Supreme Court, therefore, having applied the provisions of the Convention and the rule of law principle, had filled a formal gap in the legislation. It had acted as a tribunal established by law whose task was to decide a dispute. Accordingly, that competence which the Supreme Court, as the highest judicial body, applied in this case could not be called specific as the Court called it in the case of *Sokurenko and Strygun v. Ukraine* (cited above, § 26) since by acting in this very way the Supreme Court *in corpore* had ensured the right to a tribunal that was lawfully established, competent in this kind of case and had decided the dispute.

21. Accordingly, the Government considered that the applicant company's right to a fair trial guaranteed by Article 6 § 1 of the Convention had not been violated.

b. Applicant

22. The applicant company maintained that to be considered "a tribunal established by law" the Supreme Court had to comply with the legal norms that regulated its competence to render decisions. In its case the Supreme Court did not have the power to uphold the decisions of the first-instance and appellate courts in commercial cases.

23. It recalled that the object of the term "established by law" in Article 6 of the Convention was to ensure "that the judicial organisation in a democratic society [did] not depend on the discretion of the Executive, but that it [was] regulated by law emanating from Parliament" (see *Zand v.*

Austria, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80).

24. The applicant company further objected to the Government's argument as to the Supreme Court's competence to review decisions of all lower courts in commercial cases. It indicated that Chapter XII of the Code of Commercial Procedure, under which the Supreme Court exercised its competence in commercial cases, clearly provided for the Supreme Court of Ukraine to review judicial decisions of the Higher Commercial Court of Ukraine. In its opinion, therefore, it was clear that the competence of the Supreme Court was limited to decisions of the Higher Commercial Courts and did not include examination of the merits of first-instance and appellate commercial court decisions.

25. In the applicant company's opinion the Government's arguments as to the necessity for the Supreme Court to decide the dispute and avoid delay in the proceedings disregarded the more important fact that this made it impossible to establish the truth, as only the lower courts were authorised to establish the circumstances of the case.

26. The applicant company further maintained that by overstepping its competence foreseen by the Code of Commercial Procedure the Supreme Court had not filled any gap in the legislation but had seriously breached the legal norms by trying to assume the functions of the legislative body.

2. Court's assessment

27. In the case of *Sokurenko and Strygun v. Ukraine* (cited above, § 26), the Court noted that the Supreme Court's competence under the Code of Commercial Procedure was limited to review of the decisions of the Higher Commercial Court, as it could only have quashed the resolution of the Higher Commercial Court, remitted the case for fresh consideration or nullified the proceedings (see paragraph 10 above). Instead, the Supreme Court upheld the decision of the Court of Appeal, without giving any reasons for exceeding its jurisdiction, when no such course of action was provided for under the Code of Commercial Procedure. The Court concluded that the Supreme Court had acted contrary to Article 6 § 1 of the Convention, not as a "tribunal established by law", as it overstepped the limits of its jurisdiction, which were clearly laid down in the Code of Commercial Procedure (see *Sokurenko and Strygun*, cited above, §§ 26-28).

28. In the Court's view, the factual and legal circumstances of the present case are identical to those already examined by the Court in the judgment of *Sokurenko and Strygun* (cited above). The Court sees no reasons which would justify departure from its previous case-law and concludes that there has also been a violation of Article 6 § 1 of the Convention in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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.”

30. The applicant company did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award it any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the issue whether in the circumstances of the case the Supreme Court could be considered “a tribunal established by law” admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 13 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President