



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

FIFTH SECTION

CASE OF LOSHENKO v. UKRAINE

(Application no. 11447/04)

JUDGMENT

STRASBOURG

11 December 2008

FINAL

11/03/2009

This judgment may be subject to editorial revision.

In the case of Loshenko v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Volodymyr Butkevych,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 18 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 11447/04) 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 Mikhail Pavlovich Loshenko (“the applicant”), on 5 February 2004.

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

3. On 6 December 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant, Mr Mikhail Pavlovich Loshenko, was born in 1930 and lives in Kyiv.

5. In 1995 the applicant concluded a contract with A., a private bank (“the Bank”), by which it would invest the applicant’s funds in the construction of an apartment by JSC “K.” (“the Construction Company”), to be completed by 30 July 1996. Pursuant to the provisions of this contract, in the event of a delay in completion of the construction works, the applicant could claim late-payment penalties from the Bank.

6. As the Construction Company officially completed the works only on 29 August 1996, on 2 October 1996 the applicant instituted civil proceedings in the Pechersky District Court of Kyiv claiming payment from the Bank for delay in completion of the works.

7. On 2 December 1996 Judge V. held a hearing. Subsequently Judge Z., the President of the Pechersky Court at the material time, withheld the case from Judge V. for unspecified reasons.

8. On 27 October 1997 the Bank lodged a counterclaim, alleging that the promise to pay a penalty for the Construction Company's failure to fulfil the work on time had been given by it *ultra vires*, and had to be annulled as incompatible with the applicable banking law.

9. On 19 November 1997 Judge Z. pronounced a judgment dismissing the applicant's claim and allowing the Bank's counterclaim. However, he did not sign this judgment.

10. On 27 November 1997 the applicant lodged a cassation appeal with the Kyiv City Court.

11. On 3 December 1997, pursuant to the requirements of the procedural law in place at the material time, the appeal was forwarded to Judge Z. to decide on its compliance with procedural formalities.

12. In June 2001 a new appeal procedure was introduced, and the Kyiv City Court was transformed into the Kyiv City Court of Appeal.

13. In July 2001 Judge Z. was dismissed on disciplinary grounds.

14. On 10 December 2001 the Kyiv City Department of Justice informed the applicant that it had investigated his complaint about the lengthy consideration of his cassation appeal and discovered that former Judge Z. had failed to register it and had withheld the case file from the court's registry. The Department assured the applicant that the case would be promptly transferred to the Kyiv City Court of Appeal for consideration.

15. On 7 May 2002 the City Court quashed the judgment of 19 November 1997 as unsigned by the presiding judge and remitted the case for a fresh consideration.

16. On 10 October 2002 the Pechersky Court allowed the applicant's claim and dismissed the Bank's counterclaim. On 24 October 2002 the Bank appealed.

17. On 4 December 2002 the Kyiv Court of Appeal reversed the judgment, having annulled the clause concerning the Bank's responsibility for the Construction Company's delay as incompatible with the applicable law.

18. On 23 December 2002 the applicant appealed in cassation before the Supreme Court.

19. On 16 October 2003 the Supreme Court rejected the applicant's request for leave to appeal in cassation.

20. On 24 March 2004 Judge Z. was convicted of failure to perform official duties and sentenced to two years' imprisonment, suspended. His

criminal case included several episodes, none of which concerned the applicant's civil case.

21. Subsequently the applicant unsuccessfully sought to reopen the proceedings, alleging that a similar complaint by another investor had been upheld in the investor's favour.

THE LAW

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

22. 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..."

A. Admissibility

23. The Government maintained that the period to be taken into consideration began only on 11 September 1997, when the recognition by Ukraine of the right of individual petition took effect. Therefore, the applicant's complaints related to the events prior to that date should be rejected as inadmissible *ratione temporis*.

24. The Government further argued that the applicant had failed to exhaust domestic remedies. In particular, they maintained that the applicant could have instituted disciplinary proceedings against the judge who had dealt with his case. They further submitted that the applicant could have instituted criminal proceedings against the judge and then lodged a civil claim seeking compensation. Lastly, they alleged that the applicant was not interested in consideration of his cassation appeal since he had lodged his complaint only in 2001.

25. The applicant disagreed.

26. The Court notes that part of the proceedings complained of relates to the period prior to 11 September 1997, the date on which the Convention came into force in respect of Ukraine. Therefore, this part of the application is incompatible *ratione temporis* with the provisions of the Convention, within the meaning of Article 35 § 3 of the Convention.

27. As concerns disciplinary proceedings against judges, the Court has previously held that this remedy could not be considered effective for Convention purposes (see *Efimenko v. Ukraine*, no. 55870/00, § 49, 18 July 2006).

28. The Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether the applicant can raise this complaint before domestic courts by claiming specific redress; in other words, whether a remedy exists that could answer his complaints by providing direct and speedy redress (see *Deweert v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 16, § 29). The Court has also held that a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI, and *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII).

29. The Court further notes that Ukrainian law does not envisage criminal responsibility for delaying proceedings.

30. Applying the aforementioned considerations to the instant case, the Court finds that instituting criminal proceedings against a judge and seeking compensation from him within the criminal proceedings cannot be considered as an effective remedy within the meaning of Article 35 §1 of the Convention.

31. The Court considers, in the light of the parties’ submissions, that the applicant’s complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that it cannot be rejected for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

32. The Court notes that after the date on which the Convention came into force in respect of Ukraine the proceedings lasted from 11 September 1997 to 16 October 2003, when the Supreme Court gave a final decision in the applicant’s case. However, in assessing the reasonableness of the time that elapsed after 11 September 1997, account must be taken of the state of proceedings on that date (see *Milošević v. “the former Yugoslav Republic of Macedonia”*, no. 15056/02, § 21, 20 April 2006; *Styrkowski v. Poland*, no. 28616/95, § 46, ECHR 1998-VIII; and *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, p. 18, § 53).

33. Therefore, the overall length of the proceedings in the applicant case was seven years; the length of the proceedings falling within the Court’s temporal jurisdiction was six years and one month.

2. *Reasonableness of the length of the proceedings before the domestic courts*

34. The Government contested the applicant's complaint, stating that there were no significant periods of inactivity attributable to the State. They maintained that the case had been complex since a third party was involved in the proceedings. They also submitted that the case was complex since a forensic examination had been held. According to the Government, the parties were responsible for the delays. The Government maintained, lastly, that the length of proceedings in the applicant's case was not unreasonable.

35. The applicant disagreed.

36. 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).

37. The Court notes that the major delay in the proceedings at issue was caused by the judge's failure to register the applicant's appeal against the judgment of 19 November 1997 in good time. The Government have offered no satisfactory explanation for that lapse of time, spanning four years. The Court cannot accept a period of total inactivity lasting for four years (see *Bunkate v. the Netherlands*, judgment of 26 May 1993, Series A no. 248-B, p., §§ 20-23).

38. The Court reiterates that it is the role of the domestic courts to manage their proceedings so that they are expeditious and effective. However, in the Court's opinion the national courts did not act with due diligence.

39. 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 *Frydlender*, cited above, and *Blidchenko v. Ukraine*, no. 20339/03, 29 November 2007).

40. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. The applicant further complained, under Article 6 § 1 of the Convention, of the unfairness of the hearings and the outcome of the

proceedings and the lack of professionalism, independence and impartiality of the domestic judges in handling his dispute. He also invoked Articles 3, 13 and 17 of the Convention, referring to the same facts.

42. Having carefully examined the applicant's submissions in the light of all the material in its possession, and in so far 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 12,000 US dollars (USD) in respect of pecuniary damage. He further claimed 4,000 Ukrainian hryvnas¹ (UAH) in respect of non-pecuniary damage.

45. The Government contested these claims as unsubstantiated.

46. 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, ruling on equitable basis, it awards the applicant 600 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

47. The applicant made no separate claims as to costs and expenses. Therefore, the Court makes no award under that head.

C. Default interest

48. 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.

1. Around EUR 596

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 §1 of the Convention 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 600 (six hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement, plus any tax that may be chargeable;
 - (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 11 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President