



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

FIFTH SECTION

CASE OF KHRISTOV v. UKRAINE

(Application no. 24465/04)

JUDGMENT

STRASBOURG

19 February 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Khristov v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Renate Jaeger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 24465/04) 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 Dmitriy Stepanovich Khristov (“the applicant”), on 5 July 2004.

2. The applicant died on 1 August 2006. On 1 March 2008 his children, Gennadiy Khristov, Olena Kristova, and Lyudmyla Filobok, being the sole heirs of the applicant, expressed their wish to continue the proceedings before the Court on the applicant’s behalf. The applicant and his children were represented by Mr M. Khoteyev, a lawyer practising in Melitopol. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that a final judgment in his favour had been quashed by way of extraordinary review, in violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

4. On 11 May 2006 the President of the Fifth Section decided to give notice of the application to the Government. It was 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

5. The applicant was born in 1939 and lived in Melitopol.

6. In 1996 a Moldovan national transferred his car to the applicant and issued a power of attorney granting the applicant broad rights in respect of the car including, *inter alia*, the right to drive and to sell it. The Moldovan national, however, remained the owner of the car.

7. The applicant did not pay customs clearance for importing the car from a foreign country. In order to comply with the requirements of domestic customs law, the applicant returned across the Ukrainian border every third month, declaring the car as newly imported and giving an undertaking to re-export it within the following three-month period.

8. In October 1998 the applicant was unable to undertake his regular trip outside Ukraine because of health problems. On 2 June 1999 the applicant attempted to cross the border with his car. However, the customs officer, having noted that the three-month re-export period was substantially overdue, seized the car pending adjudication of the applicant's administrative offence.

9. On 24 June 1999 the Primorsky District Court of Mariupol (hereafter "the District Court") found the applicant guilty of a customs offence, fined him 74 Ukrainian hryvnas (UAH) and ordered the confiscation of the car.

10. On 27 August 1999 the Primorsky District Prosecutor, at the applicant's request, lodged with the District Court a *protest*, seeking to open the extraordinary review proceedings in the applicant's case.

11. On 14 October 1999 the District Court, by way of extraordinary review, adopted a judgment by which it quashed the fine as being time-barred, while leaving the confiscation order in force.

12. On 16 March 2000 the car was sold by public auction at the price of UAH 7,970 in the course of the enforcement of the judgment of 24 June 1999. The funds received from the sale were transferred to the State budget.

13. On 23 October 2000 the President of the Donetsk Regional Court, on a request by the applicant for extraordinary review, reopened the proceedings in the applicant's case and quashed the judgments of 24 June 1999 and 14 October 1999, finding, in particular, that under the Constitution the car could not be confiscated from the applicant as he had not been its owner.

14. On 16 March 2001 the applicant brought a claim in the Starokyivsky District Court against the Ministry of Justice and the Customs Office, seeking recovery of the confiscated car or reimbursement of its value and compensation for non-pecuniary damage.

15. On 10 April 2001 the court left the claim unexamined on account of the applicant's failure to comply with procedural requirements, stating, *inter alia*, that the applicant failed to provide any calculation of the non-pecuniary damage and to enclose the documents for the car.

16. By letters of 12 April 2001, 10 October 2001, 19 March 2002 the Customs Office confirmed to the applicant that he could be reimbursed the value of the confiscated car upon finalisation of procedural formalities.

17. On 25 April 2002 the President of the Supreme Court, upon a request by the Customs Office for extraordinary review, reopened the proceedings in the applicant's case and, relying on Article 294 of the Code on Administrative Offences, quashed the judgment of 23 October 2000 in the applicant's favour as unfounded, thereby upholding the District Court's judgments of 24 June and 14 October 1999. The judgment provided, *inter alia*, that under customs law, which was applicable in the applicant's case, confiscation was to be ordered irrespective of whether the applicant had been the owner of the car or not.

18. By a letter of 6 August 2004 from the Customs Office the applicant was informed about the judgment of 25 April 2002 and served with a copy of it. The applicant alleged that he had not previously been aware of the judgment.

II. RELEVANT DOMESTIC LAW

Code on Administrative Offences (in the wording in force at the material time)

19. Article 287 of the Code provided that a decision imposing an administrative sanction could be appealed against, except for decisions given by a first-instance court. The latter were final and were not subject to the ordinary administrative appeal procedure, unless the legislation provided otherwise.

20. Article 290 of the Code provided that a prosecutor could lodge a *protest* against a decision imposing an administrative sanction.

21. Article 294 of the Code provided that a court judgment concerning an administrative offence could be reviewed by a judge of the same court upon a *protest* lodged by a prosecutor, or by the president of the higher court of his or her own motion.

22. On 24 September 2008 the Code was amended to the effect that it provided an ordinary appeal procedure for challenging the decisions given by the first-instance courts in administrative cases.

THE LAW

I. SCOPE OF THE CASE

23. The applicant complained that the administrative proceedings in his case had been unfair in so far as the final judgment of 23 October 2000 in his favour had been quashed by the President of the Supreme Court by way of extraordinary review. He further complained that his attempts to have the confiscated car returned to him or its value reimbursed had been set at nought as a result of the extraordinary review conducted by the President of the Supreme Court, following which the confiscation order had been restored. The Court finds it appropriate to consider these complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 respectively.

II. AS TO *LOCUS STANDI*

24. The applicant died on 1 August 2006, while the case was pending before the Court (see paragraph 2 above). It has not been disputed that his children are entitled to pursue the application on his behalf and the Court sees no reason to hold otherwise (see, among other authorities, *Benyaminson v. Ukraine*, no. 31585/02, § 84, 26 July 2007, and *Horváthová v. Slovakia*, no. 74456/01, §§ 25-27, 17 May 2005). However, reference will still be made to the applicant throughout the ensuing text.

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

25. Article 6 § 1 of the Convention provides, in so far as relevant, as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

26. The Government maintained that this complaint was inadmissible since the applicant had failed to submit it within the six-month period as required by the Convention.

27. The applicant disagreed, claiming that he had been notified about the judgment of 25 April 2002 only by the letter of 6 August 2004 from the Customs Office.

28. The applicant has submitted evidence to the effect that he became aware of the judgment of 25 April 2002 only in August 2004, whereas the

Government provided no evidence to the contrary. The Court therefore accepts the applicant's allegation in that regard. It further observes that since this complaint was first mentioned by the applicant in his submissions of 28 August 2004, no issue under the six-month rule arises. Accordingly, the Court dismisses the Government's objection.

29. The Court further notes that it is not disputed by the parties that the proceedings in the applicant's case fall within the scope of Article 6 § 1 of the Convention. The Court finds that the proceedings at issue, though classified as administrative, were in fact of a criminal character, having regard to the nature of the applicant's offence and to the penalty incurred, which was clearly intended to punish and deter reoffending (see *Engel and Others v. the Netherlands*, 8 June 1976, §§ 82-83, Series A no. 22; *Lauko v. Slovakia*, 2 September 1998, § 58, *Reports of Judgments and Decisions* 1998-VI; and *Nadtochiy v. Ukraine*, no. 7460/03, § 21, 15 May 2008).

30. 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. The submissions of the parties

31. The Government maintained that the judgment of 23 October 2000 had been reviewed by the Supreme Court by way of the cassation appeal procedure provided for under the Code of Civil Procedure and that such review therefore complied with the requirements of Article 6 of the Convention. They further insisted that the quashing of the judgment of 23 October 2000 by the President of the Supreme Court had pursued the legitimate aim, in particular, of rectifying the errors made by the lower court when considering the applicant's case.

32. The applicant disagreed, claiming that the final judgment of 23 October 2000 in his favour had been quashed arbitrarily.

2. The Court's assessment

33. 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, in its relevant part, declares 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 requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII).

34. Legal certainty presupposes respect for the principle of *res judicata* (ibid., § 62), 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 *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX). The Court therefore has to assess whether, in a given case, the power to launch and conduct an extraordinary review was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of justice (see, *mutatis mutandis*, *Nikitin v. Russia*, no. 50178/99, § 57, ECHR 2004-VIII, and *Savinskiy v. Ukraine*, no. 6965/02, § 23, 28 February 2006).

35. Turning to the present case the Court observes that under the Code on Administrative Offences, court judgments imposing an administrative sanction could not be appealed against under the ordinary appeal and cassation appeal procedures. In this connection the Court observes that it has already found a violation of Article 2 of Protocol No. 7 on account of the lack of an effective appeal procedure in administrative cases (see *Gurepka v. Ukraine*, no. 61406/00, §§ 57-62, 6 September 2005). It further notes that the President of the Supreme Court quashed the judgment of 23 October 2000 by way of the extraordinary review procedure envisaged by Article 294 of the Code on Administrative Offences, clearly referring in particular to that Article in his judgment. Accordingly, the Government's contentions that the applicant's case was reviewed by the Supreme Court under the cassation appeal procedure fall to be dismissed.

36. The Court observes that the extraordinary review procedure at issue could be initiated either on a prosecutor's *protest* or on a motion of the president of a higher court. It follows that this procedure was not directly accessible to a party to the proceedings, the latter being only allowed to plead before the relevant officials to reopen proceedings. The power to review court judgments under this procedure was not subject to any time-limit or special grounds, so that final and binding judgments were liable to be challenged indefinitely. The principle of legal certainty therefore came to be extremely vulnerable within that review procedure.

37. The Court further observes that the evidence in the case file does not suggest that there existed any "circumstances of a substantial and compelling character" that could justifiably explain why the final judgment of 23 October 2000 was reviewed and quashed. It appears that the only

reason for the review was that the applicant's case was to be reconsidered in the light of a different law, thereby turning such a review into an appeal in disguise. The Court finds therefore that in the present case the principle of legal certainty has not been respected.

38. In the light of the above considerations, the Court concludes that the reopening of the proceedings in the applicant's case by way of extraordinary review, following which the judgment of 23 October 2000 was quashed, breached the principle of legal certainty and the applicant's right to a fair trial under Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

39. Article 1 of Protocol No. 1 to the Convention provides as follows:

“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 or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

40. The Government submitted that this complaint was inadmissible since the applicant had failed to submit it within the six-month period as required by the Convention.

41. The applicant disagreed.

42. The Court, referring to its conclusions under Article 6 § 1 of the Convention as regards the applicants' compliance with the six-month rule (see paragraph 28 above), rejects the Government's objection in this respect.

B. Merits

1. The parties' submissions

43. The Government maintained that the Supreme Court had acted in accordance with the procedure prescribed by domestic legislation and its purpose was to correct the mistake which had been made by the lower court in the applicant's case. Accordingly, the interference with the applicant's right under Article 1 of Protocol No. 1 was proportionate as it had been made in the public interest.

44. The applicant disagreed, claiming that the interference with his property rights had not been proportionate.

2. The Court's assessment

45. Both parties agreed that the final and binding judgment of 23 October 2000 in the applicant's favour conferred a possession on him within the meaning of Article 1 of Protocol No. 1 in that that judgment opened to the applicant legal channels of obtaining reimbursement for the wrongful confiscation of the car. The parties further agreed that the quashing of the judgment of 23 October 2000 by the Supreme Court constituted an interference with the applicant's right under Article 1 of Protocol No. 1. The Court does not find any reason to depart from the parties' opinion.

46. It remains, therefore, to be established whether the interference had been justified. In this regard the Court reiterates that a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be struck where the person concerned bears an "individual and excessive burden" (see, *mutatis mutandis*, *Brumărescu* cited above, § 78).

47. The Court observes that the Government's argument that the impugned interference was made in public interest is similar to the one submitted by them under Article 6 § 1 of the Convention. Having found a violation of Article 6 § 1 of the Convention, the Court concludes that, although the correct application of the law is undeniably a "public interest", in the circumstances of the present case it was pursued in violation of the fundamental principle of legal certainty. Accordingly, this argument must be dismissed.

48. In the circumstances, therefore, the Court finds that the "fair balance" was upset and that the applicant bore an individual and excessive burden. There has, accordingly, been a violation of Article 1 of Protocol No. 1.

V. THE REMAINDER OF THE APPLICATION

49. The applicant complained under Article 6 § 1 of the Convention about the length of the proceedings in his case. He further complained under Article 6 § 1 and Article 13 of the Convention that the courts dealing with his case had not been impartial. Relying on Article 6 § 3 (a) of the Convention, the applicant complained that he had been unlawfully induced to sign an administrative record documenting his offence. He finally alleged that he had been discriminated against on the ground of social status, in violation of Article 14 of the Convention.

50. The Court has examined the remainder of the applicant'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 did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicant claimed 5,000 United States dollars (the "USD") (approximately 3,902 euros (EUR)) as the compensation for the confiscated vehicle and USD 40,000 (approximately EUR 31,213) as compensation for the loss of his job which had been allegedly an ultimate consequence of the confiscation measure. He further claimed USD 55,000 (approximately EUR 42,918) in respect of non-pecuniary damage.

53. The Government contested these claims, stating that they were groundless.

54. The Court first notes that the applicant has failed to specify how the loss of his job was connected to the quashing of the judgment, and it rejects this part of the claim. He also claimed pecuniary damage on the basis of the value of the car which was confiscated. However, it was the applicant's claim in the proceedings, and indeed the basis for the court's judgment of 23 October 2000, that he was not the owner of the car. The issue under Article 41 of the Convention is how much pecuniary compensation, if any, should be granted in respect of the loss of the judgment of 23 October 2000. The Court notes that the applicant has not made any submissions in this respect, considers that it cannot speculate on the matter and also rejects this part of applicant's pecuniary damage claims as unsubstantiated.

55. The Court further considers that the applicant must have suffered some non-pecuniary damage as result of the violations found, which cannot be made good by the Court's mere finding of a violation. Making its assessment on the equitable basis, the Court awards the applicant EUR 2,000 for non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

57. 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 under Article 6 § 1 of the Convention concerning the quashing of the final judgment of 23 October 2000 by way of extraordinary review and the complaint under Article 1 of Protocol No. 1 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the quashing of the final judgment of 23 October 2000 by way of extraordinary review;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
4. *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, plus any tax that may be chargeable, to be converted into the national currency of Ukraine 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;

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

Done in English, and notified in writing on 19 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President