



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF GAVRYLYAK v. UKRAINE

(Application no. 39447/03)

JUDGMENT

STRASBOURG

18 June 2009

FINAL

06/11/2009

This judgment may be subject to editorial revision.

In the case of Gavrylyak v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 26 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 39447/03) 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, Mr Bogdan Stepanovych Gavrylyak (“the applicant”), on 24 April 2003.

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

3. On 23 January 2008 the Court decided to communicate to the Government the complaint concerning the length of the criminal proceedings against the applicant. 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 1962 and lives in Lviv.

A. The facts concerning the companies owned by the applicant

5. The applicant owns 99% of shares in a limited liability company “Sykhiv” (“the Sykhiv company”) and is the sole owner of a private company “Sykhiv-MB” (“the Sykhiv-MB company”).

6. In February 1997 the “Ukrsotsbank” bank (“the U. bank”) granted the Sykhiv-MB company a sum in credit that had to be paid back within a year. The credit was secured by the company’s real estate.

7. In September 1997 the “Prominvestbank” (“the P. bank”), granted credit to the Sykhiv company, also with the latter’s property as security. The criminal proceedings against the applicant would later establish that this contract was provided on the basis of fictitious transactions and in fact was aimed at raising funds for repayment of the Sykhiv-MB company’s debt *vis-à-vis* the U. bank (see paragraph 11 below).

8. In October-November 1997, according to the applicant, the State Tax Administration and the police seized certain financial documents of both the Sykhiv and Sykhiv-MB companies.

9. The Sykhiv-MB company failed to pay back the debt owed to the U. bank in a timely manner. Therefore, in March 1998 the notary who had certified the pledge contract securing the credit issued a writ of execution for the sale of the pledged property. In May 1998 the Galytskyi District Court of Lviv (“the Galytskyi court”) ordered the seizure of that property, which in June 1998 was sold at a public auction.

B. The criminal proceedings against the applicant

10. On 18 March 1997 the Lychakivskyi District Department of the Ministry of the Interior in Lviv opened a criminal investigation against the applicant on suspicion of embezzlement of State (or collective) property. On 9 May 1997 the proceedings were discontinued as the action in question had ceased to be a criminal offence.

11. On 12 February 1999 the Lviv Regional Prosecutor opened a new criminal investigation against the applicant on a charge of financial fraud. He was suspected of having provided a bank with false information regarding his company’s financial situation in order to obtain credit, which had allegedly caused considerable damage to the bank.

1. The pre-trial investigations

(a) From February 1999 to August 2003

12. The parties’ versions of events during this period varied.

13. According to the applicant, he was not aware of the investigation opened against him on 12 February 1999 until August 2003. He alleged, however, that in early May 2000 he had discovered from a letter of the Lviv

Regional State Administration that a criminal investigation against him on a financial fraud charge had been opened on 24 February 1999 and subsequently discontinued on 15 October 1999. This was not disputed by the Government.

14. In May-July 2000 the applicant complained to the Lviv Town Prosecutor, Regional Prosecutor and Prosecutor General that the criminal investigation against him had been improper, and that he had not been informed of the grounds for its opening and closure, nor had been involved in any investigative activities. The outcome of the applicant's complaints is unknown.

15. According to the Government (see also paragraph 13 above), following the opening of the criminal investigation on 12 February 1999, he was summoned several times by the investigating officer for questioning, but failed to appear.

16. According to the documents submitted by the Government, on 29 May 1999 the "*criminal case against the applicant on a charge of fraud ... [was] ... stayed pending identification of the persons who had committed the crime*"; in August-December 2000 the investigator issued three warrants to the police to ensure the applicant's appearance for questioning as a witness; and on 12 March 2001 the investigator issued another warrant for the applicant's obligatory appearance, but that time as an accused.

17. On 14 March 2001 the investigator found the applicant to be absconding and put him on a wanted list.

18. The Government submitted that the preliminary investigation was stayed four times pending establishment of the applicant's whereabouts. The applicant maintained that he had been permanently staying at his ordinary residential address at which he had not received any summons. In support of that argument he referred to the fact that in May 2000 he had filed a number of complaints with the prosecution authorities, some of those in the course of his personal meetings with their officials.

19. On 12 June 2003 the Galytskyi court authorised a search of the applicant's dwelling.

20. On 5 August 2003 the police apprehended the applicant and conducted a search in his flat. As a preventive measure pending trial, he was placed under an undertaking not to abscond.

(b) From August to November 2003

21. On 17 November 2003 the applicant was notified about completion of the pre-trial investigation and was provided with access to the case file.

22. On 24 November 2003 he was officially indicted and his case file was sent to the court.

2. The trial

23. On 8 December 2003 the Galytskyi court held a preliminary hearing. On 19 December 2003 the next hearing was adjourned owing to the applicant's and the witnesses' failure to appear.

24. On 19 January 2004 the applicant sought the withdrawal of the bench dealing with his case.

25. On 21 January 2004 the hearing was adjourned pending a decision on that matter. The case was referred to the Sykhivskyy District Court of Lviv ("the Sykhivskyy court"), which held a preliminary hearing on 1 March 2004. Another eleven hearings then followed. There were some seven adjournments, including three because of failures on the part of the witnesses and the prosecutor to appear and one because the judge was ill. Another adjournment was caused by a motion of the applicant on the summoning of witnesses.

26. On 20 May 2005 the Sykhivskyy court ruled that the case be returned for additional investigation, having found that the one already conducted had been flawed and superficial. Both the prosecutor and the applicant appealed: the former held that the case file already contained conclusive evidence of the applicant's guilt, while the applicant maintained that he was clearly innocent and that no further investigation was required. On 11 October 2005 the Lviv Regional Court of Appeal upheld the above ruling in the main. On 26 January 2006 the Supreme Court rejected as unsubstantiated the applicant's request for leave to appeal in cassation.

3. The additional investigation ordered by the court

27. According to the Government, in December 2005 and later on in April-September 2006, the investigation was stayed five times on account of the applicant's illness. The applicant denied this.

28. In March 2006 the applicant complained to the Regional Prosecutor about a lack of any visible progress in the additional investigation ordered by the court. In response, he was informed that the investigating officer in charge had been disciplined for some procedural violations.

29. On 29 August 2006 a warrant was issued for seizure from the bank of certain classified financial documents relevant for the investigation, and in September 2006 the seizure took place.

30. On 30 August 2006 the investigator issued a ruling on finding the whereabouts of some witnesses.

31. On 19 October 2006 the applicant was notified about the completion of the pre-trial investigation and was provided with access to the case file.

32. On 30 October 2006 the case was referred to the Galytskyi court.

4. The trial following the additional investigation

33. On 10 November 2006 the court held a preliminary hearing, for which the applicant and the plaintiff failed to appear.

34. The case was subsequently referred to the Sykhivskyy court, which held some ten hearings. According to the information provided by the Government, there were nine adjournments: three owing to the prosecutor's failure to appear, three caused by the applicant's motions, and three for other reasons. The applicant submitted that the prosecutor had failed to appear for hearings more than ten times.

35. On 17 April 2008 the applicant unsuccessfully sought the withdrawal of the bench of the Sykhivskyy court.

36. On 18 April 2008 he also unsuccessfully complained about the bench of the Regional Court of Appeal before the Supreme Court, alleging that it had been involved in a "robbery" against him.

37. On 22 April 2008 the Sykhivskyy court found the applicant guilty of financial fraud and sentenced him to two years' imprisonment and to a one-year disqualification from holding certain administrative and commercial positions. He was, however, released from serving the sentence under the statute of limitations. The court also found unsubstantiated the prosecution's statement about the applicant's absconding during the pre-trial investigation, having noted that he had been addressing various authorities with complaints during that time and that there were thus no reasons to consider him to have been avoiding the investigation.

38. On 30 April 2008 the applicant challenged the verdict by a complaint, which he considered to be a cassation appeal, while the Court of Appeal regarded it as an ordinary appeal. As the applicant insisted that it was a cassation appeal to be considered by the Supreme Court, on 8 July 2008 the Court of Appeal ruled to leave it without consideration.

39. On 26 February 2009 the Supreme Court rejected the applicant's request for leave to appeal in cassation as unsubstantiated.

C. The proceedings instituted by the Sykhiv-MB company

1. Before the commercial courts

40. In July 1998 the Sykhiv-MB company lodged a claim with the Lviv Regional Arbitration Court against the U. bank, seeking the return of part of its property allegedly in excess of the collected debt (see paragraph 9 above).

41. In August 2002 the company made some modifications to its claims.

42. On 26 September 2002 the Regional Commercial Court ruled to discontinue the proceedings, having found the modified claims to be beyond the scope of the commercial procedure.

43. On 14 October 2002 the Lviv Commercial Court of Appeal rejected the company's request for leave to appeal on account of procedural flaws which had not been rectified.

44. On 14 January 2003 the Higher Commercial Court ruled that the company's cassation appeal be left without consideration for having been lodged out of time.

45. On 10 April 2003 the Supreme Court rejected the company's request for leave to appeal in cassation as unsubstantiated.

2. Before the civil courts

46. The Sykhiv-MB company complained to the Galytskyi court about the bailiff in charge of the auction at which its property had been sold.

47. On 4 March 1999 the court ruled to leave that complaint without consideration, having found that it had to be considered within a contentious civil procedure, which the company could initiate by lodging an appropriate claim. On 29 March 1999 the Lviv Regional Court upheld the above ruling. Apparently, the Sykhiv-MB company did not lodge such a claim.

D. The inheritance-related dispute

48. On 26 July 2004 the applicant's father died. In a judgment of 27 August 2004 the Rogatyn Town Court recognised the entitlement of the applicant's brother D. to a house bequeathed to him by his – and the applicant's – deceased father.

49. On 14 September 2004 the applicant requested the court to review the above judgment under newly discovered circumstances.

50. On 17 November 2004 the court found against the applicant.

51. On 8 February 2005 the Ivano-Frankivsk Regional Court of Appeal upheld the judgment.

52. The applicant lodged an appeal in cassation which apparently remains undecided.

E. The criminal complaints by the applicant

53. The applicant complained several times to the police and prosecution authorities about arson attempts on his flat, threats to his and his family's life by "state officials", alleged misconduct of the police during his apprehension in August 2003, and the fact that he had been "robbed" by the court which had passed the judgment against him.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION ON ACCOUNT OF THE UNREASONABLE LENGTH OF THE CRIMINAL PROCEEDINGS

54. The applicant complained that the criminal proceedings against him had been excessively long. He relied on Articles 6 § 1 and 13 of the Convention, which provide, in so far as relevant, as follows:

Article 6 § 1

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

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.”

A. Admissibility

55. 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. *Period to be taken into consideration*

56. The Government submitted that the period at issue started on 12 February 1999 when the criminal proceedings were brought against the applicant for suspected financial fraud and ended on 8 July 2008 with a decision of the Lviv Regional Court of Appeal to leave his appeal without consideration (see paragraphs 11 and 38 above).

57. The applicant considered the period concerned to have commenced on 18 March 1997, when the criminal case was opened against him for embezzlement (see paragraph 10 above).

58. The Court reiterates that the period to be taken into consideration in determining the length of criminal proceedings begins with the day on which a person is “charged” within the autonomous and substantive

meaning to be given to that term (see, for example, *Fedko v. Ukraine*, no. 17277/03, § 22, 12 June 2008). “Charge”, for the purposes of Article 6 § 1 of the Convention, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 33, § 73). The relevant period ends with the day on which a charge is finally determined or the proceedings are discontinued (see *Rokhlina v. Russia*, no. 54071/00, § 81, 7 April 2005).

59. The Court notes at the outset that the criminal investigations against the applicant opened on 18 March 1997 constituted separate proceedings that were discontinued as soon as 9 May 1997. It thus finds no reason to include their duration in the period to be taken into consideration for the present purposes.

60. Applying the above principles of its case-law to determine the *dies a quo* in the present case, the Court observes that the investigating authorities apparently failed to promptly notify the applicant about the opening of a criminal case against him on 12 February 1999 for reasons disputed by the parties (the Government alleged that the applicant was absconding, while the latter insisted on his involuntary ignorance). As submitted by the applicant and not contested by the Government, at the beginning of May 2000 the applicant found out from an indirect source about the criminal investigation against him, albeit with a different date of opening and with the information that it had been discontinued by that time.

61. Having regard to all the circumstances of the case before it, including the applicant’s numerous complaints to the prosecution authorities in 2000 (see paragraph 14 above), which undoubtedly demonstrated his anxiety about the grounds and status of the charge against him, the Court will calculate the period to be taken into consideration from the beginning of May 2000 (see, *mutatis mutandis*, *Totchev v. Bulgaria*, no. 58925/00, §§ 75-76, 30 November 2006).

62. The period to be considered thus lasted from early May 2000 to 26 February 2009, that is eight years and ten months for the investigation and two levels of jurisdiction.

2. The reasonableness of the length of the proceedings

63. The Court reiterates that the reasonableness of the length of these proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria laid down in the Court’s case-law, in particular the complexity of the case, the applicant’s conduct and the conduct of the competent authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Lugovoy v. Ukraine*, no. 25821/02, § 33, 12 June 2008).

64. The Government opined that the criminal proceedings had concerned complex financial issues and involved numerous participants. They further submitted that a number of delays were attributable to the applicant, referring to the latter's absconding and illness. To be precise, the Government submitted that the applicant had been avoiding the investigation for about three and a half years, and that the investigation was stayed because of his illness for a total of nine months.

65. The applicant disagreed. He contested the Government's statements on both his absconding and his illness as unsubstantiated.

66. Having regard to its finding in paragraph 62 above, the Court notes that the criminal proceedings at issue lasted for a total of eight years and ten months, of which: the pre-trial investigation – including the additional investigation ordered by the court – took about four years and four months; the first-instance court examined the case in substance for about two years and eleven months; the appellate and cassation courts considered the parties' appeal against the remittal of the case for additional investigation for about eight months; and the Supreme Court considered the applicant's cassation appeal during ten months.

67. The Court considers that there is a certain degree of complexity inherent in the economic nature of the charges laid against the applicant (see *Antonenkov and Others v. Ukraine*, no. 14183/02, § 42, 22 November 2005). It notes, in particular, that the investigation concerned the activities of two companies owned by the applicant and necessitated the assessment of numerous financial documents. Nevertheless, the Court does not regard these factors as justifying the duration of the proceedings for over eight years.

68. As regards the conduct of the applicant and the relevant authorities, the Court observes that the Government alleged the applicant's absconding, which, according to them, was the major reason for the delay, whilst the applicant denied this and attributed the delay to the inadequacy of the investigation efforts. The domestic courts, which are definitely better placed than the European Court to assess the facts, considered the prosecution's submission about the applicant's alleged absconding during the pre-trial investigation and, in the verdict of 22 April 2008, found it to have been unsubstantiated (see paragraph 37 above). The Court finds nothing in the case file to warrant a different conclusion. It notes at the same time that on 20 May 2005 the Sykhyvskyy court declared superficial and flawed the pre-trial investigation, which had lasted for three years and seven months, that being equal to almost half of the overall duration of the criminal proceedings.

69. 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, for example, *Lugovoy v. Ukraine*, §§ 36-37, and *Antonenkov and Others v. Ukraine*, § 47, both cited above).

70. 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.

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

72. The Court does not find it necessary in the circumstances to examine under Article 13 of the Convention the same complaint as under Article 6 § 1 (see *Inkovtsova v. Ukraine*, no. 39946/03, § 34, 26 July 2007).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF UNFAIRNESS IN THE CRIMINAL PROCEEDINGS

73. The applicant complained that he had been wrongly convicted of fraud and that the investigators and the judges involved in his case had been biased and corrupt.

74. The Court notes that the applicant failed to challenge the verdict before a court of the appellate instance. Therefore, it considers that the domestic remedies have not been exhausted in this case.

75. Accordingly, the Court rejects this part of the application as inadmissible under Article 35 §§ 1 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

76. The applicant also complained that the Ukrainian authorities had violated Article 1 of the Convention, that the inheritance-related proceedings had lasted an unreasonably long time and that he and his wife had been unlawfully deprived of their possessions.

77. However, in the light of all the material before it, 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 or its Protocols.

78. 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.

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

79. Relying on the European Agreement Relating to Persons Participating in Proceedings, the applicant alleged that he had been

persecuted and pressurised by the State authorities with a view to forcing him to withdraw his application from the Court.

80. The Court notes that this complaint also falls to be examined in substance under Article 34 of the Convention which reads as follows:

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

81. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. The expression “any form of pressure” must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or their legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy (see *Kurt v. Turkey*, 25 May 1998, § 160, *Reports of Judgments and Decisions* 1998-III, and *Tanrikulu v. Turkey* [GC], no. 23763/94, § 130, ECHR 1999-IV).

82. Turning to the circumstances of the present case, the Court notes that the applicant’s allegation that pressure was put on him by the State authorities on account of his application before the Court is wholly unsubstantiated: he did not provide any evidence either of the existence of such pressure or of its link with his application before the Court.

83. Therefore, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 24,470,065 euros (EUR) in respect of pecuniary damage and EUR 154,059 in compensation for non-pecuniary damage.

86. The Government contested the claims as exorbitant and unsubstantiated.

87. The Court does not discern any causal link between the violation found and the pecuniary damage alleged by the applicant. It makes no award in this respect. However, the Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 1,600 under this head.

B. Costs and expenses

88. The applicant also claimed EUR 8,053 for the costs and expenses incurred before the domestic courts and before the Court. He confirmed with receipts his postal costs for his correspondence with the Court for the amount of 327.85 Ukrainian hryvnias¹.

89. The Government maintained that the applicant had failed to show that the costs allegedly incurred had been related to the alleged violation and were reasonable or necessary.

90. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court awards the applicant EUR 41 for costs and expenses.

C. Default interest

91. 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 applicant's complaint concerning the length of the criminal proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
3. *Holds* that there is no need to examine separately the applicant's complaint under Article 13 of the Convention;

1. About EUR 41.

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 1,600 (one thousand six hundred euros) in respect of non-pecuniary damage and EUR 41 (forty one euros) in costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at 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 amounts 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 18 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President