



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

1959 · 50 · 2009

FIRST SECTION

CASE OF KLIMENKO AND OSTAPENKO v. RUSSIA

(Applications nos. 30709/03 and 30727/03)

JUDGMENT

STRASBOURG

23 July 2009

FINAL

23/10/2009

This judgment may be subject to editorial revision.

In the case of Klimenko and Ostapenko v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 2 July 2009,

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

PROCEDURE

1. The case originated in two applications (nos. 30709/03 and 30727/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Russian nationals, Mr Nikolay Ivanovich Klimenko (“the first applicant”) and Mr Anatoliy Nikolayevich Ostapenko (“the second applicant”), on 27 and 26 August 2003, respectively.

2. The Russian Government (“the Government”) were represented by Mr P. Laptev and subsequently by Ms V. Milinchuk, both former Representatives of the Russian Federation at the European Court of Human Rights.

3. On 3 July 2006 the President of the First Section decided to give notice of the applications to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

4. The Government objected to the joint examination of the admissibility and merits of the applications. Having examined the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Initial judgments in the applicants' favour and the supervisory review proceedings

5. The first applicant was born in 1948 and the second applicant in 1952. They live in Bataysk, the Rostov Region.

6. The applicants, Chernobyl victims, were in receipt of a monthly pension and a special "food allowance" from the State. They brought proceedings against the regional social security office ("the defendant") claiming recalculation of the pension and the allowance in line with the increase of the minimum subsistence amount.

7. On the dates listed below the Bataysk Town Court of the Rostov Region granted the applicants' claims and ordered the increase of the allowance and its subsequent index-linking. In re-calculating the amounts to be paid the court applied the multiplier of 1.92 reflecting the increase of the minimal subsistence amount in the Rostov Region. The judgments acquired legal force, as upheld on 16 April 2003 by the Rostov Regional Court.

8. On 13 May 2003 the defendant appealed to the Regional Court by way of supervisory review of the judgments.

9. On 30 June 2003 the judge rapporteur refused to initiate the supervisory review proceedings and to remit either of the two cases for examination on the merits to the Presidium of the Rostov Regional Court ("the Presidium"). The defendant complained to the President of the Regional Court about the judgments in the applicants' favour and the judge rapporteur's decision of 30 June 2003.

10. On 19 September 2003 the President of the Rostov Regional Court and on 24 October 2003 judge B. of the Regional Court allowed the defendant authority's applications for supervisory review of the judgments in the first and the second applicants' favour respectively and sent the cases for examination on the merits to the Presidium. These decisions referred to the arguments adduced by the defendant but offered no explanation as to the grounds for overruling the judge rapporteur's decision of 30 June 2003.

11. On the dates listed in the Appendix the Presidium, by way of supervisory review, quashed the first instance and the appeal judgments on the ground that that the lower courts had applied an incorrect multiplier to the applicants' cases, and remitted the cases for a fresh examination to the first instance court.

B. Subsequent proceedings

1. Judgment of 25 December 2003 in respect of both applicants

12. On 25 December 2003 the Bataysk Town Court examined the cases anew. The court, by a single judgment, established that the allowance due to the applicants should have been multiplied by 1.25 in 2002 and by 1.26 for 2003. The court restored in the favour of each applicant 34,500 Russian roubles (RUB) for the period between 1 January 2002 and 1 January 2004 and established that as of 1 January 2004 they were entitled to the monthly compensation in the amount of RUB 3,937.50, to be index-linked in future. The judgment was not appealed against and became final ten days later.

2. Further developments in the second applicant's case

13. In 2004 and 2005 the second applicant brought further court proceedings for adjustment of the allowance. On 22 April 2004 and 12 September 2005 the Bataysk Town Court granted his claims and ordered the allowance to be increased by application of the multipliers of 1.16 and 1.08 respectively and to pay him arrears for the periods from 1 to 30 April 2004 and from 1 January to 30 June 2005.

14. As follows from the Government's additional observations, on 31 October 2006 the second applicant applied for annulment of these two judgments and the award of 25 December 2003 due to discovery of new circumstances. On 15 February 2007 the request was granted by an unspecified court. The judgments of 25 December 2003, 22 April 2004 and 12 September 2005 were annulled on account of discovery of unspecified new circumstances, and the cases were remitted for a new examination.

15. According to the Government, on 13 March 2007 the Bataysk Town Court recovered in the second applicant's favour RUB 142,027.04 of unpaid allowance in respect of the period from 1 July 2000 to 31 December 2006 and ordered further increase of the monthly payments up to RUB 8,670.75. The scope of the applicant's claims was not specified by the Government and it is unclear whether these claims had been granted in full or in part. The judgment entered into force on 26 March 2007 and at some point was executed in full.

16. The parties did not submit copies of the judgments of 15 February 2007 and 13 March 2007, the second applicant's statement of claims in the respective proceedings and his application dated 31 October 2006 for annulment of the earlier judgments.

II. RELEVANT DOMESTIC LAW

17. For the relevant provisions on the supervisory-review proceedings contained in the Code of Civil Procedure of the Russian Federation see the Court's judgment in the case of *Sobelin and Others v. Russia* (nos. 30672/03 et seq., § 34, 3 May 2007).

THE LAW

I. JOINDER OF THE APPLICATIONS

18. Given that the two applications at hand concern similar facts and complaints and raise identical issues under the Convention, the Court decides to consider them in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 ON ACCOUNT OF THE QUASHING OF THE JUDGMENT IN THE APPLICANTS' FAVOUR

19. The applicants complained that the quashing of the judgments in their favour violated their rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, which, insofar as relevant, provide as follows:

Article 6 § 1

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

Article 1 of Protocol No. 1

“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.”

20. The Government submitted that in the cases at hand the applications for supervisory review were lodged by a party to the proceedings and within the time-limit prescribed by law and the proceedings had fully complied with the requirements set out in the Code of Civil Procedure of the Russian Federation. The quashing had been justified because the judgments had been based on a misapplication of law and hence had contained a fundamental defect. Review of binding judgments had been legitimate in a democratic society and known to such countries as Germany, Austria, and

Switzerland. Besides, the Council of Europe had been satisfied with reforms of the supervisory-review procedure in Russia. As regards the complaint under Article 1 of Protocol No. 1, the Presidium had found that the applicants' claims had been unfounded and therefore they had not had a "possession" within the meaning of Article 1 of Protocol No. 1. The fact that they had not appealed against the judgment of 25 December 2003 showed that they considered the initial multiplier incorrect.

21. In their additional observations the Government pointed out that the second applicant had lost his victim status. After 25 December 2003 he was successful in several sets of the proceedings for adjustment of the allowance, had benefitted from the new round of the annulment proceedings and had obtained a new pecuniary award by virtue of the judgment of 13 March 2007. Therefore, the State had taken effective measures to restore and protect his rights. They further argued that the applicant had not made use of the domestic remedies available to him before applying to the Court and therefore his complaint should be rejected as premature.

22. The applicants maintained their claims.

A. Admissibility

1. Objection as regards exhaustion and victim status in the second applicant's case

23. As regards the objection concerning the second applicant's victim status, the Court reiterates that to deprive an applicant of his status as a "victim" it is for the national authorities to acknowledge, either expressly or in substance, and then afford redress for, the breach of the Convention (see *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). The Court notes that parties had not submitted any documents as regards the proceedings after 12 September 2005, such as copies of the domestic judgments, the applicant's respective statements of claims or his application for annulment of the judgments (see § 16 above), nor even had they identified the court which had granted the request for annulment. Furthermore, neither the exact scope of the second applicant's claims in the proceedings which resulted in the judgment of 13 March 2007 nor the reasoning of the domestic courts (i.e. the particular method of calculation of the allowance used by them) was specified. It is unclear whether the claims had been granted in full or in part and, in the latter case, to which extent. In these circumstances, there is no basis on which the Court is able to conclude that the pecuniary award made on 13 March 2007 in respect of arrears for the period from 2000 to 2006 could be regarded as an acknowledgement and redress for the alleged breach of the applicant's Convention rights as a result of the quashing of the judgment in his favour.

24. Similarly, as regards the Government's submission that the complaint was premature, the Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, and, in particular, that it was capable of providing redress in respect of the applicant's complaints (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII). The Court notes that the issue in the present case is whether the principle of legal certainty was infringed as a result of the quashing on supervisory review which is an instantaneous act and does not create a continuing situation, even if it entails a re-opening of the proceedings (see, *mutatis mutandis*, *Sitokhova v. Russia* (dec.), no. 55609/00, 2 September 2004). In the present case, it was not demonstrated that the subsequent proceedings for recalculation of the pension was a remedy to exhaust in respect of the legal certainty complaint (see, *mutatis mutandis*, *Ryabykh v. Russia* (dec.), no. 52854/99, 21 February 2002). The objection should therefore be dismissed.

2. Conclusion as regards the two cases

25. The Court notes that the applicants' complaint about quashing of the judgments in their favour is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Article 6 of the Convention

26. The Court reiterates that the quashing by way of supervisory review of a judicial decision which has become final and binding may render the litigant's right to a court illusory and infringe the principle of legal certainty (see, among other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII; *Ryabykh v. Russia*, no. 52854/99, §§ 56-58, 24 July 2003). Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see *Protsenko v. Russia*, no. 13151/04, §§ 25-34, 31 July 2008).

27. As regards the compliance with the time-limits set in the Code of Civil Procedure of the Russian Federation, the Court rejects this argument, because according to the domestic law in force at the relevant time the president's power to overrule decisions of other judges refusing to initiate supervisory-review proceedings was not subject to any time-limits, and it was unclear on which grounds the president could overrule the judge rapporteur's decision (see *Septa v. Russia*, no. 30731/03, § 33, 15 February 2007). Indeed, the respective decisions by the President and judge B. of the

Regional Court did not provide reasons for overruling the judge rapporteur's findings of 30 June 2003.

28. The Court further observes that in the cases at hand the judgments were set aside by way of a supervisory review solely on the ground that the lower court applied an incorrect multiplier in the applicant's cases. The Court reiterates its constant approach that in the absence of a fundamental defect in the previous proceedings a party's disagreement with the assessment made by the first-instance and appeal courts is not a circumstance of a substantial and compelling character warranting the quashing of a binding and enforceable judgment and re-opening of the proceedings on the applicant's claim (see *Boris Vasilyev v. Russia*, no. 30671/03, § 34, 15 February 2007; *Kot v. Russia*, no. 20887/03, § 29, 18 January 2007). The Government did not put forward any arguments which would enable the Court to reach a different conclusion in the cases at hand. There has been, accordingly, a violation of Article 6 § 1 of the Convention.

2. Article 1 of Protocol No. 1

29. The Court reiterates that the existence of a debt confirmed by a binding and enforceable judgment constitutes the beneficiary's "possession" within the meaning of Article 1 of Protocol No. 1. (see, among other authorities, *Androsov v. Russia*, no. 63973/00, § 69, 6 October 2005).

a. First applicant's case

30. Insofar as the Government submitted that the first applicant had failed to appeal against the Town Court judgment of 25 December 2003, the Court observes that the core issue before it is the quashing of the final and binding judgment, an instantaneous act. Thus, the eventual outcome of the post-quashing proceedings is not directly relevant for the Court's analysis of the quashing complaint (see *Ivanova v. Ukraine*, no. 74104/01, §§ 35-38, 13 September 2005), unless, as a result of the subsequent proceedings, the applicant obtained more than he had had before the supervisory review (see *Boris Vasilyev*, cited above, § 37). This was clearly not the case.

31. The Court observes that by virtue of the judgment of 22 January 2003 the applicant's allowance was considerably increased. The quashing of the enforceable judgment frustrated the applicant's reliance on a binding judicial decision and deprived him of an opportunity to receive the money he had legitimately expected to receive. The Court considers that the quashing placed an excessive burden on the applicant and was incompatible with Article 1 of Protocol No. 1. There has therefore been a violation of that Article in the first applicant's case.

b. Second applicant's case

32. The Court notes the argument advanced by the Government that the applicant had been successful in a new round of the court proceedings after the quashing and that as a result of the proceedings he had received the amount which equalled or even exceeded the initial one made in his favour by the final judgment of 16 April 2003. The Court observes, however, that it is not in possession of any information on the scope of the applicant's claims before the domestic courts in these proceedings, the extent to which the claims were granted and the method of calculation of the allowance used by the domestic courts (see § 23 above).

33. In these circumstances the Court does not consider it necessary to rule on the question where there has been a violation of Article 1 of Protocol No. 1 in respect of the second applicant (see, *mutatis mutandis*, *Zasurtsev v. Russia*, no. 67051/01, §§ 53-55, 27 April 2006).

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 ON ACCOUNT OF THE NON-ENFORCEMENT

34. The applicants complained about the non-enforcement of the judgments in their favour. They relied on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, both cited above.

35. The Court observes that the principles insisting that a final judicial decision must not be called into question and should be enforced represent two aspects of the same general concept, namely the right to a court (see the *Ryabykh* judgment, cited above, §§ 55-57; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III). The Court further observes that the judgments in the applicants' favour were quashed shortly after having become binding and enforceable. In these circumstances, the Court considers that the applicants' non-enforcement complaint is closely linked to the supervisory review issue and should be declared admissible as well. However, having regard to its findings above concerning violation of the applicants' rights on account of the quashing of the judgments in their favour, the Court does not consider it necessary, in the circumstances of the case, to examine their complaint concerning the non-enforcement of the respective judgments separately (see *Boris Vasilyev*, cited above, §§ 41-42).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicants claimed 3,000 euros (EUR) each in respect of non-pecuniary damage. The Government contested the claims as excessive and submitted that the amounts claimed could be adjusted at the domestic level and there was no causal link between the alleged violation and the claim for damages.

42. The Court accepts that the applicants suffered distress and frustration because of quashing of the final judgment in their favour. Making its assessment on an equitable basis and taking into account the length of the enforcement stage, the Court awards each applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

38. The applicants did not make any claim in respect of costs and expenses. Accordingly, there is no call for the Court to make an award under this head.

C. Default interest

39. 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. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds*, in respect of both applicants, that there has been a violation of Article 6 § 1 of the Convention on account of the quashing of the final judgments in their favour by way of supervisory review;
4. *Holds*, in respect of the first applicant, that that there has been a violation of Article 1 of Protocol No. 1 on account of the quashing of the final judgments in their favour by way of supervisory review;

5. *Holds* that there is no need to examine the second applicant's complaint under Article 1 of Protocol No. 1 about quashing of the final judgment in his favour by way of supervisory review and the first and the second applicants' complaint about non-enforcement of the judgments in their favour;
6. *Holds*
 - (a) that the respondent State is to pay to the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts in respect of non-pecuniary damage plus any tax that may be chargeable on these amounts, to be converted into Russian roubles at the rate applicable at the date of the settlement:
 - (i) EUR 3,000 (three thousand euros) to Mr Klimenko;
 - (ii) EUR 3,000 (three thousand euros) to Mr Ostapenko;
 - (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.

Done in English, and notified in writing on 23 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

APPENDIX

APPLICATION NUMBER	APPLICANT'S NAME	JUDGMENT IN THE APPLICANT'S FAVOUR (DATE)	AWARD (PARTICULARS)	QUASHING ON SUPERVISORY REVIEW (DATE)
30709/03	KLIMENKO Nikolay Ivanovich	22 January 2003	RUB 4,800 (disability pension), and RUB 576 (“food allowance”) monthly, as of 1 January 2003 until change in the applicant’s state of health	13 November 2003
30727/03	OSTAPENKO Anatoliy Nikolayevich	21 January 2003	RUB 4,800 monthly (disability pension), as of 1 January 2002, and RUB 576 (“food allowance”), as of 1 January 2003	4 December 2003