



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF KOMNATSKYY v. UKRAINE

(Application no. 40753/07)

JUDGMENT

STRASBOURG

15 October 2009

FINAL

15/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Komnatskyy v. Ukraine,

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

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Rait Maruste,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 22 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 40753/07) 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 Viktor Ivanovych Komnatskyy (“the applicant”), on 4 September 2007.

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

3. On 20 January 2009 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 case was given priority under Rule 41 of the Rules of the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1925 and lives in Zhytomyr, Ukraine. He has been recognised as falling within Category I disabled status (the gravest one) on account of his service during the Second World War.

5. The applicant was an operative who dealt with the consequences of the Chernobyl disaster. From 1997 he was on a special priority list of persons to be allocated an apartment by the State.

6. On 31 August 2006 the Korolyovskyy District Court of Zhytomyr ordered Zhytomyr Town Council to provide the applicant with an apartment in accordance with the requirements of section 20 § 10 of the Chernobyl Victims' Status and Social Security Act (see paragraph 12 below). This decision became final. Enforcement proceedings were commenced on 28 September 2006.

7. According to the Government, in February 2008 the bailiff requested from the Korolyovskyy District Court of Zhytomyr replacement of the in-kind award conferred by the decision of 31 August 2006 with an equivalent amount of money. On 8 July 2008 the court dismissed that request. The court's reasoning is unknown, as neither the party furnished a copy of that decision. The State Bailiffs' Service appealed and the proceedings are apparently still pending before the Kyiv Administrative Court of Appeal.

8. Although the debtor was fined several times by the bailiffs, the decision of 31 August 2006 has not been enforced. On several occasions, in their replies to the relevant applicant's complaints, the State authorities gave explanations based on a lack of funds in the budget to purchase or construct new apartments and the lack of available apartments. The enforcement proceedings are still pending.

9. According to the applicant, he lives in a rented house in poor living conditions (for example, without water supply). The local press described the house as “old” and “ramshackle”.

II. RELEVANT DOMESTIC LAW

10. The general provisions of domestic legislation on enforcement of judicial decisions are set out in the judgment of 27 July 2004 in the case of *Romashov v. Ukraine* (no. 67534/01, §§ 16-18).

11. Under section 33 of the Enforcement Proceedings Act the bailiff is entitled to request *proprio motu* the relevant court to change the means of enforcement of a court decision if there are circumstances which preclude its enforcement by the means specified in that decision.

12. Section 20 § 10 of the Chernobyl Victims' Status and Social Security Act (adopted on 28 February 1991) provides, *inter alia*, that the entitled persons must be housed within one year of the date of their relevant application. Construction of houses shall be funded from the State budget.

THE LAW

I. COMPLAINTS AS TO LENGTHY NON-ENFORCEMENT OF THE DECISION IN THE APPLICANT'S FAVOUR

13. The applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 that the decision of 31 August 2006 had not been enforced for a very long time. These provisions read, in so far as relevant, as follows:

Article 6 § 1 of the Convention

“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.

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.”

The applicant further complained that he had no effective remedy in respect of the non-enforcement of the decision in question. He relied in that respect on Article 13 of the Convention which reads as follows:

“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.”

Lastly, in view of the State authorities' failure to provide him with an apartment as prescribed by the decision of 31 August 2006, the applicant also relied on Article 8 of the Convention which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

14. The parties did not submit any observations in respect of the admissibility of the application.

15. The Court notes that the application 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. Article 6 § 1 of the Convention

16. The Government submitted that the delay in the enforcement of the decision at issue was justified by the interests of many other persons awaiting apartments from Zhytomyr Town Council since the early 1990s. They maintained that the State authorities had to respect the order of application when allocating apartments among eligible persons. In any case the State authorities acted in good faith and therefore there was no violation of the invoked provision.

17. The applicant disagreed.

18. The Court notes that the decision in the applicant's favour has remained unenforced for more than three years. Having regard to the vulnerable status of the applicant, his present living conditions, and first and foremost to his age, the Court considers that the enforcement of the decision required particular diligence.

19. The Court admits that the enforcement of a judgment incorporating a ruling of a non-pecuniary nature may take more time than is the case with payment of money awarded under a court judgment (see *Ganenko v. Ukraine* (dec.), no. 27184/03, 11 January 2005). However, it finds it important to distinguish the present case from the *Ganenko* case, where the two-year delay in providing the applicant with a car designed for disabled persons was found to be compatible with the Convention. Firstly, in the instant case the decision has not yet been enforced to the present date, that is more than three years, regardless the circumstances which urged the domestic authorities to act with particular diligence (see preceding paragraph). Secondly, unlike in the *Ganenko* case, the decision of 31 August 2006 had explicit reference to the domestic law imposing time-limits for housing.

20. The Court further notes that in the present case the State authorities informed the applicant on several occasions that the decision at issue had not been enforced due to a lack of funds in the budget to purchase or construct new apartments (see paragraph 8 above). In this regard the Court reiterates that it is not open to a State authority to cite lack of funds as an

excuse for not honouring a judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. But the delay must not be such as to impair the essence of the right protected under Article 6 § 1 (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V, and *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III).

21. Even assuming that the decision remains unenforced solely due to the lack of available apartments, the Court finds that the Government have not demonstrated that sufficient attempts were made by the authorities to make alternative arrangements for the applicant's accommodation or a compensation (see, *mutatis mutandis*, *Shpakovskiy v. Russia*, no. 41307/02, § 29, 7 July 2005, and *Malinovskiy v. Russia*, no. 41302/02, § 38, ECHR 2005-VII (extracts); see also section 33 of the Enforcement Proceedings Act at paragraph 11 above). In particular, they failed to advance any plausible explanation as to why the bailiff had sought a change of the means of enforcement almost a year and a half after the enforcement proceedings had been instituted, a period which is excessively long in the circumstances of the present case, whereas it was clear *ab initio* that the debtor lacked available apartments to enforce the decision in timely fashion as there were a lot of other eligible persons who had already been waiting for apartments since the early 1990s.

22. Furthermore, although the domestic court's reasons not to change the means of enforcement of the decision at issue are unavailable (see paragraph 7 above), the Court takes the view that if the domestic court had granted the bailiff's request the applicant would inevitably have had to face the question of availability of funds in the budget to have such a monetary award enforced, the lack of which does not excuse the domestic authorities for failure to enforce a decision, as set out above. In any case, the Court reiterates that it is up to the respondent State to make the guarantees under the Convention effective within its jurisdiction and that the discrepancies between the domestic authorities should not prejudice the applicant's rights under the Convention (see, *mutatis mutandis*, *Antonyuk v. Ukraine*, no. 17022/02, § 38, 11 December 2008).

23. The foregoing considerations are sufficient to enable the Court to conclude that, by failing for years to take the necessary measures to comply with the final judicial decision in the instant case, the respondent State deprived the provisions of Article 6 § 1 of the Convention of all useful effect (see *Lukyanov v. Ukraine*, no. 11921/04, § 25, 19 June 2008).

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

2. Article 1 of Protocol No. 1

24. The Government admitted that the apartment awarded to the applicant by the decision of 31 August 2006 constituted a "possession" within the meaning of Article 1 of Protocol No. 1. They further contended

that the interference in the applicant's right was legitimate and proportional, advancing arguments similar to those put forward with respect to Article 6 § 1 of the Convention.

25. The applicant disagreed that the interference was justified.

26. The Court concedes that the apartment in question falls within the notion of “possessions” contained in Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Shpakovskiy v. Russia*, cited above, § 32 et seq., and *Malinovskiy v. Russia*, cited above, § 42 et seq.). Taking into account the foregoing conclusions (see paragraphs 18-23), the Court notes that the impossibility for the applicant to obtain enforcement of the decision in his favour for an unreasonably long period of time constituted an interference with his right to the peaceful enjoyment of his possessions. The Government have not advanced any plausible justification for that interference.

27. The Court finds therefore that there has been an infringement of Article 1 of Protocol No. 1 to the Convention.

3. Article 13 of the Convention

28. The Government pleaded that there was no violation of Article 13 of the Convention in so far as there had been in their view no violation of either Article 6 § 1 of the Convention or Article 1 of Protocol No. 1.

29. The Court reiterates that it has already found violations of Article 13 of the Convention in cases concerning the lengthy non-enforcement of the judgments (see, for example, *Voytenko v. Ukraine*, no. 18966/02, §§ 30 and 48, 29 June 2004).

30. 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. Accordingly, there has been a breach of this provision.

4. Article 8 of the Convention

31. Having regard to the finding relating to Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention (see paragraphs 23 and 27 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 8 of the Convention (see, *mutatis mutandis*, *Laino v. Italy* [GC], no. 33158/96, § 25, ECHR 1999-I).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 40,552 euros (EUR) in respect of pecuniary damage, namely the current cost of an apartment awarded to him by the decision of 31 August 2006. He further claimed the same amount in respect of non-pecuniary damage.

34. The Government contested these claims as exorbitant.

35. The Court notes that it is undisputed that the State still has an outstanding obligation to enforce the decision at issue.

36. The Court further awards the applicant, on an equitable basis, EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

37. The applicant also claimed EUR 500 for the costs and expenses incurred before the domestic courts and the Court. In support he submitted vouchers in the total amount of 209.01 Ukrainian hryvnias¹ for his postal expenses incurred before the Court.

38. The Government contested the first-mentioned sum as unsubstantiated.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 20 for the proceedings before the Court.

C. Default interest

40. 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 About EUR 20.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 13 of the Convention;
4. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
5. *Holds* that there is no need to examine the complaint under Article 8 of the Convention;
6. *Holds*
 - (a) that the respondent State, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, is to enforce the decision of 31 August 2006;
 - (b) 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 1,000 (one thousand euros) in respect of non-pecuniary damage and EUR 20 (twenty euros) for 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 to the applicant;
 - (c) 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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President