



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF MIKHAYLYUK AND PETROV v. UKRAINE

(Application no. 11932/02)

JUDGMENT

STRASBOURG

10 December 2009

FINAL

10/03/2010

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 Mikhaylyuk and Petrov 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,

Zdravka Kalaydjieva, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 11932/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Ms Iraida Ivanovna Mikhaylyuk (“the first applicant”) and Mr Vladimir Petrovich Petrov (“the second applicant”), on 24 November 2001.

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

3. On 3 April 2007 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the allegedly unlawful interception of the applicants' correspondence by a public authority to the Government. It also decided to examine the merits of that part of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1949 and 1951, respectively, and live in Odessa.

5. From 1976 until 1996 the second applicant worked for the Chernomorska Penitentiary Institution no. 74 (“the colony”). He was provided with a room in a hall of residence, which was situated on the site of the colony and had the same postal address. He resided there until 1991. Afterwards, the applicants lived together in the first applicant's flat. The second applicant is still entitled to reside in the colony and it remains his registered place of residence.

6. In September 1998 the applicants instituted civil proceedings in the Prymorsky District Court of Odessa against the colony and the local post office. They alleged that letters addressed to them by domestic and international courts, which had been delivered to the address of the second applicant, had been unlawfully opened and read by the defendant institutions. The applicants sought compensation for non-pecuniary damage.

7. On 29 March 2001 the court rejected the applicants' claims. It established that the colony had opened two letters addressed to the applicants: the letter of 27 October 1998, sent by the Starokyivsky District Court of Kyiv to the first applicant, and the letter of 24 August 1998, sent by the European Court of Human Rights to the second applicant in the context of his previous application to the Court (no. 44997/98, declared inadmissible on 26 October 1999).

8. The court held that, pursuant to Article 28 of the Correctional Labour Code of 1970 and section 7 of the Pre-Trial Detention Act of 1993, the administration of the colony had been authorised to monitor all correspondence delivered to it. Since the room of the second applicant was situated on the premises of the colony, his correspondence had been dealt with by its administration in accordance with the rules applicable to detainees' correspondence. The court also found that the administration had acted in accordance with the Instruction on the processing of documents in the organs of the Ministry of the Interior and the Instruction on the organization of the monitoring of correspondence of persons held in penitentiary institutions and pre-trial detention centres, issued by the Ministry of the Interior on 22 June 1993 and 28 May 1999, respectively. The court further stated that the letter addressed to the first applicant had been opened also due to the fact that there had been a detainee with the same name in the colony. The court concluded that the interception of the applicants' correspondence had not violated their constitutional rights.

9. On 19 July 2001 the Odessa Regional Court upheld the first-instance court's decision. On 15 May 2002 a panel of three judges of the Supreme Court rejected the applicants' request for leave to appeal in cassation.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine of 1996

10. The relevant provisions of the Constitution read as follows:

Article 31

“Everyone shall be guaranteed privacy of mail, telephone conversations, telegraph and other correspondence. Exceptions shall be established only by a court in cases envisaged by law, with the purpose of preventing crime or ascertaining the truth in the course of the investigation of a criminal case, if it is not possible to obtain information by other means.”

Article 56

“Everyone shall have a right to compensation from public or municipal bodies for losses sustained as a result of unlawful decisions, acts or omissions by public or municipal bodies or civil servants in the performance of their official duties.”

B. Interception of Detainees' Correspondence

1. *Correctional Labour Code of 1970 (repealed as of 1 January 2004)*

11. According to Article 2 of the Code, the correctional labour legislation regulated the procedure and conditions of serving criminal sentences and the activities of the organs enforcing criminal sentences.

12. Article 28 of the Code provided that detainees' correspondence was subject to censorship, and their parcels and packages were subject to opening and checking.

2. *Pre-Trial Detention Act of 1993*

13. According to section 1 of the Act, pre-trial detention is a preventive measure in respect of an accused, a defendant or a person suspected of having committed a crime punishable with imprisonment, or a convicted person whose sentence has not yet become final.

14. Section 7 of the Act provides that detainees' personal belongings and correspondence must be checked.

C. Interception of Correspondence in the Framework of Criminal Investigations or Related Inquiries

1. Code of Criminal Procedure of 1960

15. At the material time Articles 177 and 187 of the Code empowered investigators to intercept a person's correspondence on the basis of a prosecutor's or a court's warrant if there were sufficient grounds to believe that such correspondence contained information of importance for establishing the truth in a criminal case.

2. Retrieval and Search Operations Act of 1992

16. According to section 1 of the Act, as worded at the material time, retrieval and search operations were aimed at detection and recording of information about unlawful activities by a person or groups of persons and about intelligence and subversive activities of foreign special services, and in the interests of public safety. Retrieval and search operations were to be carried out by the organs of the Interior, the Security Service, the Boarder Guard Forces, the State Guard Department, and the Tax Administration (section 5). Interception of correspondence, as one of the types of such activities, required a prosecutor's warrant (section 8).

17. Section 6 of the Act contained an exhaustive list of grounds pursuant to which retrieval and search operations might be carried out, which included the presence of sufficient information about crimes, intelligence and subversive activities against Ukraine, persons who were preparing or have committed crimes, persons hiding from the investigative bodies or evading the application of criminal sanctions, and disappeared persons; the submission of requests by the relevant authorities to check persons for the reasons of granting them access to secret information; and the need to obtain intelligence information in the interests of public and State safety.

THE LAW

I. SCOPE OF THE CASE

18. The Court notes that, after the communication of the case to the respondent Government, the applicants introduced new complaints, which concerned the first applicant's allegedly unlawful dismissal from her position as a teacher in a secondary school, the authorities' alleged persecution of the second applicant during his employment with the Chernomorska Penitentiary Institution no. 74 in 1976-1996, and the exclusion of his name from the electoral roll in the area where he lived.

19. In the Court's view, the new complaints are not an elaboration of the applicants' original complaints to the Court, lodged approximately seven and a half years earlier, about the State authorities' alleged interception of their correspondence. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The applicants complained about the allegedly unlawful interception of their correspondence by a public authority. They invoked Article 8 of the Convention, which reads, in so far as relevant, as follows:

“1. Everyone has the right to respect for ... 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

21. 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

22. The Government did not submit observations on the merits of the case.

23. The applicants maintained their above complaint. They further argued that the interference by the authorities with their correspondence had not been in accordance with the law and that the courts had groundlessly relied in their case on the rules applicable to persons detained in the course of criminal proceedings against them.

24. The Court reiterates that the opening of a letter is sufficient in itself to disclose an interference with an applicant's right to respect for his correspondence (see *Narinen v. Finland*, no. 45027/98, § 32, 1 June 2004). Given that it was acknowledged by the domestic courts that the opening by the authorities of the letters addressed to the applicants had actually taken place, the Court must examine whether that interference with the applicants' rights had been in conformity with the requirements of the second paragraph of Article 8, namely, whether it had been “in accordance with the law”, had

pursued a legitimate aim and had been necessary in a democratic society in order to achieve that aim (*Valašinas v. Lithuania*, no. 44558/98, § 128, ECHR 2001-VIII).

25. The Court reiterates that the expression “in accordance with the law” requires firstly that the impugned interference has some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see, among many other authorities, *Poltoratskiy v. Ukraine*, no. 38812/97, § 155, ECHR 2003-V).

26. The Court notes that, according to the domestic courts, the applicants' correspondence was opened and reviewed pursuant to the national legislation (see paragraph 8 above). In particular, they referred to the provisions of section 7 of the Pre-Trial Detention Act of 1993 and Article 28 of the Correctional Labour Code of 1970. The Court notes that those legislative provisions provided for the screening of correspondence of a particular category of persons, namely, persons held in pre-trial detention or serving their sentences in penitentiary institutions.

27. In this context, the Court observes that the applicant did not belong to that category of persons. Given the purpose and wording of the above legislative provisions, they were not applicable to the applicants, having regard to the mere fact that the applicants were not detained in the colony. The domestic courts' conclusions to the contrary were not supported by any reasonable explanation.

28. As regards the instructions on dealing with correspondence by the organs of the Ministry of the Interior and the State Department for Execution of Sentences, on which the courts also relied in the applicants' case, the Court notes that those instructions were internal and unpublished and, thus, not accessible to the public, including the applicants (see paragraph 8 above). Moreover, their texts were not provided in the present case.

29. On the whole, the Court considers that given the applicants' particular situation, the relevant Constitutional guarantees, and the rules governing interception of correspondence at the material time (see paragraphs 10-17 above), the interference with the applicants' correspondence did not have any basis in domestic law. Therefore, the Court finds that the requirement of lawfulness, within the meaning of Article 8 § 2 of the Convention, was not met in the present case.

30. In view of the above finding, the Court considers it unnecessary to examine whether the interference was “necessary in a democratic society” for one of the legitimate aims pursued within the meaning of Article 8 § 2 of the Convention.

31. There has therefore been a violation of Article 8 of the Convention.

III. 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 applicants claimed 500,000 Ukrainian hryvnas¹ (UAH) each in respect of non-pecuniary damage.

34. The Government maintained that the applicants' claim was unsubstantiated.

35. The Court has no doubt that the applicants must have sustained non-pecuniary damage as a result of the interference with their right to respect for their correspondence. The Court, making its assessment on an equitable basis, as required by Article 41 of the Convention, awards each applicant EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

36. The applicants also claimed UAH 845² for the translation and correspondence expenses incurred before the Court. They produced receipts in respect of these expenses.

37. The Government left the matter for the Court's consideration.

38. The Court reiterates that, according to its 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 considers it reasonable to award the requested sum of EUR 81.

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.

¹ About 47,893 euros (EUR).

² About EUR 81.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:
 - (i) EUR 1,200 (one thousand two hundred euros) to each applicant in respect of non-pecuniary damage;
 - (ii) EUR 81 (eighty-one euros) to the applicants jointly for costs and expenses;
 - (iii) plus any tax that may be chargeable to the applicants on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President