



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

FIFTH SECTION

CASE OF NIKIFORENKO v. UKRAINE

(Application no. 14613/03)

JUDGMENT

STRASBOURG

18 February 2010

FINAL

18/05/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nikiforenko 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,

Mark Villiger,

Isabelle Berro-Lefèvre, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 26 January 2010,

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

PROCEDURE

1. The case originated in an application (no. 14613/03) 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, Ms Lyudmila Vasilyevna Nikiforenko (“the applicant”), on 21 February 2003.

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

3. On 2 March 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 FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1945 and lives in Chervonopartizansk.

5. On 11 November 1997 the applicant broke into the apartment of Ms M. and took a bicycle which had belonged to her ex-husband, who had died three days earlier.

6. On receiving a complaint from Ms M., on 18 November 1997 the Sverdlovskiy District Prosecutor’s Office (“the SDPO”) instituted criminal proceedings against the applicant for burglary and theft.

7. In November and December 1997 the investigation was suspended several times because of the applicant's illness.

8. On 5 January 1998 the applicant was charged with burglary and theft. The same day she was placed under an obligation not to abscond.

9. In January, April, May and August 1998 the investigation was suspended several times because of the applicant's illness.

10. In November 1998 the investigation was completed and the criminal case against the applicant was referred to the Sverdlovskiy Local Court, Lugansk Region ("the Sverdlovskiy Court").

11. On 25 December 1998 the Sverdlovskiy Court remitted the case for additional investigation.

12. On 20 September 1999 the SDPO reclassified the applicant's actions and charged her with burglary and robbery.

13. On 3 November 1999 the SDPO completed the additional investigation and referred the case to the court.

14. On 2 December 2000 the Sverdlovskiy Court convicted the applicant, but on 28 March 2000 the Lugansk Regional Court quashed the judgment and remitted the case for fresh investigation.

15. On 15 June 2000 the SDPO reclassified the applicant's actions from robbery to forcible assertion of right.

16. On 12 July 2000 the applicant was charged with robbery.

17. On 5 August 2000 the charges against the applicant were changed back to forcible assertion of right. The SDPO terminated the criminal case against the applicant because further prosecution was time-barred.

18. On 20 September 2000 the Lugansk Regional Prosecutor's Office ("the LRPO") quashed the decision of 5 August 2000 and took over the investigation into the case.

19. On 21 December 2000 the investigation was completed and on 29 December 2000 the criminal case was transferred to the court.

20. On 26 March 2002 the court remitted the case for further investigation.

21. On 10 November 2003 the investigator changed the charges against the applicant to concealment of a crime.

22. In May 2004 the investigation was completed and the case was referred to the court.

23. On 17 June 2004 the court remitted the case for further investigation.

24. On 17 August 2004 the Lugansk Regional Court of Appeal upheld the decision of 17 June 2004.

25. In October 2004 the charges against the applicant were changed to forcible assertion of right. The investigation was completed and the case was referred to the court.

26. In November-December 2004 the court held three hearings.

27. On 28 December 2004, 26 January and 16 February 2005 the hearings were adjourned because of the applicant's absence.

28. In 2004 Ms M., the aggrieved party, died.

29. On 11 April 2005 the Rovensky Local Court closed the criminal case against the applicant as time-barred for further prosecution. On 17 June 2005 the Lugansk Court of Appeal quashed this decision and remitted the case for fresh consideration.

30. Between September and November 2005 court hearings were postponed four times due to the applicant's failure to appear.

31. On 27 December 2005 the court remitted the case for further investigation.

32. On 30 June 2006 the investigation was completed and the case was referred to the court.

33. Between July and November 2006 court hearings were postponed four times due to the applicant's failure to appear.

34. On 14 May 2007 the case was remitted for further investigation.

35. On 12 July 2007 the investigation was completed and the case was referred to the court.

36. On 6 September 2007, 4 June 2008 and 12 February 2009 the court remitted the case for further investigation.

37. On 22 October 2008 the investigator cancelled the applicant's obligation not to abscond. During the period when the applicant had been under the obligation not to abscond she had been allowed several times to go abroad to visit her relatives and on several occasions she had done so without permission. On one occasion, the applicant had not been permitted to leave her place of residence.

38. On 21 March 2009 the prosecutor terminated the criminal proceedings against the applicant for lack of proof of crime.

II. RELEVANT DOMESTIC LAW

39. The text of Articles 148, 149 and 150 of the Code of Criminal Procedure of 1960, which are the general rules on preventive measures, is set out in *Merit v. Ukraine* (no. 66561/01, judgment of 30 March 2004).

40. According to Article 151 of the Code, an undertaking not to abscond consists of an obligation by a suspect or an accused not to leave his or her place of residence or temporary address without the permission of an investigator. In the event of a breach of such a written undertaking, a stricter measure of restraint may be applied.

THE LAW

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

41. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement laid down in Article 6 § 1 of the Convention, which reads as follows:

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

42. The Government contested that argument. According to the Government the delays caused by the applicant’s conduct constituted almost ten months during the court proceedings and several more months during the investigation stage.

43. The period to be taken into consideration began on 18 November 1997 and ended on 21 March 2009. It thus lasted eleven years, four months and four days at two levels of jurisdiction.

A. Admissibility

44. 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

45. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)

46. 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 *Pélissier and Sassi*, cited above).

47. 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, even excluding the period of delay attributable to the applicant from the overall length of the proceedings.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

48. The applicant further complained that in Ukraine there was no court to which application could be made to complain of excessive length of proceedings. She relied 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.”

49. The Government contested that argument.

50. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

51. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). It further refers to its finding in the *Merit* case about the lack of an effective and accessible remedy under domestic law for complaints in respect of the length of criminal proceedings (see *Merit v. Ukraine*, cited above, §§ 78-79).

52. Accordingly, the Court considers that in the present case there has been a violation of Article 13 of the Convention on account of the lack of a remedy under domestic law whereby, the applicant could have obtained a ruling upholding her right to have her case heard within a reasonable time, as set forth in Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 4 TO THE CONVENTION

53. The applicant also complained about the lengthy restriction on her freedom of movement as a result of the undertaking not to abscond. She relied on Article 2 of Protocol No. 4, which, in so far as relevant, reads as follows:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence....

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

A. Admissibility

54. 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

55. It is not in dispute between the parties that the obligation not to abscond constituted an interference with the applicant’s freedom of movement. Furthermore, as the Court had previously found in cases raising similar issues, in the context of criminal proceedings in Ukraine such interference with a right of a criminal suspect or an accused is in accordance with law and, in principle, pursues a legitimate aim (see, among other authorities, *Ivanov v. Ukraine*, no. 15007/02, §§ 87-89, 7 December 2006). It remains to be seen whether such interference was “necessary in a democratic society”.

56. The test of “necessity in a democratic society” requires the Court to determine whether the interference complained of was “proportionate to the legitimate aims pursued” (see, *mutatis mutandis*, *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 170-171, ECHR 2005-...). As regards the proportionality of the interference, the Court had particular regard to the duration of the measure in question.

57. The applicant was under obligation not to abscond from 5 January 1998 until 22 October 2008, that is for ten years, nine months and nineteen days. This had restricted her from leaving her place of residence without permission throughout that time (see paragraph 40 above).

58. The Court ruled on the compatibility with Article 2 of Protocol No. 4 of an obligation not to leave one’s place of residence in a series of cases against Italy, including the case of *Luordo* (see *Luordo v. Italy*, no. 32190/96, § 96, ECHR 2003-IX). In this case the Court found such an obligation, imposed on the applicant for the duration of bankruptcy proceedings, disproportionate because of their length, in that case fourteen years and eight months, even though there had been no indication that the applicant wished to leave his place of residence or that such permission had ever been refused. However, in the *Antonenkov and Others* case (see, *Antonenkov and Others v. Ukraine*, no. 14183/02, §§ 59-67, 22 November 2005), where the length of the impugned restriction within the course of criminal proceedings was four years and ten months, the Court

found no violation of Article 2 of Protocol No. 4. Also, in the *Fedorov and Fedorova* case (see *Fedorov and Fedorova v. Russia*, cited above, §§ 32-47), where an obligation not to leave their place of residence was imposed on the applicants for four years and three months and four years and six months, the Court found that in the circumstances of the case the restriction on the applicants' freedom of movement was not disproportionate.

59. In the Court's view, the present application should be distinguished from the *Antonenkov and Others* and *Fedorov and Fedorova* cases. The Court firstly notes that the length of the restriction was significantly longer than in the two aforementioned cases, and its mere duration could be sufficient to conclude that it was disproportionate. Furthermore, the lengthy interference occurred in the context of prosecuting a fairly trivial offence.

60. In view of the above considerations, the Court reaches the conclusion that a fair balance between the demands of the general interest and the applicant's rights was not achieved. Accordingly, there has been a violation of Article 2 of Protocol No. 4 to the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

61. Lastly, the applicant complained under Article 6 of the Convention that there had been procedural violations during the criminal proceedings against her.

62. Having carefully examined the applicant's submissions in the light of all the material in its possession, 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. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

65. The Government considered this amount excessive and unsubstantiated.

66. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated by the mere finding of a violation of her Convention rights. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards her EUR 5,200 in respect of non-pecuniary damage.

B. Costs and expenses

67. The applicant made no claims under this head. The Court therefore makes no award.

C. Default interest

68. 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 concerning length of the proceedings and lack of effective remedies in this respect, as well as interference with freedom of movement admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of length of the proceedings;
3. *Holds* that there has been a violation of Article 13 of the Convention;
4. *Holds* that there has been a violation of Article 2 of Protocol No. 4 to the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias 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;

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

Done in English, and notified in writing on 18 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President