



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

FIFTH SECTION

CASE OF GUREPKA v. UKRAINE (no. 2)

(Application no. 38789/04)

JUDGMENT

STRASBOURG

8 April 2010

FINAL

08/07/2010

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

In the case of Gurepka v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Zdravka Kalaydjieva, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 16 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 38789/04) 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 Nikolay Vasilyevich Gurepka (“the applicant”), on 27 September 2004.

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

3. The applicant alleged, in particular, the impossibility of an appeal against the decision of the first-instance court in the administrative offence proceedings (Article 2 of Protocol No. 7) and his absence from those proceedings (Article 6 § 1) .

4. On 26 May 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

5. The applicant was born in 1956 and lives in Simferopol.

A. First set of proceedings

6. On 6 September 2005 the Court found a violation of Article 2 of Protocol No. 7 in the applicant's case having established the lack of an effective remedy against the decision of 1 December 1998 by the first-instance court ordering the applicant's administrative arrest and detention (see *Gurepka v. Ukraine*, no. 61406/00, §§ 59-62, 6 September 2005).

7. After the above judgment of the Court became final, the applicant was paid the awarded amount of non-pecuniary damage.

8. On 4 January, 20 February and 2 October 2006, the applicant sent requests for review of the decision of 1 December 1998 to the President of the Supreme Court but to no avail.

B. Second set of proceedings

9. On 8 May 2003 the applicant and two other individuals instituted proceedings in the Kievsky District Court against the Krymenergo Power Supply Company for cutting off the electricity supply to the apartment in which the plaintiffs had an office.

10. On 27 April 2005 the court found in part for the applicant and ordered the defendant to restore the electricity supply. The judgment was not appealed against and became final. According to the applicant it was enforced on 14 October 2005.

C. Third set of proceedings

11. On 3 March 2004 the applicant failed to appear before the Simferopolsky District Court in the civil proceedings in which he was participating as a representative of the plaintiff. The same day, in the applicant's absence, the court registry drew up a report on the administrative offence of contempt of the court on account of the applicant's failure to appear for the hearing which demonstrated his disrespect to the court.

12. On 19 April 2004 the Zheleznodorozhny District Court found the applicant guilty of contempt of court under Article 185-3 of the Code on Administrative Offences and fined him 136 hryvnias (UAH, around 20 euros (EUR) at the material time). The applicant was not present at the hearing. In the court's decision it was mentioned that the applicant had been duly informed of the court's hearing. According to the applicant, he was not summoned to the above hearing.

13. On 8 August 2004 the applicant requested the President of the Crimea Court of Appeal to review the decision of 19 April 2004.

14. By a letter of 30 August 2004, the Acting President of the Crimea Court of Appeal informed the applicant that there were no grounds for

review of his case, since the decision of 19 April 2004 had been well-founded and there had been no procedural violations.

II. RELEVANT DOMESTIC LAW

Code on Administrative Offences of 7 December 1984

15. Paragraph 1 of Article 185-3 of the Code provides as follows:

“Contempt of court, which is defined as malicious avoidance of summons by a witness, victim, plaintiff or defendant; or as failure by the above persons or others to comply with the orders of the presiding judge; or as violation of public order during a court hearing, or the committal by any person of acts which indicate blatant disrespect for the court or for the rules of court, shall be punishable by a fine of six to twelve times the monthly minimal income of citizens or by administrative arrest for up to fifteen days.”

16. By Amendment Act of 24 September 2008 the second level of jurisdiction had been introduced in the administrative offence procedure (Article 287 of the Code on Administrative Offences).

17. Other relevant provisions of the Code summarised in the *Gurepka v. Ukraine* judgment (cited above, §§ 28-32), and *Nadtochiy v. Ukraine* (no. 7460/03, § 13, 15 May 2008).

III. EXPLANATORY REPORT TO PROTOCOL No. 7 TO THE CONVENTION

18. The relevant paragraphs of the explanatory report to Protocol No. 7 are worded as follows:

“17. This article recognises the right of everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher tribunal. It does not require that in every case he should be entitled to have both his conviction and sentence so reviewed. Thus, for example, if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence. As compared with the wording of the corresponding provisions of the United Nations Covenant (Article 14, paragraph 5), the word 'tribunal' has been added to show clearly that this provision does not concern offences which have been tried by bodies which are not tribunals within the meaning of Article 6 of the Convention.

...

20. Paragraph 2 of the article permits exceptions to this right of review by a higher tribunal:

- for offences of a minor character, as prescribed by law;

- in cases in which the person concerned has been tried in the first instance by the highest tribunal, for example by virtue of his status as a minister, judge or other holder of high office, or because of the nature of the offence;

- where the person concerned was convicted following an appeal against acquittal.

21. When deciding whether an offence is of a minor character, an important criterion is the question of whether the offence is punishable by imprisonment or not.”

THE LAW

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

19. The applicant complained that he had not been present before the court when the latter had rendered its decision ordering him to pay the fine under Article 185-3 of the Code on Administrative Offences and that the proceedings had been unfair. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

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

A. Admissibility

20. 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

21. The applicant maintained that he had not been properly summoned to appear before the court, and the records of the despatch of a summons did not prove that it had been served on him. The applicant claimed that he had never received such a summons and there was no acknowledgement of receipt in the court's records. Therefore he considered that he had been deprived of an opportunity to be heard in person by the court. He further maintained that the report on his administrative offence had been falsified, as the representative of the court registry who had drawn up the report had been with him in another courtroom within the other set of proceedings.

22. The Government maintained that the applicant had been duly notified about the court hearing and his failure to appear could not be

attributed to the State. Therefore, they considered that there had been no violation of the applicant's rights under Article 6 § 1 of the Convention.

23. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Nadtochiy v. Ukraine*, cited above, § 26, with further references).

24. In the present case, the applicant was found guilty of failing to appear before the court and a report on the administrative offence was drawn up in his absence (see paragraph 11). Furthermore, there is no confirmation in the materials submitted by the Government that the applicant had been duly notified of the court proceedings against him. The record of dispatching of the summons to the applicant does not prove that it was received by him. Therefore, there is no evidence that the applicant had been aware at all of the proceedings against him while they were pending.

25. The Court considers that the impugned proceedings lacked important procedural guarantees and that these procedural deficiencies, in the circumstances of the case, were serious enough to compromise the fairness of the proceedings. In these circumstances it sees no need to examine the applicant's other arguments concerning unfairness of the proceedings.

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

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7

26. The applicant complained that he could not appeal against the decision of the court by which he had been found guilty of an administrative offence. He relied on Article 13 of the Convention.

27. The Court reiterates that Article 13 of the Convention does not, as such, guarantee a right of appeal or a right to a second level of jurisdiction (see *Kopczynski v. Poland* (dec.), no. 28863/95, 1 July 1998, and *Csepyová v. Slovakia* (dec.), no. 67199/01, 14 May 2002). However, the Court, which has control of the characterisation to be given in law to the facts of the case, decided to examine the problem raised by the applicant under Article 2 of Protocol No. 7 which is the relevant provision and which provides as follows:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

A. Admissibility

28. 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

29. The applicant noted that at the material time, April 2004, there had been no ordinary appeal procedure against decisions of first-instance courts on administrative offences. He considered that the offence of which he had been found guilty was serious enough and therefore it could not fall under the exceptions of the second paragraph of Article 2 of Protocol No. 7.

30. The Government noted that the applicant could lodge a request for an extraordinary appeal with the court or the prosecutor and he had lodged such an appeal with the Crimea Court of Appeal which had reviewed his case. They also noted that since September 2008 an ordinary appeal procedure had been introduced in the Code on Administrative Offences (see paragraph 16 above).

31. They further submitted that in the instant case, unlike in the applicant's previous case (see paragraph 6 above), the court fixed more lenient punishment, namely a fine of UAH 136, around EUR 20 at the material time) and therefore, with a view to the actual consequences of the proceedings for the applicant, these proceedings should fall within the exceptions provided for in the second paragraph of Article 2 of Protocol No. 7.

32. The Court reiterates that it has already faced a similar issue in the applicant's previous case (cited above) and found that the Code on Administrative Offences did not provide for an ordinary appeal procedure and that the extraordinary appeal procedure did not satisfy requirements of Article 2 of Protocol No. 7 (see *Gurepka v. Ukraine*, no. 61406/00, §§ 59-61, 6 September 2005). The Government's argument that the second level of jurisdiction had been introduced into the Code in 2008 is not relevant to the circumstances of the present case, which took place in 2004. In these circumstances the Court does not find any reasons to deviate from the conclusions reached in the *Gurepka* judgment.

33. The Government contended that the offence of which the applicant was convicted was an "offence of a minor character" within the meaning of Article 2 § 2. In that connection the Court has considered the terms of the Explanatory Report to Protocol No. 7, which states expressly that when deciding whether an offence is of a minor character, an important criterion is whether or not the offence is punishable by imprisonment (see paragraph 24 above). In the instant case, Article 185-3 of the Code on Administrative

Offences stipulated that the offence in question was punishable by a term of detention of up to fifteen days. Having regard to the aim of Article 2 of Protocol No. 7 and the nature of the guarantees for which it provides, the Court is satisfied that an offence for which the law prescribes a custodial sentence as the main punishment cannot be described as “minor” within the meaning of the second paragraph of that Article. The exception invoked by the Government is therefore not applicable in the present case (see *Zaicevs v. Latvia*, no. 65022/01, § 55, ECHR 2007-IX (extracts)).

34. In the light of the foregoing considerations, the Court concludes that there has been a violation of Article 2 of Protocol No. 7 to the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

35. The applicant complained under Article 2 of Protocol No. 7 that in the first set of proceedings his requests for extraordinary review lodged with the Supreme Court were rejected and, therefore, that the Court's judgment in his previous case no. 61406/00 (cited above) had not been enforced. He also complained that the domestic authorities had not given him a fair trial within a reasonable time in violation of Article 6 § 1 of the Convention. The applicant complained under Articles 6 and 13 of the Convention of the unfairness and length of the second set of proceedings and the lack of effective judicial protection in the higher courts.

36. 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 provisions the applicant relied on.

37. 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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.”

39. The applicant claimed EUR 15,000 in respect of non-pecuniary damage.

40. The Government considered the amount claimed excessive and that there was no causal link between the alleged violations and non-pecuniary damage claimed.

41. The Court notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, §§ 207-210, ECHR 2005-IV). Therefore, it considers that the finding of a violation constitutes in itself sufficient just satisfaction.

42. As to the costs and expenses, the applicant did not submit any claims and the Court therefore makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 6 § 1 of the Convention and Article 2 of Protocol No. 7 concerning the third set of proceedings admissible and the remainder of the application inadmissible;
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 2 of Protocol No. 7 to the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President