



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

FIFTH SECTION

CASE OF PELEVIN v. UKRAINE

(Application no. 24402/02)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

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

In the case of Pelevin v. Ukraine,

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

Peer Lorenzen, *President*,

Renate Jaeger,

Karel Jungwiert,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 24402/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Mykola Mykolayovych Pelevin (“the applicant”), on 21 May 2002.

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

3. The applicant alleged that the Supreme Court's initial refusal to consider his appeal in cassation within the ordinary cassation review proceedings violated his right to access to a court.

4. On 8 April 2003 the Court 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

5. The applicant, Mr Mykola Mykolayovych Pelevin, is a Ukrainian national who was born in Rostov-on-Don in 1938 and who currently resides in L'viv.

I. THE CIRCUMSTANCES OF THE CASE

6. On 22 July 1999 a private dispute arose between the applicant and M.M.E. (a private person) over access to the attic of a building. As a result the applicant inflicted bodily injury on M.M.E. with an axe.

7. On 18 August 1999 M.M.E. instituted a private prosecution (*приватне обвинувачення*) against the applicant before the Zaliznychny District Court of L'viv and claimed compensation for non-pecuniary damage.

8. On 7 June 2000 the applicant sought to institute criminal proceedings against M.M.E. before the Zaliznychny District Court of L'viv for inflicting minor bodily injury.

9. On 13 July 2000 the Zaliznychny District Court of L'viv, in particular Judge U.P.F., instituted criminal proceedings against the applicant. He also decided that M.M.E. should be granted victim status in these proceedings.

10. On 9 June and 3 August 2000 and 27 April 2001 the applicant applied to the President of the Zaliznychny District Court of L'viv, seeking the withdrawal of Judge U.P.F. from his case. The applicant submitted, *inter alia*, that Judge U.P.F. had not allowed him to use the Russian language in court, in particular to put questions to witnesses. On 18 October 2000 and 27 April 2001 the President of the Zaliznychny District Court of L'viv dismissed the applicant's request as unsubstantiated.

11. On 18 May 2001 the Zaliznychny District Court of L'viv refused the applicant's request to institute criminal proceedings against M.M.E and his family members on suspicion of inflicting minor bodily injury on the applicant in May 2000. The applicant appealed against this decision. On 25 December 2001 the L'viv Regional Court of Appeal dismissed the applicant's appeal.

12. On 21 June 2001 the Zaliznychny District Court of L'viv found the applicant guilty of inflicting minor bodily injury and of arbitrary behaviour in July 1999, sentenced him to an administrative fine and released him from criminal liability because of his advanced age, on the basis of the amnesty law in force at the time. It also ordered the applicant to pay M.M.E. compensation for non-pecuniary damage and legal costs in the amount of 2,406 Ukrainian hryvnias (UAH). The court also acquitted M.M.E. of inflicting minor bodily injury on the applicant. The applicant was allowed to submit his oral plea to the court in Russian. According to the record of the court hearings, the applicant did not lodge a request for leave to use the Russian language, nor did he request the assistance of an interpreter.

13. The applicant lodged an appeal against the judgment of 21 June 2001. On 25 September 2001 the L'viv Regional Court of Appeal dismissed the applicant's appeal as unsubstantiated. In the proceedings before the first-instance court and the court of appeal the applicant was assisted by a lawyer practising in L'viv (a licensed advocate).

14. On 16 March 2002 the applicant lodged an appeal in cassation with the Supreme Court. In his appeal the applicant relied on Articles 383 - 387 of the Code of Criminal Procedure which governed the examination of criminal cases within the ordinary cassation review proceedings. In his appeal he mentioned that he had not been able to participate effectively in

the proceedings because he had not been allowed to use Russian while putting questions to the witnesses and had not been provided with the assistance of an interpreter.

15. On 9 April 2002 a judge of the Supreme Court V.S., by a letter and without taking any procedural decision, refused to institute extraordinary review proceedings (*перегляд в порядку виключного провадження*) in the applicant's case.

16. On 13 June 2003 the Supreme Court, on the decision of Judge K.M., assumed jurisdiction over the appeal in cassation and decided to institute cassation proceedings in the applicant's case.

17. On 31 July 2003 the Supreme Court examined the applicant's appeal in cassation on merits and dismissed it within the ordinary review proceedings. The Supreme Court held its hearing in the absence of the applicant and in the presence of the prosecutor and victim in the criminal case.

II. RELEVANT DOMESTIC LAW

A. Provisions of the Code of Criminal Procedure governing cassation proceedings (as amended on 21 June 2001)

18. The relevant provisions read as follows:

Article 348. Persons entitled to lodge an appeal

“The following persons are entitled to lodge an appeal:

1. a convicted person...”

Article 383. Court decisions that may be reviewed in cassation proceedings

“The following decisions may be reviewed in cassation proceedings:

...

- 2) judgments and resolutions of a court of appeal given by it in appeal proceedings.

Judgments and resolutions or rulings of district (city) courts, inter-district (circuit) courts and garrison military courts may be also reviewed in cassation proceedings, as well as rulings of courts of appeal given in respect to those judgments and resolutions or rulings with the exceptions of rulings by which the court of appeal cancels such decisions and sends the case for a new investigation or examination.”

Article 384. Persons entitled to lodge an appeal in cassation or to file a cassation petition

“Appeals in cassation against the court decisions referred to in part one of Article 383 of this Code may be lodged by the persons specified in Article 348 of this Code.

Cassation appeals against the court decisions referred to in part two of Article 383 of this Code may be lodged by:

- 1) a convicted person...”

Article 394. Examination of a case by a court of cassation

“Cassation appeals and petitions against the court decisions referred to in part one of Article 383 of this Code shall be examined with a mandatory notice of that examination being served on the prosecutor and the persons referred to in Article 384 of this Code.

Cassation appeals and petitions against the court decisions referred to in part two of Article 383 of this Code shall be examined within thirty days of receipt by the court of cassation, composed of three judges with the participation of a prosecutor. The court shall either assign the case for examination and notify the persons referred to in Article 384 of this Code accordingly or dismiss it...”

Article 396. Results of the examination of a case by a court of cassation

“As a result of the examination of a case within the cassation proceedings, the court shall make one of the following decisions:

- 1) uphold the judgment, resolution or ruling and dismiss the cassation appeal or petition;
- 2) quash the judgment, resolution or ruling and refer the case for a fresh investigation or trial before the first-instance court or review in appeal proceedings;
- 3) quash the judgment, resolution or ruling and terminate the case;
- 4) modify the judgment, resolution or ruling. ”

B. Provisions of the Code of Criminal Procedure governing extraordinary review proceedings (as amended on 21 June 2001)

19. The relevant provisions read as follows:

Article 400-4. Grounds for examination of the judgments within the extraordinary review proceedings

“The final and binding judgments may be examined within the extraordinary review proceedings in view of:

- 1) newly disclosed circumstances;
- 2) incorrect application of the criminal law and fundamental breach of the requirements of criminal procedural law that have essentially impaired the correctness of the judgment (...)"

Article 400-9. Request to examine a judgment within the extraordinary review proceedings

"Parties to the proceedings and other persons entitled by law may lodge with the prosecutor a request for examination of the case on the grounds set forth in paragraph 1 of part one of Article 400-4 of this Code.

Requests for examination of the case on the grounds set forth in paragraph 2 of part one of Article 400-4 of this Code may be lodged by the convicted person or his defender or legal representative (...)"

THE LAW

I. ACCESS TO A COURT

20. The applicant complained of lack of access to the Supreme Court on account of its refusal to review his case in the course of cassation proceedings. He relied on Article 6 § 1 which provides, 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

21. The Government submitted that the applicant could no longer claim to be a "victim" of a breach of his right of access to a court as on 31 July 2003 the Supreme Court examined his appeal in cassation on its merits. They further submitted that the applicant's appeal in cassation was initially dealt with as if it was a request for extraordinary review proceedings due to a technical error.

22. The applicant disagreed. He contended that examination of his appeal in cassation on 31 July 2003 was prompted by his recourse to the Court and communication of the application to the respondent Government.

23. The Court finds that the victim status issue and the parties' arguments in that respect are closely linked to the substance of the applicant's complaint under Article 6 § 1 of the Convention. It should, therefore, be joined to the merits.

24. The Court considers, in the light of the parties' submissions, that the case raises issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. It finds that the applicant's complaints as to lack of access to a court are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

25. The Government did not comment on the merits of the complaint of lack of access to a court and maintained that application was inadmissible.

26. The applicant maintained his complaint.

27. The Court notes that a State which institutes courts of appeal or cassation is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (see, for example, *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11). It reiterates that the right to a court, of which the right of access is one aspect, is not absolute and may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal, which must not impair the very essence of the right of access. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (see, for example, *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93).

28. Turning to the facts of the present case, the Court observes that the applicant's appeal in cassation, although lodged within ordinary cassation review proceedings, was examined and rejected by the Supreme Court as if it was a request for extraordinary review of his conviction without any reasons being given for such a decision and without any procedural decision taken (see paragraphs 18 and 19 above). The Government acknowledged that appeal in cassation was examined in the course of the extraordinary review proceedings erroneously.

29. The Court notes that after the present case was communicated to the Government, on 13 June 2003 (see paragraph 16 above) the Supreme Court instituted ordinary cassation review proceedings on the applicant's appeal in cassation, examined it on its merits and dismissed it. The national authorities however did not recognise in any way that the initial decision of 9 April 2002 (see paragraph 15 above), to deal with the applicant's appeal in

cassation as if it was a request for extraordinary review, interfered with the applicant's right of access to the court of cassation.

30. Moreover, the examination of the appeal in cassation on 31 July 2003 (see paragraph 17 above) was held in the absence of the applicant, while the prosecutor and the victim of the criminal offence were both present at the Supreme Court hearing.

31. Having regard to all the circumstances of the case, the Court considers that the applicant suffered an excessive restriction of his right of access to a court, and therefore of his right to a fair trial, which was never acknowledged or redressed by the authorities. There has consequently been a violation of that provision. It follows that the Government's preliminary objection as to the victim status (see paragraph 21 above), previously joined to the merits (see paragraph 23 above) must be dismissed.

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

II. REMAINDER OF THE COMPLAINTS

33. The applicant also complained under Article 6 §§ 1 and 2 that the criminal proceedings instituted against him were both unfair and excessively long. He further complained of a violation of Article 6 § 3 (e) in that he had not been allowed to use the Russian language in the proceedings before the domestic courts and had not been granted the assistance of an interpreter from Ukrainian to Russian.

He further complained of an infringement of his right to private life and lack of an effective domestic remedy for his claims on account of the refusal of the domestic authorities to institute criminal proceedings against M.M.E. He relied on Articles 8 and 13 of the Convention in this respect.

The applicant also complained of a violation of Article 2 § 1 of Protocol No. 1 on account of the Supreme Court's refusal to examine his criminal case within the ordinary review proceedings.

34. The Court, having carefully considered the applicant's submissions, in the light of all the material in its possession, finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

35. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. 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.”

37. The applicant submitted his claims for just satisfaction out of time. These submissions were not included in the case file for examination by the Court. Accordingly, the Court considers that there is no call to award any sum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's preliminary objection as to the applicant's victim status and dismisses it after having examined the merits;
2. *Declares* the complaint concerning lack of access to a court under Article 6 § 1 admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President