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

FIFTH SECTION

CASE OF MIROSHNIK v. UKRAINE

(Application no. 75804/01)

JUDGMENT

STRASBOURG

27 November 2008

FINAL

27/02/2009

This judgment may be subject to editorial revision.

In the case of Miroshnik v. Ukraine,

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

Rait Maruste, *President,*
Karel Jungwiert,
Volodymyr Butkevych,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 4 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 75804/01) 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 Aleksey Vasilyevich Miroshnik ("the applicant"), on 10 May 2001.

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

3. The applicant complained about the non-enforcement of a court decision in his favour. He further alleged that the military courts dealing with his cases had not met the requirement of constituting an "independent tribunal" as requested by the Convention.

4. On 13 September 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and resides in the village of Akimovka, the Zaporizhzhya region, Ukraine.

6. In December 1998 the applicant was dismissed from the military forces.

A. First set of proceedings

7. On 8 June 1999 the Zaporizhzhya Garrison Military Court ("the Zaporizhzhya Court") ordered the Zaporizhzhya Regional Military Enlistment Office to pay the applicant 1,260.91 Ukrainian hryvnyas (UAH) for his uniform expenses for the period up to 31 December 1998.

8. On 11 February 2000 the enforcement proceedings were discontinued because of the debtor's lack of funds and because, according to Article 5 of the Economic Activities of the Armed Forces Act, the property of the Armed Forces could not be used to enforce a court decision.

9. According to the applicant, on 16 October 2001 the decision was enforced in part by the debtor. At 21 August 2007 the decision had not been enforced in full.

B. Second set of proceedings

10. In June 1999 the applicant instituted proceedings in the Zaporizhzhya Court against his former employer, the Akimovskiy District Military Enlistment Office, claiming an allowance due to him for the period of January-February 1999. The applicant stated that though he was officially dismissed on 31 December 1998, he had actually left the forces on 16 February 1999.

11. On 23 June 1999 the court found for the applicant and awarded him UAH 442.03 for the unpaid allowance to be paid by the Enlistment Office.

12. On 17 August 1999 the South Regional Military Court quashed that decision and remitted the case for a fresh consideration.

13. On 3 November 1999 the Zaporizhzhya Court found against the applicant.

14. On 7 December 1999 the South Regional Military Court upheld that decision.

15. On 11 July 2000 the Supreme Court quashed the decisions of 3 November 1999 and 7 December 1999 upon *a protest*, lodged by the President of the Supreme Court (at the applicant's request), and remitted the case for a fresh consideration.

16. The applicant lodged an additional claim asking to change the date of his dismissal and requesting the payment of an insurance premium, compensation for pecuniary and non-pecuniary damage, and the enforcement of the decision of 8 June 1999.

17. On 3 November 2000 the Zaporizhzhya Court, considering the case in the applicant's presence, changed the date of his dismissal and ordered the Enlistment Office to pay him UAH 791.78 for the unpaid allowance and other payments.

18. The applicant did not appeal against the decision.

19. In a letter of 30 January 2004, the applicant informed the Court that the decision of 3 November 2000 had been enforced in full, without specifying the date of enforcement.

C. Third set of proceedings

20. In August 2000 the applicant instituted proceedings in the Zaporizhzhya Court against the Enlistment Office and the Ministry of Defence with claims similar to those in the second set of proceedings.

21. On 31 August 2000 the court returned the applicant's claim, stating that he had failed to pay the court fee and to enclose any evidence in support of his claim as required by the legislation.

22. The applicant neither appealed against that decision nor submitted his claim anew.

D. Fourth set of proceedings

23. In November 2000 the applicant instituted proceedings in the Central Regional Military Court against the Ministry of Defence contesting the lawfulness of his dismissal from the military service and seeking compensation for damage. The applicant also clamed that the defendant had been unlawfully ignoring the court decisions in his favour.

24. On 12 December 2000 the court returned the applicant's claim for *res judicata* reasons, stating, in particular, that such a claim had already been considered by the courts.

25. On 23 January 2001 the Supreme Court quashed that decision and remitted the case for a fresh consideration, finding that the applicant's claim had not been considered by the courts before.

26. On 5 March 2001 the Central Regional Military Court returned the applicant's claim for failure to indicate all the requisites of the claim, and to enclose any evidence in its support, as required by the legislation.

27. The applicant states that this decision was sent to him too late to enable him to appeal against it within the fixed time-limit. The applicant did not submit any request for an extension of the time-limit for appeal.

28. On 12 April 2001 the Supreme Court rejected an appeal by the applicant against the decision of 5 March 2001 under the extraordinary review procedure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law regarding enforcement of court decisions

29. The relevant domestic law regarding enforcement of court decisions is summarised in the judgment of *Voytenko v. Ukraine* (no. 18966/02, §§ 20-25, 29 June 2004)

B. Domestic law and practice regarding independence of the judiciary

1. The Constitution of Ukraine of 1996

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

Article 126

"The independence and immunity of judges are guaranteed by the Constitution and the laws of Ukraine.

Influencing judges in any manner is prohibited ..."

Article 129

"In the administration of justice, judges are independent and subject only to the law ..."

2. Code of Civil Procedure of 1963 (in force at the material time)

31. Section 123 of the Code provided that garrison military courts, as first-instance courts, had jurisdiction over civil cases where military servicemen challenged the lawfulness of acts or decisions taken by military officials or military bodies as well as over other civil cases where military servicemen's rights and freedoms were claimed to be violated, except for cases falling within the jurisdiction of the regional military courts. The regional military courts, as first-instance courts, had jurisdiction over civil cases where the lawfulness of acts or decisions taken by military officials or military bodies having the level of a military association or higher, were challenged.

32. In accordance with Sections 289 and 325 of the Code, appeals against decisions of military garrison courts were to be submitted to the military regional courts. Appeals against decisions of the military regional courts were to be submitted to the Supreme Court.

3. The Judicial System Act of 5 June 1981 (in force at the material time)

33. Sections 20, 38-1, 38-3 of the Act provided that the military courts were incorporated into the system of the general courts of Ukraine. They exercised judicial power in the Armed Forces of Ukraine and other military formations allowed by Ukrainian legislation. The judges of the military courts were elected by the Verkhovna Rada of Ukraine for ten years. The candidates, on passing a competitive examination the first time, were elected for five years. Only an acting officer in the army could become a judge of the military court.

34. Section 38-10 of the Act envisaged that the financing, logistics, maintenance and archiving of the military courts and the Military Chamber of the Supreme Court were performed by entities of the Ministry of Defence at the expense of the Ministry of Justice and the Supreme Court, using part of the State Budget allocated specifically for those purposes.

35. According to Section 38-11 of the Act the servicemen of the military courts were considered to be in military service and constituted a part of the staff of the Armed Forces of Ukraine. The judges of the military courts were awarded military ranks by the President of Ukraine upon the joint submission of the Minster of Justice and the Chairman of the Supreme Court (as regards the judges of the military garrison courts, military regional courts, and naval courts) or upon the sole submission of the Chairman of the Supreme Court (as regards the judges of the military chamber of the Supreme Court).

36. Section 43 of the Act provided that a military chamber was incorporated into the structure of the Supreme Court. According to Section 49 of the Act the chambers of the Supreme Court could consider cases as, *inter alia*, the court of appeal instance.

The Act was repealed on 7 February 2002.

4. The Status of Judges Act of 15 December 1992 (in force at the material time)

37. According to Section 11 of the Act the independence of judges was guaranteed by the manner of their appointment, termination and suspension of their office; by the special procedure of awarding military ranks to the military judges; by the special procedure of administration of justice; by the secrecy of the decision-making process; by prohibition of interference with the administration of justice; by the establishment of the legal responsibility for contempt of court; by the judges' right to resign; by the judges' inviolability; by the provision of the technical and informational conditions necessary for the operation of the courts; by the material support and social welfare programs provided for the judges; by the special procedure of the courts' financing; and by the system of judicial self-government.

38. Section 44 of the Act foresaw that judges of the military courts who needed to improve their living conditions were provided with an appropriate flat or house by the Ministry of Defence within the term of six months from the date of their appointment.

5. The Armed Forces of Ukraine Act of 6 December 1991 (in force at the material time)

39. Section 3 of the Act provided that the Armed Forces of Ukraine were subordinate to the Ministry of Defence.

THE LAW

I. NON-ENFORCEMENT OF THE COURT DECISION OF 8 JUNE 1999

A. Admissibility

40. The applicant complained about the non-enforcement of the decision of the Zaporizhzhya Court of 8 June 1999 in his favour. He also complained of a violation of his property rights on that account. The applicant invoked Article 6 § 1 of the Convention.

41. The Court finds it appropriate to examine these complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 which read, in so far as relevant, as follows:

Article 6

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... 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 ..."

42. The Government raised objections regarding exhaustion of domestic remedies similar to those which the Court has already dismissed in a number of similar cases concerning the non-enforcement of court judgments (see *Sokur v. Ukraine* (dec.), no. 29439/02, 16 December 2003, and *Voytenko,* cited above, §§ 27-31). The Court considers that these objections must be rejected for the same reasons.

43. The Court finds 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

44. The Government contended that the State Bailiffs had taken every action necessary to enforce the decision of 8 June 1999 in the applicant's favour and that there had been no violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

45. The applicant disagreed.

46. The Court notes that as of 21 August 2007 the decision of the Zaporizhzhya Court of 8 June 1999 in the applicant's favour has not been fully enforced. Thus, the period of non-enforcement constituted eight years and two months.

47. The Court has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases like the present one (see, among other authorities, *Voytenko v. Ukraine*, no. 18966/02, §§ 43 and 55, 29 June 2004 and *Dubenko v. Ukraine*, no. 74221/01, §§ 47 and 51, 11 January 2005). The Court finds no ground to depart from its case-law in this case.

48. Having examined all the material in its possession, 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.

49. There has, accordingly, been a violation of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1.

II. ALLEGED LACK OF INDEPENDENCE OF MILITARY COURTS

50. The applicant complained about the lack of independence of military courts, stating that at the material time they were administratively dependant upon the Ministry of Defence. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

Article 6

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. The parties' submissions

51. The Government submitted that as regards the third and fourth sets of proceedings the applicant had failed to appeal against the decisions of 31 August 2000 and 5 March 2001, and thus had not exhausted domestic remedies. They further contended that as regards the first and third sets of proceedings the applicant had introduced this complaint out of the six-month time-limit. They lastly asserted that the applicant had failed to prove that he had been affected by the alleged violation of the Convention and therefore could not claim to be a victim on that account.

52. The applicant disagreed with those submissions, arguing that he had introduced his compliant to the Court in time and exhausted all the remedies he considered relevant. He further insisted that his right to an independent tribunal had been violated and he was therefore a victim within the meaning of the Convention.

2. The Court's assessment

a. Exhaustion of domestic remedies (third and fourth sets of proceedings)

53. The Court recalls that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court. However, the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see *Khokhlich v. Ukraine*, no. 41707/98, § 149, judgment of 29 April 2003). The domestic remedy should be capable of providing redress in respect of the applicant's complaints and offer reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V).

54. The Court notes that it is not disputed between the parties that the applicant did not appeal against the decisions of the military courts of 31 August 2000 and 5 March 2001. However, claiming that the applicant had not availed himself of the impugned appeal procedures, the Government have not shown how the superior military courts, considering such appeals, could effectively deal with the essence of the applicant's complaint. It is unclear to the Court how the superior military courts would address the issue of judicial dependence arising, in the applicant's opinion, from the legislative provisions and affecting therefore the whole system of the military courts. It is also well to mention that the applicant could not avail himself of the possibility of lodging his claims with the other domestic

courts since those claims fell within the jurisdiction of the military courts only (see paragraph 31 above). It follows that the Government's objection as to the non-exhaustion of domestic remedies should be dismissed.

b. Observance of the six-month period (first, second, and third sets of proceedings)

55. The Court reiterates that Article 35 § 1 of the Convention provides that the Court may only deal with a matter where it has been introduced within six months from date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the time-limit expires six months after the date of the acts or measures complained of, or after the date of knowledge of that act or its effect or prejudice on the applicant (see *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I). It is not open to the Court to set aside the application of the six-month rule in the absence of the relevant objection from the Government (see *Belaousof and Others v. Greece*, no. 66296/01, judgment of 27 May 2004, § 38).

56. In the present case the applicant complained of a lack of independence on the part of the tribunal with respect to four sets of his proceedings before the military courts. The Court observes that the first, second and third sets of proceedings terminated on 8 June 1999, 3 November 2000, and 31 August 2000, respectively, that is, more than six months before the date when the application was submitted to the Court (10 May 2001). The Court therefore holds that the first, second and third sets of proceedings fall outside the six-month period and rejects this part of the application pursuant to Article 35 §§ 1 and 4 of the Convention.

c. Victim status (fourth set of proceedings)

57. The Court considers that the Government's objection concerning the applicant's victim status with respect to the fourth set of proceedings is closely linked to the merits of the complaint. Accordingly, it joins the preliminary objection of the Government to the merits (see *Bączkowski and Others v. Poland*, no. 1543/06, §§ 45-48, judgment of 3 May 2007).

58. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

59. The Government maintained that the judges of the military courts possessed strong guarantees regarding their appointment and dismissal, as well as the duration of their term of office. They further stated that the safeguards and immunities provided to judges by the domestic law had effectively prevented them from any outer influence. The Government finally submitted that the Ministry of Defence had no influence on the military courts and that there accordingly had been no breach of Article 6 § 1 of the Convention.

60. The applicant disagreed, arguing that the military courts were dependent on the Ministry of Defence, referring in particular to the way they were financed and to the vulnerable status of military judges, who were military servicemen and therefore subordinate to the Ministry of Defence.

2. The Court's assessment

61. The Court recalls at the outset that the right to a fair trial, of which the right to a hearing before an independent tribunal is an essential component, holds a prominent place in a democratic society (see, *mutatis mutandis*, *the De Cubber v. Belgium judgment* of 26 October 1984, Series A no. 86, p. 16, § 30 *in fine*). The Court reiterates that, in order to establish whether a tribunal can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. In this latter respect, what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and, above all, the parties to the proceedings. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the party to the proceedings is important without being decisive. What is decisive is whether the party's doubts can be held to be objectively justified (see, *mutatis mutandis*, *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1572-73, § 71; and *Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 2003-XII).

62. Turning to the instant case, the Court agrees with the Government that there were guarantees of the independence of judges of the military courts, provided, *inter alia*, by the manner of their appointment, the term of their office, their inviolability, and the prohibition of interference with the administration of justice (see paragraphs 30 and 37 above).

63. The Court, however, notes that it was foreseen by the domestic law that the judges of the military courts were military servicemen, and in that capacity they constituted a part of the staff of the Armed Forces subordinate

to the Ministry of Defence (see paragraphs 33, 35, and 39 above). The Court further observes that it was up to the Ministry of Defence to provide the judges of the military courts with appropriate flats or houses if they needed to improve their living conditions (see paragraph 38 above). Finally, the Court notes that the entities of the Ministry of Defence carried out the financing, logistics and maintenance of the military courts on a practical level. While it was not the competence of the Ministry of Defence to decide on the annual scope of the financing and maintenance of the military courts, it did however administer that financing and maintenance on a daily basis (see paragraph 34 above). It is noteworthy that this procedure of financing the military courts was repealed in 2002 by the subsequent law.

64. In the Court's opinion the above aspects of the status of the military courts and their judges, taken cumulatively, gave objective grounds for the applicant to doubt whether the military courts complied with the requirement of independence when dealing with his claim against the Ministry of Defence. The Court therefore holds that the applicant had not had an opportunity to present his case before an independent tribunal, as required by the Convention, and in this regard he clearly possessed victim status. It therefore dismisses the Government's preliminary objection as to the applicant's victim status and finds that there has been a violation of Article 6 § 1 of the Convention on account of the lack of an independent tribunal in the applicant's fourth set of proceedings.

III. THE REMAINDER OF THE APPLICANTION

65. The applicant complained under Articles 6 and 13 of the Convention about the outcome and length of the proceedings in his cases. He also invoked Articles 1 and 14 of the Convention, complaining that the State had failed to secure his rights guaranteed by the Convention and that he had suffered discrimination, providing no further details.

66. The Court has examined the remainder of the applicant's complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of were within its competence, they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 60,000 euros (EUR) in respect of non-pecuniary damage. The applicant also claimed pecuniary damage without any further specification.

69. The Government submitted that the applicant's claims for non-pecuniary damage were exorbitant and unsubstantiated. In the Government's opinion, the finding of a violation, if any, would constitute sufficient just satisfaction.

70. As regards the applicant's claims for non-pecuniary damage, the Court, ruling on the equitable basis, awards the applicant EUR 2,000.

B. Costs and expenses

71. The applicant did not submit any claim under this head; the Court therefore makes no award for costs and expenses.

C. Default interest

72. 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 complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 concerning the non-enforcement of the court decision of 8 June 1999 and the complaint under Article 6 § 1 of the Convention about the lack of the military courts' independence in the applicant's fourth 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 and Article 1 of Protocol No. 1 on account of the non-enforcement of the court decision of 8 June 1999;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of the military courts' independence in the applicant's fourth set of proceedings;

4. *Holds*

(a) 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 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of Ukraine 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;

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

Done in English, and notified in writing on 27 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Rait Maruste
Deputy Registrar	President