

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

FIFTH SECTION

CASE OF FESENKO v. UKRAINE

(Application no. 18693/16)

JUDGMENT

STRASBOURG

10 October 2024

This judgment is final but it may be subject to editorial revision.



In the case of Fesenko v. Ukraine,

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

Kateřina Šimáčková*, President*,
Mykola Gnatovskyy,
Úna Ní Raifeartaigh*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 18693/16) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 24 March 2016 by a Ukrainian national, Ms Lyudmyla Andriyivna Fesenko ("the applicant"), who was born in 1953, lives in Zaporizhzhya and was represented by Mr I. Zhovnirenko, a lawyer practising in Zaporizhzhya;

the decision to give notice of the application to the Ukrainian Government ("the Government"), represented by their then Agent, Mr I. Lishchyna;

the parties' observations;

Having deliberated in private on 19 September 2024,

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

SUBJECT MATTER OF THE CASE

1. The case concerns the allegedly excessive length of insolvency proceedings.

2. In June 2009 the applicant deposited funds with a private credit union, "Meotida" (the "Credit Union"), which subsequently defaulted on its obligation to repay her this money together with the amount due in interest.

3. On 28 October 2009 the Zaporizhzhya Regional Commercial Court (the "commercial court") started insolvency proceedings against the Credit Union, imposing a moratorium on debt repayments and appointing an insolvency administrator (*"розпорядник майна"*).

4. On 14 January 2010 the applicant lodged her claim as a creditor with the commercial court.

5. On 2 November 2010 the commercial court recognised the applicant's entitlement, as a creditor, to 58,801.96 Ukrainian hryvnias (UAH) (around 5,300 euros (EUR) at the material time). Besides the applicant, the commercial court recognised the claims of 244 other creditors of the Credit Union.

6. Starting from 2010, the court hearings were adjourned on multiple occasions for various reasons. These included but were not limited to, the failure of parties or their representatives to appear before it, the need to obtain further documentary evidence, and the failure of the insolvency administrator or the creditors' committee to comply with the commercial court's instructions.

7. The court hearings were adjourned between 15 January 2014 and 10 June 2015, and again between 13 February and 31 October 2017 because the commercial court found itself unable to appoint a new insolvency administrator after the previous incumbent asked to be removed from the case. Potential candidates either did not respond to the commercial court's requests or were unavailable (see paragraph 11 below).

8. The commercial court twice suspended the insolvency proceedings (from 12 March to 12 December 2013, and from 27 April 2018 to 21 May 2020) pending the outcome of a criminal trial in which former Credit Union officials were defendants. In doing so, the commercial court relied on the relevant provisions of the Code of Commercial Procedure (see paragraph 13 below), without providing further reasoning.

9. Following the dismissal of yet another insolvency administrator, on 4 November 2020 the commercial court requested that the creditors' committee propose a replacement candidate (see paragraph 12 below). There is no information in the case file as to whether this was done.

10. On 9 May 2023 the commercial court again adjourned the hearing, without indicating the date of the next court session.

RELEVANT DOMESTIC LAW AND PRACTICE

11. Section 114 of the Law of Ukraine on restoring a debtor's solvency or declaring insolvency of 14 May 1992 (the "1992 Law") provided, *inter alia*, that a commercial court could remove an insolvency administrator from a case at his or her request. A commercial court appointed an insolvency administrator, following the automatic selection process, from the integrated register of arbitration administrators *("Єдиний реєстр арбітражних керуючих України"*). In the absence of written consent from a candidate selected via the automatic system, indicating their willingness to work on the case, a commercial court had to choose and appoint an insolvency administrator from the integrated register of arbitration administrators.

12. The Code of Ukraine on Insolvency Proceedings entered into force on 21 October 2019 and repealed the 1992 Law. Article 28 § 1 of the Code mirrors the procedure for the initial appointment of insolvency administrators prescribed by section 114 of the 1992 Law. The appointment of all future insolvency administrators was to be carried out at the request of the creditors' committee.

13. Articles 79 and 227 of the Code of Commercial Procedure, as in force at the material time, provided commercial courts with the right to suspend the proceedings, either *proprio motu* or at request of the parties, when it was impossible to consider the case until a related case had been resolved.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

14. The applicant complained that the length of the insolvency proceedings in her case had been incompatible with the "reasonable time" requirement as laid down in Article 6 § 1 of the Convention.

15. The Government asserted that the proceedings had complied with the "reasonable time" requirement in view of the complexity of the issues and the parties' behaviour. The Government noted, in particular, that the creditors' committee had delayed the judicial consideration of the case by failing to suggest a new insolvency administrator. They also submitted that the periods during which the proceedings had been suspended should not be counted towards their overall length.

16. The applicant disagreed, arguing that the creditors' committee was not required to suggest the names of prospective candidates for the position of insolvency administrator. She also stated that the parallel criminal proceedings against the Credit Union's management had had no bearing on the outcome of the insolvency proceedings.

17. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

18. The general principles concerning the length of proceedings under Article 6 § 1 have been summarised in *Frydlender v. France* ([GC], no. 30979/96, § 43, ECHR 2000-VII).

19. In the present case, the relevant period to be taken into consideration began on 14 January 2010 and is still ongoing. To date, the insolvency proceedings have lasted for more than fourteen years at one level of jurisdiction.

20. The Court is prepared to accept that the complexity of the present case might have justified a lengthier period of consideration, especially given the large number of creditors involved. Nevertheless, this protracted duration of domestic proceedings at only one level of jurisdiction, caused largely by the repeated adjournments of hearings on identical grounds (see paragraph 6 above), cannot be explained by complexity alone.

21. The Government submitted that the creditors' committee had contributed to the overall length of proceedings by failing to appoint a new insolvency administrator. The Court notes that under the 1992 Law a commercial court was not bound by the decisions of the creditors' committee in the appointment of insolvency administrators (see paragraph 11 above). However, with the enactment of the Code of Ukraine on Insolvency Proceedings in 2018, this procedure was amended, thereby making the appointment of subsequent insolvency administrators contingent on the cooperation of the creditors' committees (see paragraph 12 above).

22. Notwithstanding the alleged lack of such cooperation in the present case, the Court reiterates that it is for the State to organise its legal system in such a way as to enable its courts to comply with the requirement of Article 6 § 1 of the Convention (see *Zavodnik v. Slovenia*, no. 53723/13, § 97, 21 May 2015), even where the procedural initiative lies with the parties (see, *mutatis mutandis*, *Scopelliti v. Italy*, 23 November 1993, § 25, Series A no. 278, and *Sürmeli v. Germany* [GC], no. 75529/01, § 129, ECHR 2006-VII, with further references).

23. The Court has previously found a violation of Article 6 § 1 of the Convention in a situation where the excessive length of the insolvency proceedings was caused by the domestic court's dilatory approach to appointing a liquidator. It held that the parties to the domestic proceedings, who had not suggested a prospective liquidator, could not be blamed for the delay (see *Parinov v. Ukraine* [Committee], no. 48398/17, § 64, 10 December 2020).

24. The fact that, in the present case, the reason for delay lies not in the conduct of a particular court but in the domestic legislation itself (apparently providing the court with no clear means of accelerating proceedings in the absence of the creditors' committee's proposals as to the new insolvency administrator), does not change that assessment.

25. Therefore, the Court finds that in the present case the delay caused by the inability of the domestic court to appoint a new insolvency administrator (see paragraphs 7 and 9 above) should be attributable to the respondent State. The alleged lack of procedural initiative by the creditors' committee in the insolvency proceedings should not absolve the State from its obligations under Article 6 § 1 of the Convention.

26. As to the periods when the proceedings were suspended pending the outcome of the criminal case (see paragraph 8 above), the Court does not see how the trial of the former Credit Union officials had sufficient bearing on the insolvency proceedings as to warrant a delay of more than two years and nine months in total. Nor did the relevant decisions of the commercial court contain the reasons for such prolonged suspension. Thus, in the Court's view, the suspension of the insolvency proceedings was not justified (see *König v. Germany*, 28 June 1978, § 110, Series A no. 27, and *Herbst v. Germany*, no. 20027/02, § 78, 11 January 2007).

27. It follows that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. The applicant claimed 2,850 euros (EUR) in respect of pecuniary damage and EUR 16,716 in respect of non-pecuniary damage. She also claimed EUR 4,242 in respect of costs and expenses incurred before the Court

(including EUR 11 of postage costs), the latter to be transferred directly to her representative's bank account.

29. The Government contested those claims.

30. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 6,600 in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant.

31. Having regard to the documents in its possession, the Court considers it reasonable to award EUR 1,000 covering costs and expenses under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 6,600 (six thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of costs and expenses (to be paid into the bank account of her lawyer, Mr Zhovnirenko);
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Kateřina Šimáčková President