

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

FIFTH SECTION

CASE OF GAVRILOV v. UKRAINE

(Application no. 11691/06)

JUDGMENT

STRASBOURG

16 February 2017

FINAL

16/05/2017

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Gavrilov v. Ukraine,

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

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Yonko Grozev,
Carlo Ranzoni,
Lətif Hüseynov, *judges,*
Sergiy Goncharenko, ad hoc *judge,*
and Milan Blaško, *Deputy Section Registrar,*

Having regard to the parties' submissions,

Having deliberated in private on 24 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 11691/06) 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 Vladimir Vasilyevich Gavrilov ("the applicant"), on 10 March 2006.

2. The applicant was represented by Ms E.V. Boyko, a lawyer practising in Simferopol. The Ukrainian Government ("the Government") were represented by their Agent, most recently, Mr I. Lishchyna of the Ministry of Justice.

3. On 10 April 2013 the application was communicated to the Government. Mrs G. Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Fifth Section decided to appoint Mr S. Goncharenko to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant, a retired military officer, was born in 1947 and lives in the city of Simferopol, Ukraine.

5. In December 2004 the applicant instituted proceedings before the Simferopol Garrison Military Court against a local military enlistment office seeking an order to recalculate his pension.

6. On 20 May 2005 the court found against the applicant. On 11 August 2005, following his appeal, the Navy Court of Appeal upheld the decision of the first-instance court.

7. On 30 August 2005 the applicant appealed on points of law.

8. On 17 October 2005 the Higher Administrative Court of Ukraine allowed the applicant a time-limit until 1 November 2005 to rectify the procedural shortcomings of his appeal on points of law. The relevant part of the decision reads as follows:

> "The [present] appeal on points of law does not comply with the requirements laid down in Article 213 of the Code of Administrative Justice, as the applicant failed to pay the court fee and to provide a number of copies of the appeal on points of law corresponding to the number of persons involved in the proceedings ...
>
> [The court decides to] set for Gavrilov V.V. a deadline of 1 November 2005 for rectifying the shortcomings of the appeal on points of law submitted by him.
>
> [The court brings to] the attention of Gavrilov V.V. that if he fails to rectify the above shortcomings, in accordance with Article 108 of the Code of Administrative Justice, the appeal on points of law will be returned to the applicant and considered not submitted."

9. The applicant dispatched his rectified appeal on points of law by registered post on 24 October 2005. It appears that the applicant resubmitted several copies of the appeal dated 30 August 2005 accompanied, in accordance with the instructions of the Higher Administrative Court of Ukraine, with proof of payment of the court fee.

10. According to the acknowledgment of receipt form, the letter was received by the court registry on 27 October 2005.

11. On 7 November 2005 the Higher Administrative Court of Ukraine adopted a decision which stated, *inter alia*, as follows:

> "Gavrilov V.V. failed to rectify the shortcomings indicated in the ruling [of 17 October 2005] within the time-limit granted by the court, the appeal on points of law should, therefore, be considered as not submitted and be returned to the applicant."

12. On 10 November 2005 the Higher Administrative Court of Ukraine adopted another decision, the relevant part of which read as follows:

> "When the Higher Administrative Court of Ukraine received the [applicant's] appeal on points of law, it was established that the above appeal on points of law had been lodged outside the statutory time-limit for lodging such an appeal as provided for by Article 212 of the Code of Administrative Justice ... In particular the challenged ruling of the Navy Court of Appeal was delivered on 11 August 2005, the appeal on points of law was dated 30 August 2005, and, according to the postmark, was dispatched to the Higher Administrative Court of Ukraine on 24 October 2005, the applicant failed to submit a request for an extension of the time-limit for lodging an appeal on points of law, his appeal on points of law should therefore be left without examination."

II. RELEVANT DOMESTIC LAW

Code of Administrative Justice, 2005

13. The relevant extracts from the Code, in force at the material time, read as follows:

Article 103. Calculation of procedural time-limits

"9. A time-limit is not considered to have been missed, where before its expiry a claim, a complaint or other documents ... have been deposited by post ..."

Article 212. Lodging of an appeal on points of law

"2. An appeal on points of law against a judicial decision should be lodged within one month of the entry into force of [the relevant] decision of a court of appeal, except when this Code provides otherwise ...

3. An appeal on points of law lodged after the expiry of the period set up in paragraph 2 of this Article should be left without examination unless a court of cassation at a request of a person who has lodged an appeal on points of law finds grounds to restore the time-limit ..."

Article 213. Admissibility requirements for an appeal on points of law

"1. An appeal on points of law shall be lodged in writing.

2. An appeal on points of law shall include:

...

5. A document confirming payment of the court fee and a number of copies of the appeal on points of law corresponding to the number of persons who are taking part in the proceedings shall be attached to the appeal on points of law."

Article 236. The right to challenge judicial decisions in the light of exceptional circumstances

"1. Parties to the proceedings ... have the right to challenge in the light of exceptional circumstances before the Supreme Court of Ukraine judicial decisions in administrative cases after [those decisions] have been reviewed in cassation, as well as the decisions delivered by a court of cassation ..."

Article 237. Grounds for review in the light of exceptional circumstances

"1. Judicial decisions in administrative cases may be reviewed in the light of exceptional circumstances by the Supreme Court of Ukraine if they are appealed against on the [following] grounds:

(1) divergent application of the law by a cassation court (or courts);

(2) a finding by an international judicial authority, whose jurisdiction has been recognised by Ukraine, that a [domestic] judicial decision is in conflict with the international commitments of Ukraine."

THE LAW

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

14. The applicant complained that he had been denied access to a court as the Higher Administrative Court of Ukraine had arbitrarily refused to examine his appeal on points of law. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

15. The Government argued that the applicant had not exhausted domestic remedies. He could have requested the Supreme Court of Ukraine to initiate proceedings under Article 237 of the Code of Administrative Justice (the Code) to review the decisions of the Higher Administrative Court of Ukraine, dated 7 and 10 November 2005, in the light of exceptional circumstances, specifically the divergent application of the same legal provision. The applicant had failed to do so.

16. The applicant submitted no comments in this respect.

17. The Court reiterates that, to be effective, a remedy must be independent of any discretionary action by the authorities and must be directly available to those concerned (see *Kucherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999). The Court does not consider it necessary to elaborate on whether the Supreme Court of Ukraine can be considered the court of final instance in administrative proceedings for the purposes of exhaustion of ordinary domestic remedies within the meaning of Article 35 § 1 of the Convention. In the circumstances of the present case, the Court is not persuaded that the disputed rulings of the Higher Administrative Court fall within the formulation "divergent application of the law" under Article 237 of the Code and thus can constitute grounds for seeking a review before the Supreme Court of Ukraine.

18. In the decision of 17 October 2005 the Higher Administrative Court examined the content of the applicant's appeal on points of law and identified the shortcomings to be rectified within the time-limit specified by that court (the requirement to pay the court fee and to provide additional copies). On 7 November 2005 that court noted that the applicant had failed to comply with the allowed time-limit and to rectify the mentioned shortcomings. Lastly, on 10 November 2005 the court refused to examine the applicant's rectified appeal for failure to request an extension of the statutory period when such an appeal may be lodged.

19. The Court therefore considers that, instead of applying inconsistently a single legal provision, the Higher Administrative Court of Ukraine relied on different reasoning in delivering the contested decisions. The Court also takes into account that the Government did not provide any example of domestic case-law where an appeal to the Supreme Court of Ukraine would – in the light of exceptional circumstances – serve as an effective remedy for obtaining a re-examination of the case on the grounds of inconsistent application of procedural rules on time-limits by a third-instance court.

20. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

21. The applicant maintained that he had been deprived of access to a court, as the Higher Administrative Court of Ukraine had erroneously not examined his appeal on points of law as having been submitted outside the procedural time-limit.

22. The Government did not submit any observations on the merits of this complaint.

23. The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 37, *Reports of Judgments and Decisions* 1997-VIII, and *Andrejeva v. Latvia* [GC], no. 55707/00, § 97, ECHR 2009).

24. The Court further reiterates that the "right to a court" is not absolute, but is subject to limitations permitted by implication, in particular where the conditions of admissibility of appeals are concerned (see *Golder v. the United Kingdom*, 21 February 1975, § 38, Series A no. 18, and *Baka v. Hungary* [GC], no. 20261/12, § 120, ECHR 2016).

25. According to its well-established case-law, it is not for this Court to deal with the alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015). The Court has, in particular, previously found it incompatible with the requirement of a "fair hearing" guaranteed by Article 6 § 1, that the decision not to examine an applicant's appeal on points of law which, in principle, deprived that applicant of a remedy which could have proved to be decisive for the outcome of the dispute in her case, was the result of a manifest error of assessment on the

part of a higher domestic court (see *Dulaurans v. France*, no. 34553/97, §§ 34 and 39, 21 March 2000).

26. In the present case, the applicant appealed on 30 August 2005 against the decision of 11 August 2005 by the Navy Court of Appeal, i.e. within the one month time-limit laid down in Article 212 (3) of the Code of Administrative Justice (see paragraphs 6, 7 and 13) above). By its ruling of 17 October 2005 the Higher Administrative Court of Ukraine noted that the applicant had failed to observe the requirements in Article 213 of the Code, as he had neither paid the court fee nor provided a sufficient number of copies of his appeal. It set a time-limit, which ended on 1 November 2005, to rectify these shortcomings (see paragraph 8 above). The applicant submitted his rectified appeal on 24 October 2005 – before this deadline expired (see paragraph 9 above).

27. It is true that the rectified appeal of 24 October 2005 was submitted after the original one month time-limit under Article 212 (3) had expired, and the applicant did not specifically request an extension of that time-limit. However, in the Court's view he could have reasonably expected that the rectified appeal of 24 October 2005 – submitted before 1 November 2005 – would have been examined on the merits by the court subject to rectification of the formal deficiencies indicated by it

28. In its decision of 7 November 2005 the Higher Administrative Court did not refer to any reasons for the inadmissibility of the applicant's appeal on points of law which would allow the Court to conclude that it had failed to meet any procedural requirements other than the time-limit for lodging it. The Court further notes that the limitations applied to the right of access to a court must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see *Winterwerp v. the Netherlands*, 24 October 1979, § 60, Series A no. 33, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012).

29. It follows that the refusal of the Higher Administrative Court of Ukraine to examine the applicant's appeal on points of law first because of his alleged failure to comply with the ruling of 17 October 2005 and later because of his failure to request an extension of the relevant time-limit, even though the same court had earlier provided the applicant with additional time for lodging such an appeal, hindered the effective exercise of the applicant's right to have his administrative claim examined by the courts. The Court finds no justification for such an impairing of the right of access to a court in the circumstances of the case.

30. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

31. The applicant also complained, under Articles 6 § 1 and 13 of the Convention, that the outcome of the proceedings in his case had been unfavourable and, therefore, the proceedings as a whole had been unfair, in particular, because the domestic courts had allegedly erred in the assessment of the facts and in the application of the law. He further complained, relying on Article 1 of Protocol No. 1, that he had been prevented from enjoying his possessions (his recalculated pension). Lastly, the applicant complained, under Article 14 of the Convention, that he had been discriminated against because his pension had been lower than that of some other pensioners retired from the armed forces.

32. 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 or its Protocols. It follows that this part of the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed 150,606.82 Ukrainian hryvnias (UAH) (at the material time, approximately 13,945 euros (EUR)) in respect of pecuniary and non-pecuniary damage.

35. The Government maintained that the applicant's claims were excessive and unsubstantiated.

36. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, ruling on an equitable basis, it awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

37. The applicant also claimed UAH 1,450 (at the material time, approximately EUR 134) in respect of the legal fees in connection with lodging the application before the Court, and UAH 141.25 (at the material

time, approximately EUR 13) for the postal expenses incurred in the proceedings before the Court.

38. The Government argued that the claims were not justified by the supporting documents.

39. Regard being had to the documents in its possession and to its case-law, the Court, in absence of a contract with a lawyer or other documents showing that the expenses claimed have been actually and necessarily incurred and are reasonable as to quantum, rejects the claim for legal fees and considers it reasonable to award EUR 13 for the postal expenses related to the proceedings before the Court.

C. Default interest

40. The Court considers it appropriate that the default interest rate 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 applicant's complaint under Article 6 § 1 of the Convention concerning the unjustified denial of access to a court by the Higher Administrative Court of Ukraine 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*
   (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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 13 (thirteen euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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 16 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President