

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

FIFTH SECTION

CASE OF KOTLYAR v. UKRAINE

(Application no. 36124/13)

JUDGMENT

STRASBOURG

10 November 2022

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



In the case of Kotlyar v. Ukraine,

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

Mārtiņš Mits*, President*,
Lətif Hüseynov,
Kateřina Šimáčková*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 36124/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 22 May 2013 by a Ukrainian national, Mr Valeriy Mykolayovych Kotlyar, born in 1960 and living in Kremenchuk ("the applicant"), who was represented by Mr M. Tarakhkalo, Ms O. Chilutyan and Ms O. Kuvaieva, lawyers practising in Kyiv;

the decision to give notice of the complaint concerning the failure to notify the applicant of the cassation proceedings to the Ukrainian Government ("the Government"), represented by their acting Agent, Ms O. Davydchuk, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 20 October 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns the applicant's allegation under Article 6 of the Convention that he had not been notified of the cassation proceedings initiated by the defendant and could therefore not present his arguments; as a result, the judgments delivered in his favour were quashed.

2. The background of the case is a dispute between the applicant, a retired police officer, and the State authorities over his entitlement to a higher amount of pension.

3. On 27 October 2009 and on 28 September 2010 the Circuit Administrative Court of Kyiv and the Kyiv Administrative Court of Appeal respectively allowed a claim by the applicant against the government by which he sought to have certain provisions of a governmental decree on the procedure for the recalculation of pensions declared unlawful.

4. According to the applicant, on 14 June 2011 the Higher Administrative Court ("the HACU") granted a request by the defendant for an extension of the time-limit for a cassation appeal and accepted its cassation appeal for examination. On 11 June 2012 it ruled that the case should be examined at an open hearing, to be held on 3 July 2012. No copies of the relevant procedural documents have been provided by the parties to the Court.

5. By a final judgment of 3 July 2012, delivered in the absence of the applicant but in the presence of the defendant's representative, the HACU

quashed the judgments of the lower courts delivered in the applicant's favour and rejected the applicant's claim. According to the applicant, he only became aware of that judgment, by chance, on 22 November 2012. On the same date, he lodged a request with the Circuit Administrative Court of Kyiv asking to be granted access to his case file and submitting that he had never received any notification of the cassation proceedings from the HACU.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

6. Relying on Article 6 § 1 of the Convention, the applicant complained that his right to adversarial proceedings and equality of arms had been breached, as he had not been notified of the cassation proceedings, including the hearing in his case, and had accordingly not been able to present his arguments to the HACU, which had eventually quashed the judgments delivered in his favour.

7. The Government stated that they were unable to provide any information concerning the applicant's allegations since in 2019 the case file had been destroyed on the expiry of the statutory storage period. However, they asserted that the examination carried out by the HACU had been aimed at the correction of fundamental judicial errors and based on facts and material of which the parties had already been aware. The Government argued that mere dissatisfaction on the part of the applicant with the outcome of the proceedings was not sufficient to raise an arguable claim under Article 6 of the Convention.

8. The Court notes that this complaint 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.

9. The general principles concerning the right to an adversarial trial, and the principle of equality of arms in particular, have been summarised in *Lazarenko and Others v. Ukraine* (nos. 70329/12 and 5 others, §§ 36 and 37, 27 June 2017).

10. Turning to the circumstances of the present case, the Court observes that under Articles 215 and 216 of the Code of Administrative Justice ("the CAJ"), the applicant had a right to submit his written response to the cassation appeal, and the HACU was under an obligation to send to the applicant the notice of the cassation appeal and to invite him to respond. Article 232 of the CAJ provided that the arguments contained in the cassation appeal as well as the position of other participants to the case were to be set out in the text of a HACU judgment and followed by the court findings on the case.

11. No evidence, such as, for example, a copy of the notification letter or notification of receipt has been provided to the Court by the Government (see

paragraph 7 above). It is thus on the basis of the available documents that the Court will decide whether the applicant was afforded an adequate opportunity to present his case effectively.

12. The Court observes in this respect that in his request to the Circuit Administrative Court of Kyiv lodged on 22 November 2012 the applicant specifically complained that he had not been informed that the judgments in his favour had been appealed against in cassation and that he had not been aware of any decision taken by the HACU on the matter (see paragraph 5 above).

13. The Court furthermore observes that no reference to the applicant's comments on the cassation appeal can be found in the text of the judgment of the HACU of 3 July 2012, contrary to the explicit requirements set out in the CAJ (see paragraph 10 above). Nor did that judgment state that the applicant had waived in any way his right to present his written arguments in respect of the case (see *Gankin and Others v. Russia*, nos. 2430/06 and 3 others, § 38, 31 May 2016).

14. In these circumstances, and lacking any evidence of proper notification, the Court accepts the applicant's submission that he was not aware of the cassation proceedings in his case, and that this prevented him from protecting his interests before the HACU.

15. As regards the Government's arguments that the applicant's alleged inability to submit his comments on the cassation appeal did not affect the fairness of the proceedings as only questions of law were considered by the HACU, the Court notes that the applicant clearly had an interest in receiving a copy of the cassation appeal and making comments on it, as the cassation appeal was manifestly aimed at influencing the decision of the HACU by calling for the quashing of the judgments delivered in the applicant's favour.

16. Having regard to the established case-law and the circumstances of the present case, the Court finds that the applicant was deprived of the opportunity to present his case effectively before the HACU and that his right to a fair trial guaranteed by Article 6 of the Convention was not ensured (see, *mutatis mutandis*, *Lazarenko and Others*, cited above, § 43, and *Sozonov and Others v. Ukraine* [Committee], nos. 29446/12 and 11 others, § 10, 8 November 2018).

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

APPLICATION OF ARTICLE 41 OF THE CONVENTION

18. The applicant claimed 82,040.32 euros (EUR) in respect of pecuniary damage, which was equal to the amount of underpaid pension. He further claimed EUR 50,000 in respect of non-pecuniary damage and EUR 3,750 in respect of the costs and expenses incurred before the Court.

19. The Government submitted that there was no causal link between the alleged violations and the alleged pecuniary damage. They also contested as unsubstantiated the applicant's claims in respect of non-pecuniary damage.

20. Like the Government, the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. It notes in this connection that it is not for the Court to speculate as to what the outcome of the proceedings would have been if they had been in conformity with the requirements of Article 6 § 1 of the Convention (see *Milatová and Others v. the Czech Republic*, no. 61811/00, § 70, ECHR 2005-V).

21. As regards non-pecuniary damage, the Court, ruling on an equitable basis, awards the applicant EUR 500.

22. Having regard to the documents in its possession, the Court further considers it reasonable to award the applicant EUR 500 for costs and expenses incurred in the proceedings before the Court, plus any tax that may be chargeable to him.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 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 500 (five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly into the bank account of the applicant's representative, Mr M. Tarakhkalo;
   (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 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Mārtiņš Mits President