

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

FIFTH SECTION

CASE OF KRYVENKYY v. UKRAINE

(Application no. 43768/07)

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.



In the case of Kryvenkyy v. Ukraine,

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

Angelika Nußberger, *President,*
Erik Møse,
Faris Vehabović,
Síofra O'Leary,
Carlo Ranzoni,
Lətif Hüseynov, *judges,*
Sergiy Goncharenko, ad hoc *judge,*
and Milan Blaško, *Deputy Section Registrar,*

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. 43768/07) 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 Volodymyr Oleksandrovych Kryvenkyy ("the applicant"), on 26 September 2007.

2. The applicant, who had been granted legal aid, was represented by Mr M.O. Motyga, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented, most recently, by their Agent, Mr I. Lishchyna.

3. The applicant alleged, in particular, that he had been arbitrarily deprived of his farmland.

4. On 30 August 2013 the application was communicated to the Government. Mrs Ganna Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court). Accordingly, the President of the Fifth Section decided to appoint Mr Sergiy Goncharenko to sit as an ad hoc judge (Article 26 § 4 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background information

5. The applicant, Mr Volodymyr Oleksandrovych Kryvenkyy, is a Ukrainian national who was born in 1934 and lives in Velyki Gadomtsi.

6. On 25 March 1997 the applicant obtained a certificate (*сертифікат на право на земельну частку (пай)*) attesting his entitlement to a nominal 3.61-ha share of the land belonging to the V.G. collective farm. At the same time, according to him, he was allocated a specific plot measuring 3.61 ha, which, he had farmed and paid land tax on since that time. It appears that the allocated land consisted of at least two different parcels, one of them measuring 0.6021 ha.

7. In September 1998 V.G. merged with Kh., a neighbouring collective farming company, which was designated as its successor. Following the merger, Kh. did not register itself as the new owner of the land formerly allocated to V.G. Subsequently the two farms separated again.

8. On 18 March 1999 the Parliament of Ukraine ordered the expropriation of 150 ha of Kh.'s land and its transfer to U.C.C. closed joint stock company for the exploitation of kaolin deposits. By the same decision, U.C.C. was obliged, in particular, to compensate the local council for the damage suffered by the agricultural producers in connection with the expropriation of the land.

9. On 10 June 1999 the Berdychiv district land authority drew up a draft land-ownership certificate designating the boundaries of the plot to be allocated to U.C.C. This plot was *de facto* located on the land which had been registered as belonging to V.G.. The draft certificate mentioned, in particular, that U.C.C. had to obtain and register a relevant State land-use certificate.

10. According to the applicant, until 2004 U.C.C. took no action to register its land-use rights and the plot designated for expropriation by Parliament's decision of 18 March 1999 remained in the hands of the members of the V.G. collective farm. The 0.6021-ha parcel of the land farmed by the applicant was affected by the Parliament's decision.

11. Meanwhile, on 17 January 2003 the Berdychiv district administration approved a draft certificate determining the boundaries of the plots of land to be designated to individual farmers from the lands allocated to V.G. and ordered production of the respective individual land-ownership certificates.

12. On the basis of this decision, on 4 June 2003 the applicant was issued with the land-ownership certificate for the aforementioned 0.6021-ha

plot. No information concerning registration of ownership in respect of any other land parcels farmed by the applicant has been provided to the Court.

13. On 7 July 2005 the Berdychiv district prosecutor addressed the Berdychiv district administration objecting to its decision of 17 January 2003. The prosecutor maintained, in particular, that 150 ha of land designated for exploitation of kaolin deposits had been allocated to individual farmers in breach of U.C.C.'s rights.

14. On 22 July 2005 the Berdychiv district administration accepted the prosecutor's objection and annulled its decision of 17 January 2003 in so far as it related to the 150 ha of land claimed by U.C.C.

B. Civil action concerning the annulment of the applicant's land title

15. On 31 August 2005 U.C.C. lodged a civil action claiming the 0.6021-ha plot of land allocated to the applicant and seeking annulment of the land-ownership certificate issued to him on 4 June 2003. It noted, in particular, that the Berdychiv district administration had already annulled its own decision of 17 January 2003, which had served as the basis for the issuance of the land-ownership certificate to the applicant. The issuance had therefore been devoid of legal basis.

16. On 17 August 2006 the Berdychiv Court allowed the aforementioned claim. It noted that the disputed plot had been allocated to the applicant mistakenly on the basis of the decision of 17 January 2003, without due regard to the fact that in 1999 this very plot had already been expropriated and transferred to U.C.C.

17. Following this decision, U.C.C. blocked the road leading to the plot disputed by the U.C.C. and it became impossible for the applicant to access it or use it for farming.

18. On 12 December 2006 the Zhytomyr Regional Court of Appeal upheld the above judgment.

19. The applicant appealed in cassation before the Supreme Court of Ukraine. He noted, in particular, that he had obtained the disputed land lawfully and in good faith. He could therefore not be deprived of it unless fair compensation was paid.

20. In February 2007 the applicant added to his cassation appeal, informing the Supreme Court of Ukraine that on 12 February 2007 the Regional Court had annulled the decision of 22 July 2005 and revalidated the decision of 17 January 2003, on the basis of which he had obtained his land-ownership certificate (see paragraph 23 below).

21. On 4 April 2007 the Supreme Court of Ukraine rejected the applicant's request for leave to appeal in cassation.

C. Proceedings concerning the annulment of the decision of 22 July 2005

22. On an unspecified date several individuals, excluding the applicant, apparently the land owners whose land was also being claimed by U.C.C., instituted administrative proceedings against the Berdychiv district administration. They sought, in particular, to annul its decision of 22 July 2005 and to declare lawful the decision of 17 January 2003, on the basis of which their land-use certificates had been issued.

23. On 12 February 2007 the Zhytomyr Regional Court of Appeal allowed their claim. It noted, in particular, that Parliament had ordered the expropriation of Kh.'s land, while the land, whose boundaries had been in dispute, had belonged to V.G., which had been a separate legal entity on the date of the decision at issue.

24. On 23 July 2008 the Higher Administrative Court of Ukraine quashed the above decision and remitted the case for retrial.

25. After several rounds of proceedings, on 14 September 2011 the Berdychiv Court found that the decision of 22 July 2005 had been unlawful in so far as it had related to the plots of land of the individuals who had instituted the proceedings. On 6 December 2011 and 27 August 2013 the judgment of 14 September 2011 was upheld by the Zhytomyr Regional Administrative Court and the Supreme Court of Ukraine respectively.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine (1996)

26. Article 41 of the Constitution of Ukraine reads as follows:

Article 41

"Everyone shall have the right to own, use, or dispose of his or her property and the results of his or her intellectual or creative activities.

The right to private property shall be acquired in compliance with the procedure established by law ...

No one shall be unlawfully deprived of the right to property. The right to private property shall be inviolable.

The expropriation of private property objects may be applied only as an exception for the reasons of societal necessity, on the grounds of, and in the order established by law, and on terms of advance and complete compensation of the value of such objects. The expropriation of such objects with subsequent complete compensation of their value shall be permitted only under conditions of martial law or a state of emergency ..."

B. Code of Civil Procedure of 2004

27. Under Article 355 of the Code, as it read at the material time, an application for review of a final judgment in a civil case may be lodged, in particular, where it is alleged that the cassation court(s) had inconsistently applied a legal provision in different judgments, which resulted in divergent application of the law in court judgments.

28. Under Article 356 of the Code, an application for review of a judgment could be lodged within the period not exceeding one year from the date of the adoption of the judgment which was being appealed against. It was within the discretion of the judicial authority to admit an application outside of the established time-limit.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

29. The applicant complained that he had been deprived of his plot of land in breach of Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention. The Court considers that the present complaint falls to be examined under Article 1 of Protocol No. 1 only. This provision reads as follows:

> "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 or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

30. The Government alleged that the applicant had not exhausted domestic remedies in respect of the above complaint. They noted, in particular, that following revocation of the district administration's decision of 22 July 2005 (see paragraph 25 above), the applicant obtained the right to lodge with the Supreme Court of Ukraine an application for review of the court judgment of 17 August 2006, by which his title to the disputed land had been annulled, in view of the inconsistent application of the relevant law in the two procedures. In addition to that, the applicant had also failed to bring a court action with a view to demanding compensation for the disputed plot.

31. The applicant disagreed. He noted that, while his land had been taken from him in August 2006, the decision of 22 July 2005 had been invalidated only in 2013, so the review procedure to which the Government referred had not been available to him at the time of lodging of the present application. Neither had it become available in 2013 as, according to Article 356 of the Code of Civil Procedure, a one-year time-limit had been applicable to any demands for review. The applicant also noted that he had properly raised the compensation issue in his ordinary and cassation appeals against the judgment of 17 August 2006, whereby his title to the plot of land had been annulled. As regards the institution of any separate compensatory proceedings, he stated that this would have been futile, because the proceedings whereby his land had been taken concerned retrospective annulment of the title, rather than expropriation. The Government had not shown any examples in the case-law of the domestic courts where a person whose title to property had been retrospectively annulled had successfully claimed compensation for it.

32. The Court notes from its established case-law that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. 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. Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

33. In the present case, the Court has not been provided with evidence that the remedies proposed by the Government were available to the applicant and offered a reasonable prospect of success.

34. Notably, as regards a possibility to file a request for review of the final judgment which annulled the applicant's title to the land, among other things, this discretionary procedure was not available to the applicant at the moment of filing the present application. As pointed out by the applicant, the judgment, which, according to the Government, entitled him to apply for a review of the final judgment taken against him in 2007, was delivered only in 2013. That is, it was taken long after the present application had been brought and after the expiration of the one-year time-limit established by Article 356 of the Code of Civil Procedure for filing an application for a review (see paragraphs 27-28 above).

35. As regards the possibility to claim compensation for the seizure of the plot of land, the Court notes the applicant's argument that the relevant proceedings concerned retrospective annulment of the land title, rather than expropriation. The Government have not provided any examples of court decisions or other material in evidence that filing separate proceedings for

compensation could offer a reasonable prospect of success in cases regarding such annulments. In this connection, the Court considers that the applicant sufficiently raised the matter of compensatory redress in his appeals lodged within the framework of the proceedings against him concerning the annulment of title.

36. In light of the above, the Court considers that the Government's objection regarding non-exhaustion should be dismissed.

37. The Court next notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

38. The applicant maintained that retrospective annulment of his title to the disputed 0.6021-ha plot of land had been arbitrary and had been effected in breach of the "good governance" principle. He noted that the Supreme Court had arbitrarily failed to take into account that the district administration's decision of 17 January 2003, which had served as the basis for the allocation of the disputed land to him, had been revalidated by the time the proceedings against the applicant had been pending in cassation. In addition to that, the courts had not made any effort to strike a fair balance between the applicant's interest in retaining the land and U.C.C.'s interest in taking it from him. In particular, the applicant had acquired the disputed land in good faith and had farmed it for some nine years (since 1997) when the decision to annul his title had been taken. Loss of the land had constituted a significant disadvantage for the applicant and he should therefore have been fairly compensated for it.

39. The Government did not comment on the merits of the present complaint.

40. The Court notes that it is clear from the case file and is not disputed between the parties that the impugned 0.6021-ha plot of land constituted the applicant's "possession" within the meaning of Article 1 of Protocol No. 1. Indeed, as appears from the applicant's uncontested submissions, in 1997 the disputed plot was allocated to the applicant in-kind as a share in the plot of land co-owned by members of a collective farm and subsequently (in June 2003) the applicant was officially issued with an individual land-ownership certificate in respect of the above plot.

41. The Court further refers to its settled case-law, according to which retrospective annulment of valid title to property constitutes deprivation within the meaning of Article 1 of Protocol No. 1 (see, in particular, *Gashi v. Croatia*, no. 32457/05, §§ 27-40, 13 December 2007; *Pyrantienė v. Lithuania*, no. 45092/07, § 42, 12 November 2013; and *Vukušić v. Croatia*, no. 69735/11, § 50, 31 May 2016).

42. The Court must therefore assess whether this deprivation was lawful, effected in the public interest and whether it pursued a legitimate aim by means reasonably proportionate to the aim sought to be realised (see, among others authorities, *Moskal v. Poland*, no. 10373/05, §§ 49-50, 15 September 2009).

43. The Court next notes that the applicant's title to the disputed plot was nullified on the grounds that, on the day the decision to allocate him this land had been issued (17 January 2003), the same land had already been attributed to U.C.C. Accordingly, the decision to attribute the same land to the applicant had been taken erroneously. It is notable that on 12 February 2007, while the proceedings concerning the annulment of the applicant's title were pending on appeal before the Supreme Court, the decision of 17 January 2003 was revalidated by way of another judicial procedure (see paragraph 25 above). However, as the relevant judgment had not become final at that time, the Court cannot take issue with the fact that the Supreme Court ignored the applicant's argument in this connection. Accordingly, the Court considers that annulment of his title to the property by way of a contentious court procedure with a view to correcting a mistake in the attribution of such title had a basis in domestic law.

44. The Court next reiterates that the applicant's plot was taken from him on the basis of Parliament's decision concerning development of a kaolin exploitation site. It therefore considers that the deprivation of property was in the public interest and pursued a legitimate aim.

45. It remains to be examined whether the deprivation at issue in the present case also struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights (see, among many other authorities, *Gashi*, cited above, § 31). In this regard the Court reiterates that the taking of property without payment of an amount reasonably related to its value will normally fail to respect the requisite fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights and will constitute a disproportionate burden on the applicant (see *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A, and *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII). In the context of revoking property titles granted in error, the "good governance" principle may impose on the authorities an obligation to act promptly in correcting their mistake, as well as necessitate the payment of adequate compensation or another type of appropriate reparation to the former good-faith holders (see, in particular, *Rysovskyy v. Ukraine*, no. 29979/04, § 71, 20 October 2011, with further references).

46. The Court notes that, as is apparent from the applicant's submissions, which were not contested by the Government, the applicant acquired and possessed the plot of land at issue in the present proceedings

according to a valid certificate and in good faith. He paid land tax on it and farmed it since 1997 as a holder of a share in the land plot owned by a collective farm and duly registered his individual title in 2003. In these circumstances, in the Court's view, the fact that in 2006 the land was taken from the applicant without any compensation or another type of appropriate reparation is sufficient to find that the applicant was subjected to a disproportionate burden as a result of having been deprived of this plot of land.

47. Accordingly, there has been a breach of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant claimed 15,000 euros (EUR) in respect of pecuniary damage. According to his personal estimates, this amount corresponded to the market value of the land taken from him and the profits lost over the years in connection with his inability to use that plot for farming. By way of explaining his calculations, the applicant submitted that some unspecified owners of nearby plots had voluntarily surrendered their land title certificates in 2006-2007 in exchange for UAH 30,000 (around EUR 5,000). In his view, however, the real market value of his land was higher and he suffered significant damage over the years on account of not being able to farm it.

50. In addition, the applicant also claimed EUR 10,000 in respect of non-pecuniary damage.

51. The Government submitted that the applicant had failed to substantiate his calculation method in respect of the pecuniary damage claimed and had not provided any official documents in support of his estimates. They also submitted that his non-pecuniary damage claim was exorbitant and unsubstantiated.

52. The Court notes that the applicant's submissions concerning pecuniary damage are not supported by any documentary proof enabling it to establish the relevant amount. At the same time, the Court is mindful that sometimes a precise calculation of the sums necessary to make complete reparation in respect of the pecuniary losses suffered by the applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (see, as a recent authority, *East West Alliance Limited*

v. Ukraine, no. 19336/04, § 250, 23 January 2014). The Court enjoys certain discretion in the exercise of the power conferred by Article 41, as is borne out by the adjective "just" and the phrase "if necessary" in its text. In order to determine just satisfaction, it must have regard to the particular features of each case (see ibid., § 247). On a number of occasions, where one or more heads of damage could not be calculated precisely, the Court made a global assessment ruling on an equitable basis (see, as recent references, *Agrokompleks v. Ukraine* (just satisfaction), no. 23465/03, §§ 80 and 93, 25 July 2013 and *East West Alliance Limited* cited above, §§ 254-265).

53. In light of the foregoing considerations and having regard to all the materials in its possession, the Court finds it appropriate to rule in equity and make a global assessment in the present case. It considers it reasonable to award the applicant an aggregate sum of EUR 10,000, covering all heads of damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

54. The applicant also claimed EUR 500 for the costs and expenses incurred before the domestic courts and EUR 2,900 in legal fees payable to the applicant's lawyer, Mr M. Motyga, for his representation before the Court.

55. The Government noted that the applicant had failed to provide any supporting documents in justification of the aforementioned claims.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court reiterates that the applicant in the present case was given legal aid. It further considers that, regard being had to the applicant's failure to provide any documentary proof in support of his claims for costs and expenses, his claim must be rejected.

C. Default interest

57. 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

1. *Declares* unanimously the application admissible;

2. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* by four votes to three 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 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

4. *Holds* unanimously 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* unanimously 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
Deputy Registrar

Angelika Nußberger
President