

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

1959 · 50 · 2009

FIFTH SECTION

CASE OF IVAN PANCHENKO v. UKRAINE

(Application no. 10911/05)

JUDGMENT

STRASBOURG

10 December 2009

FINAL

10/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ivan Panchenko v. Ukraine**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges,*
Mykhaylo Buromenskiy, ad hoc *judge,*

and Claudia Westerdiek, *Section Registrar*.

Having deliberated in private on 17 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 10911/05) 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 Ivan Ivanovych Panchenko ("the applicant"), on 8 February 2005.

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

3. On 22 September 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1957 and lives in Brovary, Ukraine.

5. The applicant is a disabled war veteran. From 1994 he was on a special list of persons to be allocated an apartment by the State on priority basis (see paragraph 38 below).

1. First set of proceedings

6. In May 1997 the applicant instituted proceedings in the Brovary Town Court ("the Town Court") against Brovary Town Council, requesting the court to order the defendant to provide him with an apartment on a priority basis.

7. On 17 July 1997 the court dismissed the applicant's claim.

8. The applicant appealed and on 19 August 1997 the Kyiv Regional Court (since June 2001 the Kyiv Regional Court of Appeal) upheld the lower court's judgment.

2. Second set of proceedings

9. In August 2001 the applicant instituted proceedings in the Town Court against the Brovary Town Executive Committee, the Kyiv Regional State Administration and the Ministry of Defence of Ukraine, requesting the court to order the defendants to provide him with a apartment on a priority basis and seeking compensation for non-pecuniary damage.

10. On 10 December 2001 the court dismissed the applicant's claims.

11. On 14 March 2002 the Kyiv Regional Court of Appeal ("the Court of Appeal") quashed the lower court's judgment and remitted the case to it for fresh consideration.

12. In the course of subsequent hearings before the Town Court the applicant withdrew some of his claims, eventually requesting the court only to order the Ministry of Defence of Ukraine to provide him with an apartment on a priority basis.

13. On 27 November 2002 the Town Court dismissed the applicant's claim. On 27 December 2002 the same court rectified certain clerical errors in its judgment.

14. On 6 June 2003 the Court of Appeal quashed the judgment of 27 November 2002 and rendered a new one, ordering the Ministry of Defence of Ukraine to provide the applicant with an apartment within three months of the judgment becoming final. Apparently, this judgment was not appealed against.

15. On 20 October 2003 the State Bailiff's Service instituted proceedings to enforce this judgment.

16. In May 2004 the applicant requested the Court of Appeal to change the means of enforcement of the judgment of 6 June 2003. In particular he sought replacement of the in-kind award with monetary compensation to him in the amount of 225,332.40 Ukrainian hryvnias (UAH)[1].

17. On 27 May 2004 the court rejected that request, indicating that the matter should be examined by the Town Court.

[1] About 35,416.20 euros (EUR) at the material time.

18. On 13 October 2004 the Town Court allowed the applicant's request in part, ordering the Ministry of Defence of Ukraine to pay Brovary Town Council the above-mentioned sum in order to purchase an apartment for the applicant.

19. On 12 May 2005 this sum was transferred to the bank account of Brovary Town Council.

20. On 16 May 2005 the State Bailiff's Service terminated the enforcement proceedings against the Ministry of Defence of Ukraine as the judgment of 6 June 2003 as amended by the decision of 13 October 2004 had been enforced.

21. On 26 May 2005 Brovary Town Council authorised the Brovary Town Executive Committee to arrange the purchase of an apartment for the applicant in compliance with the judgment of 6 June 2003 as amended by the decision of 13 October 2004.

22. According to the Government, the sum awarded on 13 October 2004 was insufficient to purchase an apartment for the applicant on the second-hand market due to the dramatic increase in real estate prices. For that reason, having invited tenders, on 30 August 2005 the Brovary Town Council concluded a contract with an appropriate company for the construction of an apartment for the applicant.

23. By 2007 the apartment at issue had been constructed, and on 14 August 2007 the Brovary Town Executive Committee issued the applicant with a housing warrant (*ордер на заселення житлової площі*). On several occasions the applicant was invited to take that warrant but to no avail.

24. On 3 July 2008 the Town Court found the applicant to be abusing his rights (namely, by evading concluding the tenancy contract and, accordingly, paying the tenancy fee) and ordered him to take the housing warrant and move into the apartment within ten days. In that regard enforcement proceedings were instituted against the applicant but the judgment of 3 July 2008 has not yet been enforced.

25. In November 2007 the applicant instituted proceedings in the Town Court against the Brovary Town Executive Committee, seeking to annul the defendant's decision of 14 August 2007 to issue him with the housing warrant. In particular, he pleaded that the floor space of the apartment allocated to him was less than that guaranteed by the domestic law and that the apartment had been purchased as a result of an unlawful tender. On 8 September 2008 the court dismissed his claims as unsubstantiated. It is not clear whether the applicant appealed against that decision.

26. According to the applicant, though, the judgment has still not been enforced. He did not inform the Court about the events set out in the preceding paragraphs (23-25).

3. Third set of proceedings

27. In October 2005 the applicant instituted administrative proceedings in the Town Court against Brovary Town Council, seeking enforcement of the judgment of 6 June 2003 as amended by the decision of 13 October 2004. In view of the increase in real estate prices, the applicant also sought an additional sum of money to be paid by the defendant as compensation for pecuniary damage as a result of the alleged inactivity.

28. On 28 October 2005 the court dismissed the applicant's claim on account of procedural shortcomings (in particular, for failure to pay the court fee).

29. On 17 February 2006 the Court of Appeal quashed that decision and remitted the matter of the admissibility of the applicant's claim to the Town Court for fresh consideration.

30. On 24 November 2006 the Town Court dismissed the applicant's claim as unsubstantiated.

31. On 26 February 2007 the Court of Appeal upheld that judgment.

32. On 25 September 2008 the Higher Administrative Court quashed the lower courts' decisions and discontinued the proceedings, having found that the claim should be examined under the civil procedure.

4. Fourth set of proceedings

33. On 31 October 2006 the applicant requested the General Prosecutor's Office to institute criminal proceedings against Brovary Town Council, alleging embezzlement and misuse of budgetary funds.

34. On 15 December 2006 the prosecutor refused to institute criminal proceedings as requested. The applicant appealed against that decision to the Town Court.

35. On 3 August 2007 the Town Court quashed the decision in question and referred the matter back for additional investigation. Subsequently the prosecutor refused to institute the proceedings in question on several occasions and the applicant successfully challenged those refusals before the Town Court.

36. Apparently the investigation is still pending.

II. RELEVANT DOMESTIC LAW

A. Housing legislation

37. Under section 61 of the 1983 Housing Code publicly owned dwellings shall be used on the basis of a tenancy contract concluded between the tenant and the relevant authority.

38. The Military Servicemen Legal and Social Protection Act (no. 2011-XII of 20 December 1991, as amended at the material time) sets forth that the State provides the military servicemen with, among other benefits, appropriate dwelling (section 12). Those servicemen who have retired due to their service-related injuries and diseases are entitled to housing on a priority basis (section 12 § 4).

39. Under section 6 § 1 of the State Housing Fund Privatisation Act (no. 2482-XII of 19 June 1992, as amended at the material time) the dwelling occupied by the military servicemen who enjoy benefits under the above Military Servicemen Legal and Social Protection Act shall be granted free of charge into private property of these military servicemen.

40. The Veterans of War and Their Social Protection Guarantees Act (no. 3551-XII of 22 October 1993, as amended at the material time) guarantees that disabled war veterans shall be housed within two years, at maximum, of submitting an appropriate application, provided that their existing accommodation does not comply with the relevant housing standards (section 13 § 18).

41. The State Social Housing Fund Act (no. 3334-IV, valid since 1 January 2007) provides the same guarantees to the veterans of war (sections 11 and 12). Under section 3 § 5, however, social dwellings are not subject to privatisation.

B. Enforcement proceedings

42. The relevant domestic law is summarised in the judgment of *Romashov v. Ukraine* (no. 67534/01, §§ 16-19, 27 July 2004).

43. Under section 33 of the Enforcement Proceedings Act the bailiff and the parties to the enforcement proceedings (debtor and creditor) are entitled to request *proprio motu* the relevant court to change the means of enforcement of a court decision if there are circumstances which preclude its enforcement by the means specified in that decision.

THE LAW

I. LENGTH OF THE SECOND SET OF PROCEEDINGS AND ENFORCEMENT OF THE JUDGMENT IN THE APPLICANT'S FAVOUR

44. The applicant complained under Article 6 § 1 of the Convention that the length of the second set of proceedings had been excessive. He further submitted that by not enforcing the judgment of 6 June 2003, as amended

by the decision of 13 October 2004, the State authorities had infringed his rights under Article 1 of Protocol No. 1. The applicant complained under Article 13 of the Convention that he had no effective remedy in respect of the non-enforcement of the above judgment. The applicant also relied on Article 8 of the Convention with respect to the lengthy examination of his claim and the enforcement of the judgment in question. The above provisions provide, in so far as relevant, as follows:

Article 6 § 1

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

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

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 ..."

A. Admissibility

45. The Government pleaded that the applicant was no longer a victim of the alleged violation as the judgment of 6 June 2003 had been already enforced. They also submitted that the applicant had abused his right of

petition to the Court by avoiding taking the housing warrant and not moving into the apartment constructed for him. By failing to inform the Court that the apartment had been constructed for him, the applicant also, in their view, acted contrary to his obligations under Rule 47 of the Rules of Court and requested the Court to declare the application inadmissible. Lastly, they argued that the complaints under Article 1 of Protocol No. 1 were incompatible *ratione personae* as the judgment of 6 June 2003, as amended by the decision of 13 October 2004, had not conferred any property right on the applicant.

46. The applicant disagreed, asserting that the judgment in question had still not been enforced.

47. As to the applicant's failure to inform the Court about the construction of the apartment at issue and events relating to it (see paragraphs 23-24 above), the Court notes that on several occasions it has declared applications inadmissible because the applicants had failed to inform it about important developments in their respective cases (see, among others, *Keretchashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006 and, recently, *Khvichia and Others v. Georgia* (dec.), no. 26446/06, 23 June 2009). However, the Court distinguishes these cases from the present one as in the former cases the applicants did not inform the Court about receipt of relevant payments due to them under the monetary awards whereas in the present case the applicant resisted accepting the apartment allocated to him under the in-kind award. In the situation where the applicant does not accept the offer as enforcement of the judgment in his favour (see the applicant's claims before the Town Court lodged in November 2007 as set out paragraph 25 above), his failure to inform the Court about further developments in his case does not, in the Court's view, amount to abuse of right of individual petition. Accordingly, the Court dismisses the Government's objection.

48. The Court further notes that the judgment of 6 June 2003 had been formally enforced by 16 May 2005 when the Ministry of Defence of Ukraine transferred money to Brovary Town Council. Although there were no formal enforcement proceedings after that date, the Court considers that the judgment remained unenforced till 14 August 2007, when the Brovary Town Executive Committee issued the applicant with a housing warrant. It is not for the Court, however, to speculate on whether the apartment allocated to the applicant complied with the judgment at issue, despite the applicant's position that it did not. In the absence of the domestic court's decision to the contrary, it deems, for the purposes of the present case, that the judgment was enforced on 14 August 2007. However, the fact that the judgment in the applicant's favour has been enforced does not deprive the applicant of his victim status in relation to the period during which that judgment remained unenforced (see *Romashov v. Ukraine*, cited above, §§ 26-27). Accordingly it dismisses the Government's objection.

49. As to the objection compatibility of the applicant's complaints under Article 1 of Protocol No. 1 *ratione personae,* which is in fact an objection of a *ratione materiae* nature, the Court reiterates that Article 1 of Protocol No. 1 does not guarantee the right to acquire property (see *Van der Mussele v. Belgium*, 23 November 1983, § 48, Series A no. 70, *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his or her "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (*Kopecký,* cited above, § 35). A "legitimate expectation" must be of a nature more concrete than a mere hope, and must be based on a legal provision or a legal act such as a judicial decision (ibid., § 49).

50. The Court further reiterates that the right to any social benefit is not included as such among the rights and freedoms guaranteed by the Convention (see, for example, *Aunola v. Finland* (dec.), no. 30517/96, 15 March 2001). The right to live in a particular property not owned by the applicant does not as such constitute a "possession" within the meaning of Article 1 of Protocol No. 1 (see *H.F. v. Slovakia* (dec.), no. 54797/00, 9 December 2003; *Kovalenok v. Latvia* (dec.), no. 54264/00, 15 February 2001, and *J.L.S. v. Spain* (dec.), no. 41917/98, 27 April 1999).

51. In the present case the judgment at issue did not require the authorities to grant the applicant ownership of a particular apartment, but rather to issue him with a housing warrant in respect of any apartment satisfying the criteria laid down in the domestic legislation. Thus, having regard the case-law in the preceding paragraphs, the crucial issue is whether the applicant had a "legitimate expectation" to get the disputed apartment into his private property (see, *mutatis mutandis*, *Malinovskiy v. Russia*, no. 41302/02, § 44, ECHR 2005-VII (extracts)). Having regard the relevant domestic legislation (see paragraphs 39 and 41 above) and that the parties did not comment in this vein, the Court concludes, for the purposes of the present case only, that at least before 1 January 2007 the applicant had a "legitimate expectation" to get the apartment at issue into his private property. Accordingly, it dismisses the Government's objection.

52. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

53. The Government pleaded that the length of the judicial and enforcement stages of the applicant's case was not excessive. In particular, they stated that the judgment of 6 June 2003 could not be enforced as there had been no available apartments owned by the Ministry of Defence of Ukraine at the time. Subsequently, it was the applicant who had claimed a sum insufficient to replace the in-kind award and by the decision of 13 October 2004 had restricted Brovary Town Council's means to enforce the judgment at issue. As real estate prices had increased, it was impossible for the Council to purchase an apartment for the applicant in advance. For that reason it invested the sum awarded in the construction of the apartment but it delayed the enforcement of the judgment at issue. As the Council acted in good faith and took all measures available to it, the delay in enforcement could not be attributed to it. The Government concluded that there had been no violation of the invoked provisions.

54. The applicant disagreed.

55. The Court reiterates that the court proceedings and the enforcement proceedings are stages one and two in the total course of proceedings (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 197). Therefore, the enforcement proceedings should not be dissociated from the action and the proceedings are to be examined in their entirety (see *Estima Jorge v. Portugal*, 21 April 1998, § 35, *Reports of Judgments and Decisions* 1998-II, and *Sika v. Slovakia*, no. 2132/02, §§ 24-27, 13 June 2006).

56. The Court notes that the consideration of the applicant's case by the domestic courts lasted from August 2001 to 6 June 2003, when the Town Court found in the applicant's favour. The length of proceedings in the judicial phase involving two levels of jurisdiction is therefore one year and nine months and there is no discernible period of inactivity which can be attributed to the domestic courts.

57. However, the judgment of 6 June 2003 remained unenforced till 14 August 2007, that is for four years and two months.

58. The Court admits that the enforcement of a judgment incorporating a ruling of a non-pecuniary nature may take more time than is the case for payment of money awarded under a court judgment (see *Ganenko v. Ukraine* (dec.), no. 27184/03, 11 January 2005, where the two-year delay in providing the applicant with a car designed for disabled persons was found to be compatible with the Convention). It is true that by 13 October 2004 when the in-kind award was replaced by a pecuniary one, the judgment had remained unenforced for one year and two months, which is even less than in the *Ganenko* case. Nevertheless, in the particular circumstances, the Court does not consider this delay justified. In this regard the Court emphasises that neither the debtor nor the bailiff, who were or ought to have been aware of the lack of available apartments from the very

beginning, made any attempts to make alternative arrangements for the applicant's accommodation or compensation (see, *mutatis mutandis*, *Shpakovskiy v. Russia*, no. 41307/02, § 29, 7 July 2005, and *Malinovskiy v. Russia*, cited above, § 38). It was the applicant who sought replacement of the in-kind award with the pecuniary one.

59. Furthermore, the Court notes that it took an additional seven months for the Ministry of Defence of Ukraine to transfer the sum awarded by the decision of 13 October 2004. Although this period cannot be considered excessive *per se*, having regard to the inactivity examined in the preceding paragraph and the alleged dramatic increase in real estate prices, this delay was inexcusable, diminishing as it did the applicant's prospects to have the judgment in his favour enforced.

60. The Court points out that by failing to take reasonable steps at the initial stage of the enforcement proceedings, the domestic authorities protracted enforcement of the judgment over four years. The alleged diligent conduct of Brovary Town Council cannot accordingly justify the whole period of non-enforcement of the judgment of 6 June 2003.

61. The Court reiterates that it has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases concerning lengthy non-enforcement of judgments in the applicants' favour (see, among many other authorities, *Voytenko v. Ukraine*, no. 18966/02, §§ 43 and 55, 29 June 2004). The Court finds no ground to depart from its case-law in the present case.

62. There has accordingly been a violation of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1 in respect of the lengthy non-enforcement of the judgment in the applicant's favour in the present application.

63. Having regard to the above finding, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 8 (see, *mutatis mutandis*, *Laino v. Italy* [GC], no. 33158/96, § 25, ECHR 1999-I).

64. Lastly, the Court reiterates that it has held on numerous occasions that no remedy existed under Ukrainian law against non-enforcement of domestic court judgments given against State authorities (see, among many other authorities, *Voytenko v. Ukraine*, cited above, § 48). It finds no ground to depart from its case-law in the present case. Accordingly, there has been violation of Article 13 of the Convention in the present application as well.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

65. The applicant further complained under Article 6 § 1 of the Convention about the length of other sets of his court proceedings, refusal to entertain his claim (third set of proceedings) and lack of an effective

criminal investigation of his complaints (fourth set of proceedings). He also relied on Articles 3 and 17 of the Convention.

66. Having carefully considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

67. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed EUR 4,180,138 in respect of pecuniary damage and the same amount in respect of non-pecuniary damage.

70. The Government contested these claims as excessive and unsubstantiated.

71. 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, it awards the applicant, on an equitable basis, EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

72. The applicant also claimed EUR 15,439 for the costs and expenses incurred before the domestic courts and EUR 968 for those incurred before the Court. In support of the latter he provided postal vouchers to the total amount of UAH 253.90[2].

73. The Government contested these claims.

74. 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. In the present case, regard being had to the information in its

[2] About EUR 23.

possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 23 for the proceedings before the Court.

C. Default interest

75. 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, 8 and 13 of the Convention and Article 1 of Protocol No. 1 concerning the length of the second set of court proceedings, including the enforcement phase, and lack of remedies in that respect 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;

3. *Holds* that there is no need to examine the complaint under Article 8 of the Convention;

4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *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 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage and EUR 23 (twenty three euros) for costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant;
   (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;

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

Done in English, and notified in writing on 10 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Peer Lorenzen President