

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

FIFTH SECTION

CASE OF VYELYEV v. UKRAINE

(Application no. 57211/13)

JUDGMENT

This version was rectified on 25 January 2022
under Rule 81 of the Rules of Court

STRASBOURG

20 January 2022

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



In the case of Vyelyev v. Ukraine,

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

Mārtiņš Mits, *President,*
Jovan Ilievski,
Ivana Jelić, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 57211/13) 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 Vyelyev ("the applicant"), on 27 August 2013;

the decision to give notice of the application to the Ukrainian Government ("the Government");

the parties' observations;

Having deliberated in private on 16 December 2021,

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

INTRODUCTION

1. The case concerns the quashing of a final judgment delivered in the applicant's favour. It raises issues under Article 6 of the Convention and Article 1 of Protocol No. 1.

THE FACTS

2. The applicant was born in 1952 and lives in Zaporizhzhya. He was represented before the Court by Ms A. Velmozhko, a lawyer practising in Zaporizhzhya.

3. The Government were represented by their Agent, Mr I. Lishchyna, of the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 27 October 2010 the applicant instituted proceedings in the Komunarskyy District Court of Zaporizhzhya ("the District Court") against the Komunarskyy District Department of the Pension Fund in Zaporizhzhya ("the defendant"), seeking to have his pension recalculated in his favour as from 1 June 2010 on the basis of the average national wage.

6. On 28 December 2010 the District Court allowed the applicant's claim. The case was examined by way of an abridged procedure, pursuant to Article 183-2 of the Code of Administrative Justice.

7. On 7 September 2011 the Dnipropetrovsk Administrative Court of Appeal ("the Court of Appeal") upheld the findings of the District Court and ordered that the applicant's pension be recalculated on the basis of the

average national wage. This decision was final and not subject to further appeal (see paragraph 14 below).

8. Following the above-mentioned judgment given by the Court of Appeal, the applicant's pension was recalculated by the defendant, and from 25 October 2011 to 15 July 2013 (see paragraph 12 below), he accordingly received his pension payments in the increased amount.

9. In the meantime, on 28 October 2011, the defendant lodged a cassation appeal with the Higher Administrative Court ("the HAC") against the judgment of 7 September 2011, arguing that the lower courts had wrongly interpreted and applied the substantive law.

10. On 7 November 2011 the HAC decided to open cassation proceedings in the case.

11. On 4 July 2013 the HAC found that the lower courts had misapplied the substantive law. In particular, it found that the relevant law was to be interpreted in such a way that the amount of the average national wage relied on by the applicant should have been used to calculate his pension when the pension had first been awarded, and not for the purpose of its subsequent recalculation. The HAC therefore allowed the defendant's cassation appeal, quashed the judgment of 7 September 2011 and rejected the applicant's claim.

12. On 15 July 2013 the amount of the applicant's pension was recalculated in compliance with the judgment given by the HAC on 4 July 2013 and, until 1 October 2017 (when the pension was recalculated again in accordance with a new law), he received a lower pension amount than the one paid as a result of the final judgment of 7 September 2011 in his favour.

RELEVANT LEGAL FRAMEWORK

CODE OF ADMINISTRATIVE JUSTICE OF 6 JULY 2005

13. The relevant extracts of the Code of Administrative Justice, as in force at the material time, provided for the following.

14. Article 183-2 provided, *inter alia*, that claims concerning pension payments were to be considered by way of an abridged procedure without the parties being summoned. The judgment could be appealed against before a court of appeal. The decision of the court of appeal would be final and not subject to further appeal.

15. Pursuant to Article 211, parties to the proceedings were entitled to lodge a cassation appeal against judgments of the court of appeal, except in the cases provided for in the Code.

16. Article 214-5 provided that a judge rapporteur was to refuse an application for a cassation appeal if, *inter alia*, the case was not amenable to cassation review.

THE LAW

I. QUASHING OF THE FINAL JUDGMENT

17. The applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 that by overturning the final and enforceable judgment given by the Court of Appeal on 7 September 2011 in his favour, the Higher Administrative Court had acted in breach of the principle of legal certainty and, as a result, had deprived him of the higher pension payments he had been receiving following that final judgment. The relevant parts of those provisions read as follows:

Article 6 § 1

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

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 ..."

A. Arguments by the parties

1. The Government

18. The Government alleged that the applicant's complaint of a breach of the principle of legal certainty had been lodged outside the six-month time-limit, which, in their opinion, had started running from the adoption of the ruling by the HAC of 7 November 2011 on the opening of the cassation proceedings. The applicant had been aware of the opening of the cassation proceedings, but had not objected to or participated in them. In any event, his complaint had been unsubstantiated, since the HAC had reasonably quashed the final judgment in order to correct judicial errors and miscarriages of justice, namely the incorrect application of substantive law by the lower courts.

19. Lastly, the Government agreed that the judgment of 7 September 2011 had constituted a "possession" within the meaning of Article 1 of Protocol No. 1 until it had been quashed by the HAC. However, the applicant had failed to initiate enforcement proceedings in that regard while the judgment had still been in force, which implied that the issue had been of no importance to him.

2. The applicant

20. The applicant alleged that the ruling by the HAC of 7 November 2011 on the opening of the cassation proceedings referred to by the Government had been of an interim character and could not be considered to be final for

the purposes of Article 6 and Article 35 § 1 of the Convention. The outcome of the application for a cassation review had not yet been determined and the proceedings could have been closed at any moment. In any event, he had not been aware of the opening of the cassation proceedings and had not received any notifications from the HAC in that respect. Therefore, the HAC's ruling of 7 November 2011 could not have triggered the running of the six-month period, which should have been counted from the date on which the final judgment in the applicant's favour had ultimately been quashed.

21. There had been no need for the applicant to institute any enforcement proceedings in respect of the final judgment of 7 September 2011, since the pension authority had complied with the judgment voluntarily and had been paying him the higher pension payments until 15 October 2013, when his pension amount had been recalculated and decreased following the quashing of the above-mentioned judgment by the HAC.

22. The quashing of the final and enforceable judgment delivered in his favour following a cassation appeal which had no basis in law had irremediably undermined legal certainty and had deprived him of the right to receive the pension payments to which he had been entitled.

B. The Court's assessment

1. Admissibility

(a) Six-month rule

23. The parties disagreed as to the starting-point from which the six-month period was to be calculated (see paragraphs 18 and 20 above).

24. The Court notes that in the specific circumstances of the present case, even assuming that the six months were to be counted from the date when the HAC had accepted for examination the cassation appeal against the final judgment and opened the proceedings, the Government provided no evidence that the applicant had been duly notified of the HAC's ruling on the matter. Contrary to the Government's assertions, the domestic case-file material provided to the Court by the Government contains no proof that any document informing the applicant of the opening of the cassation proceedings had been dispatched to him or had ever even been issued.

25. The Court therefore concludes that applicant cannot be reproached for not having lodged his complaint with the Court within six months from the date of the HAC's ruling referred to by the Government and it accordingly dismisses their objection.

(b) Otherwise as to admissibility

26. The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

(a) Alleged violation of Article 6 of the Convention

27. The Court reiterates that the right to a fair hearing before a court as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of *res judicata*, that is to say, the principle of the finality of judgments, according to which no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, §§ 51 and 52, ECHR 2003-X). The judgment in question can be quashed exclusively in order to rectify an error of truly fundamental importance to the judicial system (see *Shchurov v. Russia*, no. 40713/04, § 21, 29 March 2011).

28. The Court notes that the present case does not concern an extraordinary review of a final and binding judgment in supervisory review proceedings or in the light of newly discovered circumstances or following a renewal of the time-limit for an ordinary appeal (see, among other authorities, *Tregubenko v. Ukraine*, no. 61333/00, §§ 34-38, 2 November 2004; *Pravednaya v. Russia*, no. 69529/01, §§ 27-34, 18 November 2004; and *Ponomaryov v. Ukraine*, no. 3236/03, §§ 40-42, 3 April 2008), but an ordinary review by a cassation court of a judgment delivered by the court of appeal by way of an abridged procedure.

29. As was noted in the text of the judgment of 7 September 2011, Article 183-2 of the Code of Administrative Justice provided that a judgment given by the court of appeal by way of an abridged procedure was final and not subject to appeal (see paragraph 14 above). The final nature of the judgment given by the Court of Appeal in the present case was not disputed by the Government either. Accordingly, by virtue of Articles 211 and 214 of the Code of Administrative Justice, the HAC was expected to reject the defendant's application for a cassation review of the case (see paragraphs 15 and 16 above). Instead, it opened cassation proceedings and reviewed the case, thus undermining legal certainty.

30. The Government did not advance any argument to the effect that the proceedings before the lower courts had been tarnished by a fundamental defect which had justified the course of action taken by the HAC. Indeed, the judgment in the applicant's favour was set aside on the ground that the lower courts had incorrectly applied the substantive domestic law (see paragraphs 18 and 11 above). The Court reiterates its consistent approach in that regard, noting that, in the absence of a fundamental defect in the previous proceedings, a disagreement with the assessment made by the lower courts is

not a circumstance of a substantial and compelling character warranting the quashing of a binding and enforceable judgment and reopening of the proceedings concerning the applicant's claim (see *Dovguchits v. Russia*, no. 2999/03, § 30, 7 June 2007; *Kot v. Russia*, no. 20887/03, § 29, 18 January 2007; and *Luchkina v. Russia*, no. 3548/04, § 21, 10 April 2008).

31. Having regard to the above considerations, the Court finds that by quashing the final and enforceable judgment given by the Court of Appeal on 7 September 2011, the HAC infringed the principle of legal certainty and the applicant's right to a court for the purposes of Article 6 § 1 of the Convention.

32. There has accordingly been a violation of that Article.

(b) Alleged violation of Article 1 of Protocol No. 1

33. The Court reiterates that a debt arising under a judgment which is sufficiently established to be enforceable constitutes a "possession" for the purposes of Article 1 of Protocol No. 1 (see, among other authorities, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B). Quashing such a judgment after it has become final will constitute an interference with the beneficiary's right to the peaceful enjoyment of that possession (see, among other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 74, ECHR 1999-VII, and *Ryabykh*, cited above, § 61).

34. The Court notes that, as a result of the quashing of the final judgment in the applicant's favour, his monthly pension was set at a lower rate. Having regard to its findings relating to the complaint under Article 6 § 1 of the Convention, the Court considers that the quashing of the final judgment in a manner which was incompatible with the principle of legal certainty frustrated the applicant's reliance on a binding judicial decision and deprived him of an opportunity to receive the money he had legitimately expected to receive in accordance with that judgment.

35. In these circumstances, the Court considers that the quashing of the judgment of 7 September 2011[1] placed an excessive burden on the applicant in breach of Article 1 of Protocol No. 1 (see *Ponomaryov*, cited above, §§ 46-47). There has therefore been a violation of that Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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."

[1] Rectified on 25 January 2022: the text was "5 October 2001".

A. Damage

37. The applicant claimed 67,337.76 Ukrainian hryvnias (UAH – the equivalent of 2,022 euros[2] (EUR)) in respect of pecuniary damage. His calculation was based on the difference between the amount of the pension which he had actually received from 15 July 2013 to 1 October 2017 and the amount he would have continued to receive during that period had the final judgment of 7 September 2011 not been quashed. The applicant also claimed EUR 3,000 in respect of non-pecuniary damage.

38. The Government argued that these claims were excessive and unfounded. The applicant had not furnished any documents as evidence of the alleged non-pecuniary damage. The judgment had been quashed because of a fundamental defect in the proceedings. Nothing should be awarded to the applicant, since there had been no violation of his rights.

39. The Court notes that the applicant had been receiving the judicial award in his favour – the recalculated (higher) pension – until the relevant judgment was quashed by the HAC (see paragraph 8 above). Consequently, he had suffered no pecuniary damage until that moment. As regards the period from 15 July 2013 to 1 October 2017, the Court notes that the applicant would have continued receiving the increased pension during that period had the final judgment in his favour not been unlawfully quashed. In these circumstances, and in the absence of the Government's comments on the calculation submitted by the applicant in this respect, the Court considers it appropriate to allow the applicant's claim in respect of the period at issue in full and awards him EUR 2,022 as pecuniary damage, plus any tax that may be chargeable.

40. The Court further considers that, in the particular circumstances of the present case, the finding of a violation of Article 6 of the Convention and Article 1 of Protocol No. 1 constitutes in itself sufficient just satisfaction in respect of non-pecuniary damage.

B. Costs and expenses

41. The applicant also claimed UAH 35,420 (EUR 1,063) for the costs and expenses incurred before the Court, which included UAH 1,420 (EUR 42) paid by the lawyer for translation services.

42. The Government contested those claims.

43. According to the Court's case-law, an applicant is entitled to the reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its

[2] Hereafter, the amounts specified in UAH have been converted into the equivalent amount in euros at a rate applicable on the date of the submission of the claim.

possession and the low level of complexity of the case, the Court considers it reasonable to award the applicant EUR 500 under this head, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

44. 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 application admissible;

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

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

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

5. *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 2,022 (two thousand and twenty-two euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 500 (five hundred 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;

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

Done in English, and notified in writing on 20 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Mārtiņš Mits President