

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

FIFTH SECTION

DECISION

Application no. 4519/11
Tetyana Volodymyrivna FAKAS
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 3 June 2014 as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 10 January 2011,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mrs Tetyana Volodymyrivna Fakas, is a Ukrainian national, who was born in 1966 and lives in Ivano-Frankivsk. The applicant, who had been granted legal aid, was represented by Mr R. Karvatskyy and Mr D. Karapish, lawyers.

2. The Ukrainian Government ("the Government") were represented by their Agent, most recently Ms Nataly Sevostianova, of the Ministry of Justice of Ukraine.

A. The circumstances of the case

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

4. The applicant has been unemployed since 1997. She is married and has three children. On 24 August 2001 the applicant gave birth to her third child. Between November 2001 and July 2004 the applicant received a monthly child allowance of between 35.40 Ukrainian hryvnias (UAH) (November 2001) and UAH 43.14 (July 2004).

5. On 2 July 2006 the applicant instituted proceedings in the Ivano-Frankivsk City Court, claiming unpaid child allowance for the period between September 2001 and July 2004 under the State Assistance (Families with Children) Act (see the "Relevant domestic law" part below). The applicant stated that she was entitled to a monthly child allowance in an amount equal to the monthly "minimum subsistence level" established by law ("*прожитковий мінімум*") for a child aged up to six years. She further referred to Article 46 of the Constitution of Ukraine, which provided that pensions and other types of social payment and assistance that were the recipient's principle sources of subsistence should ensure an income not lower than that level. Between July 2001 and July 2004 she was receiving around UAH 40 (approximately 7 euros (EUR)) a month, whereas the official subsistence level for a child aged up to six years changed from UAH 276.48 (at the material time around EUR 57) in September 2001 to UAH 324.49 (at the material time EUR 50) in August 2004.

6. On 26 February 2007 the court rejected the applicant's claims as lodged outside the one-year time-limit, which runs from the date when the person concerned has learned or should have learned about a breach of his or her rights.

7. The applicant appealed, stating that she had learned about the alleged breach of her rights only in March 2006 after having consulted a lawyer.

8. On 7 June 2007 the Lviv Administrative Court of Appeal quashed the decision of the first-instance court but rejected the applicant's claims as unsubstantiated. The court held that although the applicant was entitled to a monthly allowance in accordance with section 15 of the State Assistance (Families with Children) Act, these amounts had been determined by the State Budget Acts of 2002-04. Therefore, the applicant had received the reduced amounts in accordance with the law.

9. On 3 November 2010 the Higher Administrative Court of Ukraine upheld that decision. The court held that the amounts of the allowance in question had been determined by the State Budget Acts of 2001-2004.

B. Relevant domestic law

1. Legal acts in force between 1 September 2001 and 31 December 2001

10. According to sections 22, 23 and 26 of the State Assistance (Families with Children) Act 1992 (*Закон України «Про державну допомогу сім'ям з дітьми»*), in force until 1 January 2002, child allowance was paid monthly to a child's principal carer (e.g. employed women, unemployed women registered as such etc.) until the child reached the age of three in an amount equal to 100% of the minimum wage.

11. Section 29 of the same Act provided that unemployed women were entitled to child allowance in an amount equal to 50% of the minimum wage until a child reached the age of two.

12. By decision no. 14 of the Cabinet of Ministers of Ukraine of 12 January 2001 "On the Amount of State Assistance [payable] to Families with Children in 2001", the amount of assistance was established as 20% (unemployed women) or 30% (employed women) of UAH 118 (the minimum wage in 2001).

2. Legal acts in force between 1 January 2002 and 31 July 2004

13. According to section 15 of the State Assistance (Families with Children) Act, which was adopted on 22 March 2001 and entered into force on 1 January 2002, until a child reached the age of three child allowance was payable to a non-insured person in an amount equal to the minimum subsistence level for a child aged up to six years.

14. The monthly minimum subsistence level for children aged up to six years was determined yearly by a special law (*Закон України "Про затвердження прожиткового мінімуму"*). It was gradually increased from UAH 307 (2002) to UAH 324.49 (2004).

15. Part 3 of the Final Provisions of the State Assistance (Families with Children) Act provided that the amount of child allowance under section 15 of the Act was to be determined yearly by the Verkhovna Rada of Ukraine as a percentage of the minimum subsistence level with a view to gradually reaching that level. The amount in question could not be lower than 25% of the official subsistence level.

16. The State Budget Acts of 2002-2004 established that child allowance, which was provided for by the State Assistance (Families with Children) Act, was payable in an amount of 50% of the "guaranteed minimum" of the official subsistence level (*"рівень забезпечення прожиткового мінімуму"*). This portion was set as UAH 80 (2002-2003) and UAH 85 (2004) (section 42 of the State Budget Act 2002, section 48 of the State Budget Act 2003, and section 66 of the State Budget Act 2004).

COMPLAINTS

17. The applicant complained under Article 1 of Protocol No. 1 about the courts' failure to award her the amount claimed.

18. The applicant also complained under Article 6 of the Convention about the length of the proceedings in her case and alleged that they were unfair. In particular, she referred to the case of *Pronina v. Ukraine* (no. 63566/00, 18 July 2006) and complained that the courts had ignored her reference to the Constitution of Ukraine. She also cited Article 13 of the Convention.

THE LAW

A. The applicant's complaint under Article 1 of Protocol No. 1

19. The applicant complained about the courts' failure to award her the amount claimed. She relied on Article 1 of Protocol No. 1, which 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."

20. The applicant claimed that she had been entitled to an allowance equal to the minimum subsistence level under the State Assistance (Families with Children) Act.

21. The Government noted that, according to section 15 of the State Assistance (Families with Children) Act, adopted on 22 March 2001, until a child reached the age of three child allowance was payable to a non-insured person in an amount equal to the subsistence level established by law for a child aged up to six years.

22. They further noted that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning, which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests, for instance debts, constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In their view, the issue that needed to be examined was whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive

interest protected by Article 1 of Protocol No. 1 (see *Broniowski v. Poland* (dec.), no. 31443/96, 19 December 2002).

23. Therefore, the Government considered that it should be determined whether the applicant had any legitimate expectations in the present case.

24. The Government further referred to the Court's case-law, according to which "it is within the State's discretion to determine what benefits are to be paid to its employees out of the State budget. The State can introduce, suspend or terminate the payment of such benefits by making the appropriate legislative changes. However, once a legal provision is in force which provides for the payment of certain benefits and the conditions stipulated have been met, the authorities cannot deliberately refuse their payment while the legal provisions remain in force" (see *Kechko v. Ukraine*, no. 63134/00, § 23, 8 November 2005).

25. The amount of the allowance in question had to be determined yearly by the Verkhovna Rada of Ukraine as a percentage of the subsistence level established by law with a view to gradually reaching that level. The amount in question could not be lower than 25% of the subsistence level. This provision was adopted on 22 March 2001 and entered into force on 1 January 2002. Before that date the amount of the allowance was determined by the Cabinet of Ministers of Ukraine.

26. The subsistence level for children up to six years of age was determined by the relevant laws and increased from UAH 307 in 2002-2003 to UAH 324.49 in 2004.

27. The State Budget Acts for 2002-2004 established a child allowance, provided for by the State Assistance (Families with Children) Act, to be paid in an amount of 50% of the guaranteed minimum of the official subsistence level. This portion was set at the amount of UAH 80 (2002-2003) and UAH 85 (2004) (section 42 of the State Budget Act 2002, section 48 of the State Budget Act 2003, and section 66 of the State Budget Act 2004).

28. The above legal acts were public and sufficiently clear for the applicant to be able to act in accordance with them. The applicant used this opportunity and received an allowance in 2001-2004.

29. The Government further noted that the State Budget Acts for 2002-2004 were adopted later than the State Assistance (Families with Children) Act and therefore had precedence over the latter.

30. Therefore, during the reference period the law in force contained no provisions which could have entitled the applicant to receive the allowance in question in the amount claimed. Moreover, her claims were rejected by the courts.

31. The Court notes that Article 1 of Protocol No. 1 comprises three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of

the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, for instance, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 78, ECHR 2005-VI).

32. Where there is an interference by a public authority with the peaceful enjoyment of possessions, it should be lawful and it should pursue a legitimate aim "in the public interest". Any interference must also be reasonably proportionate to the aim sought to be achieved. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see, amongst many other authorities, *Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).

33. With specific reference to social security payments, Article 1 of Protocol No. 1, places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. However, if a Contracting State has in force legislation providing for the payment as of right of a welfare benefit - whether conditional or not on the prior payment of contributions - that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X); the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable (see *Moskal v. Poland*, no. 10373/05, § 39, 15 September 2009).

34. The Court finds that the applicant's – undisputed – claim to child allowance as such falls within the scope of Article 1 of Protocol No. 1, and that it can be considered a "possession" within the meaning of that provision. The question is whether the applicant's claim that she was entitled to a higher amount can constitute a possession within the meaning of the provision, and, if so, whether the failure to make such payment interfered with the possession.

35. The Court recalls that, in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having

a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX). However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (see *Kopecký*, cited above, § 50) *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-I).

36. The Court notes that four months after the applicant gave birth to a child a new law on child allowance entered into force. The amended law established different methods for calculating child allowance, and therefore the Court will examine the applicant's situation under the old and the new law separately.

1. The period between 24 August 2001 and 31 December 2001

37. The Court notes that the applicant gave birth to her child on 24 August 2001. She started receiving child allowance in October 2001. In the national courts the applicant requested recalculation and payment of her child allowance as of September 2001. In her claim the applicant referred to the amended text of section 15 of the State Assistance (Families with Children) Act, which had been adopted on 22 March 2001 but had entered into force on 1 January 2002 only, and to Article 46 of the Constitution of Ukraine.

38. The Court further notes that when rejecting the applicant's claims related to that period the Lviv Administrative Court of Appeal did not refer to any legal acts which set the amount of the allowance in question during this period. The Higher Administrative Court of Ukraine stated that the amount of child allowance was determined by the State Budget Act 2001.

39. It appears, however, that during the period between 1 September 2001 and 31 December 2001 issues related to child allowance payments were covered by the former version of the State Assistance (Families with Children) Act. It is, however, unclear, in the absence of any specification from either the applicant or the domestic courts and the Government, which particular section of the former State Assistance (Families with Children) Act was applicable to the applicant's situation.

40. Moreover, the applicant did not refer in her claim to the law which was in force during the period in question but claimed payments under a law which was not yet in force. It cannot be concluded that Article 46 of the Constitution of Ukraine, referred to by the applicant, taken separately, entitled her to a particular amount of child allowance.

41. Although the national courts did not address the applicant's claim related to the period between September 2001 and December 2001 in more detail, which would enable the Court to see more clearly whether the her

claim was adequately met, the Court draws attention to its supervisory role, which is subject to the principle of subsidiarity (see, *mutatis mutandis*, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 61, ECHR 2007-II). Consequently, the Court is not in a position to apply the national law as a first-instance domestic court and substitute its findings for those of the national courts, which are better placed to resolve disputes on the national level.

42. The Court notes that the applicant was receiving a certain amount of child allowance between September 2001 and December 2001 and there is no evidence that she had an assertable right under domestic law to receive a different amount.

43. The applicant has therefore not made out that she had a "legitimate expectation" to the increased level of child allowance.

2. The period between 1 January 2001 and 31 July 2004

44. The Court notes that following the entry into force of the new State Assistance (Families with Children) Act, in 2002-2004 the amount of child allowance was determined by three legal provisions. According to section 15 of the Act, this amount had to be equal to the subsistence level established by law for a child aged up to six years. At the same time the Final Provisions of the same legal act provided that the amount in question had to be determined yearly by the Verkhovna Rada of Ukraine as a percentage of the subsistence level with a view to gradually reaching that level. The amount in question could not be lower than 25% of the subsistence level. Finally, the State Budget Acts for 2002-2004 set the amount at 50% of the "guaranteed minimum" of that subsistence level. The amount of this portion was set at UAH 80 (2002-2003) and UAH 85 (2004). The applicant received around UAH 40 during the period in question, which is the eighth of the amount provided for in section 15 of the Act.

45. It appears that the relevant provisions of the State Budget Acts for 2002-2004 were adopted in compliance with Part 3 of the Final Provisions of the State Assistance (Families with Children) Act.

46. When examining the applicant's claim the national courts decided that the provisions of the State Budget Act were applicable in the case. Referring again to its subsidiary role, the Court reiterates that it is primarily for the national authorities to interpret and apply domestic law. However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court's case-law (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 190-191, ECHR 2006-V).

47. The Court notes that the laws applied in the applicant's case were adopted under an ordinary procedure by a democratically elected parliament. The Final Provisions of the State Assistance (Families with

Children) Act had expressly vested in the parliament the power to set the amount of allowance payable yearly. Given that the reduction in the allowance for a certain year by virtue of the State Budget provision was clearly made on account of economic considerations for that year, the Court considers that the courts' decision to apply the provisions of the State Budget Act in the applicant's case does not appear to be arbitrary.

48. Thus the Court does not accept that the applicant's claim to child allowance based on the minimum subsistence level amounted to a "legitimate expectation" within the meaning of the case-law on that term or that there was otherwise an interference with her possessions within the meaning of Article 1 of Protocol No. 1

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

B. Other alleged violations of the Convention

50. The applicant complained under Article 6 of the Convention about the length of the proceedings in her case and alleged that they were unfair. In particular, she referred to the case of *Pronina v. Ukraine* (no. 63566/00, 18 July 2006) and complained that the courts had ignored her reference to the Constitution of Ukraine. She also cited Article 13 of the Convention.

51. The Court, having carefully considered the remainder of the applicant's submissions in the light of all the material in its possession, 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.

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

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President