CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 21291/02
by Anastasiya Borisovna KOZAK
against Ukraine

The European Court of Human Rights (Second Section), sitting on 17 December 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application lodged on 10 May 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Anastasiya Borisovna Kozak, is a Ukrainian national who was born in Odessa on 28 November 1948 and lives in Ukraine.

A. The circumstances of the case

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

1. Proceedings before the Illichevck District Court of Odessa

In February 1986 the Illichevsk Municipal Council instituted proceedings against the applicant for the withdrawal of her title to a plot of land and the house built on that land by R.L.P. without authorisation. According to the applicant, this property belonged to her.

On 18 March 1986 the Illichevck District Court of Odessa allowed the Illichevsk Municipal Council's claims.

In 1998 the applicant requested the President of the Odessa Regional Court to initiate supervisory review proceedings and to seek annulment of the decision, since she had not participated in the proceedings as the owner of the property in question.

The Odessa Regional Court rejected the applicant's complaint on 8 April 1998, 23 September 1998 and 28 January 1999, as being unsubstantiated.

In February 1999 the applicant lodged a request with the President of the Supreme Court of Ukraine for a supervisory review of her case.

On 16 March 1999, the Supreme Court of Ukraine instructed the Odessa Regional Court to review the complaints of the applicant and to inform her of the results of the review.

On 12 May 1999, the Odessa Regional Court informed the applicant that it was not possible to review the case because the case-file had been destroyed.

In February 2001 the applicant instituted proceedings in the Illichevsk District Court of Odessa for the reconstruction of the case-file which had formed the basis of the 1986 decision.

On 5 February 2001 the Illichevsk District Court of Odessa decided to reconstruct the case-file.

In May 2001 the applicant lodged an application with the President of the Odessa Regional Court to annul the decision of the Illichevsk District Court of Odessa of 18 March 1986. On 30 May 2001 the Odessa Regional Court refused to initiate supervisory review proceedings on the basis of the applicant's complaints.

2. Proceedings before the Supreme Court

In September 2001 the applicant lodged an application with the Supreme Court of Ukraine in accordance with the procedure prescribed by the

transitional provisions of the Law of 21 June 2001 on the Introduction of Changes and Amendments to the Code of Civil Procedure, for annulment (*касаційна скарга*) of the decision of the Illichevsk District Court of Odessa of 18 March 1986.

On 7 December 2001 a panel of the Supreme Court of Ukraine refused to transfer the case to a chamber for consideration.

B. Relevant domestic law

Law of 21 June 2001 on the Introduction of Changes to the Code of Civil Procedure Civil Procedure

Section 319

The Court of Cassation

"The Court of Cassation is the Supreme Court of Ukraine."

Section 320

Persons having the right to lodge a cassation appeal

"Parties and other persons who participate in court proceedings, and the prosecutor and other persons who have not participated in the proceedings in which the court has decided on their rights and obligations, may lodge a cassation appeal against judgments and rulings adopted by the court of first instance, only in relation to a violation of the substantive or procedural law and rulings and judgments of an appeal court.

The basis for such an appeal is the incorrect application of the norms of substantive law or infringement of the norms of procedural law."

Section 321

The deadlines for lodging an application for annulment

"The deadline for lodging an application by the prosecutor is three months from the date of delivery of the ruling or judgment of the Court of Appeal, or one year from the date of delivery of the ruling or judgment of the court of first instance, if these rulings or decisions have not been appealed against."

Section 329

The procedure for consideration of the issue of transfer of the case for consideration by the judicial chamber

"The issue of the transfer of the case for consideration by a judicial chamber is to be considered by a panel of three judges, in camera, without the participation of the parties to the proceedings.

The case shall be transferred for a hearing by a judicial chamber if one of the judges of the court reaches that conclusion. ...

If the grounds for transfer of the case for consideration by the chamber are not satisfied, the court shall adopt a ruling refusing to allow the applicant's claims."

Section 334

The powers of the Court of Cassation

"The Court of Cassation has the power to:

1) adopt a ruling rejecting the application for annulment;

2) adopt a ruling fully or partly annulling a judicial decision at issue and remitting the case for a re-hearing to the court of first instance or appellate court;

3) adopt a ruling annulling the decision at issue and leaving in force a judgment that was quashed by an appeal court in error;

4) adopt a ruling annulling a decisions at issue, terminating the proceedings in a civil case and refusing to allow an applicant's claims;

5) change the decision on the merits of the case and not remit it for further consideration."

Chapter II. Transitional Provisions

"1. This Law shall enter into force as from 29 June 2001.

2. Laws and other normative acts adopted before this Law entered into force are effective in so far as their provisions do not conflict with the Constitution of Ukraine and this Law.

3. Appeals in civil cases lodged before 29 June 2001 shall be considered in accordance with the procedure adopted for the examination of appeals against local courts' decisions.

4. Protests against judicial decisions lodged before 29 June 2001 shall be sent to the Supreme Court of Ukraine for consideration in accordance with the procedure for consideration of cassation appeals (*касаційних скарг*).

5. Decisions that have been adopted and have entered into force before 29 June 2001 can be appealed against within three months in accordance with the procedure for consideration of cassation appeals (to the Supreme Court of Ukraine)."

COMPLAINTS

The applicant complains under Article 1 of Protocol No. 1 to the Convention that her right to the peaceful enjoyment of her possessions was infringed. In substance, the applicant also complains that the refusal of the Supreme Court of Ukraine to annul and re-open the proceedings in her case amounted to an infringement of Article 6 § 1 of the Convention, and in particular her right of access to a court.

THE LAW

1. The applicant complains that the decision of Illichevsk District Court of Odessa in 1986 deprived her of her property. She relies in this connection on Article 1 of Protocol No. 1 to the Convention, which provides:

> "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."

The Court observes that the applicant's complaint refers to events which took place prior to 11 September 1997, which is the date on which the Convention entered into force in respect of Ukraine and on which the declaration whereby Ukraine accepted the right of individual petition took effect. This part of the application is therefore incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention, and must therefore be rejected in accordance with Article 35 § 4.

2. The applicant complains that her petitions for the initiation of supervisory review proceedings were refused. She further complains that the Supreme Court refused to re-open the proceedings in her case and to annul the 1986 District Court decision. In substance, the applicant relies on Article 6 § 1 of the Convention, which provides as relevant:

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

The Court considers that there are two aspects to this complaint: the first concerns the refusals between 1998 and 2001 to initiate a supervisory review of the 1986 decision; the second concerns the refusal on 7 December 2001 to re-open the proceedings in her case with a view to the annulment of

the 1986 decision, pursuant to the transitional provisions of the Law of 21 June 2001 on the Introduction of Changes and Amendments to the Code of Civil Procedure.

a) In so far as the complaint relates to the refusal to grant the applicant's requests for supervisory review of the 1986 decision, the Court notes that the pursuit of supervisory review proceedings cannot be considered an effective remedy for the purposes of Article 35 § 1 of the Convention, the decision on whether to open such proceedings being based on the exercise of discretionary powers (see *Kucherenko v. Ukraine,* no. 41974/98, inadmissibility decision 04.05.1999). In so far as the applicant impugns the fairness of the refusal to allow supervisory review, her complaint must be considered incompatible *ratione materiae* with the provisions of the Convention, since the Convention does not guarantee a right to re-open proceedings in a case which is the subject of a final decision (see, *inter alia, X. v. Austria,* no. 7761/77, D.R. 14, 8.05.78, pp. 171, 174; *Jose Maria Ruiz Mateos and Others v. Spain*, no. 24469/94, D.R. 79, 2.12.94, p. 141).

It follows that the applicant's complaint under this head must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

b) In so far as the applicant's complaint relates to the refusal of the panel of the Supreme Court of Ukraine on 7 December 2001 to accede to her application for annulment of the 1986 decision, the Court notes that the transitional provisions of the Law on the Introduction of Changes and Amendments to the Code of Civil Procedure of 21 June 2001 provide an opportunity to re-open judicial decisions adopted prior to 29 June 2001 in certain circumstances.

However, as regards final decisions adopted *before* 29 June 2001, as in the present case, the Court does not consider the new cassation channel to be part of the necessary chain of domestic remedies, for the following reasons:

The decision in the applicant's case was *res judicata*, and it was only by virtue of the introduction of the new transitional remedy on 21 June 2001 that she was able to challenge that decision. However, inherent to the Convention are the notions of legal certainty and the rule of law (see e.g. the *Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, § 58, and the *Stran Greek Refineries and Stratis Andreadis v Greece* judgment of 9 December 1994, Series A no. 301-B, § 49). In such circumstances, the applicant's recourse to the Supreme Court to challenge proceedings which had been brought to an end by a final decision must be seen as akin to a request to re-open those proceedings. However, the Court repeats that the Convention does not guarantee a right to re-open proceedings in a case which is the subject of a final decision (see references under point (a) above).

For the above reasons, the Court concludes that the decision of 7 December 2001 of the panel of the Supreme Court refusing to transfer the

applicant's case to a chamber cannot revive the original proceedings, which became final on 18 March 1986 with the decision of the Illichevck District Court of Odessa. Since that decision was rendered before Ukraine's ratification of the Convention, it follows that this part of the application must also be rejected as being incompatible *ratione temporis* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President