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

FIFTH SECTION

DECISION

Application no. 6023/23
Oleksandr Volodymyrovych KULISH
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 15 June 2023 as a Committee composed of:

Lado Chanturia*, President*,
Stéphanie Mourou-Vikström,
Mykola Gnatovskyy*, judges*,

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 6023/23) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 13 January 2023 by a Ukrainian national, Mr Oleksandr Volodymyrovych Kulish ("the applicant"), who was born in 1977, lives in Lugy and was represented by Ms N.M. Kalachyk, a lawyer practising in Vinnytsya;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case mainly concerns the applicant's complaint, under Article 6 of the Convention, that the domestic courts which examined an administrative-offence case against him had lacked impartiality on account of the absence of a prosecuting party in the proceedings.

2. The police drew up an administrative-offence report charging the applicant with an administrative offence under Article 130 § 1 of the Code of Administrative Offences ("the CAO") for driving while displaying signs of intoxication and refusing to undergo a test for intoxication.

3. On 14 September 2014 the Vinnytsya City Court held a hearing in the presence of the applicant's lawyer (according to the court decision the applicant had been summoned but had failed to appear). The lawyer submitted that the applicant was not guilty and asked that the proceedings be

discontinued. The court examined the evidence in the file, notably the administrative-offence report and a video recording of the relevant events.

4. At the close of the hearing the court convicted the applicant as charged, sentenced him to a fine of 17,000 Ukrainian hryvnia (about 445 euros) and suspended his driver's licence for one year, the maximum punishment possible for a first offence of that type within one year (which was the applicant's case).

5. The applicant appealed. In his appeal he contested the factual findings of the first-instance court, the lawfulness of the administrative-offence report and other matters of fact and interpretation of domestic law, and asserted that he was not guilty.

6. On 20 October 2022 the Vinnytsya Regional Court of Appeal, sitting without the parties, upheld the first-instance court's judgment, finding no indication of any errors of fact or law in it and concluding that the evidence in the case file supported the finding of guilt.

THE COURT'S ASSESSMENT

7. In the case of *Mikhaylova v. Ukraine* (no. 10644/08, §§ 15-19, 29 and 56-67, 6 March 2018) the Court found a violation of Article 6 § 1 of the Convention in respect of the impartiality requirement. That finding was made in a situation which was characterised by the following combination of circumstances: (i) an oral hearing was held before the first-instance court; (ii) no party presenting and substantiating the charges, whether a prosecutor or other, was present at the hearing; (iii) the applicant was present at the hearing and pleaded not guilty; (iv) the first-instance court convicted the applicant and sentenced her, for contempt of court, to five days' detention; and (v) no appeal as of right lay against that decision, as provided for by the law at the time.

8. In *Mikhaylova* the Court considered that, in such circumstances, the first-instance court had had no alternative but to carry the burden of supporting the accusation during an oral hearing before it and the Court was not convinced, on the basis of the facts, that sufficient safeguards had been put in place to exclude legitimate doubts as to the adverse effect that such a procedure had had on the trial court's impartiality (ibid., § 64).

9. The Court observes at the outset that the case of *Mikhaylova* concerned a conviction for contempt of court, an offence punishable at the relevant time by – and in the case of Ms Mikhaylova actually punished by – detention. By contrast, in the instant case the proceedings against the applicant concerned a minor traffic-related administrative offence.

10. Even though Article 6 in its criminal aspect may be assumed to apply to such proceedings (see, for example, *Igor Pascari v. the Republic of Moldova*, no. 25555/10, §§ 17-23, 30 August 2016; *Varadinov v. Bulgaria*, no. 15347/08, §§ 39-40, 5 October 2017; and *Slobodyan v. Ukraine*

no. 2511/16, § 17, 9 December 2021 [Committee]), its guarantees do not necessarily apply with their full stringency (see *Marčan v. Croatia*, no. 40820/12, § 37, 10 July 2014).

11. In contrast to the case of *Mikhaylova*, the applicant's case was examined under the provisions of the CAO as amended by the Road Safety Amendment Act of 24 September 2008, which introduced a procedure for appeal as of right to the second level of jurisdiction, namely the Courts of Appeal (see *Gurepka v. Ukraine* (no. 2), no. 38789/04, §§ 16 and 32, 8 April 2010, and *Chernega and Others v. Ukraine*, no. 74768/10, § 98, 18 June 2019).

12. The applicant therefore had at his disposal an appeal procedure, of which he made use.

13. However, Article 35 § 1 of the Convention requires that complaints intended to be made subsequently in Strasbourg should first have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. Where an applicant has failed to comply with those requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014, with further references).

14. The applicant did not put forward any arguments to show that the remedy in question was inadequate or ineffective in respect of the complaint he subsequently made before the Court or that there existed special circumstances absolving him from the requirement to exhaust it.

15. The Court does not perceive any such circumstances either. The Court of Appeal had jurisdiction to deal with questions of law as well as questions of fact. It had the power to examine new evidence if it found that a good reason had been shown for the non-production of such evidence before the first-instance court or that the first-instance court had rejected such evidence without sufficient grounds. The Court of Appeal was empowered to uphold the first-instance judgment, quash it and discontinue the proceedings, quash the judgment and adopt a new judgment, or amend it (Article 294 of the CAO, see *Chernega and Others*, cited above, § 98).

16. By law (Article 294 of the CAO), the Courts of Appeal examine appeals at public hearings in the presence of the parties, unless the parties, having been duly summoned, fail to appear. In the present case, there is no indication of the reason why no public hearing was held before the Court of Appeal.

17. Article 250 of the CAO (see *Mikhaylova*, cited above, § 24) authorises prosecutors to take part in the examination of administrative-offence cases, lodge applications and exercise other procedural rights within the framework of administrative-offence proceedings.

18. Moreover, the Court's case-law demonstrates that, in some legal systems of other Contracting States, in administrative-offence proceedings of the type in issue in the present case the charges may also be presented and substantiated before the courts by officers or representatives of the authority which was responsible for issuing the administrative-offence report (see, for example, *Makarashvili and Others v. Georgia*, nos. 23158/20 and 2 others, § 59, 1 September 2022). There is nothing to indicate that the relevant Ukrainian law prevented the courts from summoning representatives or officers of such authorities for those purposes.

19. In view of those powers of the Court of Appeal there was nothing preventing it from remedying the defect (if any) caused by the absence of a party presenting and substantiating the charges before the first-instance court, by either quashing the judgment for lack of impartiality and acquitting the applicant (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86) or by rehearing the case with the participation of a prosecuting party. The applicant, however, did not raise this complaint in his appeal.

20. Moreover, even were the Court to give the applicant the greatest possible benefit of the doubt and assume that the Court of Appeal would not have put right the relevant defect owing to some peculiarity in the applicant's case, it is in any event apparent that the defence had not raised the issue of the absence of a prosecuting party even before the first-instance court.

21. Therefore, the applicant failed to show that he had taken advantage of the tools available to him at the domestic level for the defence of his rights (see *mutatis mutandis*, *Zahirović v. Croatia*, no. 58590/11, §§ 31-37, 25 April 2013, *Smailagić v. Croatia* (dec.), no. 77707/13, §§ 34 and 36, 10 November 2015, *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, §§ 45-49, 4 June 2019, and, for example, *Pikhotskyy v. Ukraine* (dec.), no. 47866/13, 25 March 2021 [Committee], with further references).

22. Lastly, the applicant also complained, invoking Article 13 and Article 1 of Protocol No. 1 to the Convention, that the domestic courts had erred in their assessment of the evidence and of the domestic law and had wrongly convicted him. The Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by a domestic court unless and in so far as they may have infringed rights and freedoms protected by the Convention. In the determination of whether the proceedings were fair this Court does not act as a court of fourth instance deciding on whether the evidence has been obtained unlawfully in terms of domestic law, on its admissibility or on the guilt of an applicant (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 149, 18 December 2018).

23. It follows that the application does not meet the admissibility criteria set out in Article 35 §§ 1 and 3 (a) and must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 6 July 2023.

Martina Keller Deputy Registrar	Lado Chanturia President