

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

FIFTH SECTION

DECISION

Application no. 45368/12
Svitlana Oleksandrivna MARCHENKO
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 24 March 2022 as a Committee composed of:

Lado Chanturia, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 45368/12) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 12 July 2012 by a Ukrainian national, Ms Svitlana Oleksandrivna Marchenko, who was born in 1976 and lives in Balky ("the applicant") who had been granted legal aid and was represented by Mr Y.L. Boychenko, a lawyer practising in Strasbourg;

the decision to give notice of the application to the Ukrainian Government ("the Government"), represented by their Agent, Mr Ivan Lishchyna, of the Ministry of Justice;

the parties' observations;

Having deliberated, decides as follows:

INTRODUCTION

1. The application concerns complaints by the applicant under Article 8 of the Convention about her and her daughter's eviction and her alleged separation from the four-year-old daughter.

SUBJECT-MATTER OF THE CASE

2. In May 1999 Y.M. (the applicant's future husband) and O.M. (his adult daughter from a previous marriage) were allocated a protected tenancy of a municipally owned flat. Both Y.M. and O.M. were officially registered as residing in the flat.

A. Judicial proceedings concerning the flat

3. In 2006 Y.M. instituted judicial proceedings seeking to cancel O.M.'s registration of her place of residence in the flat.

4. On 30 October 2006 the Golosiyivskyy District Court ("the District Court") heard the case in O.M.'s absence and gave a default judgment cancelling the registration of her residence in the flat.

5. On 26 December 2006 O.M. was deregistered as residing in the flat.

6. On 30 December 2006 the applicant married Y.M., who suffered from alcohol use disorder.

7. In January 2007 the applicant registered her residence in the flat as the new family member of a protected tenant. According to the applicant, she started living in the flat together with Y.M. According to the Government, she had not permanently lived in the apartment (see also paragraph 25 below).

8. On 1 July 2007 the applicant gave birth to a daughter, Sabrina. Y.M was indicated as Sabrina's father on her birth certificate. Sabrina was registered as living in the same flat as a family member of a protected tenant.

9. On 9 June 2008 the District Court set aside its default judgment of 30 October 2006 following an appeal by O.M. and started a fresh examination of the case.

10. In July 2008 O.M. lodged a counterclaim seeking to cancel the applicant's and Sabrina's registration of their residence in the flat. O.M. also sought their eviction.

11. In March 2009 Y.M. died and the applicant replaced him in the proceedings on her own behalf and on behalf of her daughter.

12. After several rounds of proceedings, on 21 December 2010 the District Court found that O.M. had not lost her right to occupy the flat and that her consent should have been sought before the applicant had been registered as residing in the flat. As no such consent had been sought or obtained, the applicant had not acquired any right to have her residence registered at the flat or to live there after Y.M.'s death. However, Sabrina's registration of residence in the flat had been lawful and she had a right to live in the flat, because Y.M. had had the right to register his minor child's residence in the flat without anyone's consent. The court decided that neither Sabrina nor the applicant had to be evicted, and in particular, that the applicant could not be evicted because she could not be separated from her daughter, the lawful occupant of the flat.

13. On 5 October 2011 the Kyiv Court of Appeal reversed the above-mentioned decision and decided that O.M. and Sabrina had a right to live in the flat, and that the applicant had no such right and for this reason had to be evicted.

14. According to the applicant, on 8 October 2011 she, together with her daughter, moved out of the flat. According to the Government, she had not lived there so she had not moved out (see paragraph 8 above). After 8 October 2011 the applicant lived in various homes of her friends and in 2013 she moved to her parents' home in the village of Balky. Sabrina has been living with the applicant's parents since that time, while the applicant works in Kyiv and other cities. She visits her daughter and spends several months a year with her.

15. On 6 February 2012 the Higher Specialised Civil and Criminal Court rejected the applicant's cassation appeal against the decision of 5 October 2011.

16. The applicant complained to the prosecutor's office and the District State Administration that as a result of the decision of 5 October 2011, she had been evicted, but her daughter had been allowed to live in the flat, meaning that the applicant would be separated from her daughter, which was not in the child's best interests.

17. The prosecutors unsuccessfully sought the quashing of the decision of 5 October 2011. The applicant was informed about the prosecutors' efforts and their outcome.

18. In the meantime, the District State Administration appealed to the Higher Specialised Court against the decision of 5 October 2011.

19. On 2 October 2013 the Higher Specialised Court allowed the appeal, quashed the decisions of 21 December 2010 and 5 October 2011 and remitted the case for fresh examination to the first-instance court. According to the applicant, she had not been informed about this development in her case. It was from the Government's observations that the Court and the applicant learned about the judgment of 2 October 2013 and the ensuing proceedings.

20. On 3 June 2014 the first-instance court decided to stay the proceedings in the case until the resolution of a civil case concerning the annulment of the marriage between Y.M and the applicant (see paragraphs 24 and 25 below).

21. The Government provided a copy of the acknowledgement of receipt slip according to which a registered letter had been sent to the address of the applicant's parents in Balky Village. According to the Government, by that letter the District Court had notified the applicant that the hearing in her case had been scheduled for 12 February 2018. The slip does not contain a signature or any other indication that the letter had been received by the applicant. The applicant submitted before the Court that she had not received the notification because at the time she had not been permanently residing in Balky.

22. On 12 February 2018 the District Court allowed O.M. to cancel the registration of the applicant's and her daughter's residence in the flat, having regard to the decision of 25 April 2017 (see paragraph 25 below). In particular, it found that they had never acquired the right to live in or be registered as resident in the flat.

23. The decision of 12 February 2018 was not appealed against and became final.

B. Judicial proceedings concerning annulment of marriage

24. On 25 April 2017 the District Court, acting upon a complaint lodged by O.M., established that the marriage between the applicant and Y.M. was invalid. In the same decision, the court established that Y.M. was not Sabrina's biological father and that he had not given his consent to be registered as her father. The court ordered that Sabrina's birth certificate should not mention Y.M as her father. The court established that there was no evidence that the applicant and Y.M. had lived together as a family in the disputed flat or formed a household. The court took into account written submissions provided by neighbours and relatives of Y.M. These witnesses stated that Y.M. had lived in his flat alone and that they had not seen the applicant or a child living with him.

25. The decision of 25 April 2017 was upheld by the Higher Specialised Court on 15 November 2017 and became final.

THE COURT'S ASSESSMENT

A. Scope of the case

26. The Court notes that, after the communication of the application to the respondent Government, the applicant introduced new complaints. In particular, she complained that she had not been informed about the proceedings in her case after 2 October 2013 and could not participate in them.

27. In the Court's view, the new complaints are not an elaboration of the applicants' original complaints on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

B. Complaint under Article 8 of the Convention

28. The applicant complained that she and her daughter had been evicted from the flat which they had occupied. She also complained that by a decision of 5 October 2011, the court had ordered her to move out, thus separating her from her four-year-old daughter, who had been allowed to reside in the flat.

29. The applicant relied on Article 8 of the Convention which reads as follows:

> "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."

30. The Government submitted that the applicant had abused her right of petition because she had not informed the Court about the decision of the Higher Specialised Court of 2 October 2013 and the ensuing proceedings. In the alternative, they stated, referring to the findings of the domestic courts, that it could not be considered that the flat had constituted the applicant's "home" within the meaning of Article 8 of the Convention. The domestic courts had assessed the proportionality of the applicant's eviction.

31. The applicant disagreed and maintained her complaints. She submitted that she had not been aware of the decision of 2 October 2013 and the ensuing proceedings in her case, and that in any event, those developments had not been in her favour.

32. The Court reiterates that it is primarily the role of the domestic courts to establish the facts of the case (see, *mutatis mutandis*, *De Tommaso v. Italy* [GC], no. 43395/09, § 170, 23 February 2017). In the present case the Court finds no reason to doubt the findings of the domestic courts that the applicant did not establish a household with Y.M. and did not live with him and Sabrina in his flat (see paragraph 25 above). The Court thus concludes that the disputed flat cannot be considered to be the applicant's and her daughter's "home" within the meaning of Article 8 of the Convention (see *Winterstein and Others v. France*, no. 27013/07, § 141, 17 October 2013, with further references). The Court also notes that the applicant did not appeal against the District Court's judgment of 12 February 2018 (see paragraph 24 above). Even assuming that the applicant had learned about the existence of this decision only from the Government's observations submitted to the Court in 2020, she was not precluded from lodging a belated appeal on the points of law explaining why she had not been able to lodge it on time and requesting the renewal of the time-limit for lodging an appeal.

33. The Court further notes that after the decision of 5 October 2011 the applicant continued to live together with her daughter (see paragraph 15 above). The above-mentioned decision did not concern her parental rights and did not preclude her from living with her daughter in a place other than the disputed flat.

34. In view of the above the Court concludes that the application should be declared inadmissible as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

35. In the light of its conclusion above, the Court does not need to rule on the other objections raised by the Government.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 15 September 2022.

Martina Keller Deputy Registrar	Lado Chanturia President