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. 21287/02
by Danyila Semenivna PRYSTAVSKA
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 30 April 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Danyila Semenivna Prystavska, is a Ukrainian national who was born in the L'viv region on 19 April 1948 and currently resides in L'viv, Ukraine.

A. The circumstances of the case

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

In December 1998 the applicant instituted proceedings in the local court of the Shevchenkivsky district of L'viv against the local accommodation office and the Shevchenkivska local authority, seeking an order for repairs to be carried out to her apartment. She also sought compensation for moral damage, since her living conditions were unsatisfactory. On 3 December 1998 the Shevchenkivsky District Court of L'viv allowed her claims in part. On 6 December 2000 the applicant's claims for compensation for moral damage were rejected by the Shevchenkivsky District Court of L'viv. On 12 March 2001 the L'viv Regional Court upheld this decision.

On 16 July 2001 the applicant lodged complaints with the Supreme Court of Ukraine in accordance with the procedure prescribed by the Law of 21 June 2001 on the Introduction of Changes to the Code of Civil Procedure. On 28 November 2001 a panel of three judges of the Supreme Court of Ukraine refused to transfer the applicant's appeal for consideration on the merits to a chamber of the Supreme Court of Ukraine.

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 6 § 1 of the Convention that the domestic courts unfairly refused to allow her claims. She also complains that the Supreme Court of Ukraine refused to re-open the proceedings in her case.

THE LAW

The applicant complains of the unfairness of the proceedings in her case. She claims that the domestic courts unfairly refused her claims. She alleges an infringement of Article 6 § 1 of the Convention, which provides as relevant:

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

The Court considers it appropriate first to determine whether the applicant has complied with the admissibility requirements defined in Article 35 § 1 of the Convention, which stipulates:

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

As to the rule on exhaustion, it recalls that Article 35 § 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged. The purpose of Article 35 § 1 is to afford the Contracting States the

opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Lakatos v. Czech Republic* (dec.), no. 42052/98, 23 October 2001, unreported).

However, an applicant is not obliged to have recourse to remedies which are inadequate or ineffective (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-1V, p. 1210, § 67). It follows that the pursuit of such remedies will have consequences for the identification of the "final decision" and, correspondingly, for the calculation of the starting point for the running of the six-months' rule (see, for example, *Kucherenko v. Unkraine*, no. 41974/98, decision of 4 May 1999).

The Court has no reason to doubt the effectiveness of the new cassation appeal to the Supreme Court of Ukraine for decisions which were adopted *after* 29 June 2001. The Court finds that this remedy affords an individual aggrieved by a court decision adopted after that date a real opportunity to have that decision annulled if the conditions prescribed by the Law of 21 June 2001 on the Introduction of Changes to the Code of Civil Procedure are satisfied (see relevant domestic law above). The cassation appeal must therefore be considered to form part of the chain of domestic remedies which an applicant is required to exhaust in accordance with the relevant procedural requirements as a condition for the admissibility of an application lodged under the Convention.

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 by means of the extraordinary transitional remedy provided for by the Law of 21 June 2001. However, it recalls in this connection that the Convention does not guarantee a right to re-open proceedings in a particular case (cf. No. 10326/83, dec. 6.10.83, D.R. 35, p. 218 with further references); nor is an applicant normally required to avail himself of an extraordinary remedy for the purposes of the exhaustion rule under Article 35 § 1 (see *Kiiskinen v. Finland* (dec.) no.

26323/95, ECHR 1999-V). Therefore, in so far as the applicant impugns the fairness of the refusal of the Supreme Court of Ukraine to re-open the proceedings in her case, her complaint must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4 of the Convention.

It also follows from the above considerations that the decision of 28 November 2001 of the panel of the Supreme Court refusing to transfer the applicant's appeal to a chamber for consideration on the merits cannot bring the application within the six-months time-limit laid down in Article 35 § 1. Moreover, the decision of the L'viv Regional Court of 12 March 2001 must be considered the "final" decision at the domestic level. Since that decision was rendered more than six months before the date of introduction of the application with the Court (30 April 2002), it follows that the application has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. EARLY
Deputy Registrar

J.-P.COSTA
President