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

FIFTH SECTION

DECISION

Application no. 54704/10
Ivan Mykolayovych SEREBRYANSKYY
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 September 2010,

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, Mr Ivan Mykolayovych Serebryanskyy, is a Ukrainian national, who was born in 1926 and lives in Pervomaysk. He had been granted legal aid and is represented by Mr V. Galkin, a lawyer practising in Toshkivka, Ukraine.

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 is entitled to a lump sum payment in accordance with section 12 of the War Veterans Status and Social Protection Guarantees Act (*Закон України «Про статус ветеранів війни, гарантії їх соціального захисту»*), payable to him every year by 5 May (the "Victory Day payment"). In 2004 the applicant received 120 Ukrainian hryvnias (UAH), UAH 250 in 2005, UAH 250 in 2006, UAH 280 in 2007 and UAH 310 in 2008.

5. In March 2008 the applicant instituted proceedings in court, stating that the above-mentioned lump sums should have been equal to five times the minimum pension and claiming the unpaid difference for 2004-08.

6. On 4 August 2008 the Pervomaysky Town Court awarded the applicant UAH 3,870 in unpaid lump sums for 2007-08 in the light of the Constitutional Court decision of 9 July 2007 (see the "Domestic law" part below). The court held that the applicant was entitled to these payments, and the dispute was limited only to their amounts. From 9 July 2007 the applicant was entitled to a payment in the amount of five times the minimum pension. The court noted that the decision of the Constitutional Court had been adopted after the payments were due to be made, but that the Constitutional Court could not adopt a decision which would not be enforced.

7. On 30 October 2008 the Donetsk Administrative Court of Appeal upheld that decision.

8. On 24 June 2010 the Higher Administrative Court of Ukraine quashed those decisions and rejected the applicant's claims. It held that the Constitutional Court decisions did not have retrospective effect. It further rejected the applicant's claims related to 2004-06, because the applicant had missed the one-year time-limit for lodging his claim.

B. Relevant domestic law and practice

9. Section 2 of the War Veterans Status and Social Protection Guarantees Act provides that legal acts which reduce the rights and privileges of war veterans laid down by the Act are null and void.

10. In accordance with section 12 of the War Veterans Status and Social Protection Guarantees Act war veterans shall receive each year by 5 May a lump sum in the amount of five times the minimum pension. In accordance with section 17(1) of this Act those who did not receive the payment before 5 May can still request payment by 30 September of the same year.

11. The State Budget Acts of 2006 and 2007 suspended the above-mentioned provision for 2006 and 2007 respectively. They also set a different level of payment. On 9 July 2007 the Constitutional Court of Ukraine found the amendments in respect of 2007 to be unconstitutional (see *Kolesnik and Others v. Ukraine* (dec.), nos. 57116/10, 74847/10 and

10642/11, § 46, 26 June 2014). It appears that no similar complaint was lodged in 2006.

12. The State Budget Act 2008 amended section 12 of the War Veterans Status and Social Protection Guarantees Act to provide that the amount of the lump sum should be determined by the Cabinet of Ministers. Decision no. 183 of the Cabinet of Ministers of 12 March 2008 set the amount of this payment at UAH 310. On 22 May 2008 the changes introduced by the State Budget Act 2008 were found to be unconstitutional by the Constitutional Court of Ukraine.

13. The minimum pension for 2007-08 was set at UAH 410.06 and UAH 481 respectively.

14. Lastly, the Code of Administrative Justice in force as of 1 September 2005 set a one-year time-limit for lodging claims under the administrative justice procedure.

15. On 1 May 2009 the Higher Administrative Court of Ukraine issued a general analysis of the administrative courts' practice in cases related to the social protection of children of war, war veterans and victims of the Nazi persecutions. The Higher Administrative Court of Ukraine noted that:

> "An analysis of the courts' practice shows that disputes are mainly caused by shortcomings in the legislative regulation of social protection; in particular, since legal acts of equal force exist on the matter, it is difficult to establish which provision has higher legal force and should thus be applied in the dispute in question.
>
> The main legal acts in question include the Constitution of Ukraine, the Children of War Social Protection Act, the War Veterans Status and Social Protection Guarantees Act [...].
>
> The State Budget Acts for 2006-2008 introduced changes to those legal acts, suspending some provisions and reducing some payments.
>
> On 9 July 2007 and 22 May 2008 some changes introduced by the State Budget Acts were found to be unconstitutional by the Constitutional Court of Ukraine."

16. The Higher Administrative Court of Ukraine further noted that the national courts had not always correctly decided which legal act should be applied. In respect of the lump sum payment under section 12 of the War Veterans Status and Social Protection Guarantees Act it noted that in 2006 the provisions of the State Budget Act 2006 were to be applied, since this Act was adopted later than the War Veterans Status and Social Protection Guarantees Act.

17. As for the 2007-2008 payments, the Higher Administrative Court of Ukraine noted that the relevant provisions of the State Budget Acts of 2007-2008 had been found to be unconstitutional. However, since the Constitutional Court decisions could not be applied retrospectively, the relevant persons had "the right to receive the 5 May lump sum payment in the amount set by the War Veterans Status and Social Protection Guarantees Act only after the dates of adoption of the relevant decisions of the Constitutional Court". In particular, only those who did not receive the

relevant payment before 5 May could receive it before 30 September under section 17(1) of the War Veterans Status and Social Protection Guarantees Act.

18. In a letter of 14 August 2009 sent to the heads of the administrative courts of appeal the Higher Administrative Court of Ukraine reiterated its position.

COMPLAINTS

19. The applicant complained about the failure of the courts to award him welfare payments in the amount he claimed. He referred to Article 6 of the Convention.

THE LAW

20. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the above complaint falls to be examined under 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."

A. Complaint related to 2004-2006 payments

21. The Government noted that the applicant had missed the one-year time-limit for lodging his claim with the national courts in respect of the payments in 2004-2006.

22. The Court considers that this could be understood as a non-exhaustion plea. It further considers that the applicant did not lodge his claims related to the 2004-2006 payments before the national courts within the time-limit prescribed by law. This part of the application must thus be rejected for non-exhaustion of domestic remedies in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Complaint related to 2007-2008 payments

23. The applicant reiterated that the practice of introducing changes to legal acts by the State Budget Act had been found to be unconstitutional on

numerous occasions. Moreover, section 2 of the War Veterans Status and Social Protection Guarantees Act provides that legal acts which reduce the rights and privileges of war veterans laid down by the Act are null and void.

24. Therefore, the applicant considered that he had a legitimate expectation to receive the payment in the amount of five times the minimum pension as provided for by section 12 of the War Veterans Status and Social Protection Guarantees Act.

25. The Government submitted that section 12 of the War Veterans Status and Social Protection Guarantees Act provided that the annual lump sum payment should be equal to five times the minimum pension.

26. The Government further pointed out 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).

27. For the Government, the first question was whether the applicant in the present case had a "legitimate expectation". Such an expectation, they considered, could stem from the plurality of legal norms in force at the material time. However, according to the Court's case-law,"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).

28. In view of the above, the Government submitted that in 2007 the applicant had had a legitimate expectation to receive the payment in question in the amount set by the War Veterans Status and Social Protection Guarantees Act, as amended by the State Budget Act 2007, and that he received the relevant amount in April 2007. The decision of the Constitutional Court of Ukraine of 9 July 2007 was adopted later and could not be applied retrospectively. A similar situation had existed in 2008.

29. Consequently, the Government maintained that during those periods the law in force had not contained any provision which could have entitled the applicant to receive a lump sum payment in the amount claimed by him in the domestic courts.

30. The Court reiterates 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).

31. 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).

32. 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).

33. In the present case the courts recognised that the applicant had a right to a yearly Victory Day payment. The very fact that he was entitled to that payment is not contested by the parties. The parties disagree, however, as to its amount.

34. The Court notes that the applicant's – undisputed – claim to a Victory Day payment 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 he was entitled to a specific amount can constitute a possession within the meaning of the provision, and, if so, whether the failure to make such payments 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 does not accept that the applicant's claim to a Victory Day payment in an amount equal to five times the minimum pension amounted to a "legitimate expectation" within the meaning of the case-law on that term. The domestic court dealt with the contentions of the applicant and gave reasons for its decision which cannot be considered arbitrary or unreasonable. It is true, the applicant was affected by the 2007 and 2008 State Budget Acts but the national court found expressly – referring to the non-retroactive character of Constitutional Court decisions - that the applicant had received the benefit to which he was entitled in accordance with the national law at the moment the payment was due.

37. The applicant has therefore not made out that he had a "legitimate expectation" to the Victory Day payment in an increased amount.

38. 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