CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 14198/02
by Lyubov Vasilyevna TATENKO
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 2 October 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 9 March 2002,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

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

The applicant, Ms Lyubov Vasilyevna Tatenko, is a Ukrainian national who was born in 1938 and lives in the city of Donetsk. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, and the Head of the Government Agent's Office, Mrs I. Shevchuk.

A. The circumstances of the case

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

In February 2001 the applicant instituted proceedings in the Prymorsky District Court of Mariupol against the local social welfare department, challenging the refusal of the latter to increase her pension in accordance with the Constitution and the Law on Pensions.

On 22 June 2001 the court found against the applicant. In its decision the court noted in particular that:

> "It is true that the Constitution of Ukraine mentions that the pension should not be lower than the minimum living standard. In this particular case, however, it is not a provision of the Constitution, but a specific legal norm on a pension matter which applies."

The court further concluded that the applicant's pension was in accordance with the Law of Ukraine on Increasing the Minimum Amount of Pensions and decided against the applicant.

The applicant appealed against this decision, claiming that the first instance court misapplied and misinterpreted the relevant pension law and Article 46 of the Constitution.

On 13 August 2001 the Donetsk Court of Appeal upheld the decision of the first instance court.

The applicant applied for leave to make a cassation appeal.

On 5 October 2001 the panel of three judges of the Supreme Court rejected the applicant's request for leave to make a cassation appeal.

B. Relevant domestic law and practice

1. Constitution of Ukraine of 1996

The relevant provisions read as follows:

Article 8

> "... The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed."

Article 46

> "... Pensions and other types of social payments and assistance that are the principal sources of subsistence, shall ensure a standard of living not lower than the minimum living standard (*прожитковий мінімум*) established by law."

Article 147

> "The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine.

The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine, and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine."

Article 150

"The jurisdiction of the Constitutional Court of Ukraine encompasses:

1) deciding on issues of conformity with the Constitution of Ukraine (the constitutionality) of the following:

- laws and other legal acts of the Verkhovna Rada of Ukraine;

- acts of the President of Ukraine;

- acts of the Cabinet of Ministers of Ukraine;

- legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.

These issues are considered on the appeals of: the President of Ukraine; at least forty-five National Deputies of Ukraine; the Supreme Court of Ukraine; the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine; the Verkhovna Rada of the Autonomous Republic of Crimea;

2) the official interpretation of the Constitution of Ukraine and the laws of Ukraine;

On issues envisaged by this Article, the Constitutional Court of Ukraine adopts decisions that are mandatory for execution throughout the territory of Ukraine, that are final and shall not be appealed."

2. The Code of Civil Procedure of 1963 (repealed as of 1 September 2005)

Article 11 of the Code provided that courts were to decide a case on the basis of the Constitution, other legislative acts or the international treaties of Ukraine, under the procedure provided for in the Code.

By Article 202 of the Code a court decision was to set out the facts of the case established by the court, evidence on which the court's conclusion was based, and reasons for admitting or rejecting this or that argument, as well as the laws applied by the court.

3. Law of Ukraine on Pensions of 5 November 1991

Article 19 of this Law provides as relevant:

"Old age pensions shall be established in the amount of 55% of the salary, but not less than the minimum amount of pensions (*мінімальний розмір пенсії*)...

The minimum amount of an old age pension shall be established in relation to the minimum consumer budget (*мінімальний споживчий бюджет*). In case of economic crisis and a fall in production, the minimum amount of pensions shall be established in an amount which is not lower than the basic standard of income (*межа малозабезпеченості*). ...

The maximum amount of an old age pension shall not exceed ... three times the minimum amount of pensions ..."

4. Law of Ukraine on Increasing the Minimum Amount of Pensions (15 July 1997)

This Law set the minimum amount of pensions (*мінімальний розмір пенсії*) at UAH 24.9[1].

5. Law of Ukraine on the Minimum Living Standard (15 July 1999)

The relevant extracts of the Law read as follows:

"This Law in accordance with Article 46 of the Constitution of Ukraine defines the minimum living standard, gives legal basis for its fixation, approval and taking into account in realisation by the State of the constitutional guarantee to sufficient living standard for citizens...

Article 2. Use of the minimum living standard

The minimum living standard shall be used for:

- general assessment of the standard of living in Ukraine, which is a basis for realisation of social policy and development of some State social programmes;

- fixing the amounts of the minimum wage and minimum old age pension, determination of amounts of social welfare, assistance to families with children, unemployment benefit, as well as stipends and other social payments in accordance with requirements of the Constitution of Ukraine and laws of Ukraine..."

6. Law of Ukraine on Fixing the Minimum Living Standard for 2000 (5 October 2000)

The relevant extracts of the Law read as follows:

"Article 1. The minimum living standard for 2000 per person shall be fixed at the amount of 270.1 hryvnas per month...

Article 2. The minimum living standard for 2000 shall be used for general assessment of the standard of living in Ukraine."

7. Resolution of the Plenary of the Supreme Court of Ukraine on the Application of the Constitution of Ukraine on the Administration of Justice (1 November 1996)

The relevant parts of the Resolution read as follows:

"2. Since the Constitution of Ukraine, as stipulated in its Article 8, has the highest legal force, and its norms are norms of direct effect, the courts, in consideration of concrete cases, shall assess the content of any law or any other legal act for its compliance with the Constitution of Ukraine and, where necessary, shall apply the Constitution as an act of direct effect. The court decisions shall be based on the Constitution and the current legislation which does not contradict it.

In case of doubt as to the compliance with the Constitution of Ukraine of a particular law, as applied or applicable in a case, the court, upon the motion of the parties to the proceedings or of its own motion, shall suspend consideration of the

[1]. Around EUR 3.9.

case and apply, by way of a reasoned decision (ruling), to the Supreme Court of Ukraine which, under Article 150 of the Constitution, may raise before the Constitutional Court the issue of compliance of laws and other legal acts with the Constitution. Such decisions can be taken by the first instance court, court of cassation or the court which considers a supervisory review..."

8. Decision of 20 March 2002 of the Constitutional Court in the case on privileges, compensations and guarantees (case no. 1-15/2002).

The case concerned budgetary restrictions proposed in the State Budget of 2001 with respect to privileges, compensations and guarantees foreseen by different legislative acts. The relevant parts of the decision read as follows:

"The Constitutional Court of Ukraine ...

...2. ... considered that, since the third paragraph of Article 46 of the Constitution of Ukraine declared that "pensions and other types of social payments and assistance that are the principal sources of subsistence, shall ensure a standard of living not lower than the minimum living standard established by law", the suspension for 2001 of privileges, compensations and guarantees provided for in the current legislation, led to a violation of constitutional rights of a significant number of Ukrainian citizens.

At the present ... the maximum amounts of an old age pension are respectively 129 and 172 hryvnas...

... At the same time, the Law of Ukraine "on Fixing the Minimum Living Standard for 2001" of 22 March 2001 approved the minimum living standard for 2001 at 311.3 hryvnas a month per person...The Law of Ukraine "on the Minimum Living Standard" of 15 July 1999 no. 966-XIV defines the minimum living standard as a cost value of set of food products sufficient for normal functioning of human body, preservation of its health, as well as minimum set of goods and minimum set of services which are necessary for main social and cultural needs of a person.

With a view to the above, the Constitutional Court considers that some of privileges, compensations and guarantees suspended for 2001 ... are not privileges, compensations and guarantees as such for the people to whom they were granted by law, since their pensions and salaries are significantly lower than the minimum living standard established by law, these privileges, compensations and guarantees serve as a particular social aid, support; supplement to the principles sources of subsistence and are aimed at realisation of a constitutional right of every citizen to sufficient living standard ...

Therefore, suspension of privileges, compensations and guarantees paid from the budgets of all levels ... violates the provisions of ... the third part of Article 46 ... of the Constitution ..."

The Constitutional Court decided that the provisions suspending the privileges, compensations and guarantees paid from the budget were unconstitutional.

COMPLAINTS

The applicant complained that the domestic courts wrongly applied the law and that the Supreme Court of Ukraine did not hold a hearing in her case and rejected her application for leave to make a cassation appeal. She further complained under Article 1 of Protocol No. 1 of the Convention that the domestic authorities denied her right to a pension not lower that minimum living standard.

THE LAW

1. The applicant complained that the domestic courts had misapplied and misinterpreted the relevant pension law and Article 46 of the Constitution. The applicant further complained that the court proceedings before the Supreme Court of Ukraine had not been public and that her application for leave to appeal in cassation had been rejected. She relied in substance 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 and public hearing ... by an independent and impartial tribunal established by law."

The Government maintained that the applicant could have requested the domestic courts to refer the issue of constitutionality of the disputed pension law provisions to the Constitutional Court of Ukraine, but failed to do so. Therefore, the applicant had not exhausted the remedies available to her under domestic law. They also maintained that the issue on constitutionality of legislative acts fell outside the jurisdiction of the ordinary courts and, therefore, the fact that they did not examine such issue of constitutionality did not violate the applicant's right to a fair hearing.

The applicant disagreed. She maintained that it was an obligation of the domestic courts to refer the issue of constitutionality of the disputed pension law provisions to the Constitutional Court of Ukraine. She further claimed that the domestic courts failed to decide her case in conformity with the Law on Pensions and with the Constitution of Ukraine.

The Court is not required to determine the Government's contention that domestic remedies have not been exhausted as the application is in any event inadmissible for the following reasons.

The Court recalls that it is not its task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law. Furthermore, it is the domestic courts which are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in the case

(see, amongst many other authorities, the judgments in *Vidal v. Belgium*, 22 April 1992, Series A no. 235-B, pp. 32-33, § 32 and *Edwards v. the United Kingdom,* 16 December 1992, Series A no. 247-B, § 34). Further, Article 6 of the Convention obliges the domestic courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. Where, however, the courts fail to address a point which is specific, pertinent and important, the provision may be breached (*Pronina v. Ukraine*, no. 63566/00, §§ 23-25, 18 July 2006).

In the instant case, the applicant claimed that the refusal of the Pension Fund to increase her pension had not been in compliance with the Law on Pensions and with the Constitution of Ukraine. Unlike in the case of *Pronina,* the first instance court gave a very clear answer to this claim, namely, that the matter fell to be considered in the light of the Law on Pensions, rather than under the Constitution. Given that it is the role of the domestic courts to interpret and apply domestic law, it is not for the Court to attempt to re-determine the issues.

In so far as the applicant complained about the lack of a hearing before the panel of the Supreme Court, the Court is satisfied that the question whether or not to grant leave to appeal was adequately resolved on the basis of the case file and the written submissions of the appellant, and that, accordingly, the absence of an oral hearing before the panel was justified (see *Stepenska v. Ukraine* (dec.), no. 24079/02, 12 June 2006).

Having regard to the materials submitted by the applicant, the Court finds that the applicant has failed to substantiate any claim that the procedural guarantees contained in Article 6 were breached in her case.

It follows that these complaints must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

2. The applicant raised an issue under Article 1 of Protocol No. 1, alleging a violation of her right to social benefits, namely a higher pension. Article 1 of Protocol No. 1 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."

The Court reiterates 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 of the formal classification in domestic law: certain other rights and interests, for instance debts, constituting assets, may also be regarded as "property rights", and thus "possessions" for the purposes of this provision. The issue that needs to

be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant an entitlement to a substantive interest protected by Article 1 of Protocol No. 1 (see *Broniowski v. Poland* (dec.) [GC], no. 31443/96, § 98, ECHR 2002-X).

The Court has previously held that entitlement to a welfare benefits, even under a non-contributory scheme, may constitute a pecuniary right for the purposes of Article 1 of Protocol No. 1. However, in order to establish such a right, the person concerned must satisfy the various statutory conditions set by the law (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-... and the case-law referred to there). In the instant case, the applicant, having reached the age of retirement, was entitled to a pension under the law. However, the essence of the applicant's complaint is not her entitlement to a pension as such, but her alleged entitlement to a higher pension. In this respect the Court reiterates that the provisions of Article 1 of Protocol No. 1 cannot be interpreted as giving an individual a right to a pension of a particular amount (see *Jankovic v. Croatia* (dec.), no. 43440/98, ECHR 2000-X).

Moreover, in the Court's view, the Ukrainian legislation (see the Domestic law Part) does not contain any provision which could lead to the conclusion that the applicant had a right or at least a legitimate expectation to receive the pension in the amount she had claimed (*see and compare*, *Kechko v. Ukraine* (dec.), no. 63134/00, 5 April 2005 and *Kechko v. Ukraine*, no. 63134/00, § 6, 8 November 2005). Therefore, in Convention terms, it cannot be said that the applicant had an enforceable claim to, or a legitimate expectation of, a higher pension.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

Accordingly, the application of Article 29 § 3 of the Convention in the present case must be discontinued.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President