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. 27517/02
by Lyudmila Grigoryevna VOROBYEVA
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 7 July 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Lyudmila Grigoryevna Vorobyeva, is a Ukrainian national who was born in 1937 and resides in Kharkov.

A. The circumstances of the case

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

In May 2001 the applicant instituted civil proceedings in the Dzerzhinsky District Court, Kharkov, against her former employer seeking reinstatement, unpaid salary and compensation. On 12 September 2001 the court found in part for the applicant. On 17 January 2002, the Kharkov Appellate Court dismissed an appeal by the applicant.

The applicant did not appeal in cassation against the decisions to the Supreme Court of Ukraine.

B. Relevant domestic law

A third level of jurisdiction, to be part of the ordinary judicial procedure, was introduced into the Ukrainian legal system by the Law of 21 June 2001 on the Introduction of Changes to the Code of Civil Procedure of Ukraine, which came into force on 29 June 2001. Under the new provisions, the parties are entitled to appeal against the decision of the first instance court and the appellate court to the Supreme Court of Ukraine, acting as a court of cassation.

Under the second paragraph of Article 320 of the Code of Civil Procedure (hereafter the "CCP"), the basis for a cassation appeal is the incorrect application of the norms of substantive law or the infringement of the norms of procedural law.

Article 329 of the CCP provides for the filter of cassation appeals by a panel of three judges of the Civil Chamber of the Supreme Court who decide whether or not leave to appeal should be granted. No participation of the parties is foreseen at this stage of proceedings. Leave to appeal is granted unless the panel unanimously decides otherwise.

Under Article 334 of the CCP, the Supreme Court, acting as the court of cassation, has the power to:

1) reject the cassation appeal;

2) fully or partly annul the judicial decision at issue and remit the case for a re-hearing to the court of first instance or appellate court;

3) annul the decision at issue and leave in force a judgment that was quashed by an appeal court in error;

4) annul the decision 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.

The system became effective as of 29 June 2001 and concerned cases pending before first and second instance courts.

Under the transitional provisions of the same law, any final decision in a civil case could be appealed under the new cassation procedure within three months of the new law coming into force, that was from 29 June to 29 September 2001.

COMPLAINT

The applicant complained under Article 6 § 1 of the Convention that the domestic courts had misapplied national law in considering her case, so she had not had a fair hearing. She submitted that the reason why she had not appealed in cassation was that the cassation appeal procedure was neither ordinary nor effective.

THE LAW

The applicant complained that she had not had a fair hearing before the domestic court, invoking Article 6 § 1 of the Convention, which provides, in so far 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 Court notes that in the present case the applicant did not appeal in cassation to the Supreme Court of Ukraine, because she considered this appeal to be both extraordinary and ineffective.

The Court recalls that, according to Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

The Court reiterates that this rule only requires normal recourse by an applicant to such remedies which are likely to be effective, sufficient and available. For a remedy to be effective, it must be, *inter alia*, capable of remedying the criticised state of affairs directly. Moreover, a remedy must exist with a sufficient degree of certainty to be regarded as effective (see, *mutatis mutandis*, application no. 26384/95, Decision of 26 June 1996, D.R. 86 p. 143).

In that connection, the Court notes that a third level of jurisdiction was introduced into Ukrainian civil procedure on 29 June 2001. According to the relevant provisions of the CCP, a cassation appeal similar to that found in other member States of the Council of Europe is available to each party in a civil case and does not depend on the discretionary power of a State authority.

The Court further notes that decisions of the lower courts given after 29 June 2001, as in the applicant's case, could not be challenged in cassation indefinitely, but only within a period prescribed by law. Therefore, this procedure does not undermine the principle of legal certainty, one of the fundamental aspects of the rule of law, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question (cf., *Brumărescu v. Romania*, no. 28342/95, 28.10.1999, §§ 61).

In the instant case, the remedy already existed when the applicant's case was still pending before the court of first instance. The applicant must have been aware of this remedy and was entitled to use it, after the appellate court had given its decision on 17 January 2002. Moreover, the applicant alleged that the norms of substantive law had been incorrectly applied by the domestic courts, which is a matter falling within the jurisdiction of the court of cassation.

The Court considers, therefore, that an appeal in cassation can be considered an effective remedy for lower court decisions taken after 29 June 2001.

The Court reiterates that the existence of mere doubts as to the prospects of success of a particular remedy, which is not obviously futile, is not a valid reason for failing to exhaust domestic remedies (see the *Van Oosterwijck v. Belgium* judgment of 6 November 1980, Series A no. 40, p. 18, § 37, and *A.B. v. the Netherlands*, no. 37328/97, 29.01.2002, § 72).

The applicant accordingly cannot be regarded as having exhausted all domestic remedies available to her under Ukrainian law.

It follows that the application must be rejected under 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