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

FIFTH SECTION

Application no. 66191/10
Lidiya Volodymyrivna ZHURA against Ukraine
lodged on 5 November 2010

STATEMENT OF FACTS

The applicant, Ms Lidiya Volodymyrivna Zhura, is a Ukrainian national, who was born in 1956 and lives in Kyiv.

A. The circumstances of the case

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

In 1999 the Kyiv city authorities expropriated a land plot and a house from the applicant's father, Mr K., as a new line of the underground railways was to be constructed there. Instead, according to an agreement with Mr K., they provided him with a comparable land plot and undertook to construct a house for him.

The land plot previously belonging to Mr K. was allocated to "Kyivskyy Metropoliten" communal company, which, in turn, entrusted the house construction to "Kyivmetrobud" joint stock company (see also the summary of the 25 December 2007 judgment below for some additional details).

In November 2001 Mr K. initiated civil proceedings against "Kyivskyy Metropoliten", "Kyivmetrobud" and the local authorities. Relying on technical expert reports, he submitted that the new house had been built with breaches of the construction standards and was not suitable for living. He therefore claimed adequate compensation for the property expropriated from him.

In May 2002 Mr K. died. The applicant inherited his property and entered the proceedings as his legal successor.

"Kyivskyy Metropoliten" brought a counter-claim against her seeking eviction of her family from the house with a view to its capital repairs.

On 1 June 2004 the Svyatoshynskyy District Court of Kyiv ("the Svyatoshynskyy Court") allowed the applicant's claim in part and awarded her 624,664 Ukrainian hryvnias (UAH; then equivalent to about 94,000 euros (EUR)) as compensation in respect of the pecuniary damage

(costs of the capital repairs of the house as evaluated by experts at the time) and UAH 100,000 (equivalent to EUR 15,000 at the time) as compensation in respect of the non-pecuniary damage. It was established that the house had been constructed with various defects and that its condition, already considered as state of emergency, was still deteriorating. "Kyivmetrobud", which was responsible for the construction defects, had to pay 70% of both above amounts and "Kyivskyy Metropoliten", which was considered responsible for the applicant's plight to a smaller extent, had to pay 30% of the award. The court relied, in particular, on Article 440 the Civil Code 1963 on tort liability.

On 26 August 2004 the Kyiv City Court of Appeal ("the Court of Appeal"), in allowing the appeals of "Kyivmetrobud" and "Kyivskyy Metropoliten", quashed the aforementioned judgment and delivered a new one rejecting the applicant's claim and allowing the counter-claim of "Kyivskyy Metropoliten". It held that the pecuniary damage inflicted on the applicant consisted of the costs of the capital repairs of the house and could be compensated by such capital repairs at the expense of "Kyivmetrobud" and "Kyivskyy Metropoliten". The Court of Appeal therefore obliged the applicant not to hinder the defendants in repairing her house.

On 7 December 2005 the Supreme Court quashed both decisions of the lower courts and remitted the case for a fresh examination to the first-instance court. Relying on Article 46 of the Land Code 1990 and Resolution no. 13 of the Plenary Supreme Court of 25 December 1996, it concluded that the courts had not established the circumstances of the case in a comprehensive manner, had not defined the nature of the legal relations in dispute, had not established and had not stated in the decisions who had caused the damage to the applicant and who should bear the responsibility for its compensation.

On 19 September 2006 the Kyiv Scientific Research Institute of Forensic Expert Examinations of the Ministry of Justice ("the Institute of Forensic Expert Examinations") delivered a report of its forensic construction-technical expert evaluation of the applicant's house constructed by "Kyivmetrobud". It assessed the condition of the foundations, the walls and the floors as a state of emergency. The report concluded that permanent safe living in the house was impossible. It also held that the origin of all the defects was in the flawed construction of the house in breach of various standards and norms.

On 18 May 2007 the applicant and "Kyivskyy Metropoliten" withdrew their claims against each other, and the proceedings were terminated in that part.

On 20 November 2007 the Institute of Forensic Expert Examinations delivered a report on additional forensic construction-technical expert evaluation of the applicant's house. It reiterated its earlier findings (see above) and stated that the condition of the house was constantly deteriorating. The costs of its capital repairs were assessed at UAH 1,266,636 (equivalent to EUR 169,000).

On 25 December 2007 the Svyatoshynskyy Court allowed the applicant's claim in part and awarded her UAH 1,266,636 as compensation in respect of the pecuniary damage (costs of the capital repairs of the house) to be paid by "Kyivmetrobud". It noted that "Kyivskyy Metropoliten" was a

communal company subordinated to the Kyiv City State Administration. Despite the fact that the statutory activities of the former did not include designing and construction of residential houses, in 1999 the latter had entrusted it, in particular, with the construction of a new house for the applicant's father. With a view to rectifying that error, in 2000 the Kyiv City State Administration had established a "city headquarters for coordination of the activities related to the extension of the underground railways". Subsequently, the mentioned headquarters had assigned the construction of the house in question to "Kyivmetrobud". The court held that, of all the actors involved, only "Kyivmetrobud" had not complied with its obligations. It therefore had to compensate the applicant for the pecuniary damage under Article 1210 of the Civil Code 2003. Her claim for compensation in respect of non-pecuniary damage was rejected.

On 27 August 2008 the Court of Appeal quashed the aforementioned judgment and delivered a new one rejecting the applicant's claims. It agreed with the argument of "Kyivmetrobud" that the first-instance court had erroneously relied on Article 1210 of the Civil Code which concerned extra-contractual obligations, whereas there had been a contract for the house construction between "Kyivmetrobud" and "Kyivskyy Metropoliten". The ultimate liability therefore lied with the latter. However, the applicant had withdrawn her claim against "Kyivskyy Metropoliten". The appellate court relied on Articles 46 and 89 of the Land Code 1990, as well as Resolution no. 13 of the Plenary Supreme Court of 25 December 1996.

The applicant appealed on points of law. She submitted that the land plot previously belonging to her father had been withheld for public needs, but not for the profit of "Kyivskyy Metropoliten" as a separate legal entity. It was established that "Kyivskyy Metropoliten" had not even had the competence to take charge of the house construction and this had in fact been done by the local authorities. The applicant emphasised that neither she nor her father had objected to the chosen compensation for the withheld land and property. The only claim from their side concerned the deficient construction of the new house by "Kyivmetrobud". There had been no contract between the applicant (or her father) and "Kyivmetrobud". If there had been one between "Kyivskyy Metropoliten" and "Kyivmetrobud", the applicant or her father had not been a party to it. Accordingly, "Kyivmetrobud" had no contractual obligations vis-à-vis the applicant, but was liable in tort. The applicant therefore insisted that Article 1210 of the Civil Code 2003 was applicable to her case.

On 4 March 2009 the Supreme Court found for the applicant. By a final ruling, it quashed the judgment of 27 August 2008 and upheld that of 25 December 2007. The Supreme Court agreed with the findings of the first-instance court that "Kyivmetrobud" had to compensate the damages to the applicant under Article 1210 of the Civil Code 2003.

On 15 April 2009 the bailiff service initiated the enforcement proceedings.

On an unspecified date "Kyivmetrobud" lodged a request for an extraordinary review of the case under Article 354 of the Code of Civil Procedure. It alleged unequal application by the Supreme Court of Article 5 of the Civil Code 2003 concerning the temporal validity of civil legislation. More precisely, "Kyivmetrobud" submitted that in its ruling of 7 December

2005 the Supreme Court had applied Article 440 of the Civil Code 1963, whereas in the ruling of 4 March 2009 it had applied Article 1210 of the Civil Code 2003 to the same case.

On 16 June 2009 the Supreme Court accepted the above request for examination. It also ruled that the enforcement proceedings be stayed.

On 6 May 2010 the Supreme Court, in written proceedings, allowed the request of "Kyivmetrobud". By the same final ruling it quashed its previous decision of 4 March 2009 as erroneous and upheld the appellate court's judgment of 27 August 2008. It held that the Civil Code 1963 – in particular, its Article 440 on tort liability – was to be applied to the dispute in question. The Supreme Court went on to state that Article 1210 of the Civil Code 2003, which had entered into force on 1 January 2004, applied to contractual obligations. As no such contractual obligations existed between the claimant (the applicant) and the defendant ("Kyivmetrobud"), that provision was inapplicable.

The applicant and her family live in the dilapidating house constructed by "Kyivmetrobud". She provided the Court with eleven colour photos of the exterior and the interior of that house. The photos show multiple cracks in the walls, some wide enough to see through. The floor in one of the rooms has sunken in deeply.

B. Relevant domestic law and practice

1. Civil Code of the Ukrainian SSR 1963 (repealed on 1 January 2004 with the entry into force of the new Civil Code)

Article 440 read as follows in the relevant part:

> "Damage inflicted on ... the property of a citizen ..., shall be compensated in full by the person who had inflicted that damage [tortfeasor] ..."

2. Civil Code of Ukraine 2003 (in force since 1 January 2004)

Article 5 stipulates that civil legislation shall regulate relations which emerged following its entry into force. It further provides that, if civil relations emerged earlier and were regulated by a civil legal act subsequently repealed, the new civil legal act shall apply to the rights and duties which emerged after its entry into force.

The Code consists of sections. Its Section III "Specific types of obligations" is divided into two Subsections: Subsection 1 "Contractual obligations" and Subsection 2 "Extra-contractual obligations". The latter contains Chapter 83 "Compensation for damage". The mentioned chapter is further divided into separate Titles, among which there is Title 3 "Compensation for damages caused by defects of goods and works (services)" consisting of Articles 1209 to 1211.

Article 1209 provides that a seller, a manufacturer of a good or an executor of works (services) shall compensate to an individual or a legal entity the damage caused by functional, technological or other defects of goods or works (services). It is immaterial whether the manufacturer or executor is guilty or whether he/she/it is bound by a contract vis-à-vis the victim.

Article 1210 reads as follows in the relevant part:

"2. Damages caused by defects of works (services) shall be compensated by the executor of [those works or services]."

Paragraph 4 of the "Final and transitional provisions" reads as follows:

"The Civil Code of Ukraine shall apply to the civil relations which emerged after its entry into force.

As regards the civil relations which emerged prior to the entry into force of the Civil Code of Ukraine, this Code shall apply to the rights and duties which emerged or continue to exist after its entry into force."

3. Code of Civil Procedure 2004 (as worded in May 2010)

Article 354 provides that judicial decisions on civil matters may be reviewed on the ground of exceptional circumstances, in particular, in case of unequal application of the same legal provision by the cassation court.

4. Law "On property" 1991 (repealed on 24 July 2007)

The relevant part of Article 52 read as follows:

"It is acceptable to terminate the property rights to a house or other buildings or property on the ground of the withholding of the land plot on which they are situated only in the cases and under the procedure established by the legislation of Ukraine and subject to prior compensation for the damages [in full amount according to the [actual value of the property at the time of the termination of the property rights]."

5. Land Code 1990 (repealed on 1 January 2002)

Article 46 provided:

"A land plot belonging to a citizen may be withheld (bought out) for state or public needs after the [local] council of people's deputies provide him/her, if he/she wishes so, with an equivalent land plot and after the construction by the enterprises, institutions or organisations, for which the [previously owned] land plot is allocated, of residential [...] and other buildings instead of those withheld, as well as after complete compensation for all other damages under Part IV of this Code".

Pursuant to Article 89 (within Part IV), damages to landowners were to be compensated by the enterprises, institutions or organisations to which the withheld land plot had been allocated.

6. Land Code 2001 (in force since 1 January 2002)

Article 157 reads as follows in the relevant part:

"1. Compensation for damages to landowners shall lie with executive authorities, bodies of local self-government, individuals and legal entities using [respective] land plots...

2. The Cabinet of Ministers of Ukraine shall establish the procedure for definition and compensation for damages to landowners ..."

Paragraph 1 of Part X "Transitional provisions" reads as follows:

"Decisions on ... withholding (buying off) of land plots, which were delivered by the respective authorities, but have not been executed by the entry into force of this Code, shall be executed pursuant to this Code."

7. Housing Code 1983 (with amendments)

Article 50 stipulates that residential premises provided to citizens must comply with sanitary and technical requirements.

Under Article 171, owners of residential houses, which were demolished following withholding of the respective land plot for state or public needs, shall be compensated the value of those houses or provided with other accommodation according to the established rules.

8. Resolution no. 13 of the Plenary Supreme Court "On the practice of judicial application of the land legislation during adjudication of civil cases" of 25 December 1996 (repealed on 16 April 2004)

Paragraph 13 read as follows:

> "When deciding on claims concerning compensation for damages to landowners ..., courts should bear in mind that the damages related to a withholding (buying off) of a land plot ... under the established procedure shall be compensated, pursuant to Articles 88 and 89 of the Land Code, by the enterprises, institutions or organisations, for which the [previously owned] land plot is allocated ..."

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the quashing of the final judicial decision in her favour was contrary to the *res judicata* principle, that the Supreme Court examined the case under the extraordinary review procedure without offering her the possibility to make any submissions having thus breached the principle of equality of arms, and that it advanced deficient reasoning for its ruling of 6 May 2010.

She also complains under Article 6 § 1 of the Convention about the length of the proceedings.

The applicant next complains that her family is forced to live in dangerous and uncomfortable conditions in the dilapidating house, which they cannot fully enjoy as their home.

She further alleges that her property rights under Article 1 of Protocol No. 1 were violated. More specifically, she complains about the failure of the State to duly compensate for the property expropriated from her father, the quashing of the final judicial award to her and the ambiguity of the pertinent national legislation.

Lastly, she complains under Article 13 of the Convention that she did not have effective domestic remedies in respect of the above complaints.

QUESTIONS TO THE PARTIES

1. Did the applicant have a fair hearing in the determination of her civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular, were the principles of legal certainty and equality of arms respected as regards the reconsideration of the final judgment in her favour? Did the Supreme Court give adequate reasons for its ruling of 6 May 2010?

2. Was the length of the proceedings in compliance with the "reasonable time" requirement of Article 6 § 1 of the Convention?

3. Has there been an interference with the applicant's peaceful enjoyment of possessions within the meaning of Article 1 of Protocol No. 1? If so, was that interference lawful for the purpose of Article 1 of Protocol No. 1? Did it impose an excessive individual burden on the applicant within the meaning of that Article? In answering this question, the Government are invited to comment on the quashing of the final judicial decision of 4 March 2009 in the applicant's favour and, more broadly, on the compensation by the State for the property expropriated from the applicant's father for public needs.

4. Has the State complied with its positive obligations under Article 8 of the Convention as regards the applicant's right to respect for her home?

5. Did the applicant have at her disposal an effective domestic remedy for the above complaints (as regards the Article 6 complaint – the length-of-proceedings issue), as required by Article 13 of the Convention?