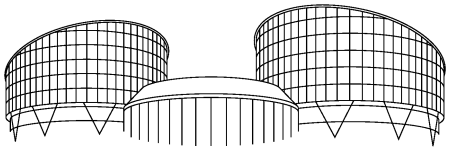

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF OSOVSKA AND OTHERS v. UKRAINE

(Applications nos. 2075/13 and 4 others – see appended list)

JUDGMENT

This version was rectified on 4 September 2018
under Rule 81 of the Rules of Court.

STRASBOURG

28 June 2018

This judgment is final but it may be subject to editorial revision.

In the case of Osovska and Others v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:

Erik Møse, *President,*
Síofra O'Leary,
Lətif Hüseynov, *judges*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 5 June 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in five applications (nos. 2075/13, 19306/13, 28131/13, 21478/14 and 56107/14) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Ukrainian nationals ("the applicants"), whose personal details and the dates on which they introduced their applications are set out in Appendix I.

2. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna from the Ministry of Justice.

3. The applicants alleged that by renewing the procedural time-limit for ordinary appeal without a proper justification and quashing the final judgments in their cases the domestic courts infringed the principle of legal certainty.

4. On 7 December 2016 the above complaint was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On the dates specified in Appendix I the applicants obtained judgments of the first-instance courts which ordered recalculation of their pensions at a higher rate. In some cases the State Bailiff's Service commenced execution of the judgments.

6. The defendant pension authorities lodged their appeals outside the statutory limitation period and requested, without providing good reasons (see paragraphs 9-12 and 29-31 below), that the time-limit for lodging an appeal be renewed. The administrative courts of appeal renewed the time-limit (in some applications after a considerable lapse of time), quashed

the judgments of the first-instance courts and rejected the applicants' claims or discontinued the proceedings.

7. Other information relevant to the applicants' cases is contained in Appendix I.

II. RELEVANT DOMESTIC LAW

Code of Administrative Justice of 6 July 2005

8. The relevant extracts of the Code of Administrative Justice in force at the material time provided the following.

9. Paragraph 6 of Article 108 provides that if the claim had been returned to the claimant, he or she is not precluded from lodging that claim repeatedly in accordance with the procedure established by law.

10. Article 183-2 of the Code provides, *inter alia*, that claims concerning social payments can be considered by summary procedure without summoning the parties. The day after the adoption of a judgment by a first-instance court, copies thereof must be sent to the parties by registered mail. The judgment may be appealed against before a court of appeal. The decision of the court of appeal shall be final.

11. Article 189 provided that the rules envisaged by Article 108 should also apply to an appeal which did not comply with the procedural requirements.

12. The revised paragraph 4 of Article 189 with effect from 15 January 2012 envisages that examination of an appeal shall be deferred if it was lodged outside the [10-day] time-limit established by Article 186 and the appellant had not requested the renewal of that time-limit or advanced reasons which had been found inadequate. It allows a thirty-day time-limit running from the date of receipt of the above decision when a request for renewal of the time-limit can be lodged or other reasons can be indicated in the request. A judge rapporteur is to refuse a leave to appeal if no request to renew the time-limit had been lodged or the reasons had been found inadequate. Regardless of the reasons for not complying with the procedural time-limit, a court is to refuse a leave to appeal if a State body or a public authority lodged an appeal more than one year after the challenged decision had been pronounced.

13. Article 191 of the Code provides that parties other than the appellant have the right to reply to an appeal within the time-limit set by a judge of an administrative court of appeal in the ruling opening the appeal proceedings.

14. Other provisions of relevant domestic law are set out in *Ustimenko v. Ukraine* (no. 32053/13, §§ 27-35, 29 October 2015).

THE LAW

I. JOINDER OF THE APPLICATIONS

15. Having regard to the similarity of the applications, the Court decides that, in the interests of the proper administration of justice, the applications should be joined in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1

16. Relying on Article 6 of the Convention, the applicants complained that the renewal of the time-limit for ordinary appeals and the quashing of final judgments in their cases had violated the principle of legal certainty. Ms G. Tardanska (application no. 28131/13) also complained that the court of appeal judgment in her case had had the effect of infringing her right to the peaceful enjoyment of possessions as ensured by Article 1 of Protocol No. 1.

17. The relevant parts of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 provide as follows:

Article 6 (right to a fair hearing)

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 1 of Protocol No. 1

"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 ..."

A. Admissibility

1. The parties' submissions

18. The Government argued that in applications by Ms T. Storozhenko (application no. 21478/14) and Ms V. Kashuk (application no. 56107/14) the applicants failed to make use of their right to reply to an appeal lodged by the defendant authorities (see paragraph 13 above for relevant domestic law) and to plead that the respective appeals had been lodged out of time.

19. The applicants made no comments on the above objection.

2. The Court's assessment

20. The Court observes that Ms T. Storozhenko (application no. 21478/14) had appealed on points of law to the Higher Administrative Court of Ukraine pleading breach of the principle of legal certainty by the unjustified renewal of the time-limit by the court of appeal. Nonetheless, the Higher Administrative Court of Ukraine refused a leave to appeal on points of law on the ground that the applicant has not demonstrated the existence of arguable grounds which would have justified review of her case. It follows that the higher court has proved to provide no redress in respect of this complaint in the applicant's case. The Court finds therefore no need to examine whether the applicant raised the same complaints before the court of appeal.

21. As to application by Ms V. Kashuk (no. 56107/14), it was the procedural decision of 27 May 2014 to grant leave to appeal by which the proceedings were reopened and which entailed the alleged violation of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *The Mrevli Foundation v. Georgia* (dec.), 25491/04, 5 May 2009). That decision was not susceptible to appeal on points of law. The Court notes that the provision of domestic law referred to by the Government concerns the procedural right *vis-a-vis* the other party, namely the right to comment on an appeal. The wording of that provision does not suggest that the applicant was entitled to lodge comments on, or objections to, the court decision which was, moreover, not amenable to appeal on points of law as noted above. Furthermore, the Government have not provided any example of domestic jurisprudence in which a plea of unjustified extension of the time-limit for lodging an ordinary appeal had been successfully relied on in a situation comparable to that of the applicant. The Court therefore rejects the Government's preliminary objection on the ground of non-exhaustion.

22. The Court notes that the above-mentioned complaints made by the applicants are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

23. The applicants maintained their complaints.

24. The Government argued that the domestic courts when opening the appeal proceedings acted in line with the domestic legislation. They relied, in particular, on paragraph 6 of Article 108 of the Code of Administrative Justice which taken in combination with Article 189 did not prevent an appellant from lodging an appeal repeatedly (see paragraphs 9 and 11 above). They further submitted that the courts of appeal intended to correct

judicial errors and miscarriages of justice made by the courts of lower instance in the present group of cases.

1. Article 6 § 1 of the Convention

25. The Court notes that in the applicants' cases the judgments of the first-instance courts confirming the applicants' entitlement to increased pensions had become final and enforceable and, in some cases, the enforcement proceedings had commenced. Those judgments were overturned on appeal, in certain cases after significant lapse of time, with the result that the applicants' pensions have been reduced.

26. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). Legal certainty presupposes respect for the principle of *res judicata* that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX).

27. The Court has previously accepted that although it is primarily within the domestic courts' discretion to decide on any extension of the time-limit for appeal, such discretion is not unlimited. The domestic courts are required to indicate the reasons. In every case, the courts should verify whether the reasons for extending a time-limit for appeal can justify the interference with the principle of *res judicata*, especially when the domestic legislation does not limit the courts' discretion as to either the time or the grounds for extending the time-limits (see *Ponomaryov v. Ukraine*, no. 3236/03, § 41, 3 April 2008 and *Ustimenko v. Ukraine*, no. 32053/13, § 47, 29 October 2015).

28. Turning to the present applications, the Court notes that the domestic courts had either referred to "valid reasons" (application no. 2075/13) to justify the extension of the time-limit without any explanation or assessment of those reasons, or had confined themselves to the finding that the appeals had been lodged in compliance with the procedural formalities without advancing any reasons whatsoever.

29. The reason, if any, relied on by the defendant pension authorities in their requests for renewal of the time-limit was, in most applications, a late service of a first-instance court judgment. The case files, however, contained no proof (such as cover letters, postal records etc.) confirming those allegations, which is particularly striking for cases in which an appeal had been lodged with a considerable delay (more than 3 years in the application of Ms V. Kashuk (no. 56107/14), 2 years and 5 months in the application of Ms T. Storozhenko (no. 21478/14). Nor is there any indication that such proof had been submitted before the domestic courts.

30. Moreover, in application by Ms G. Tardanska (no. 28131/13) the enforcement of the judgment had commenced and the defendant authorities had complied with the respective order to recalculate pension, which suggests that they were aware that the proceedings in the case had ended with a decision which became final.

31. Lastly, the Court cannot overlook that in some applications – the applications of Ms T. Osovska (no. 2075/13) and Ms G. Tardanska (no. 28131/13) – the appeals had been lodged repeatedly after the first appeal had been returned to the defendant authority as no convincing reasons for renewal of the time-limit had been established.

32. Having regard to the above, the Court finds that the domestic courts have provided no reasons which would have demonstrated that there had been circumstances of a substantial and compelling character which would have justified a re-opening of the applicants' cases (see *Ryabykh*, cited above, § 52).

33. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. Article 1 of Protocol No. 1

34. Ms G. Tardanska (28131/13) complained relying on Article 1 of Protocol No. 1 that the court of appeal judgment in her case had had the effect of infringing her right to the peaceful enjoyment of possessions.

35. The Government acknowledged that the sum awarded under the first-instance court judgment in the applicant's case constituted a "possession", but argued that it ceased to exist from the moment when that judgment was quashed on appeal.

36. The Court reiterates that a debt arising under a judgment which is sufficiently established to be enforceable constitutes a "possession" for the purposes of Article 1 of Protocol No. 1 (see, among other authorities, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B). Quashing such a judgment after it had become final will constitute an interference with the beneficiary's right to the peaceful enjoyment of that possession (see *Brumărescu*, cited above, § 74 and *Ryabykh*, cited above, § 61).

37. The Court notes that as a result of the reopening of the proceedings the applicant's monthly pension was established at a lower rate. Having regard to its findings relating to the complaint made under Article 6 § 1 of the Convention, the Court considers that quashing of the final judgment in a manner which had been incompatible with the principle of legal certainty has frustrated the applicant's reliance on a binding judicial decision and has placed an excessive burden on her (see *Ponomaryov*, cited above, §§ 46-47).

38. There has therefore been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

40. Ms T. Storozhenko (application no. 21478/14) claimed 3000 euros (EUR) in respect of pecuniary and non-pecuniary damage without specifying the amounts claimed under each head. Her calculation of the compensation claimed is based on the difference in the pension amounts which she would have continued to receive had the judgment not been quashed and the pension she actually received after the quashing.

41. With regard to award in respect of pecuniary damage in the cases that concerned quashing of the final judgments, the Court has previously made a distinction between the cases in which the judgments in the applicants' favour had been executed before quashing and those in which the domestic awards had remained unenforced. No award in respect of pecuniary damage was made to those applicants who had obtained execution of the judgments awarding them certain monthly benefits before those judgments were quashed (see *Streltsov and other "Novocherkassk military pensioners" cases v. Russia*, nos. 8549/06 and 86 others, § 85, 29 July 2010 and *Pugach and Others v. Russia*, nos. 31799/08 and 7 others, §§ 37-38, 4 November 2010). The Court notes that in application no. 21478/14 the judgment in the applicant's favour had been executed until it was quashed on appeal. The Court has also held that it cannot restore the power of the domestic judgments nor assume the role of the national authorities in awarding social benefits for the future (see *Pugach*, cited above, § 37). Following the approach taken in the *Streltsov* and *Pugach*

cases cited above, the Court dismisses the claims for pecuniary damage made by Ms T. Storozhenko (no. 21478/14).

42. The other applicants submitted no claims for pecuniary damage. Accordingly, the Court makes no award under this head in the present case.

2. Non-pecuniary damage

43. Most applicants claimed various amounts in respect of non-pecuniary damage. The Government argued that these claims were unfounded. The Court considers that the applicants must have sustained non-pecuniary damage which the finding of violation of the Convention does not suffice to remedy. Ruling on an equitable basis, the Court awards EUR 500 in respect of non-pecuniary damage to those applicants who submitted claims under this head as specified in Appendix II.

B. Costs and expenses

44. Some of the applicants also claimed reimbursement of the costs and expenses incurred in the proceedings before the domestic courts and/or the Court.

45. The Government contended that the amounts claimed had been excessive and unsubstantiated.

46. The Court reiterates that according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award Ms T. Storozhenko (application no. 21478/14) EUR 40 in respect of the postal expenses incurred in the domestic proceedings and proceedings before the Court.

C. Default interest

47. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints concerning reopening of the proceedings and quashing of the judgments which became final and enforceable admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention with respect to all the applicants as regards infringement of the principle of legal certainty;

4. *Holds* that there has been a violation of Article 1 of Protocol No. 1 with respect to the applicant in application no. 28131/13;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months, the amounts indicated in Appendix II, plus any tax that may be chargeable to them, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on those amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 28 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President

APPENDIX I

No.	Application no.	Lodged on	Applicant name date of birth place of residence	First-instance court and date of judgment	Date of the appeal	Court of appeal and date of decision	Date of a higher specialised court ruling on appeal on points of law, if applicable
1.	2075/13	19/12/2012	**Tetyana Yevgenivna OSOVSKA** 21/01/1952 Garkushyntsy	Zhovtnevyy District Court of Mariupol, 06/06/2011	31/10/2011	Donetsk Administrative Court of Appeal, 06/12/2012	No right to appeal.
2.	19306/13	12/02/2013	**Natalya Nikolayevna LITVINENKO** 11/05/1951 Mariupol	Zhovtnevyy District Court of Mariupol, 29/09/2010	24/11/2010	Donetsk Regional Court of Appeal, 26/10/2011	29/10/2012
3.	28131/13	28/03/2013	**Galyna Oleksiyivna TARDANSKA** 13/10/1954 Zhytomyr	Korolyovskyy District Court of Zhytomyr, 26/09/2011	21/11/2012	Zhytomyr Administrative Court of Appeal, 22/01/2013	No right to appeal.
4.	21478/14	04/03/2014	**Tamara Oleksiyivna STOROZHENKO** 10/07/1948 Svitlovodsk	Svitlovodsk Local Court of Kirovograd Region, 24/06/2010	06/11/2012[1]	Dnipropetrovsk Administrative Court of Appeal, 13/11/2013	30/01/2014
5.	56107/14	10/11/2014	**Valentyna Vasylivna KASHUK** 27/04/1957 Konotop	Konotop Local Court of Sumy Region, 06/04/2011	08/05/2014	Kharkiv Administrative Court of Appeal, 18/06/2014	No right to appeal.

1. Rectified on 4 September 2018: the date was “28/11/2012”.

APPENDIX II

No.	Application no. and the applicant's name	Award in respect of non-pecuniary damage		Award in respect of costs and expenses	
		Sum claimed	Court's award	Sum claimed	Court's award
1.	**2075/13** **Tetyana Yevgenivna OSOVSKA**	1000	500	No claim	0
2.	**19306/13** **Natalya Nikolayevna LITVINENKO**	600	500	230	0
3.	**28131/13** **Galyna Oleksiyivna TARDANSKA**	No claim	0	No claim	0
4.	**21478/14** **Tamara Oleksiyivna STOROZHENKO**	3000	500	150	40
5.	**56107/14** **Valentyna Vasylivna KASHUK**	No claim	0	No claim	0