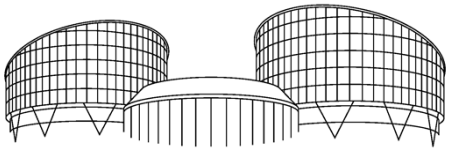

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BEREZOVSKIYE v. UKRAINE

(Application no. 22289/08)

JUDGMENT

STRASBOURG

7 November 2019

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

In the case of Berezovskiye v. Ukraine,

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

Síofra O'Leary, *President,*
Ganna Yudkivska,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 15 October 2019,

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

PROCEDURE

1. The case originated in an application (no. 22289/08) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Ukrainian nationals, Mr Vitaliy Vasilyevich Berezovskiy and Mr Aleksandr Vitalyevich Berezovskiy ("the applicants"), on 26 April 2008.

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

3. The applicants complained under Article 6 § 1 of the Convention of a violation of their right of access to a court.

4. On 8 November 2016 notice of the complaint was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Mr Vitaliy Vasilyevich Berezovskiy, was born in 1964. He died on 10 February 2014 (see also paragraphs 17-20 below).

6. The second applicant, Mr Aleksandr Vitalyevich Berezovskiy, is the son of the first applicant. He was born in November 1988 and lives in Odessa.

7. In June 2002 the first applicant lodged a claim with the national courts seeking payment, under the Status and Social Protection of Chernobyl Victims Act, of his annual health-improvement lump sum (five minimum wages). He also claimed the compensation allegedly due to his son, who was then underage (monthly payments of one and a half times the minimum wage payable to a child who suffered from the Chernobyl nuclear disaster) and compensation for non-pecuniary damage to be awarded to both himself and his son in equal amounts.

8. On 12 December 2003 the Suvorovskyy District Court of Odessa rejected the claim.

9. On 3 June 2004 the Court of Appeal of the Odessa Region upheld the decision of the first-instance court.

10. On 2 July 2004 the first applicant sent an appeal in cassation by registered mail to the Suvorovskyy District Court of Odessa, in accordance with the legal procedure provided for by Article 323 of the Code of Civil Procedure, pursuant to which a cassation appeal was to be lodged with the court of first instance that had considered the case.

11. On 5 July 2004 a letter containing the notice of cassation appeal was delivered to the Suvorovskyy District Court of Odessa. A certain E. signed the acknowledgement of receipt. The first-instance court's stamp on the cassation appeal indicates 6 July 2004 as the date of receipt.

12. On 10 November 2006 the Supreme Court, acting in accordance with the provisions of the Code of Administrative Procedure, referred the case for examination to the Higher Administrative Court.

13. On 1 November 2007 the Higher Administrative Court rendered a ruling refusing to examine the cassation appeal on the basis that it had been lodged on 6 July 2004 and thus outside the statutory time-limit.

14. The first applicant appealed to the Supreme Court, asking it to quash the decision of the Higher Administrative Court. He explained that he had sent the registered letter with acknowledgement of receipt on 2 July 2004 and attached the pre-paid return slip on which the date of 2 July 2004 was indicated. He also attached the acknowledgement of receipt form indicating 2 July 2004 as the date of posting and 5 July 2004 as the date of delivery.

15. On 26 December 2007 the Supreme Court of Ukraine refused to reopen the proceedings.

II. RELEVANT DOMESTIC LAW

16. The relevant extracts from the Code of Civil Procedure of 1963, as worded at the material time, read as follows:

Article 87. Expiry of the procedural time-limit

"... The time-limit shall not be considered to have been missed if, before its expiry, the claim or documents required by the court or monetary sums have been submitted to a post office."

Article 321. Time-limit for lodging an appeal in cassation

"1. An appeal in cassation ... shall be lodged within one month of the date of pronouncement of the ruling or judgment of the appellate court ..."

Article 323. Procedure for lodging an appeal in cassation ...

"An appeal in cassation ... shall be lodged via the court of first instance where the case file is stored [which considered the case] ..."

THE LAW

I. LOCUS STANDI OF THE FIRST APPLICANT'S WIFE

17. After the death of the first applicant, on 18 March 2014 his wife, Ms Berezovskaya, informed the Court that she wished to pursue the application in his stead.

18. The Government disagreed, arguing that the rights under Article 6 were non-transferrable.

19. The Court reiterates that in cases where an applicant has died after the application was lodged, the next of kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case. The decisive point is not whether the rights in question are or are not transferable to the heirs wishing to pursue the procedure, but whether the heirs can in principle claim a legitimate interest in asking the Court to deal with the case on the basis of the applicant's wish to exercise his or her individual and personal right to lodge an application with the Court (see, for instance, *Garbuz v. Ukraine*, no. 72681/10, § 28, 19 February 2019).

20. The Court sees no reason to doubt that the applicant's wife has a legitimate interest in doing so and holds that she has standing to continue the present proceedings in the first applicant's stead. However, reference will still be made to the first applicant throughout the ensuing text.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. The applicants complained that they had been denied access to the court of cassation on the erroneous grounds that they had failed to comply with the procedural time-limit for lodging a cassation appeal, in violation of Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

22. The Government argued that the first applicant had not asked the Higher Administrative Court to extend the time-limit for lodging a cassation appeal and had thus failed to exhaust the available domestic remedies. The Government also objected that the second applicant did not have victim status, as he had not been a party to the domestic proceedings.

23. The applicants did not provide any comments in reply.

24. Since the first applicant claimed that he had submitted the cassation appeal within the statutory time-limit, the Court is not convinced that he had to apply to the Higher Administrative Court for an extension of that

time-limit. For that reason, the Court dismisses the Government's argument about non-exhaustion of domestic remedies.

25. In response to the Government's arguments about the second applicant's lack of victim status, the Court reiterates that it interprets the concept of "victim" autonomously and irrespective of domestic concepts, such as those concerning an interest or capacity to act, even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (see *Micallef v. Malta* [GC], no. 17056/06, § 48, ECHR 2009). The Court observes that the claim pursued by the first applicant before the national courts was also in the interest of the second applicant, when he claimed monetary compensation and compensation for non-pecuniary damage allegedly due to his son. At that time, the second applicant was a minor and thus lacked legal capacity to act on his own. The domestic proceedings concerned the determination of his rights and he thus can claim to be a victim of a violation of Article 6 of the Convention.

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

27. The applicants maintained their complaint.

28. The Government repeated the findings of the Higher Administrative Court that the date on which the notice of cassation appeal had been lodged was 6 July 2004. They did not comment on the pre-paid return slip or on the acknowledgement of receipt.

29. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights or obligations brought before a court or tribunal. That right of access is not absolute and it is subject to limitations, which, however, must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see *Naït-Liman v. Switzerland* [GC], no. 51357/07, §§ 112-14, 15 March 2018, and *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 229-30, ECHR 2012). Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their civil rights and obligations (see *Zubac v. Croatia* [GC], no. 40160/12, § 80, 5 April 2018). Furthermore, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015). On the other hand, the risk of any mistake made by a State authority must be borne by the State, and errors must not be

remedied at the expense of the individual concerned (see, for instance, *Šimecki v. Croatia*, no. 15253/10, § 46, 30 April 2014).

30. Under Articles 87 and 321 of the Code of Civil Procedure of 1963, an appeal in cassation against a decision of a court of appeal is to be lodged within a month of pronouncement of that decision. In the present case, the judgment of the Court of Appeal of the Odessa Region was pronounced on 3 June 2004, so that the time-limit for lodging an appeal in cassation expired on 3 July 2004.

31. It is clear from the case file that the cassation appeal against the judgment at issue was posted and considered lodged in terms of domestic law on 2 July 2004. The decision of the Higher Administrative Court of 1 November 2007 refusing to examine it on the grounds that it had been lodged out of time was therefore based on a mistake.

32. The Court also notes that the Supreme Court did not analyse the first applicant's evidence in support of his account of the date on which he had sent his notice of cassation appeal on 2 July 2004, and that the Government did not comment on that fact.

33. Taking those factors into consideration, the Court concludes that by refusing to examine the cassation appeal, the Higher Administrative Court penalised the applicants for an error that was attributable not to them but to the judicial authorities, thus depriving the applicants of their right of access to a court (see, for comparison, *Gavrilov v. Ukraine*, no. 11691/06, § 25, 16 February 2017; *Šimecki*, cited above, § 46; and *Sotiris and Nikos Koutras ATTEE v. Greece*, no. 39442/98, § 21, ECHR 2000-XII).

34. For these reasons, there has been a violation of the applicants' right of access to a court within the meaning of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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. Damages

36. The applicants made no claim for damages. Accordingly, the Court makes no award under this head.

B. Costs and expenses

37. The applicants claimed the equivalent of 14 euros (EUR) for the expenses incurred in relation to postal services.

38. The Government objected, finding that the claim was ill-reasoned as the payment slips did not specify the applicants' name or mention the number of the present case.

39. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 14 covering costs and expenses for the proceedings before the Court.

C. Default interest

40. 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. *Holds* that the first applicant's wife has standing to pursue the present application in his stead;

2. *Declares* the complaint concerning lack of access to court admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay jointly the second applicant and Ms Berezovskaya, within three months EUR 14 (fourteen euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to them, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 7 November 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Síofra O'Leary
Deputy Registrar	President