



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

FIFTH SECTION

CASE OF NATALIYA MIKHAYLENKO v. UKRAINE

(Application no. 49069/11)

JUDGMENT

STRASBOURG

30 May 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nataliya Mikhaylenko v. Ukraine,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

André Potocki,

Paul Lemmens,

Aleš Pejchal, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 30 April 2013,

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

PROCEDURE

1. The case originated in an application (no. 49069/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Ms Nataliya Petrovna Mikhaylenko (“the applicant”), on 29 July 2011.

2. The applicant, who had been granted legal aid, was represented by Ms A. Ivanković Tamamović, a lawyer from the Mental Disability Advocacy Center, a non-governmental organisation based in Budapest. The Ukrainian Government (“the Government”) were represented by their Agent, Mr N. Kulchytskyy.

3. The applicant alleged under Article 6 of the Convention that it had not been possible for her to apply directly to a court for restoration of her legal capacity. She further complained under Article 14 of the Convention that she had been subjected to discriminatory treatment on account of having no direct access to a court.

4. On 27 April 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1971 and lives in Simferopol.

6. The applicant was born with congenital facial injury and was diagnosed with a “midline cranial cleft”. Between 1990 and 1997 she repeatedly underwent surgery in a clinic in the United States of America, following which her cranial disorders were mostly cured. However, owing to the extensive surgery, the applicant developed a mental illness. Since then she has needed regular supervision in the United States clinic.

7. In 2007 the applicant’s father applied to the Simferopol District Court of the Autonomous Republic of Crimea (“the District Court”), seeking to have her deprived of legal capacity on the ground that she suffered from serious mental illness.

8. Following a request by the District Court, on 5 June 2007 a forensic psychiatric expert issued an opinion stating that the applicant suffered from a chronic mental illness, namely paranoid schizophrenia, which prevented her from comprehending and controlling her actions.

9. On 10 July 2007 the District Court deprived the applicant of her legal capacity. The decision was not appealed against and became final.

10. On 21 November 2007 the applicant’s sister was assigned as the applicant’s guardian (*опікун*).

11. Gradually, the applicant’s mental health improved, so that on 3 April 2008 she took up a position at a local factory.

12. In 2009 the applicant’s guardian applied to the District Court for restoration of the applicant’s legal capacity. However, on 30 October 2009 the application was dismissed without being considered on the merits owing to the guardian’s repeated failure to appear in court.

13. On 1 November 2010 the applicant applied on her own to the District Court, seeking restoration of her legal capacity. She specified that Article 241 § 4 of the Code of Civil Procedure, which did not provide for the right for an incapacitated person to submit such an application, was not compatible with international legal standards and was discriminatory.

14. On 4 November 2010 the District Court returned the application to the applicant without considering it on the merits, noting that, by virtue of Article 121 § 3 and Article 241 § 4 of the Code of Civil Procedure, the applicant was not entitled to submit such an application.

15. On 12 January 2011 the court of appeal dismissed the applicant’s appeal against the decision of 4 November 2010 noting that Article 241 § 4 of the Code of Civil Procedure did not provide the applicant with the right to lodge an application for restoration of her legal capacity. The District Court had therefore lawfully returned the application without considering it on the merits, as required by Article 121 § 3 of that Code. On 12 March 2011 the court of cassation dismissed as unfounded the applicant’s appeal on points of law.

II. RELEVANT DOMESTIC LAW

A. Civil Code of 16 January 2003

16. Article 67 of the Code provides that a guardian is obliged to take measures for the protection of the civil rights and interests of the person who is under his or her guardianship.

B. Code of Civil Procedure of 18 March 2004

17. Article 121 § 3 of the Code provides that a court cannot accept a claim for consideration on the merits if it has been submitted by a person deprived of legal capacity.

18. Article 241 § 4 of the Code provides that a court decision declaring a physical person entirely incapable may be quashed and the legal capacity of that person may be restored by another court decision provided that the person has been cured or his or her mental state has significantly improved. Such a decision is to be taken upon an application submitted by the guardian or the guardianship authority (*орган опіки та піклування*) and must be supported by relevant conclusions by a forensic psychiatric expert.

C. Order of 26 May 1999 (No. 34/166/131/88) approved by the State Committee on Family and Youth Matters, the Ministry of Education, the Ministry of Health and the Ministry of Labour and Social Policy

19. This Order requires the guardianship authorities, among other things, to supervise the activities of guardians and to take measures for the protection of the rights of persons who have been placed under guardianship.

THE LAW

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

20. The applicant complained under Article 6 § 1 and Article 13 of the Convention that it had not been possible for her to apply directly to a court for restoration of her legal capacity.

21. The Court considers that this complaint should be examined solely under Article 6 § 1, which provides, in so far as relevant:

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

A. Admissibility

1. The parties' submissions

22. The Government contended that the applicant's complaint had been submitted outside the six-month period laid down in Article 35 § 1 of the Convention. They noted that the range of persons entitled to apply to a court for restoration of legal capacity was clearly defined by provisions of domestic law and that the courts could not act contrary to those provisions. The Government further submitted that the applicant had had no other effective remedies. They therefore suggested that the six-month period had started to run from the date when she had become aware that her application for restoration of legal capacity had been dismissed by the District Court.

23. The applicant submitted that the six-month rule did not apply as her complaint referred to a continuing situation created as a result of the domestic legislation.

2. The Court's assessment

24. According to the Court's settled case-law, where no domestic remedy is available the six-month period runs from the act alleged to constitute a violation of the Convention; however, where it concerns a continuing situation, it runs from the end of that situation (see, for example, *Kucheruk v. Ukraine*, no. 2570/04, § 171, 6 September 2007).

25. The Government have admitted that the applicant had no direct access to a court as a result of the domestic procedural rules and that there was no effective remedy in respect of her complaint. The procedural rules in question remained in force on the date on which she lodged her application with the Court. It follows that the applicant's complaint concerned a continuing situation which did not come to an end as a result of her unsuccessful attempt to secure access to a court. The Government's objection is therefore dismissed.

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

B. Merits

27. The applicant asserted that her right of access to a court had been restricted, in breach of Article 6 § 1 of the Convention.

28. The Government maintained that the application was inadmissible.

29. The Court notes that under the domestic legislation it was for the applicant's guardian or the guardianship authority to raise the issue of restoration of her legal capacity before a court. However, the guardian's application was dismissed without being considered on the merits as the guardian did not appear before the court. The applicant had no procedural status in those proceedings and could not influence them. Subsequently, the applicant's personal application for restoration of her legal capacity was not considered either, because the Code of Civil Procedure did not afford her the right to lodge such an application. At the same time, the Code did not indicate that a declaration of legal incapacity was subject to any automatic judicial review, and the duration for which that measure was ordered in respect of the applicant was not limited in time.

30. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 132, 13 October 2009).

31. The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*ibid.*; see also, among many other authorities, *Cordova v. Italy (no. 1)*, no. 40877/98, § 54, ECHR 2003-I, and the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

32. Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is

particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under that Article (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII).

33. The Court observes at the outset that none of the parties disputed the applicability of Article 6 in the present case. The applicant, who has been deprived of legal capacity, complained that she did not have access to a court with regard to the restoration of her legal capacity, a matter which was directly decisive for the determination of her “civil rights and obligations” (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 233, ECHR 2012). Article 6 § 1 of the Convention is therefore applicable in the instant case.

34. It also appears to be common ground that, by virtue of clear and foreseeable rules of domestic law, the applicant could not personally apply to a court for restoration of her legal capacity. It remains to be determined whether the restriction on the applicant’s right of access to court pursued a legitimate aim and was proportionate to it.

35. As noted above, the right of access to the courts is not absolute and requires by its very nature that the State should enjoy a certain margin of appreciation in regulating the sphere under examination (see *Ashingdane*, cited above, § 57). The Court acknowledges that restrictions on the procedural rights of a person who has been deprived of legal capacity may be justified for that person’s own protection, the protection of the interests of others and the proper administration of justice.

36. The Court further notes that it is for the State to decide how the procedural rights of a person who has been deprived of legal capacity should be ensured at domestic level. In this context, States should be able to take restrictive measures in order to achieve the aims identified in the preceding paragraph.

37. On the other hand, the Court has stated that the importance of exercising procedural rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity (see *Stanev*, cited above, § 241).

38. The Court notes that the approach pursued by domestic law, according to which an incapacitated person has no right of direct access to a court with a view to having his or her legal capacity restored, is not in line with the general trend at European level. In particular, the comparative analysis conducted in the case of *Stanev* (cited above, §§ 88-90) shows that seventeen of the twenty national legal systems studied provided at the time for direct access to the courts for persons who have been declared fully incapable (*ibid.*, § 243).

39. Moreover, as regards the situation in Ukraine, the general prohibition on direct access to a court by that category of individuals does not leave any room for exception. At the same time, the domestic law does not provide safeguards to the effect that the matter of restoration of legal capacity is to be reviewed by a court at reasonable intervals. Lastly, in the present case it has not been shown that the relevant domestic authorities effectively supervised the applicant's situation, including the performance of duties by her guardian, or that they took the requisite steps for the protection of the applicant's interests.

40. In the light of the above considerations, the Court notes that in the present case the applicant's inability to directly seek the restoration of her legal capacity resulted in that matter not being examined by the courts. The absence of judicial review of that issue, which seriously affected many aspects of the applicant's life, could not be justified by the legitimate aims underpinning the limitations on access to a court by incapacitated persons. The facts of the present case lead the Court to conclude that the situation in which the applicant was placed amounted to a denial of justice as regards the possibility of securing a review of her legal capacity. There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

41. The applicant complained that she had been subjected to discriminatory treatment on account of having no direct access to a court. She relied on Article 14 of the Convention, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

42. The Court notes that this complaint is closely linked to the one examined above and must therefore likewise be declared admissible. However, given the Court's findings under Article 6 of the Convention, the present complaint does not give rise to any separate issue. Consequently, the Court holds that it is not necessary to examine the complaint under Article 14 of the Convention separately.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 16,000 euros (EUR) in respect of non-pecuniary damage.

45. The Government submitted that the claim was unsubstantiated.

46. The Court considers that the applicant must have suffered distress and anxiety on account of the violation it has found. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

47. The applicant claimed 398.21 Ukrainian hryvnias (UAH) in respect of postal expenses and UAH 1,000 to cover expenses for local travel and printing and copying material. She further claimed EUR 8,734.55, less the amount already paid by way of legal aid, in respect of expenses incurred in connection with her legal representation before the Court. The applicant asked that any award in respect of the latter claim be paid directly to the bank account of the Mental Disability Advocacy Center.

48. The Government submitted that the claim for UAH 398.21 was not sufficiently substantiated and the claim for UAH 1,000 was not supported by any evidence. As to the claim for EUR 8,734.55, it had to be rejected as unfounded.

49. According to the Court’s 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. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 38 in respect of postal expenses incurred by the applicant and the sum of EUR 1,000 to reimburse the fees and expenses of the applicant’s lawyer. The latter amount is to be paid directly into the bank account of the Mental Disability Advocacy Center (see, for example, *Hristovi v. Bulgaria*, no. 42697/05, § 109, 11 October 2011, and *Singartiyski and Others v. Bulgaria*, no. 48284/07, § 54, 18 October 2011).

C. Default interest

50. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 14 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 38 (thirty-eight euros), plus any tax that may be chargeable, in respect of postal expenses;
 - (iii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of Mental Disability Advocacy Center;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge P. Lemmens is annexed to this judgment.

M.V.
J.S.P.

CONCURRING OPINION OF JUDGE LEMMENS

1. I agree with the conclusion that there has been a violation of Article 6 § 1 of the Convention, but I would prefer to base that conclusion on a more narrow reasoning.

Although the applicant states that her complaint refers to a “continuing situation created as a result of the domestic legislation” (paragraph 23), the application of that legislation has resulted in the judicial determination of a concrete claim. In cases arising from individual petitions the Court’s task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see, for a recent authority, *Kotov v. Russia* [GC], no. 54522/00, § 130, 3 April 2012). If we are to take subsidiarity seriously, it is, in my opinion, the decisions of the courts, in particular those of the court of appeal and the Court of Cassation, which should be the starting point of this Court’s review.

2. On the basis of that approach, the Government’s objection based on the six-month rule should be answered differently than the majority does in paragraphs 24-25. The majority rejects the objection on the ground “that the applicant’s complaint concerned a continuing situation which did not come to an end as a result of her unsuccessful attempt to secure access to a court”. In my opinion, the reason for rejecting the objection should be that the final decision in her case was delivered by the Court of Cassation on 12 March 2011, and that therefore the application, filed on 29 July 2011, was within the six-month time-limit.

3. As a result of this interpretation, there are further a number of paragraphs that I would prefer to draft with closer reference to the judgments handed down in the applicant’s case, in light of my more limited understanding of the object of the complaint.

I should add that I agree with the majority that the general character of the prohibition on direct access to a court and the absence of any regular review by a court at reasonable intervals of the applicant’s legal capacity (or other procedural safeguards) (see paragraph 39) are indicative of the disproportionate character of the restriction applied in the applicant’s case, as they result in the restriction being absolute and of indefinite duration.