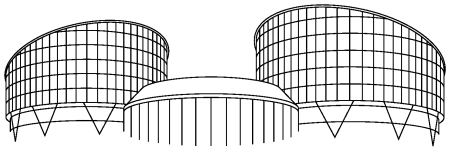

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF USTIMENKO v. UKRAINE

(Application no. 32053/13)

JUDGMENT

STRASBOURG

29 October 2015

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 Ustimenko v. Ukraine,

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

Josep Casadevall, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 October 2015,

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

PROCEDURE

1. The case originated in an application (no. 32053/13) 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, Mr Konstantin Grigoryevich Ustimenko ("the applicant"), on 3 May 2013.

2. The applicant was represented by Ms Y.N. Ashchenko, a lawyer practising in Kharkiv. The Ukrainian Government ("the Government") were most recently represented by their Agent, Mr B. Babin, of the Ministry of Justice.

3. The applicant alleged that he had not been duly informed about the appeal proceedings in his case and that the extension of the time-limit for appeal and the quashing of a final judgment in his favour breached the principle of legal certainty.

4. On 17 December 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Dnipropetrovsk.

A. Proceedings before administrative courts

6. On 18 October 2010 the applicant lodged with the Dnipropetrovsk Amur‑Nyzhnyodniprovskyy District Court ("the District Court") an administrative claim against the Department of the Pension Fund for the Dnipropetrovsk Amur‑Nyzhnyodniprovskyy District ("the defendant") seeking an increase in his pension based on the rise in the average wages in the country since his retirement.

7. On 1 December 2010 the District Court, having considered the applicant's claim by way of an abridged administrative procedure, allowed the claim. In the judgment it was pointed out that any appeal must be lodged by the appellant within a period of ten days following their receipt of a copy thereof.

8. The defendant received a copy of the judgment on 27 December 2010.

9. The defendant lodged its first appeal with the District Court on 13 January 2011 and did not request an extension of the time-limit for appeal.

10. On 11 April 2011 Judge N. of the Dnipropetrovsk Administrative Court of Appeal ("the Court of Appeal") dismissed the defendant's appeal on the grounds that it had been lodged after the time-limit for appeal had expired and the defendant had failed both to explain the reasons for the late lodging of the appeal and to submit a request for an extension. The ruling stated that it could be appealed against before the Higher Administrative Court. The defendant did not appeal.

11. On 1 June 2011 the District Court, at the applicant's request, issued a writ of enforcement confirming that the judgment had become final on 11 April 2011.

12. With effect from 1 August 2011 the defendant complied with the judgment and increased the applicant's pension.

13. On 17 June 2011 the defendant lodged a second appeal with the District Court. By letters of 21 June and 5 July 2011 the District Court forwarded the case file, including the appeal and its copy for the applicant, to the Court of Appeal. The case file gives no indication of any steps to follow up on the matter.

14. On 15 August 2011 the defendant lodged a third appeal, requesting that the Court of Appeal extend the time-limit for its submission. As grounds for its request the defendant stated that it "had begun the process of appealing against" the District Court's judgment on 31 December 2010.

15. On 26 October 2011 Judge N. of the Court of Appeal scheduled a hearing for 26 January 2012 to examine the question of extending the time-limit for appeal.

16. According to a summons dated 26 October 2012 addressed to both the applicant and the defendant, they were summoned to attend a hearing of the Court of Appeal on 26 January 2012 at which the court was to examine

the applicant's request for an extension of the time-limit for appeal. The summons included the warning that failure to appear would not prevent the Court of Appeal from examining the matter.

17. It is apparent from the domestic case file that no other document was added to it between 26 October 2011 and 26 January 2012.

18. On 26 January 2012 a panel of the Court of Appeal, presided over by Judge N., extended the time-limit for appeal, stating that the defendant had missed the deadline for "valid reasons". The Court of Appeal recounted the sequence of events in the case from 1 December 2010 to 15 August 2011, found it established that the first appeal had been lodged outside the time-limit, namely on 13 January 2011, and observed that the defendant had requested the extension because it had received a copy of the judgment only after the time-limit for appeal had already expired.

19. On 27 January 2012 Judge N. of the Court of Appeal ruled that appeal proceedings be opened, that copies of the ruling be sent to the parties, and that the applicant be sent a copy of the appeal and be invited to provide his reply.

20. According to a summons dated 30 January 2012 and addressed to both the applicant and the defendant, they were summoned to attend a hearing of the Court of Appeal on 13 June 2012 at which the court was to examine the appeal. This summons also contained the warning that failure to appear would not prevent the Court of Appeal from examining the matter.

21. On 13 June 2012 the Court of Appeal quashed the judgment of 1 December 2010 and rejected the applicant's claim, holding that the first-instance court had erred in its interpretation of the relevant legislation governing pensions.

22. On 27 November 2012 the defendant sent a letter to the applicant informing him that his pension had been reduced in accordance with the decision of the Dnipropetrovsk Court of Appeal of 13 June 2012.

B. Criminal investigation

23. On 12 December 2012 the applicant lodged a complaint with the prosecutor's office for the Dnipropetrovsk Amur‑Nyzhnyodniprovskyy District alleging that Judge N. had intentionally failed to inform him about the appeal proceedings.

24. On 29 December 2012 the prosecutor's office made an entry in the Unified Register of Pre-Trial Investigations to investigate the suspicion that offences of delivering of an intentionally unjust court decision and of failure to enforce a court decision may have been committed.

25. On 17 May 2013 the prosecutor's office decided to discontinue the investigation concerning the applicant's complaint. The prosecutor's office found, in particular, that the defendant had dispatched the original appeal against the judgment of 1 December 2010 on 31 December 2010 that is to

say within the time-limit. As to the applicant's allegations that he had not been informed about the reopened appeal proceedings, the prosecutor's office noted that the case file contained copies of court summonses dated 26 October 2012 and 30 January 2012.

26. On 21 May 2013 the District Court and on 27 May 2013 the Dnipropetrovsk Regional Court of Appeal upheld the prosecutor's decision.

II. RELEVANT DOMESTIC LAW

Code of Administrative Justice of 6 July 2005

27. Article 102 of the Code provides that the procedural time-limit can be extended if the court, at the request of a party to the proceedings, determines that the party to the proceedings missed the original time-limit for valid reasons. The question of extension may be decided in written proceedings or at a hearing, at the court's discretion. A failure to appear by those duly notified does not prevent the court from considering the question.

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

29. Article 186 of the Code provides that an appeal must be lodged within a period of ten days following pronouncement of a judgment. If the court decides to prepare a full text of the judgment after pronouncing only its operative part, or if the judgment is delivered in writing, any appeal must be lodged within a period of ten days following receipt by the appellant of a copy of the judgment.

30. At the material time, paragraph 3 of Article 189 of the Code provided that a judge rapporteur was to return to the appellant any appeal lodged outside the time-limit if no request to extend the time-limit had been lodged.

31. Article 197 of the Code provides that a court of appeal may consider an appeal sitting *in camera* on the basis of the evidential material in the case file in particular if the case concerns social benefits or pension payments and was decided at first instance by way of an abridged procedure.

32. At the material time Articles 189 and 190 of the Code provided that all new cases arriving at a court of appeal were to be allocated to a judge rapporteur. The judge, having decided to open appeal proceedings, had to send the parties, within ten days of having opened those proceedings, a copy of the ruling by which the proceedings were opened, together with a copy of the appeal, and to set a time-limit for replying to the appeal.

33. 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 the judge of the administrative court of appeal in the ruling opening the appeal proceedings.

34. Paragraph 2 of Article 211 of the Code provides that interlocutory rulings of the first-instance and appellate courts can be appealed to the courts of appeal and the Higher Administrative Court respectively, provided that such decisions prevent proceedings in the case from advancing. Objections against all other rulings can only be submitted, together with the appeal on points of law, after the first-instance court judgment has been reviewed on appeal.

35. According to Article 254, a judgment becomes final upon expiration of the time-limit for appeal if no appeal has been lodged. In cases where an appeal has been lodged, the judgment becomes final when the appeal is returned, when a judge of the appellate court refuses to open appeal proceedings, or when the appeal decision delivered upon review of the first-instance court's judgment becomes final.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

36. The applicant complained that the reopening of proceedings and the quashing of the final judgment of 1 December 2010 in his favour breached the principle of legal certainty and that the principle of equality of arms had been breached in the course of proceedings before the Court of Appeal. He relied on Article 6 § 1 of the Convention which reads:

> "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

37. The Government submitted that the fact that the applicant had been informed about the appeal proceedings was proved by the summonses dated 26 October and 30 January 2012 found in the domestic case file. They were not in a position to provide any evidence showing that the summonses in question had in fact been sent because, in accordance with the regulations in force, the registers of sent correspondence were kept for one year only and the periods relating to the summonses had expired on 26 October 2012 and 30 January 2013 respectively. Moreover, the prosecutor's office to which

the applicant complained had examined the circumstances under which the relevant decisions of the Court of Appeal had been made. The prosecutor's office had established that the defendant had missed the time-limit for lodging its appeal because it had only received a copy of the judgment after some delay, and for this reason the Court of Appeal had had valid reasons for extending the time-limit. It had also established that the case file contained summonses addressed to the applicant and copies of the defendant's appeal. These findings of the prosecutor's office had been upheld by the domestic courts. Accordingly, the Government argued that the domestic authorities had examined the applicant's complaint carefully and had established that the facts alleged by him were untrue. In view of these submissions, the Government maintained that the application was manifestly ill-founded.

38. As regards the observance of the principle of equality of arms, the applicant submitted in his application form that he had received no notification of the proceedings before the Court of Appeal after 1 June 2011 and had first learned about the proceedings concerning the defendant's second appeal from the defendant's letter dated 27 November 2012 explaining the reduction in his pension. In his observations in reply to the Government's observations the applicant maintained that he had not been sent a copy of the defendant's appeal far enough in advance and, accordingly, had not had enough time to prepare his reply. Moreover, he submitted that he had been obliged to draft his applications to the domestic courts himself, being unable to benefit from free legal assistance. As regards the reopening of proceedings in his case, the applicant submitted that the Court of Appeal's decision to extend the time-limit for appeal had been arbitrary and the reasons given for it had not corresponded to those given by the defendant in its request for extension. The applicant insisted that his application was not manifestly ill-founded.

2. The Court's assessment

(a) The complaints concerning the proceedings before the Court of Appeal following the extension of the time-limit for appeal

39. The Court reiterates that the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274). Each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party, including the other party's appeal (see *Beer v. Austria*, no. 30428/96, §§ 17-20, 6 February 2001).

40. The Court observes in this respect that although in his application form the applicant stated that he had not received any notification

whatsoever about the proceedings before the Court of Appeal after 1 June 2011, and in particular that he had not been sent a copy of the defendant's appeal, in his subsequent observations the applicant stated, to the contrary, that the copy of the defendant's appeal had not been sent to him far enough in advance, thus not allowing him enough time to prepare his reply. In view of the latter submissions, the Court finds that the applicant is no longer alleging that he did not receive a copy of the defendant's appeal at all, but rather that he only received it after some delay. However, he failed to specify exactly when he had received the copy of the appeal and, accordingly, how important the alleged delay had been. Accordingly, his complaint in this respect is wholly unsubstantiated.

41. As regards the applicant's complaint that he was not informed about the Court of Appeal hearings following the reopening of proceedings in his case, the Court observes that, in view of the lack of consistency in his submissions as to whether and when he was sent a copy of the defendant's appeal, and given that neither party was present at the Court of Appeal hearings, the applicant has failed to make out an arguable complaint that he was placed at a substantial disadvantage vis-à-vis the defendant in the course of the proceedings before the Court of Appeal. To the extent the applicant's complaint can be interpreted as a complaint that he was deprived of an opportunity to present his arguments in the course of a public hearing before the Court of Appeal on the merits of the defendant's appeal, the Court observes that in the applicant's case the only question examined on appeal was the question of the interpretation of domestic social security legislation, namely whether or not a pensioner was entitled to have his pension increased on the basis of the rising average wages in the country. The first-instance court interpreted the provisions of domestic legislation to answer this question in the affirmative, while the appellate court answered it in the negative. In short, the case raised a purely legal and technical question but no questions of fact or of the assessment of evidence. The Court has repeatedly held that such disputes concerning the benefits payable under social security schemes are technical and may accordingly be better dealt with in writing than in oral argument (see, for example, *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263). The applicant's case fell squarely within this category.

42. It follows that the applicant's complaint concerning the alleged failure of the domestic courts to inform him about the appeal proceedings following the reopening of proceedings in his case is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

(b) The complaint concerning the reopening of proceedings and the quashing of the judgment

43. As regards the applicant's complaint about the reopening of proceedings and the quashing of a final judgment in his favour, the Court notes that this part of the application raises serious issues requiring an examination of the merits. Therefore, contrary to the Government's submissions, it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

44. The applicant submitted that the decision to extend the time-limit had been arbitrary. Whilst the defendant argued that the time-limit had been complied with, the Court of Appeal had in fact extended the time-limit on grounds which had not been argued by the defendant. Moreover, although requesting an extension, the defendant had failed to submit the postal receipt which would have supported its allegation that the initial appeal had been lodged on 31 December 2011. In the applicant's view, this demonstrated that it had been the Court of Appeal, and not the defendant, which had sought to justify the extension of the time-limit.

45. The Government did not make any submissions on the merits of this complaint.

2. The Court's assessment

(a) General principles

46. The Court reiterates that the right to a fair hearing before a court 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, which presupposes respect for the principle of *res judicata*, that is to say the principle of the finality of judgments, according to which no party is entitled to seek review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. 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, §§ 51 and 52, ECHR 2003-X).

47. The Court has held that if the time-limit for an ordinary appeal is extended after a considerable lapse of time, such a decision can breach the principle of legal certainty. While 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 courts are required to indicate the reasons. In every case, the domestic 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).

(b) Application of the above principles to the present case

48. The Court notes at the outset that, as in the *Ponomaryov* case (ibid.), in the present case domestic law did not, at the material time, limit the courts' discretion as to either the time or the grounds for extending the time-limit. The very concept of "valid reasons", whereby domestic courts justified reopening the proceedings in the applicant's case, lacks precision (see, *mutatis mutandis*, *H. v. Belgium*, 30 November 1987, § 53, Series A no. 127-B, and *Georgiadis v. Greece*, 29 May 1997, § 43, *Reports of Judgments and Decisions* 1997-III). In such circumstances it was all the more important for the domestic courts to indicate the reasons for their decision to extend the time-limit and reopen proceedings in the applicant's case.

49. The Court observes that on 11 April 2011 the Court of Appeal ruled that the appeal had been lodged on 13 January 2011 that is to say outside the ten-day time-limit. The defendant did not appeal against this ruling to the Higher Administrative Court. Pursuant to domestic law, this meant that the judgment of the District Court became final and enforceable and the defendant complied with it increasing the applicant's pension (see paragraphs 11 and 12 above).

50. In its request for an extension of the time-limit, lodged on 15 August 2011, the defendant appeared to argue that the time-limit had not in fact been missed because it "had begun the process of appealing" against the District Court's judgment on 31 December 2010, that is within the time-limit. However, on 26 January 2012 the Court of Appeal found it established that the appeal had been lodged on 13 January 2011 that is outside the time-limit. Nevertheless, the Court of Appeal decided to extend the time-limit, merely referring, without further explanation, to "valid reasons".

51. According to the Government, the "valid reason" referred to by the Court of Appeal was that the defendant had experienced a delay in receiving the copy of the District Court's judgment. The Court notes, however, that neither the defendant nor the Court of Appeal cited this as the reason for the extension. In any event, that reason could not have been considered relevant to the decision to extend the time-limit, given that under domestic law the

time-limit for appeal is counted from the moment when the appellant actually receives a copy of the judgment.

52. Put differently, having implicitly rejected the only reason given by the defendant for its request to extend the time-limit, the Court of Appeal proceeded to grant the request without referring to any specific circumstances of the case, instead limiting itself to stating that the defendant had unspecified "valid reasons" for extending the time-limit. In the light of these considerations, the Court finds that the Court of Appeal extended the time-limit for appeal against a final judgment in the applicant's favour without giving coherent reasons for its decision.

53. It follows that, by deciding to extend the time-limit for appeal against the final judgment in the applicant's case without giving relevant reasons and subsequently quashing the judgment, the domestic courts infringed the principle of legal certainty and the applicant's right to a fair trial under Article 6 § 1 of the Convention.

54. There has accordingly been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

57. The Government submitted that this claim was unsubstantiated.

58. The Court considers that the applicant suffered non-pecuniary damage as a result of the violation found which cannot be compensated for by the mere finding of a violation. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

59. The applicant also claimed EUR 850 for the costs and expenses incurred before the Court.

60. The Government contended that this claim was unsubstantiated.

61. 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. The Court notes that the applicant has failed to provide any supporting documents – such as itemised bills or invoices – substantiating his claim (Rule 60 §§ 1 and 2 of the Rules of Court). The Court accordingly makes no award under this head.

C. Default interest

62. 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 complaint concerning the reopening of the proceedings and the quashing of the judgment of 1 December 2010 admissible and the remainder of the application inadmissible;

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

3. *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, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, 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 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Josep Casadevall
President