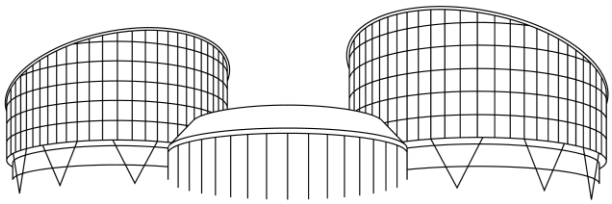

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KONTSEVYCH v. UKRAINE

(Application no. 9089/04)

JUDGMENT

STRASBOURG

16 February 2012

FINAL

16/05/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kontsevych v. Ukraine**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Mark Villiger,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 24 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 9089/04) 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, Mrs Yaroslava Ivanivna Kontsevych ("the applicant"), on 10 February 2004.

2. The applicant, who had been granted legal aid, was represented by Mr V.M. Lesyuk, a lawyer. The Ukrainian Government ("the Government") were represented by their former Agent, Mr Y. Zaytsev, succeeded by Mrs V.Lutkovska, from the Ministry of Justice of Ukraine.

3. The applicant alleged, *inter alia*, that the enforcement of the judgment by which the Bailiffs' Service was ordered to restore to her her apartment occupied by third persons had been too lengthy.

4. On 8 February 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in the town of Kalush, Ukraine.

6. In 1996 a private person, B., lent the applicant approximately 12,266 Ukrainian hryvnias (UAH) (which at the material time, according to the applicant, corresponded to 4,500 United States dollars), with the applicant's four-room apartment as security. As the applicant was not able to return the sum, in October 1997 the State Bailiffs' Service held an auction and the apartment in question was bought by B. On 19 November 1997 the applicant and her four adult sons were evicted from the apartment. According to the applicant, since then they have been living "in a half ruined building".

A. First set of proceedings

7. On 19 July 2002 the Kalush Local Court considered the applicant's complaint against the Bailiffs' Service and found that the auction and the applicant's eviction had been in breach of the law. The court found that since the applicant had nowhere to live the Bailiffs' Service should return the apartment in question to her immediately.

8. On 24 July 2002 the applicant requested the Bailiffs' Service to enforce the decision of 19 July 2002 and submitted a copy to them.

9. On 13 August 2002 the Bailiffs' Service refused to institute enforcement proceedings as the applicant had failed to present a writ of enforcement.

B. Second set of proceedings

10. In June 2000 the applicant and her four sons instituted proceedings in the Kalush Local Court against K. (who lived in the apartment in question, allegedly renting it from B.) and B., and requested the court to restore their apartment to them. On 28 May 2003 the court found for the plaintiffs. It ordered the apartment in question to be restored to the applicants and further ordered B. and K. not to hinder the plaintiffs in using their apartment. On 31 July 2003 the Ivano-Frankivsk Regional Court of Appeal upheld that judgment. On 17 November 2004 the Supreme Court of Ukraine returned B.'s cassation appeal as it had not been submitted in compliance with procedural requirements.

11. On 21 August 2003 enforcement proceedings were instituted.

12. According to the Government, on 18 November 2003 the applicant requested the staying the enforcement proceedings. The parties did not provide a copy of this request.

13. By a letter of 1 December 2003 the Ivano-Frankivsk Regional Department of Justice informed the applicant that on 28 November 2003 the enforcement proceedings had been stayed, following her request, since "the case concerning the eviction of the third parties who lived in the apartment

in question was pending before the court". The enforcement proceedings were resumed on 5 October 2005.

14. On 24 January 2006 the apartment was allegedly restored to the applicant. The applicant, however, stated that she had not been given the keys to the apartment and had not been able to stay there.

15. On 25 January 2006 the enforcement proceedings were terminated. The applicant did not appeal against the decision.

C. Third set of proceedings

16. In November 2001 the applicant and two of her sons, R. and V., instituted proceedings against B. requesting him to return their personal belongings which had been left in the apartment. On 26 December 2002 the Kalush Local Court, in B.'s absence, found for the plaintiffs and awarded them UAH 37,939 for pecuniary damage and UAH 60,000 for non-pecuniary damage. The decision became final as no appeal had been lodged against it, and enforcement proceedings were instituted.

17. On 20 June 2003 B. requested the court to provide him with a copy of the decision of 26 December 2002.

18. On 22 October 2003 B. received a copy of the decision and requested the renewal of the time-limit for lodging an appeal since he had not been informed about the court hearing on 26 December 2002.

19. On 31 October 2003 the Kalush Local Court rejected his request. It found that on 30 December 2002 a copy of the court decision of 26 December 2002 had been sent to the address indicated by B. in one of his applications to the court, that is, to the address of the applicant's apartment.

20. B. appealed, stating that he had indicated another address and had learned about the decision of 26 December 2002 only when enforcement proceedings had been instituted.

21. On 17 December 2003 the Ivano-Frankivsk Regional Court quashed the decision of 31 October 2003 and remitted the case for fresh consideration. No copy of this decision has been provided. On 29 November 2005 the Supreme Court of Ukraine upheld the decision of 17 December 2003.

22. On 1 February 2006 the Kalush Local Court decided to accept B.'s appeal against the decision of 26 December 2002. On 27 February 2006 the Ivano-Frankivsk Regional Court of Appeal similarly concluded that B.'s appeal had been lodged in compliance with procedural requirements.

23. On 22 March 2006 the Ivano-Frankivsk Regional Court of Appeal quashed the judgment of 26 December 2002 as having been given in the absence of the defendant, and remitted the case for fresh consideration. The court found that between October and December 2002 there had been six court hearings that B. had not been informed about. The court also decided that B. had not been properly informed about the court hearing of

26 December 2002 "since he denied being present in the court on 11 December 2002 [when the court summons had allegedly been served on him] and he contested his signature on the court summons, which differed from his signature on other documents".

24. On 11 April 2006 the applicant's claims for the return of her property were left unexamined by the court. The applicant did not submit a copy of this decision so it is unclear whether she had withdrawn her claims or they were left unexamined for another reason.

25. On 2 August 2006 the Supreme Court of Ukraine upheld the decision of 22 March 2006. The Supreme Court in its decision referred to the applicant as a party.

26. On 28 December 2006 the Kalush Local Court found for B. In that judgment the applicant's two sons were referred to as plaintiffs and the applicant herself was referred to as their representative.

27. On 16 May 2007 the Ivano-Frankivsk Regional Court of Appeal quashed the judgment of 28 December 2006, found in part for the applicant's two sons, and awarded them UAH 21,953 in damages. On 1 August 2007 the Supreme Court of Ukraine upheld that decision.

D. Other events

28. In March 2007 one of the applicant's sons was found dead. The cause of death was given as hypothermia, whereas the applicant believes that her son was killed.

29. On 13 June 2008 the Kalush Local Court awarded B. UAH 15,822.98, to be paid by the applicant in compensation for loss incurred as a result of the failure to repay the loan of 1996. The applicant's three sons were also to pay B. UAH 7,911.47 each. That judgment was upheld on 15 October 2008 and 30 March 2009 by the Ivano-Frankivsk Regional Court of Appeal and the Supreme Court of Ukraine respectively.

THE LAW

30. The applicant complained under Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 about the failure of the State authorities to enforce the judgments of 19 July 2002 and 28 May 2003 given in her favour.

31. She further complained, without invoking any Convention Article, that the court's decision to allow B.'s belated appeal, and the quashing of the decision of 26 December 2002, had been unlawful.

32. The Court notes that these complaints are to be considered under Articles 6 § 1 and 8 of the Convention and Article 1 of Protocol No. 1, which read, in so far as relevant, as follows:

Article 6

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

I. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 IN RESPECT OF THE NON-ENFORCEMENT OF THE DECISION OF 19 JULY 2002

A. Admissibility

33. The Government submitted that the applicant had failed to appeal against the decision not to institute enforcement proceedings of 13 August 2002. She had also failed to submit the writ of enforcement required by law. The Government noted that it was a simple requirement; however, the applicant had failed to fulfil it.

34. The Government further noted that the present application had been lodged more than six months after the decision of 13 August 2002. They considered that the applicant's complaints in respect of the non-enforcement of the decision of 19 July 2002 were inadmissible.

35. The applicant considered that the decision of 29 November 2005 (see paragraph 21) had been the final decision in her case, and stated that the proceedings in her case should be considered in their entirety and, therefore, she had complied with the six-month rule.

36. Given that in the first set of proceedings it was the State Bailiffs' Service which was ordered by the domestic court to return the apartment in question to the applicant, the Court reiterates that it is inappropriate to require an individual who has obtained a judgment against the State following legal proceedings to then bring enforcement proceedings to obtain satisfaction (see, for example, *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004). Accordingly, the applicant was not supposed to appeal against the decision of 13 August 2002.

37. As to the Government's objection that that the present application had been lodged more than six months after the decision of 13 August 2002, the Court indicates that the lengthy non-enforcement of a court decision is a continuing violation. Therefore, the Court rejects the Government's objections.

38. The Court notes that these complaints 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

39. The Government reiterated their arguments as to the admissibility of the applicant's complaints and submitted that the decision of 19 July 2002 had been enforced together with the decision of 28 May 2003 by January 2006 since both these decisions concerned identical issues, namely the applicant's moving back into her apartment.

40. The applicant contested this and stated that she had not been given the keys to her apartment and it had not been possible for her to stay there.

41. The Court notes that the two decisions indeed concerned the same issue. The applicant did not challenge the decision on termination of the enforcement proceedings of 25 January 2006, thus the court decisions of 19 July 2002 and of 28 May 2003 must be considered to have been enforced by 25 January 2006.

42. Consequently, it took the Bailiffs' Service three and a half years to enforce the decision of 19 July 2002. The Court, however, notes that on 18 November 2003 the applicant herself requested the suspension of the enforcement of the decision of 28 May 2003, and this is not contested by the

applicant in her submissions. The enforcement proceedings were resumed on 5 October 2005. Therefore, it cannot be considered that the Bailiffs' Service was under an obligation to enforce the decision of 19 July 2002 between 18 November 2003 and 5 October 2005, given that its object was identical to the one of 28 May 2003, whose enforcement the applicant herself requested to have suspended. Thus, it remains to be considered whether the enforcement proceedings between 19 July 2002 and 18 November 2003 (one year and four months) and between 5 October 2005 and 25 January 2006 (three months) were too lengthy.

1. Article 6 § 1 of the Convention and Article 1 of Protocol No. 1

43. The State authorities were responsible for not enforcing the court decision of 19 July 2002 in the applicant's favour for one year and seven months in total. During this period the applicant was not able to use the apartment which she owned. The Court observes that it has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in a number of similar cases concerning lengthy non-enforcement of court decisions in favour of applicants (see *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, § 56, 15 October 2009). Having examined all the material in its possession, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

There has, accordingly, been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

2. Article 8 of the Convention

44. The Court notes at the outset that it is not contested that the apartment in question constituted the applicant's home. Her eviction from this apartment had occurred because of unlawful actions on the part of the State Bailiffs' Service, which was later ordered by the court to restore the apartment to the applicant immediately.

45. The Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for the applicant's rights protected under Article 8 of the Convention (see, *mutatis mutandis*, *Botta v. Italy*, 24 February 1998, § 33, *Reports of Judgments and Decisions* 1998-I).

46. The Court further notes that after November 1997, when the applicant was evicted from her apartment, she lived in conditions unfit for living, which is not contested by the Government. It was expressly underlined by the domestic court in its decision of 19 July 2002 that the applicant and her family had nowhere to live, and therefore the court

ordered the immediate enforcement of its decision. However, this decision was not enforced until more than three years later.

47. Even assuming that after 18 November 2003 the applicant herself had requested the suspension of the enforcement proceedings of the decision of 28 May 2003, by that time the decision of 19 July 2002 had remained unenforced for one year and four months. No reasons for such a long period were advanced. After the enforcement proceedings were resumed, it took the national authorities another three months to enforce the decision in question.

48. Thus, it cannot be said that the Contracting State complied with its positive obligations under Article 8 of the Convention to secure to the applicant respect for her home (see, *Pibernik v. Croatia*, no. 75139/01, §§ 64-70, 4 March 2004).

There has, accordingly, been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 IN RESPECT OF THE NON-ENFORCEMENT OF THE DECISION OF 28 MAY 2003

49. The Court notes that the decision of 28 May 2003 had been enforced by 25 January 2006 (see paragraph 41).

50. The Court reiterates that its enforcement was suspended at the applicant's request between 18 November 2003 and 5 October 2005. Thus, the enforcement proceedings lasted for less than nine months.

51. Even assuming that this period is excessive since the applicant had no proper housing, the Court notes that the decision in question was adopted against private persons. The Court reiterates that the State cannot be considered responsible for the unwillingness of private persons to comply with a court decision and its responsibility extends no further than the involvement of State bodies in the enforcement proceedings (see, *mutatis mutandis*, *Shestakov v. Russia* (dec.), no. 48757/99, 18 June 2002).

52. The Court observes that the Ukrainian legislation provides for a possibility to challenge before the courts the lawfulness of actions and omissions of the Bailiffs' Service in enforcement proceedings against private debtors and to claim damages from them for the delays in payment of the awarded amount (see, for instance, *Kukta v. Ukraine* (dec.), no. 19443/03, 22 November 2005). The applicant did not institute any such proceedings against the bailiffs.

53. Thus the Court finds that the applicant's complaints in respect of the non-enforcement of the decision of 28 May 2003 must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE QUASHING OF THE FINAL JUDGMENT IN THE APPLICANT'S FAVOUR

54. The Government submitted that "between 11 November 2003 and 10 January 2006" the courts had been considering B.'s request for the renewal of the time-limit for lodging an appeal. Such request was granted since "there were serious reasons for missing the time-limit". The decision of 26 December 2002 had been quashed since it had been taken in B.'s absence and he had not been properly informed about the date of the hearing. Therefore, B.'s appeal against the decision of 26 December 2002 had been in compliance with procedural requirements and there was no violation of the applicant's right to a fair trial in this respect.

55. The applicant stated that B. should have lodged his request for renewal of the relevant time-limit earlier, whereas he had done so only in October 2003. The applicant insisted that B. had received the decision of 26 December 2002 at the address he himself had indicated to the court so there had been no grounds to renew the time-limit for him to appeal. There were also no grounds for quashing the decision of 26 December 2002.

56. The Court notes that although the decision of 1 February 2006 contains no reasons for the renewal of the time-limit for B. to lodge an appeal, it appears that B. was not properly informed about the decision of 26 December 2002 and learned about it only in June 2003. Moreover, the decision of 26 December 2002 was taken in B.'s absence as he had not been properly summoned. The Court considers that the decisions of 1 February 2006 and 22 March 2006 do not appear arbitrary.

57. The Court considers therefore that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and rejects it in accordance with Article 35 § 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

58. Lastly, the applicant complained of lengthy non-enforcement of the judgment of 26 December 2002 before it was quashed. She also complained that her son had been killed.

59. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

60. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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, costs and expenses

62. The applicant claimed 100,000 euros (EUR) in damages without any particular specification.

63. The Government considered that the applicant's claims were excessive.

64. The Court considers that the applicant must have sustained non-pecuniary damage and, deciding on an equitable basis, awards her EUR 8,000 in this respect.

65. As the applicant was granted legal aid and did not make any specific claim for costs and expenses, the Court makes no award in this respect.

B. Default interest

66. 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 under Articles 6 § 1 and 8 of the Convention and Article 1 of Protocol No. 1 concerning the lengthy non-enforcement of the decision of 19 July 2002 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1;

3. *Holds* that there has been a violation of Article 8 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros),

plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias 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;

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

Done in English, and notified in writing on 16 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President