

INDIVIDUAL COMMUNICATION
FROM INTERNATIONAL PARTNERSHIP FOR HUMAN RIGHTS
ON THE EXECUTION OF THE ECHR JUDGMENTS
IN THE CASE OF BOCHAN V. UKRAINE (2), application no.
22251/08, judgment as of 5 February 2015

I. Introduction

International Partnership for Human Rights (“**IPHR**”) is an independent, non-governmental organization that works closely together with civil society groups from different countries to raise human rights concerns at the international level and promote respect for the rights of vulnerable communities.

IPHR is committed to promoting human rights worldwide. It acts to empower local civil society groups who are working to advance the protection of human rights in their respective countries and assists them with raising human rights concerns at the international level. In cooperation with partner organizations, IPHR advocates on behalf of individuals and communities who are among those most vulnerable to discrimination, injustice and human rights violations.

Following the Rule 9.2 of the Committee of Ministers for the supervision of the execution of judgments and of the terms of the friendly settlements, IPHR hereby presents its individual communication. The communication aims to address the Committee of Ministers (the “**CoM**”) on the status of execution of the judgment in the case Bochan v. Ukraine (No. 2), application no. 22251/08 as of 5 February 2015, as well as bring to the CoM's attention the problem of re-examination of the judgments of national courts on the basis of the European Court of Human Rights judgments in Ukraine.

II. Case Summary

Since 1997 the applicant has claimed title to part of a house owned by the other person and to the land on which it is located based on the following arguments: the part of the house was constructed at her husband's expense; her husband lawfully obtained title to the property, which she subsequently inherited; that the sales contract on which the other party has claims to the property was forged. The applicant's property claim was considered on numerous occasions by domestic courts but ended with unsuccessful result for the applicant.

On 2001 the applicant lodged an application with the European Court of Human Rights (the “**Court**”) complaining of unfairness in the domestic court proceedings concerning her claim. She also complained about the length of the proceedings and alleged a violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms (the “**Convention**”) taken alone and in conjunction with Article 14 of the Convention on account of their outcome.

In its judgment as of 3 May 2007 the Court found a violation of Article 6 § 1 of the Convention in the applicant's case. The Court noted that the reassignment of the applicant's case was ordered by the Supreme Court of Ukraine (the “**Supreme Court**”) after it had disagreed with the findings of the lower courts as to the facts, having stated its position concerning one of the principal aspects of the case. Moreover, the Supreme Court had not provided the reasons for reassessment of the applicant's case.

The Court has stated that higher courts' power of review should be exercised for the correction of judicial mistakes, miscarriages of justice, but not to substitute the lower courts' assessment of facts. The Court also noted that the domestic courts had afforded no reply to the applicant's submissions concerning the reliability of the witnesses' statements and the validity of the documentary evidences, which had been decisive for the outcome of the case.

On 14 June 2007 the applicant lodged "an appeal in the light of exceptional circumstances" with the Supreme Court as set out in applicable domestic legislation. Relying on the Court's judgment of 3 May 2007, she asked the Supreme Court to quash the courts' decisions in her case and to adopt a new judgment allowing her claims in full.

On 14 March 2008 the Supreme Court refused to allow the applicant's appeal for review considering the following. The Supreme Court noted that by the judgment of 3 May 2007, the Court declared the applicant's complaints of unfairness in the proceedings and of a violation of Article 1 of Protocol No. 1 admissible, and the remainder of the application inadmissible, a violation of Article 6 § 1 of the Convention was found in the case. The Supreme Court stated that in its judgment, the Court also noted that the applicant had failed to provide evidence that she had suffered discrimination in regard to the enjoyment of her property rights, contrary to Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, on account of the outcome of the civil proceedings. The Supreme Court noted that the Court concluded that the applicant's complaints were to be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention. Therefore, the Supreme Court stated that the Court concluded that the domestic courts' decisions were lawful and well-founded and decided to award the applicant compensation of 2,000 EUR due solely to the violation of the 'reasonable time' requirement by the Ukrainian courts.

On 8 April 2008 the applicant lodged a new "appeal in the light of exceptional circumstances" with the Supreme Court. She argued that the decision of 14 March 2008 had been based on an incorrect "interpretation" of the Court's judgment of 3 May 2007 and requested the Supreme Court to reconsider the merits of the case in the light of the Court's findings under Article 6 § 1 of the Convention in that judgment.

On 5 June 2008 the Supreme Court declared the appeal inadmissible, as it contained no arguments capable of serving as grounds for reconsideration of the case in the light of exceptional circumstances.

On 7 April 2008 the applicant lodged an application against Ukraine with the Court, relying on Article 6§1 of the Convention and Article 1 of Protocol No. 1, complaining about the proceedings of review of her "appeal in the light of exceptional circumstances" grounded on the Court's judgment in the applicant's previous case *Bochan v. Ukraine*, no. 7577/02, of 3 May 2007, as provided for in Ukrainian legislation.

The applicant complained that the Supreme Court provided for unfair and arbitrary reasoning in its decision of 14 March 2008 that that constituted a new violation of Article 6 of the Convention. The Court noted that in its decision of 14 March 2008 that the Supreme Court had grossly misrepresented the Court's findings in its judgment of 3 May 2007. The Court also stated that the Supreme Court's reasoning did not amount merely to a different reading of a legal text, and that it can only be construed as being "grossly arbitrary" or as entailing a "denial of justice".

The Court also stressed the importance and effectiveness of the Convention system, and of ensuring that domestic procedures are in place which allow a case to be revisited in the light of a finding that the safeguards of a fair trial afforded by Article 6 have been violated. Such procedures are an important aspect of the execution of its judgments as governed by Article 46 of the Convention and their availability

demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (see *Bochan v. Ukraine* (No. 2), application no. 22251/08, judgement of 5 February 2015, §58).

III. Description of the situation on the ground

The CoM stated in its Recommendation No. R (2000) 2, adopted on 19 January 2000, that practice in supervising the execution of the Court's judgments demonstrated that re-examination of a case or reopening of proceedings proved in certain circumstances the most efficient, if not the only, means of achieving *restitutio in integrum*. The Recommendation called upon States introduce mechanisms for re-examination of a case following the finding of the Court that constituted a violation of the Convention, especially where:

“(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) The judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.”¹

Ukraine is among those countries that fulfilled the abovementioned recommendation. Ukrainian legislation provides an opportunity for parties to completed/terminated cassation proceedings with the right to challenge judicial decisions before the Supreme Court in the light of exceptional circumstances. The findings by an international judicial authority, whose jurisdiction has been recognised by Ukraine, that violations of Ukraine's international obligations had taken place during the proceedings is an exceptional circumstance.

There are four procedural codes in Ukraine, namely the Criminal Procedural Code, Civil Procedural Code, Commercial Procedural Code and Code of Administrative Proceedings (**“Procedural Codes”**). All Procedural Codes provide for the possibility of re-examination of proceedings and state that re-examination of a case in the light of exceptional circumstances is a kind of cassation procedure and such re-examination of the case is to be carried out under the rules applicable to cassation proceedings.

However, the merits of re-examination differ slightly depending on the type of proceeding. Thus, Article 433 § 1 of the Criminal Procedural Code sets out that the court of cassation examines the accuracy of the application of the rules of material and procedural law, makes a legal assessment of the facts and is not entitled to examine evidence, establish and/or consider to be proved those facts, which were not established or quashed by the contested decision, or decide on the reliability or unreliability of this or that evidence.

Article 400 § 1 of the Civil Procedural Code sets out that the court of cassation examines the accuracy of the application of the rules of material and procedural law and cannot establish and/or consider to be proved those facts, which were not established or quashed by the contested decision, decide on the reliability or unreliability of this or that evidence, or decide on the priority of one evidence above the other.

¹ See Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies)

Article 300 § 1 and 300 § 2 of the Commercial Procedural Code sets out that the court of cassation examines the accuracy of the application of the rules of material and procedural law and cannot establish and/or consider to be proved those facts, which were not established or quashed by the contested decision, decide on the reliability or unreliability of this or that evidence, decide on the priority of one evidence above the other, gather or take into consideration new evidence or examine evidence.

Article 341 § 1 and 341 § 2 of the Code of Administrative Proceedings sets out that the court of cassation examines the accuracy of the application of the rules of material and procedural law and cannot establish and/or consider to be proved those facts, which were not established or quashed by the contested decision, decide on the reliability or unreliability of this or that evidence, decide on the priority of one evidence above the other, gather or take into consideration new evidence or examine evidence.

Based on the analysis of the above-mentioned provisions it is clear that cassation courts in Ukraine are entitled to examine the accuracy of the application of rules of law and not to conduct a re-examination of the facts of the case and evidence.

Re-examination of the case in the light of exceptional circumstances by civil, commercial and administrative court may lead to the following results:

- 1) A decision to refuse to allow the appeal for review in the light of exceptional circumstances of the court decision and uphold the contested decision;
- 2) A decision to allow the appeal for review in the light of exceptional circumstances of the court decision, to quash the contested decision and make a new decision or change the contested decision;
- 3) A decision to quash the contested decision and close the proceedings or leave the case without consideration;
- 4) A decision to quash the contested decision partially or in full and order a reopening of proceedings.

Re-examination of the case, in the light of exceptional circumstances in the criminal procedure, cannot be terminated by changing the decision, in part, and quashing the contested decision with the following closing of the proceedings.

Considering that the powers of the Supreme Court while re-examining decisions in the light of exceptional circumstances are limited (it has the same powers as a cassation court), we believe the only feasible option to achieve *restitutio in integrum* as set out by CoM Recommendation No. R (2000) 2, adopted on 19 January 2000, is for the Supreme Court to order a reopening (retrial) of proceedings. In other cases, the Supreme Court is restricted by the limitations governing cassation proceedings. Bearing in mind that the purpose of the judicial system is to reach the truth and restore justice for violations and infringements of rights, one may conclude that under the Ukrainian legal framework the most effective way to do so is to resubmit the case for fresh consideration, especially in cases where the core problem lies in assessment of the evidence, decisions about its reliability or the priority of one piece of evidence above another.

The procedure of re-examination, as prescribed by current Ukrainian laws, is by its nature a prolongation of the original (terminated) civil procedures similar to a cassation procedure as defined by Ukrainian laws. It grants no freedom to the Supreme Court to look deeper into the contested decision, to determine the reasons and/or consequences of proceedings and leads the Supreme Court to take decisions based on formal grounds without any further examination of the substantive aspects of the case.

Moreover, no single approach for re-examination of decisions in the light of the Court's judgments which established violations of Convention provisions exists at the level of the Supreme Court.

Examination of the Supreme Court's decision taken in recent years in relation to re-examination of the Court's decisions in criminal procedures shows that there is no established practice on this matter.

Thus, the problem of re-examination procedure in Ukraine constitutes not only the misinterpretation of established violations of the Convention and arbitrary reading of the Court's judgements, as illustrated by *Bochan v. Ukraine* (No. 2), but also the formalistic approach applied by the Supreme Court when re-examining decisions in the light of exceptional circumstances.

Thus, the formal and positivistic approach of Supreme Court can be observed in several cases. Apart from *Bochan v. Ukraine* (No.2), judgments in *Yaremenko v. Ukraine* (No. 2) (application no. 66338/09, judgment of 30 April 2015), *Shabelnik v. Ukraine* (No. 2) (application no. 15685/11, judgment of 1 June 2017), *Alakhverdyan v. Ukraine* (application no. 12224/09, judgment of 16 April 2019) are also relevant.

In the case of *Yaremenko v. Ukraine* (No. 2) despite the findings indicating a breach of lawful procedure when obtaining key evidence, the Supreme Court excluded only part of the evidence found to have been obtained in breach of Convention provisions. The Supreme Court decided that the applicant's initial confession had been the only irregularity of the applicant's criminal case and that the exclusion of that evidence would have no impact on the conclusiveness of the remaining evidence in the case. In other words, the Grand Chamber of the Supreme Court pretended to take action but the case outcome was left unchanged.

Moreover, the Court noted that:

"In the Court's opinion, this latter issue in itself would require a thorough examination of the evidence in the present case in a full retrial instead of the very limited review as carried out by the Supreme Court. The Court finds that the new decision rendered in the applicant's case was again based to a decisive extent on the same pieces of evidence which had been obtained in violation of the applicant's procedural rights and there had been serious allegations, never properly dispelled by the authorities, that all self-incriminatory statements had been extracted under duress and had constituted "the fruit of the poisonous tree".

According to the Court's established doctrine of *"fruit of the poisonous tree"*, if the source of the evidence is inadmissible, the whole chain of directly related evidence shall be equally inadmissible. The criterion for attributing evidence to the *"fruits of the poisoned tree"* is the existence of sufficient grounds to believe that the relevant information would not have been obtained in the absence of the illegally obtained information. In essence, the doctrine means that the rest of the evidence should be re-examined and reassessed in adversarial proceedings.

Unlike the courts of first and appeal instances, the Supreme Court is not entitled to conduct such re-assessment of evidence, acting like a cassation court in procedures of re-examination of decisions in the light of exceptional circumstances.

In the case of *Shabelnik v. Ukraine* (No. 2), the Supreme Court remitted the case for retrial by the court of cassation. The Supreme Court, acting as the court of cassation and, having almost the same powers, without remitting the case for a full retrial, used clearly inappropriate evidence to substantiate the former outcome of the case and left it unchanged, once again applying *"fruits of the poisonous tree"*. As a result, the Court expressed the following position in its judgment:

“In view of the above conclusions the Court considers that its finding in Yaremenko (no. 2) is also pertinent to the present case in that only a full retrial could have provided, in the particular circumstances of the case, an appropriate forum for an adequate examination of the impact of the exclusion of the applicant’s confessions on the conclusiveness of the remaining evidence about the attack on K”².

In spite of the major transformations of the judicial system in Ukraine in recent years, case of Alakhverdyan v. Ukraine (application no. 12224/09, judgment of 16 April 2019) illustrates the lack of a coherent approach among Supreme Court judges to the retrial of cases in the light of Court.

In the Alakhverdyan v. Ukraine case the Supreme Court also concluded that the exclusion of the evidence obtained in violation of the Convention and applicable laws, as well as suppression of the other findings deriving from such evidence does not affect the lawfulness and justification of the domestic courts’ findings regarding finding Mr. Alakhverdyan guilty of the crimes for which he was convicted.

The Court in Alakhverdyan v. Ukraine stated the following:

“This conclusion leads the Court to hold that the Government failed to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings against the applicant was not irretrievably prejudiced by the restriction of his access to a lawyer on 12 December 2004.”³

Despite the clear statement from the Court that the proceedings in the applicant’s case were unfair, the Supreme Court did not come to the conclusion that this decision deserves to be reopened and re-examined in full. As a result, the applicant was deprived of a chance to obtain a justified decision in his case through a trial conducted in keeping with fair trial standards.

It should, however, be noted that this decision was criticised by some judges themselves. For example, in the joint separate opinion of judges of the Grand Chamber of the Supreme Court judges Antsupova, Britishchuk, Hritsiv, Lyashchenko, Prokopenko, Sytnik and Urkevich expressed the following position:

“Considering conclusions of an international court, the exclusion from the sentence of certain evidence, while the rest of court decision left unchanged, in our view, did not eliminate the overall unfairness of the criminal proceedings. The latter could only be remedied by the cancellation of court decisions with further remitting of the case to reconsideration before a competent court of first instance”⁴.

Therefore, due to the lack of power of the Supreme Court to re-examine the evidence, decide on their reliability or unreliability, decide on the priority of one evidence over another we believe the procedure for re-examination of decisions by the Supreme Court as a court of cassation is not effective. The only procedure that could meet the requirements of the CoM Recommendations of achieving *restitutio in integrum* by establishing a procedure of re-examination of national court decisions is the procedure of reopening a case under the Procedural Codes. Nevertheless, the practice shows that the Supreme Court is not minded to remit cases for full retrial instead of very limited review it conducts.

This leads to a situation whereby the Convention is no longer providing effective and practical guarantees

2 See Shabelnik v. Ukraine (No. 2), application no. 15685/11, judgement of 1 June 2017, § 56.

3 See Alakhverdyan v. Ukraine, application no. 12224/09, judgement of 16 April 2019, § 67.

4 See separate opinion of Judges of the Grand Chamber of the Supreme Court Antsupova, Britishchuk, Hritsiv, Lyashchenko, Prokopenko, Sytnik and Urkevich in the case No. 1-07/07, judgement of 13 November 2019, § 20.

for the protection of rights. Court judgments in Ukraine are deprived of their legal effect at the national level and they thus become an illusory remedy.

The Government of Ukraine demonstrated its awareness of the problem in its Action Plan on measures to comply with the Court's judgment in *Bochan v. Ukraine* (no. 2), (application no. 22251/08, judgment of 05/02/2015, final on 05/02/2015) as of 22 January 2016⁵ submitted with the CoM (the "**Action Plan**"). The Government stated that the violations found in *Bochan v. Ukraine* (No. 2) arise not from the defectiveness of legal procedures but from malpractice in the national courts.

IV. Measures taken by the Authorities

In its Action Plan the Government of Ukraine advised that the individual measures in case of *Bochan v. Ukraine* have been adopted, namely that the applicant received from the Government the amount of just satisfaction awarded by the Court and was informed that she has the right to apply for a retrial of her case by the Supreme Court.

As to the general measures, the government advised that the explanatory notes have been sent to the Supreme Court, the High Specialized Court of Ukraine for Civil and Criminal cases, the High Administrative Court of Ukraine and the Supreme Economic Court of Ukraine. Also, it was noted that in October 2018 the Government Agent in cooperation with the Council of Europe project "Strengthening the system of judicial accountability in Ukraine" had organized a high-level meeting with the Supreme Court to continue the discussion at national level.

Nevertheless, the results of retrial of the decision in case of Mr. Alakhverdyan and the reasoning provided by the Supreme Court, subsequently proved these measures to be ineffective.

V. Recommendations

In spite of the position expressed by the government that the violations found in the case of *Bochan v. Ukraine* (No. 2) arise not from the defectiveness of legal procedures but from malpractice by the national courts, we believe that the respective legislation in Ukraine can be improved as the current legal provisions are vague and provide for options, which cannot achieve *restitutio in integrum*.

We believe the current Procedural Codes should be amended in order to define a straightforward and clear legal procedure for retrial of decisions where the Court finds a violation of Convention provisions.

At the same time, we agree in part with the government's position in that the malpractice of national courts is also one of the causes for violations of the Convention in Ukraine. Therefore, we believe that the content and meaning of the Court's judgments in *Bochan v. Ukraine* (No.2), *Shabelnik v. Ukraine* (No. 2) and *Yaremenko v. Ukraine* (No. 2) should be communicated to the Supreme Court as well as to the courts of lower instance in any possible forms (recommendations, case overview, practical guides etc.).

⁵ According to Communication from Ukraine concerning the case of *Bochan v. Ukraine* (No. 2), application no. 22251/08, as of 22 January 2016, § 7.

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