CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 19065/05
by Alyona KHANYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 5 July 2007 as a Chamber composed of:

Mr C. BÎRSAN, *President*,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE,
Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having regard to the above application lodged on 11 May 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Alyona Khanyan, is an Armenian national who was born in 1977 and lives in Yerevan.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was a refugee from Azerbaijan who fled to Armenia in 1990. In accordance with a number of governmental decisions, the applicant – together with other refugees – was placed in a flat in a building previously owned by the Central Committee of the Communist Party and used as the Party's graduate school.

On an unspecified date, the applicant instituted proceedings against the Yerevan Mayor's Office (*Երևանի քաղաքապետարան*) seeking to obtain title to the above flat. She claimed that the flat was ownerless and that she had *bona fide*, manifestly and continuously been in possession of the flat for ten years, which entitled her to acquire ownership of it in accordance with Article 187 of the Civil Code. The Governmental Department for the Management of Public Property (*ՀՀ կառավարությանն առընթեր պետական գույքի կառավարման վարչություն*) was also joined as a defendant.

On 28 April 2004 the Kentron and Nork-Marash District Court of Yerevan (*Երևան քաղաքի Կենտրոն և Նորք-Մարաշ համայնքների առաջին ատյանի դատարան*) granted the applicant's claim. No appeal was lodged, so this judgment became final and enforceable on 13 May 2004.

On 27 May 2004 the applicant's title was formally registered and the relevant ownership certificate was provided to her.

On an unspecified date, the Deputy General Prosecutor (*ՀՀ գլխավոր դատախազի տեղակալ*) lodged a cassation appeal on points of law against this judgment with the Court of Cassation (*ՀՀ վճռաբեկ դատարան*), in accordance with Article 223 § 2 of the Code of Civil Procedure.

On 17 September 2004 the Court of Cassation granted the appeal and quashed the judgment of 28 April 2004. The Court of Cassation found that the flat in question, in accordance with the decision of the Supreme Soviet of Armenia of 17 April 1991 and the Law on Public Property, was in State ownership and, therefore, the applicant was not entitled to acquire ownership under Article 187 of the Civil Code. The case was remitted to the Civil Court of Appeal (*ՀՀ քաղաքացիական գործերով վերաքննիչ դատարան*) for a new examination.

On 13 October 2004 the Civil Court of Appeal examined the applicant's claim anew. The applicant and the two defendants, namely the Yerevan Mayor's Office and the Governmental Department for the Management of Public Property, made their submissions. Having heard the parties, the Court of Appeal decided to dismiss the applicant's claim on the ground that she had failed to provide evidence of *bona fide*, manifest and continuous possession of the flat in question.

The applicant lodged a cassation appeal on points of law and procedure.

On 26 November 2004 the Court of Cassation dismissed the applicant's cassation appeal on the ground that the flat in question was in State ownership and was in the possession of the applicant not as her own property but as a temporary place of residence.

B. Relevant domestic law

1. The Code of Civil Procedure (as in force at the material time)

According to Article 37, public authorities are entitled to institute court proceedings seeking to defend the pecuniary interests of the State. The public authority which has instituted proceedings enjoys all the rights of a plaintiff and bears his responsibilities. If the relevant public authority does not institute proceedings, the proceedings seeking to defend the pecuniary interests of the State shall be instituted by the public prosecutor in accordance with the Law on the Public Prosecutor's Office.

According to Article 140, judgments of first instance courts enter into force fifteen days after their delivery. According to Article 205, appeals against judgments of first instance courts which have not entered into force can be brought by the parties and persons who were not parties to the proceedings but whose rights and obligations were affected by the judgment. According to Articles 206 and 207, such appeals can be brought within fifteen days after the delivery of the judgment of the first instance court and are examined by the Civil Court of Appeal.

According to Article 219, judgments of the Court of Appeal enter into force fifteen days after their delivery. According to Article 223 § 1, appeals against judgments of the Court of Appeal which have not entered into force can be brought by the parties and persons who were not parties to the proceedings but whose rights and obligations were affected by the judgment.

According to Article 222 § 1, judgments of first instance courts and the Court of Appeal which have entered into force can be reviewed through cassation proceedings. According to Article 223 § 2, appeals against judgments of first instance courts and the Court of Appeal which have entered into force may be brought by (1) the General Prosecutor of Armenia and his deputies in cases prescribed by Article 37 of this Code and in accordance with the Law on the Public Prosecutor's Office; and (2) advocates holding a special licence and registered with the Court of Cassation.

According to Article 224, cassation appeals shall be examined by the Civil and Commercial Chamber of the Court of Cassation.

According to Article 225, a cassation appeal can be lodged on (1) points of law or a procedural violation of the parties' rights; or (2) on the ground of newly discovered circumstances. A cassation appeal on the ground

envisaged by the first paragraph of this Article can be lodged within three months from the date of entry into force of the judgment.

According to Articles 235 and 236, the Court of Cassation shall review the judgments on the basis of the grounds presented in the appeal. The Court can either dismiss the appeal, or otherwise quash the whole or part of the judgment and remit the case for a new examination by the Court of Appeal.

According to Articles 237 and 238, the Court of Cassation shall adopt a decision. The Court of Cassation is not entitled to establish or consider as proven circumstances which have not been established by the contested judgment or have been rejected by it, to determine whether or not this or that piece of evidence is trustworthy, to resolve the issue of one piece of evidence having more weight than another or the issue of which norm of substantive law must be applied and what kind of judgment must be adopted upon the new examination of the case.

According to Article 239, the decision of the Court of Cassation enters into force from the moment of its delivery and is not subject to appeal. According to Article 241, a copy of this decision shall be sent to the appellant, to the parties and to the relevant court within seven days from its adoption.

2. The Law on the Public Prosecutor's Office (ՀՀ օրենքը «Դատախազության մասին»)

According to Article 27, where a violation of pecuniary interests of the State has been disclosed, the public prosecutor or, upon his instruction, the relevant public authority or public official shall institute court proceedings.

According to Article 28, the General Prosecutor can lodge appeals against court judgments and decisions according to the relevant rules of criminal and civil procedure. Such appeals can be also lodged by the subordinate prosecutors within the limits of their competence. The public prosecutor is entitled to ask the court for the case file of any case in which a final judgment or a decision has been taken. The public prosecutor, if he considers the court judgment or decision to be unlawful or unsubstantiated, shall lodge an appeal with the superior court.

3. The Civil Code

According to Article 178, a property is considered ownerless if it has no owner or its owner is unknown or has renounced his ownership in respect of that property. Ownership of an ownerless immovable property can be obtained by virtue of adverse possession (Article 187).

According to Article 187, a citizen or a legal person, who is not the owner of an immovable property but has bona fide, manifestly and

continuously possessed it as his own property for a period of ten years, shall obtain ownership in respect of that property (adverse possession).

COMPLAINTS

1. The applicant complained under Article 6 § 1 of the Convention that the final judgment of 28 April 2004 had been quashed by an unfounded decision of the Court of Cassation of 17 September 2004.

2. The applicant also complained under Article 6 § 1 of the Convention that

(a) the Civil Court of Appeal had failed to correctly evaluate the facts and evidence in dismissing her claim; and

(b) the Civil Court of Appeal had not been independent in reaching its judgment because it had been influenced by the public prosecutor's involvement in the case.

THE LAW

1. The applicant complained about the decision to quash the final judgment in her favour. She invoked Article 6 § 1 of the Convention which, insofar as relevant, provides:

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

The Court recalls that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question. Legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher court's power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Brumărescu v. Romania* [GC], no. 28342/95, §§ 1-62, ECHR 1999-VII; *Ryabykh v. Russia*, no. 52854/99, §§ 51-52, ECHR 2003-IX). It is not necessary, however, to determine whether in the

present case the quashing of the final judgment of 28 April 2004 was in violation of the principle of legal certainty for the following reasons.

The Court recalls that the quashing of a final judgment is an instantaneous act, which does not create a continuing situation, even if it entails a reopening of the proceedings as in the present case (see, *mutatis mutandis*, *Voloshchuk v. Ukraine* (dec.), no. 51394/99, 14 October 2003; *Sardin v. Russia* (dec.), no. 69582/01, 12 February 2004; *Stanca v. Romania* (dec.), no. 59028/00, 27 April 2004; *Frunze v. Moldova* (dec.), no. 42308/02, 14 September 2004; and *Gargali v. Bulgaria* (dec.), no. 67670/01, 5 June 2006). The Court further recalls that, in accordance with Article 35 § 1 of the Convention, it may only examine complaints in respect of which domestic remedies have been exhausted and which have been submitted within six months from the date of the "final" domestic decision. If there is no adequate remedy against a particular act, which is alleged to be in breach of the Convention, the date when that act takes place is taken to be "final" for the purposes of the six months' rule (see, e.g., *Valašinas v. Lithuania* (dec.), no. 44558/98, 14 March 2000).

The Court notes that no remedies existed in the Armenian law, in force at the material time, against a decision of the Court of Cassation to grant an "appeal" lodged within three months against a final judgment by the prosecutor, by which this judgment was set aside and the case was subsequently examined anew on the merits. According to Article 239 of the Code of Civil Procedure, this decision was final and not subject to appeal. In the absence of an effective remedy, the Court concludes that it was the very act of quashing of the final judgment of 28 April 2004 that triggered the start of the six-month time-limit for lodging this part of the application to the Court (see, *mutatis mutandis*, *Sardin*, cited above). In the present case the final judgment was quashed by the Court of Cassation on 17 September 2004, while the application was lodged only on 11 May 2005. Nothing in the applicant's submissions indicates that she was not immediately aware of this decision and, in any event, she had undoubtedly become aware of it at the latest by the time her case was examined anew by the Civil Court of Appeal on 13 October 2004. The Court finally notes that, in any event, this particular procedure has been modified and no longer exists in the Armenian law.

It follows that this part of the application was introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

2. The applicant complained that the Court of Appeal had dismissed her claim, and that the Court of Appeal had not been independent. She invoked Article 6 § 1 of the Convention cited above.

a) As to the judgment of the Court of Appeal, the Court, first of all, reiterates that it is not for it to act as a court of appeal in respect of the decisions taken by domestic courts. It is the role of the domestic courts to

interpret and apply the relevant rules of procedural or substantive law (see, e.g., *Fehr v. Austria*, no. 19247/02, § 32, 3 February 2005). Furthermore, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *inter alia*, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

In the present case, the applicant was present at the hearing before the Court of Appeal. She was able to submit evidence, to make oral submissions and to defend her case in conditions which did not put her at a disadvantage vis-à-vis her opponent. There is nothing in the case file to suggest that the proceedings before the Court of Appeal were conducted in violation of the fair trial guarantees contained in Article 6 § 1.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

b) As to the independence of the Court of Appeal, the Court recalls that "independence" of the tribunal presupposes its independence of the executive and also of the parties (see *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, § 95). In the present case, nothing in the materials before the Court suggests that the Court of Appeal was not independent of the executive or of the parties to the case, or that the Court of Appeal in reaching its judgment was pressured or influenced by the fact that it was the public prosecutor who had requested for the case to be reopened.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Santiago QUESADA
Registrar

Corneliu BÎRSAN
President