



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

SECOND SECTION

CASE OF LÁNCZÁD HITEL ÉS FAKTOR ZRT v. HUNGARY

(Application no. 40381/05)

JUDGMENT

STRASBOURG

2 November 2010

FINAL

02/02/2011

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

In the case of Lánchíd Hitel és Faktor Zrt v. Hungary,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria,

Kristina Pardalos,

Guido Raimondi, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 12 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 40381/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian company limited by shares, Lánchíd Hitel és Faktor Zrt (“the applicant”), on 28 October 2005.

2. The applicant was represented by Ms I. Aszódi, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged that the fact that the Hungarian courts had declared unenforceable certain outstanding social security contributions which it had acquired by way of assignment amounted to arbitrary deprivation of property.

4. On 13 March 2009 the President of the Second 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

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a company limited by shares with its seat in Budapest.

6. By way of assignments for consideration, done in October 2001 and July 2002, the applicant acquired – through intermediaries – the debts of V. Rt and M. Rt from the Tax Authority. The debts consisted mostly of unpaid payroll taxes and social security contributions and originated in the period before 1998.

7. Since the debtors had become insolvent, the applicant brought an action against the State-owned Hungarian Privatisation and State Holding Company (ÁPV Rt) before the Budapest Regional Court in order to recover the assigned claims. Relying on section 328 of the (Old) Companies Act 1988, it argued that ÁPV Rt – the majority owner of the two debtor companies – bore vicarious liability for the outstanding debts.

8. On 25 September 2003 the Regional Court partly found for the applicant. The court awarded some 47.3 million Hungarian forints (HUF) to the applicant, which corresponded to the debts of V. Rt other than the payroll taxes and social security contributions. It dismissed the action in respect of the latter items. The applicant was obliged to pay HUF 9.6 million to the respondent in legal fees.

9. The applicant appealed. It claimed 22,482,500 Hungarian forints (HUF) plus accrued interest on account of the remaining debts of V. Rt and HUF 177,975,985 plus accrued interest on account of those of M. Rt.

10. The Budapest Court of Appeal upheld the first-instance decision on 9 July 2004. The applicant was obliged to pay HUF 3 million as procedural fees.

11. The applicant lodged a petition for review with the Supreme Court in respect of the social security contributions owed by M. Rt. It submitted that their amount altogether was approximately HUF 160 million – a sum including the principal of HUF 84,515,225 – but susceptible to further taking of evidence in resumed proceedings.

12. On 5 April 2005 the Supreme Court upheld the Court of Appeal's decision. It was satisfied that ÁPV Rt indeed bore vicarious liability in the circumstances. Relying on Uniformity Decision no. 2/2004.PJE, it held however that – pursuant to sections 3(3) and 25(2) of the (Old) Taxation Order Act 1990 – for the impugned social security contributions to be enforceable by the applicant, a decision should have been issued by the Tax Authority establishing the vicarious liability. For want of such a decision, the contributions could not be enforced by the applicant, since the assignment had not conferred any public law powers on it. The applicant was obliged to pay once more HUF 3 million as procedural fee.

II. RELEVANT DOMESTIC LAW

13. Section 328 of the (Old) Companies Act 1988 provided as follows:

“(1) If [the majority-owner, i.e. controlling] joint-stock company acquires such part of the shares of [the controlled joint-stock company] as exceeding three-fourth of [the

latter's] share capital, the board of directors of the controlling ... company ... may give instructions concerning the management of the [controlled] ... company to [its] board of directors, which the latter must carry out ("joint-stock company under direct control").

(2) The controlling ... company shall bear unlimited liability for the debts of the joint-stock company under direct control."

14. Section 3(3) c) of the (Old) Taxation Order Act 1990 (no. XCI of 1990) (as in force at the material time) provides that the Act is to be applied to the payment of social security contributions. Section 25(2) f) provides that, if a taxpayer fails to pay the tax and it cannot be recovered from that taxpayer, the Tax Authority is entitled to the adoption of a decision establishing vicarious liability to cover the outstanding debt. Sections 6(1) and 6(2), 35(2)f) and 120(1)a) of the (New) Taxation Order Act 2003 (no. XCII of 2003) contain identical rules.

15. The interpretation that assignees cannot claim in civil courts outstanding taxes from those with vicarious liability was upheld by the Supreme Court in Uniformity Decision no. 2/2004.PJE. It considered that, under both Taxation Order Acts, vicarious liability for tax debts was to be established by a decision of the Tax Authority.

16. However, the above legislation was subsequently repealed by Act no. LVI of 2005. According to the reasoning of the bill, the interpretation of the Supreme Court in Uniformity Decision no. 2/2004.PJE – an economically unjustified misconception of the law running counter to the intentions of the lawmaker – rendered unenforceable and thus worthless those tax debts which could not be recovered in the liquidation of the original debtors. Therefore the legal avenue of a civil action was to be opened for the assignees of such claims *vis-à-vis* those with vicarious liability, so as to restore constitutionality in terms of the right to access to a court in this context.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

17. The applicant complained that the interpretation of the (Old) Taxation Act 1990 by the Hungarian courts amounted to an arbitrary deprivation of property. It relied on Article 1 of Protocol No. 1 and Article 14 of the Convention.

18. The Court considers that this complaint falls to be examined under Article 1 of Protocol No. 1 alone, which provides as follows:

“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.”

19. The Government contested that argument.

A. Admissibility

20. The Court observes that the applicant did not challenge before the Supreme Court the lower courts' decisions in respect of the debts of V. Rt (see paragraph 11 above). Its petition for review involved exclusively the social security debts of M. Rt, in respect of which the Supreme Court adopted a decision on the merits. In these circumstances, it must be concluded that the application is inadmissible for non-exhaustion of domestic remedies in so far as the debts of V. Rt are concerned, and that this part thereof must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

21. The Court further notes that the remainder of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. This part must therefore be declared admissible.

B. Merits

22. The applicant argued that the interpretation according to which its claims against ÁPV Rt were unenforceable for want of a decision by the Tax Authority was wrong and amounted to an inadmissible interference by the State with market relations, as a result of which its claims, acquired onerously on the market, had become worthless. This had amounted to arbitrary deprivation of property.

23. The Government argued that there had been no interference with the applicant's property rights. They endorsed the Supreme Court's judgment of 5 April 2005 which had stated that ÁPV Rt bore vicarious liability but could have been obliged to pay the outstanding contributions only by a decision of the Tax Authority. However, no such decision had been issued by the Tax Authority and the applicant had never requested it to do so. Therefore the applicant had failed to make use of all possibilities in order to protect its acquired property.

24. The Government further noted that, in the civil law, an assignor is not liable to the assignee for the debtor to fulfil its obligation, if the claim

was expressly assigned as an uncertain one. In the present case, the Tax Authority, being the original assignor, had not guaranteed the enforceability of the claims since this had been the very reason for which they had been sold for a fraction of their face value. When acquiring the claims, the applicant, assisted by legal experts, must have been aware of the relevant laws – according to which for public dues of such nature ÁPV Rt could be made liable vicariously only by virtue of a separate administrative decision – and of the resultant risk.

25. The Court reiterates that Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not guarantee the right to acquire possessions (see *Marckx v. Belgium*, 13 June 1979, § 50, Series A no. 31). Consequently, a person who complains of a violation of his or her right under Article 1 of the Protocol must first show that such a right existed; a “claim” can only fall within the scope of that Article if it is sufficiently established to be enforceable (see *OAO Plodovaya Kompaniya v. Russia*, no. 1641/02, § 27, 7 June 2007; *Zhigalev v. Russia*, no. 54891/00, § 146, 6 July 2006; *Uskova v. Russia* (dec.), no. 20116/02, 24 October 2006; and *Grishchenko v. Russia* (dec.), no. 75907/01, 8 July 2004). The assignment of a debt is capable in principle of amounting to such a “possession” (see *Nosov v. Russia* (dec.), no. 30877/02, 20 October 2005; *Gerasimova v. Russia*, no. 24669/02, §§ 18-22, 13 October 2005; and *Regent Company v. Ukraine*, no. 773/03, § 61, 3 April 2008; see also *OOO Rusatommet v. Russia* (dec.), no. 12064/04, 27 November 2008). Thus, the Court has to ascertain whether the assignment in the present case resulted in the acquisition by the applicant of a “possession” within the meaning of Article 1 of Protocol No. 1 (*Novikov v. Russia*, no. 35989/02, § 33, 18 June 2009).

26. In this connection the Court observes that neither the respondent nor the domestic courts called into question the validity of the assignments in question at any stage of the proceedings. Indeed, a substantial part of the applicant's claims which originated in amounts owed by private entities was granted by the courts (see paragraph 8 above), having regard to ÁPV Rt's vicarious liability established under section 328 of the (Old) Companies Act 1988 (see paragraph 13 above) which reflects a concept of intra-group liability. The remainder of the claims, concrete and quantified (see paragraph 9 above), was given away by the assignor Tax Authority for consideration, was the object of unrestricted market transactions between various intermediaries and was acquired by the applicant without any *prima facie* limitation on its enforceability. For the Court, the mere fact that the courts interpreted the law in the light of Uniformity Decision no. 2/2004.PJE in a manner which eventually barred the applicant's access to enforcement – and which was subsequently qualified by the lawmaker as running counter to its intentions (see paragraph 16 above) – cannot remove these claims from the scope of protection of Article 1 of Protocol No. 1.

It is therefore satisfied that the claim emanating from the assignment of the social security contributions owed by M. Rt amounts to a “possession” for the purposes of this provision.

27. Having established that the applicant had a “possession” under Article 1 of Protocol No. 1, the Court has to determine whether the interference complained of was in compliance with the requirements of that provision.

28. The Court reiterates that, under its settled case-law, Article 1 of Protocol No. 1 comprises three distinct rules: “The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control use of property in accordance with the general interest ... The three rules are not, however, ‘distinct’ in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule” (*Beyeler v. Italy* [GC], no. 33202/96, § 98, ECHR 2000-I).

29. The Government argued that, since the enforcement of the disputed assignment was dependent on an administrative decision not issued, the courts’ dismissals of the applicant’s action could not amount to an interference with its possessions. However, having regard to the considerations outlined in paragraph 28 above and paragraph 33 below, the Court is of the view that the courts’ decisions may be regarded as having frustrated the applicant’s legitimate expectation to benefit from an assignment acquired for consideration (*Fedorenko v. Ukraine*, no. 25921/02, § 25, 1 June 2006). Regardless of whether this is an interference with the peaceful enjoyment of the applicant’s possessions, within the meaning of the first sentence of Article 1, or a deprivation of possessions within the meaning of the second sentence of that provision, the same principles apply in the present case, and require the measure to be justified in accordance with requirements of that Article, as interpreted by the established case-law of the Court (amongst many authorities, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B, § 55).

30. The Court observes the parties’ divergent positions as to the interpretation of the relevant provisions of the (Old) Taxation Order Act 1990. It recalls that its jurisdiction to verify compliance with the domestic law is limited (*Håkansson and Stureson v. Sweden*, 21 February 1990, Series A no. 171-A, § 47) and that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of the interpretation of domestic legislation

(*Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I). Therefore, whatever doubt there may be as to the authorities' interpretation of the provisions of the (Old) Taxation Order Act 1990, the Court accepts that, at the material time, a decision of the Tax Authority could arguably be considered a lawful condition for the enforceability of the impugned claim. At this juncture, the Court notes the Government's argument according to which the applicant failed to make use of all possibilities in order to protect its acquired property by not requesting the Tax Authority to issue such a decision. However, the Government have not demonstrated the existence of this possibility under the law in the present circumstances or submitted any relevant jurisprudence. The Court is therefore not persuaded by this assertion.

31. Moreover, according to the Court's well-established case-law, an interference must strike a “fair balance” between the demands of the general interests of the community and the requirements of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph. There must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued. Furthermore, as in other areas of social, financial or economic policy, national authorities enjoy a certain margin of appreciation in the implementation of laws regulating property and contractual relationships (see, *mutatis mutandis*, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 52).

32. This margin of appreciation, however, goes hand in hand with European supervision. The Court must therefore ascertain whether the discretion afforded to the Government was overstepped, i.e. whether to require an administrative decision for the applicant's assignment to become enforceable *vis-à-vis* those with vicarious liability respected the principle of proportionality.

33. The Court considers that, by assigning its outstanding claims to private companies for consideration, the Tax Authority proceeded as an ordinary actor of a sales agreement and thus entered the domain of private law. The impugned social security charges then became the object of civil-law transactions between the various intermediaries and, finally, the applicant. The vicarious liability borne by the State-owned ÁPV Rt for these debts should normally have secured their recovery – just as it did in respect of the claims originally held by private entities. The applicant could therefore legitimately expect to recover its claims originating in the social security debts. However, the domestic courts chose an interpretation of the law which effectively impeded the applicant's collection of this debt by subjecting it to a decision to be issued by the Tax Authority in the framework of the public power conferred on it. For the Court, this approach rendered the applicant's claims completely worthless – which exceeds the risk inherent in the type of trade the applicant was involved in, even if it had

acquired the assignments for a fraction of their face value. It finds that the Supreme Court's interpretation of the law effectively hampered the enforcement against a State-owned holding of a liability originating in the sale of assets by a public authority.

In sum, the Court cannot but conclude that no “fair balance” has been struck between the demands of the general interests of the community – namely, the integrity of the treasury – and the requirements of the individual's fundamental rights.

There has accordingly been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. Concerning the assignment of the debts of M. Rt, the applicant claimed HUF 177,975,985¹ plus accrued interest in respect of pecuniary damage, this sum being the value of its unsuccessful claim (see paragraph 9 above).

36. The Government contested this claim as excessive.

37. The Court notes that before the Supreme Court, the applicant pleaded that the sum to be collected on account of the debts of M. Rt was approximately HUF 160 million² – a sum including the principal of HUF 84,515,225³ – but was susceptible to further taking of evidence in resumed proceedings. It considers that it cannot speculate as to the exact award the applicant would have been granted had the courts accepted its claim. Having regard to the inherently risky nature of trading in debts (*Regent Company v. Ukraine*, no. 773/03, § 67, 3 April 2008), it does not find it appropriate to grant the entirety of the disputed sum and awards the applicant EUR 310,000 under this head.

B. Costs and expenses

38. For the costs and expenses incurred before the domestic courts, the applicant claimed the following amounts: HUF 9.6 million⁴ (legal fee

¹ 630,700 euros (EUR)

² EUR 568,000

³ EUR 300,200

payable to the respondent as per the judgment of 25 September 2003, see paragraph 8 above), HUF 6 million¹ (procedural fees as per the judgments of 9 July 2004 and 5 April 2005, see paragraphs 10 and 12 above), HUF 2.5 million² (fees of the applicant's lawyer) and HUF 720,000³ in respect of miscellaneous costs. It did not submit any evidence supporting the two latter items.

39. The Government contested these claims.

40. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 40,000 covering costs under all heads, having regard to the fact that the legal costs claimed, in particular those incurred before the first-instance court, related to a larger scope of litigation than that of the violation found.

C. Default interest

41. The Court considers it appropriate that the default interest 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 debts of M. Rt admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 in respect of the debts of M. Rt;
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, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:
 - (i) EUR 310,000 (three hundred and ten thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;

⁴ EUR 34,000

¹ EUR 21,300

² EUR 8,900

³ EUR 2,500

- (ii) EUR 40,000 (forty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 2 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President