



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

FIFTH SECTION

CASE OF BASARBA OOD v. BULGARIA

(Application no. 77660/01)

JUDGMENT
(Just satisfaction)

STRASBOURG

20 January 2011

FINAL

20/04/2011

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

In the case of Basarba OOD v. Bulgaria,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
Pavlina Panova, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 77660/01) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Bulgarian limited liability company, Basarba OOD (“the applicant company”), on 13 November 2001.

2. Judge Kalaydjieva, the judge elected in respect of Bulgaria, withdrew from sitting in the case. On 30 January 2009 the Government appointed in her stead Ms Pavlina Panova as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1 of the Rules of Court).

3. In a judgment delivered on 7 January 2010 (“the principal judgment”), the Court held that there had been violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1. In particular, it found that in refusing to offer for sale to the applicant company a municipally-owned supermarket in Sofia (“the shop”), as ordered by a domestic court, the authorities had failed to comply with a final court judgment and had deprived the applicant company of its legitimate expectation to be offered to acquire the property at issue (see *Basarba OOD v. Bulgaria*, no. 77660/01, 7 January 2010).

4. Since the question of the application of Article 41 of the Convention was not ready for decision as regards the claims for damages, the Court reserved it and invited the Government and the applicant company to submit, within two months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (see paragraph 54 of the principal judgment and point 4 of the operative provisions).

5. The applicant company lodged just satisfaction claims. The Government submitted their comments.

6. The applicant company was represented by Ms N. Sedefova, a lawyer practising in Sofia. The Bulgarian Government (“the Government”) were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

THE LAW

7. 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

1. *The applicant company's claims*

8. The applicant company argued that had the authorities complied with their statutory obligation to offer it to buy the shop in 1996, today it would have owned that property and would have, for more than fourteen years, profited from its use. Therefore, referring to the case of *Papamichalopoulos and Others v. Greece* ((Article 50), 31 October 1995, Series A no. 330-B), the applicant company urged the Court to award to it: (a) the current market value of the shop, reduced by the preferential price it would have had to pay had it been offered to buy it in 1996, and (b) compensation for its inability to use the shop between 1996 and 2010, equalling the market rent it would have received had it been letting it out after acquiring title to it. In support of these claims the applicant company presented a report prepared in May 2010 by an expert appointed by it.

9. In order to prepare her report, the expert visited and inspected the premises. She also consulted various documents. She described the property as a one-storey building constructed in 1969, located in a residential area of Sofia, with a surface totalling 210 square metres, 80 square metres of which was a commercial area and the remainder a storage area.

10. On the basis of a document issued by the municipal company which had managed the property in 1995, the expert estimated that had it been offered to buy it in 1996, the applicant company would have been required to pay a price of 9,962 Bulgarian leva (BGN), the equivalent of approximately 5,082 euros (EUR). This was a preferential price, as provided for in section 35(1) of the Privatisation Act of 1992 (see paragraph 20 of the principal judgment).

11. In order to evaluate the current market value of the shop the expert used three different methods and then, on that basis, calculated a final amount. The first method referred to the costs that would be incurred if a

similar building was constructed today, taking also into account the actual building's amortisation. The second method was based on the possible future revenues from the shop, calculated on the basis of the rent that could possibly be received if the property was to be let out. The third method relied on information on similar properties offered for sale recently. Thus, the expert calculated that the cost of constructing the shop amounted to EUR 36,344.31, the possible revenue was EUR 103,256.46 and the shop's value under the third method amounted to EUR 160,289.36. Taking into account the respective weight of these three methods, the expert calculated the final market value of the shop at EUR 118,390.

12. Thus, the amount the applicant company claimed in respect of the value of the shop (the market value, EUR 118,390, reduced by the preferential price, EUR 5,082) was EUR 113,308.

13. As to the market rent to be received by letting out the shop, the expert relied on information about rents received for other similar shops in Sofia. She found that the monthly rent would have varied between BGN 592 and BGN 1,100. On this basis she calculated that the total rent between the beginning of 1996 and May 2010 would have amounted to BGN 138,306, the equivalent of EUR 70,926.

14. Thus, the total amount claimed by the applicant company in damages (the value of the shop, as indicated in paragraph 12 above, plus the market rent indicated in the preceding paragraph) was EUR 184,234.

2. The Government's position

15. The Government contested the expert report submitted by the applicant company. They presented a report prepared by another expert appointed by them.

16. The Government's expert agreed with the applicant company's expert that the preferential price the applicant company would have had to pay for the shop in 1996 was BGN 9,962 (see paragraph 10 above). However, his calculations led to a different amount in respect of the property's market value in March 2010. On the basis of a comparative method, taking into account the prices of similar properties offered for sale recently and the individual characteristics of the building at issue (its age, the fact that it had not been subject to major improvements), he assessed the shop's market value at EUR 34,800.

17. As to the market rent for the shop for the period from the beginning of 1996 to May 2010, the Government's expert used a comparative method and then diminished the amount reached by 20% to account for "commercial risk". He thus calculated the market rent for the shop at BGN 60,945, the equivalent of EUR 31,100.

18. In any event, the Government contested the approach proposed by the applicant company, namely that it had based its claims on the current market price of the shop and the market rent after 1996. The Government noted that those claims as formulated did not account for the taxes that

would have had to be paid. Furthermore, the applicant company could have invested the sum it had been prepared to pay for the shop in 1996 in another activity and still received profit. In addition, it was speculative to assert that the applicant company would have received rent for the shop and would not have, for instance, immediately sold it to a third party. In the latter case it would have received the shop's market value in 1996, which was considerably lower than its current value.

3. *The Court's assessment*

19. The Court considers that in the circumstances of the present case the reparation should aim at putting the applicant company in the position in which it would have been had the violation not occurred (see *Zlinsat, spol. s. r.o. v. Bulgaria* (just satisfaction), no. 57785/00, § 39, 10 January 2008).

20. The Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst others, *Stretch v. the United Kingdom*, no. 44277/98, § 47, 24 June 2003). A precise calculation of the sums necessary to make complete reparation in respect of the pecuniary losses suffered by applicants may be prevented by the inherently uncertain character of the damage flowing from the violation. An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award, the matter to be determined by the Court at its discretion, having regard to what is equitable (see *ibid.*, § 48, and *Lustig-Prean and Beckett v. the United Kingdom* (Article 41), judgment of 25 July 2000, §§ 22-23).

21. In the case at hand the Court found a violation of Article 6 § 1 of the Convention because the municipal authorities in Sofia had failed to comply with a final judgment ordering them to initiate a privatisation procedure and offer for sale to the applicant company under preferential conditions a shop that it had previously been renting (see paragraphs 32-33 of the principal judgment). Under Article 1 of Protocol No. 1, the Court found that the applicant company had had a legitimate expectation of being offered the shop for sale and had unlawfully been deprived of that expectation (see paragraphs 44 and 48 of the principal judgment).

22. Thus, the present case does not concern deprivation of existing property or an unconditional obligation on the part of the authorities to transfer property (see *Stretch*, cited above, § 50, and contrast *Kirilova and Others v. Bulgaria* (just satisfaction), nos. 42908/98, 44038/98, 44816/98 and 7319/02, §§ 26-27, 14 June 2007). What the applicant company was deprived of was an opportunity to buy the shop under preferential

conditions and eventually develop a commercial activity in it; the respondent State must therefore make good that loss of opportunity.

23. The Court is unable to accept the approach to assessing that loss proposed by the applicant company, which claimed the current market value of the shop reduced by the preferential price it would have had to pay in 1996, and the market rent it would have received had it been letting out the shop between 1996 and 2010 (see paragraph 8 above). The Court notes firstly that even though there is a strong likelihood that this would have happened, it cannot be accepted as a definite fact that the applicant company would have accepted the offer to buy the shop, had it been made, would have been able to pay the asking price, and would have thus acquired title to the shop. Moreover, the Court is unable to speculate as to whether the applicant company would have kept the shop or, for example, as the Government suggested (see paragraph 18 above), would have preferred to sell it. Neither does the Court consider that the market rent which the applicant company could have received had it been letting out the shop between 1996 and 2010, is an appropriate basis for assessing the damage suffered by it as a result of the breaches found. In this respect the Court agrees with the Government that it is mere speculation to assume that the applicant company would have let out the property instead of using it for its own commercial activities or selling it, and would have received rent for it during the whole period between 1996 and 2010. Furthermore, the Court notes that even if this had been the case, the applicant company would have inevitably incurred expenses for maintaining the shop, given in particular the fact that the building was rather old (see paragraph 9 above). In addition, any revenue from rent would have been subject to taxation (see *Popov v. Moldova (no. 1)* (just satisfaction), no. 74153/01, § 13, 17 January 2006, and *Kirilova and Others*, cited above, § 31).

24. To sum up, the Court considers that it has not been established with certainty that the applicant company would have acquired title to the shop and would have been letting it out up to today. Thus, in assessing the loss of opportunity suffered by the applicant company the Court will not rely on the calculations of the property's value and the rent to be received contained in the expert reports presented by the parties.

25. As to the Government, although they criticised the applicant company's approach to assessing the loss suffered by it (see paragraph 18 above), they did not indicate how, in their view, the quantum of award was to be calculated.

26. Thus, having regard to the lapse of time, the large number of imponderables involved and the impossibility of quantifying the applicant company's loss in exact terms, given in particular that the present case concerns the commercial activities of a company, which implies the taking of risks and a degree of uncertainty as to the use and the profitability of the properties acquired, the Court considers that it must rule in equity (see paragraph 20 above). It takes into account all the circumstances which have

become known to it concerning the applicant company and the economic situation in Bulgaria. It therefore awards the applicant company EUR 40,000 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

27. The applicant company did not claim costs and expenses for the proceedings under Article 41 of the Convention.

28. The Court sees no reason to make an award under this head in the absence of a claim by the applicant company.

C. Default interest

29. 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. Holds

(a) that the respondent State is to pay the applicant company, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 40,000 (forty thousand euros) in respect of pecuniary damage, plus any tax that may be chargeable, to be converted into Bulgarian leva at the rate applicable on 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;

2. Dismisses the remainder of the applicant company's claims for just satisfaction.

Done in English, and notified in writing on 20 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President