



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

FIFTH SECTION

CASE OF ROMAN MINARIK v. THE CZECH REPUBLIC

(Application no. 58874/11)

JUDGMENT

STRASBOURG

22 November 2012

DÉFINITIF

22/02/2013

Cet arrêt est devenu définitif en vertu de l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

In the case of Roman Minarik v. the Czech Republic,

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

Dean Spielmann, *President*,

Mark Villiger,

Karel Jungwiert,

Boštjan M. Zupančič,

André Potocki,

Paul Lemmens,

Helena Jäderblom, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 23 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 58874/11) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Roman Minarik (“the applicant”), on 12 September 2011.

2. The applicant was represented by Mr P. Zima, a lawyer practising in Prague. The Czech Government (“the Government”) were represented by their Agent, Mr V. A. Schorm, of the Ministry of Justice.

3. On 12 January 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1965 and lives in Willstätt, Germany. He was a minority shareholder of IVAX CR, a.s., a joint stock company incorporated under Czech law.

5. On 25 June 2002 general meeting of that company adopted, by votes of the main shareholder, a resolution on the winding up of the company and division of its assets between two new companies: IVAX Pharmaceuticals, s.r.o and První Opavská, a.s. The former company included all the business of IVAX CR, a.s. and was owned exclusively by the main shareholder of the wound-up company. The latter company included only financial assets

and was owned by minority shareholders of the wound-up company, including the applicant.

A. Proceedings on the deletion of the company from the Companies Register

6. On 5 September 2002 the Ostrava Regional Court (*krajský soud*) approved the registration of the winding up of the company and its deletion from the Companies Register with effect from 31 December 2002. The applicant did not have standing to participate in the proceedings. He nevertheless lodged an appeal.

7. On 26 November 2002 the Olomouc High Court (*vrchní soud*) dismissed the applicant's appeal. It ruled that since the applicant did not have standing to take part in the impugned proceedings, he was not entitled to appeal their outcome.

8. On 1 March 2006 the Supreme Court (*Nejvyšší soud*) dismissed the applicant's appeal on points of law.

9. On 31 August 2006 the Constitutional Court (*Ústavní soud*) dismissed the applicant's constitutional appeal holding that participation of shareholders in Companies Register proceedings would cause considerable delays, which would compromise the requirement to record events and facts in the Register as soon as possible in order to protect rights of third persons relying on the correctness of information in it. It added that the right of access to court of the shareholders was sufficiently safeguarded in other proceedings. It also noted that if a court in charge of the Companies Register were to record a fact which was based on a resolution of a general meeting, and if the resolution was subsequently found unlawful in proceedings under Article 131 of the Commercial Code, that court would make necessary amendments to the Register even *proprio motu*.

B. Proceedings to set aside the resolution of the general meeting

10. On 25 June 2002 the applicant lodged with the Regional Court an action to have the resolution on the winding up of the company set aside, asserting that it had been adopted contrary to the applicable law.

11. On 24 November 2006 the Regional Court terminated the proceedings noting that company IVAX CR, a.s. had been deleted from the Companies Register on 31 December 2002. It referred to Article 220v in conjunction with 220h § 4 of the Commercial Code that prevented it from continuing the proceedings after the company had been deleted from the Companies Register.

12. On 24 April 2007 the High Court dismissed the applicant's appeal agreeing with the conclusions of the Regional Court.

13. On 24 June 2009 the Supreme Court dismissed the applicant's appeal on points of law agreeing with the lower courts.

14. On 3 March 2011 the Constitutional Court dismissed the applicant's constitutional appeal. It interpreted the relevant provisions of the domestic law in a way that, in its view, was compatible with the Convention, taking into account especially the Court's judgment in *Kohlhofer and Minarik v. the Czech Republic*, nos. 32921/03, 28464/04 and 5344/05, 15 October 2009. It held that the applicant could have instituted proceedings under Article 131 § 4 of the Commercial Code claiming just satisfaction caused by an unlawful decision of a general meeting. In those proceedings the courts, as a necessary preliminary question, would have to decide on the legality of the decision, which was the issue that the applicant had been seeking access to court for. Consequently, the applicant's right of access to court was sufficiently safeguarded in other proceedings. The relevant part of the judgment reads:

“Although the European Court of Human Rights found the existence of a legitimate aim of the decisive legal regulations embodied in Article 131 § 3(c) and Article 220 § 4 of the Commercial Code, it did not agree that it is a ‘proportionate’ measure, not even with regard to the existence of related and anticipated proceedings on the ‘review of the compensation’, damages and just satisfaction. ...

However, at present – with regard to the presented legal interpretation of the interconnection between the proceedings concerned, envisaged in Articles 220v, or 220h of the Commercial Code (on additional compensation Article 220k, damages or just satisfaction) and the proceedings on the invalidity of the general meeting's resolution – [the proportionality of the measure] can already be regarded as proved if it was newly stipulated, in addition to the legal elements ‘at play’ before the European Court of Human Rights, that [the proceedings] are characterised (in Article 131 § 4 of the Commercial Code) by the basis, which is provided for in the grounds for the invalidity of the general meeting's resolution (even ‘if the court does not declare the general meeting's resolution null and void for reasons mentioned in § 3’). This corresponds to the above conclusion that the issue of validity, or invalidity, of a general meeting's resolution is an issue that the court examines as a preliminary question in related proceedings on those ‘new’ claims; in such proceedings, in which the appellant is (could be) a fully-fledged participant, he can appropriately defend his rights, including adequate opposition to the general meeting's resolution. It has also been said that the ‘declaration’ sought by the appellant in the reasoning of the order discontinuing the proceedings on the invalidity of the general meeting's resolution lacks the decisive nature (if it ever had one), and it was also noted that the granting of ‘certain claims for damages and just satisfaction’ is already thereby capable of expressing that the previously challenged general meeting's resolution contained some of the deficiencies claimed by the appellant.”

C. Compensation proceedings under Article 220k of the Commercial Code

15. The applicant instituted proceedings claiming compensation under Article 220k of the Commercial Code for an inadequate exchange ratio of shares of the wound-up company for shares of the new company.

16. On 30 November 2007 the Regional Court decided that the amount of compensation the applicant had received was inadequate and ordered the defendant to pay to the applicant a sum amounting to 289,735.60 Czech korunas (CZK, 11,802 euros (EUR)) together with interest rate of 7.5 per cent starting from 31 December 2001.

17. On 18 September 2009 the High Court upheld the judgment. It nevertheless partly modified the judgment's operative part by including a declaration that the applicant, together with another petitioner, was entitled to additional compensation as provided for by Articles 200k and 220v of the Commercial Code.

18. On 14 August 2012 the Supreme Court quashed the decision in part and remitted the case to the High Court. It considered that that court had erred when it included the declaration in the operative part.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. The relevant domestic law and practice are set out in the Court's judgment *Kohlhofer and Minarik v. the Czech Republic*, nos. 32921/03, 28464/04 and 5344/06, §§ 40-70, 15 October 2009.

20. With effect from 1 January 2012 Act no. 355/2011 amending Act no. 125/2008 on the Transformation of Companies and Cooperatives was adopted. The new wording of section 57 of that act reads as follows:

“(1) After the registration of the transformation in the Companies Register it is not possible

...

(b) to declare the transformation project null and void or to declare the decision on the approval of transformation null and void; this shall be without prejudice to the members' right to [additional] compensation and damages, or to just satisfaction, [...]

(2) If court proceedings are pending on a motion for the declaration of the transformation project null and void or a motion for the declaration of the decision on the approval of transformation null and void at the moment of the registration of the transformation in the Companies Register, within a time limit set by the court, which must be at least 30 days, the petitioner can modify the motion for the initiation of the proceedings, even without the court's approval, in a way that he seeks a declaration of whether the transformation project, or the decision on the approval of the transformation, is contrary to law, memorandum of association or articles of association. ...

(3) If the court declares that the transformation project or the decision on the approval of the transformation are contrary to law, memorandum of association or articles of association, or that they are null and void, then the persons

(a) who suffered damage in consequence of such violation or invalidity shall be entitled to damages, and

(b) whose rights were interfered with by such violation, shall have the right to just satisfaction, which can also be provided in money.

(4) Persons referred to in subsection 3 shall have the right mentioned therein

(a) against all persons participating in the transformation or their legal successors if such a violation or the reason for the invalidity of the transformation project or the invalidity of the decision on the transformation are based on the content of the transformation project, or

(b) against a person participating in the transformation whose [governing] body decided on the transformation, or against its legal successor, if such a violation or the reason for the invalidity of the decision on the transformation is not based on the content of the transformation project. ...”

21. In its decision of 30 March 2011, no. 29 Cdo 1048/2008 the Supreme Court referred to the Constitutional Court’s judgment in the present case and accepted its conclusions that the issue of validity, or invalidity, of a general meeting’s resolution is an issue that the court would examine as a preliminary question in continued proceedings on the right to damages or just satisfaction, or additional compensation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained that the domestic courts refused to consider the merits of his action challenging the resolution on the winding up of the company and thus the interference with his property rights has not been reviewed by any court. He relied on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1. The Court considers it appropriate to examine the complaint under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

23. The Government maintained that the application was inadmissible for non-exhaustion of domestic remedies, the compensation proceedings being still pending before domestic courts and the applicant had failed to institute the proceedings for damages and just satisfaction under Article 131 § 4 of the Commercial Code.

24. The applicant disagreed, considering these proceedings not an effective remedy regarding his complaint.

25. The Court considers, as in the case of *Kohlhofer and Minarik* (cited above, § 80) that the question of effectiveness of this remedy is inseparably linked to the Government's plea on the merits that such a remedy justified the limitation on the applicant's access to court in the set-aside proceedings. It therefore joins this question to its examination on the merits of the application.

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

B. Merits

1. Submissions of the parties

27. The applicant maintained that Czech legislation had made it impossible for him to challenge the winding-up resolution before a court. He considered that his application had the same characteristics as that of *Kohlhofer and Minarik v. the Czech Republic*, cited above, where the Court found a violation of Article 6 of the Convention.

28. According to him, the proceedings on damages and just satisfaction had a different purpose and could not substitute a court review of the legality of the winding-up resolution, which deprived him of his shares. Furthermore, solely monetary compensation for an illegal squeeze-out of minority shareholders would not have the necessary dissuasive effect. Moreover, these proceedings were subject to a much higher court fee than the set-aside proceedings.

29. The Government maintained that the right of access of minority shareholders to court can also be secured in a different way than solely by participation in the very proceedings on the invalidity of the general meeting's resolution with a decision on the merits. Relying in particular on the judgment of the Constitutional Court in the present case and the subsequent case-law of the Supreme Court, they argued that the applicant's right of access to court was secured by proceedings pursuant to Article 131 § 4 of the Commercial Code.

30. In their view Article 6 of the Convention did not stipulate the consequences under substantive law, which the domestic law must tie to the fact that any act had been found to be contrary to the law, or to documents like a memorandum of association or articles of association. The determination of such consequences was clearly the domain of the domestic law and the Convention did not call upon the Court to substitute the domestic authorities in this regard, the legislator in particular.

31. Therefore, even though under Article 6 of the Convention there existed a right for adversarial proceedings to take place in which the court decided on the issue of the consistency of a general meeting's decision with legal rules or agreements, it did not follow that such proceedings must necessarily lead to the outright setting aside of the unlawful act. There was therefore nothing to prevent the consequence under substantive law, compliant with Article 6 of the Convention, from being, for example, the very finding of unlawfulness, invalidity or illegality, accompanied by an obligation to provide damages or just satisfaction.

32. A different concept of national legislation, which would provide minority shareholders with an unrestricted right to challenge a majority shareholder's decision before a court, could result in a practical infeasibility of transformation of companies and in a destabilisation of commercial relationships, with heavy impacts on the Czech Republic's economy and also could potentially have a negative impact on the compatibility of Czech law with the European Union law, namely Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

33. In the proceedings on damages or just satisfaction pursuant to Article 131 § 4 of the Commercial Code, the validity, or invalidity, of a general meeting's resolution was an aspect that would always have to be considered as a preliminary question. At the same time this would take place in proceedings to which a minority shareholder was a fully-fledged party and in which he would be able to make his claims in adversarial proceedings. In such proceedings the question that was the very essence of the original proceedings on the invalidity of the general meeting's resolution would always be considered on the merits, and the proceedings would satisfy all requirements of Article 6 of the Convention.

2. *The Court's assessment*

34. The Court first notes that it had already several opportunities to rule on exactly the same complaint as is the present one. In all cases it found a violation of Article 6 of the Convention on account of lack of access to court regarding the legality of the general meeting resolutions which had deprived the applicants of their shares (see *Kohlhofer and Minarik v. the Czech Republic*, cited above ; *Minarik v. the Czech Republic*, no. 46677/06, 10 February 2011 ; *Kohlhofer v. the Czech Republic* [Committee], no. 22915/07, 13 October 2011 ; *Solaris, s.r.o. and Others v. the Czech*

Republic [Committee], no. 8992/07, 13 October 2011 ; and *Minarik and Others v. the Czech Republic* [Committee], no. 10583/09, 13 October 2011).

35. In those cases the Court rejected the Government's argument that the right of access to court was secured in proceedings for damages under Article 131 § 4 of the Commercial Code with the following arguments. First, those proceedings had different objectives and dealt with the separate issue of the monetary satisfaction. Second, the Government had not shown that these legal avenues were capable of giving rise to a discussion of the lawfulness of the resolution in circumstances comparable to a review in the set-aside proceedings (*Kohlhofer and Minarik*, cited above § 101).

36. The Court takes note of the judgment of the Constitutional Court adopted in the present case that, in reaction to the Court's case-law requirements, in the proceedings under Article 131 § 4 of the Commercial Code the courts will have to decide in the future on the issue of validity, or invalidity, of a general meeting's resolution as a preliminary question. It also notes that in these proceedings the claimants can claim both pecuniary and non-pecuniary damages for violations of their fundamental rights and that protection of property is guaranteed as a fundamental right by the Czech constitution.

37. In view of these developments, the Court cannot rule out that proceedings under Article 131 § 4 of the Commercial Code might satisfy the requirements of Article 6 of the Convention of access to court regarding disputes about the legality of deprivation of shares of minority shareholders and that these proceedings could be considered as an effective remedy in this respect. However, these case-law developments had no bearing on the applicant's case.

38. Under Article 131 § 4 of the Commercial Code these proceedings must be started within three months after the decision to terminate the set-aside proceedings became final. In the present case that decision became final shortly after 24 April 2007 when the decision of the High Court was delivered to the parties. Consequently, on 3 March 2011 when the Constitutional Court delivered its judgment the time-limit for bringing these proceedings had already expired. Moreover, there is no suggestion in the judgment of the Constitutional Court that the applicant should be able to bring these proceedings in spite of the expired time-limit.

39. Similarly, the Court considers that the new legislation, which entered into force on 1 January 2012 and stipulates that courts must decide on the legality of a general meeting resolution even after the transformation was registered in the Companies Register, cannot have any bearing on the present case either. It observes that unlike in the case of *Lajda and Others v. the Czech Republic* ((dec.), no. 20984/05, 3 March 2009), the applicant cannot take an advantage of this new legislation as the set-aside proceedings had already finished in his case and he cannot institute them again under the new legislation.

40. Consequently, the Court considers that the issue in the present case is the same as that in the cases cited in paragraph 34 above. The Court sees no reason to depart from its well-established case-law on this matter. Accordingly, it dismisses the Government's objection of non-exhaustion of domestic remedies in this respect and finds that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed CZK 383,152 (EUR 15,607) in respect of pecuniary damage consisting of the difference between the real value of the shares of První opavská a.s. and the amount of settlement he received for those shares.

43. The Government maintained that there was no causal link between the alleged violation of the applicant's right of access to court and the pecuniary damage claimed.

44. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim (see *Kohlhofer and Minarik*, cited above § 116). Regarding the non-pecuniary damage, it notes that the applicant did not request any and accordingly the Court makes no award under this head.

B. Costs and expenses

45. The applicant also claimed CZK 5,000 (EUR 204) for the costs and expenses incurred before the domestic courts and CZK 96,720 (EUR 3,940) for those incurred before the Court.

46. The Government did not consider the costs of the domestic court proceedings unreasonable. On the other hand they maintained that the costs of the proceedings before the Court were excessive.

47. 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 are 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 4,144 covering costs under all heads.

C. Default interest

48. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *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 4,144 (four thousand one hundred forty four euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Czech korunas 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President