



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

FIFTH SECTION

CASE OF BUDCHENKO v. UKRAINE

(Application no. 38677/06)

JUDGMENT

STRASBOURG

24 April 2014

FINAL

24/07/2014

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

In the case of Budchenko v. Ukraine,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ann Power-Forde,

Ganna Yudkivska,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 1 April 2014,

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

PROCEDURE

1. The case originated in an application (no. 38677/06) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Vladimir Vasilyevich Budchenko (“the applicant”), on 11 September 2006.

2. The applicant, who had been granted legal aid, was represented by Mr M. Tarakhkalo, a lawyer practising in Kharkiv, Ukraine. The Ukrainian Government (“the Government”) were represented by their Agent, most recently Mr N. Kulchytsky, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that the courts had failed to grant him an exemption from electricity and gas payments as required by law.

4. On 25 August 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1932 and lives in the town of Gorlivka, Ukraine.

6. From 1953 to 1966 the applicant worked in a mine.

7. In 2001-2002 the applicant asked the Lenin Mine (his former employer) and the State mining enterprise Artemvugillya (the Lenin Mine’s legal successor) to explain to him how section 43 of the Mining Act

(“Гірничий закон”) (see “Relevant domestic law” below) was to be implemented, and to pay his electricity and gas costs in accordance with this provision. In reply he was informed that persons who were entitled to receive coal free of charge but were living in houses with central heating had the right to exemption from electricity and gas payments, such costs being borne by the mining companies. However, no appropriate legal mechanisms implementing “the methods of calculation and the sources of financing” had been adopted by the Cabinet of Ministers.

8. In 2003 the applicant complained to a prosecutor’s office that his requests to have his electricity and gas payments covered had been ignored. In a letter dated 13 February 2003 from the Tsentralno-Miskyy District Prosecutor’s Office, the applicant was informed that he was entitled to exemption from electricity and gas payments. Since the Lenin Mine had refused to accept his claims owing to the lack of funds and no compensation mechanism was provided for by law, the applicant was advised to lodge his claims with the court.

9. In April 2003 the applicant instituted proceedings in the Tsentralno-Miskyy District Court against the State mining enterprise Artemvugillya and local communal heating and gas providers. He claimed that under section 43 of the Mining Act the mine should cover his electricity and gas costs by means of contributions paid into the local budget. He also claimed reimbursement of amounts already paid and asked that the State mining enterprise Artemvugillya settle his heating and gas debts. The applicant also claimed compensation for non-pecuniary damage. He updated his claims in 2004.

10. On 7 April 2004 the Tsentralno-Miskyy District Court found against the applicant. The court held that the applicant had worked in a mine for more than ten years and thus was entitled to receive free coal for everyday domestic needs. As he lived in a house with central heating, section 43-8 of the Mining Act should apply in his case. However, no mechanism was in place for the implementation of that provision. In particular, there was no procedure for transferring funds from mining enterprises to the local budget. The court also held that the applicant’s request for reimbursement of the amounts already paid had no basis in law.

11. On 29 July 2004 the Donetsk Regional Court of Appeal upheld that decision.

12. On 4 April 2006 the Supreme Court rejected an appeal on points of law by the applicant.

13. In a decision of 1 December 2006 the Tsentralno-Miskyy District Court ordered the applicant to settle his heating debts, noting that section 43 of the Mining Act did not exempt him from paying for heating services. That decision was upheld on 26 June 2007 by the Donetsk Regional Court of Appeal. On 23 October 2007 the Supreme Court of Ukraine rejected a request by the applicant for leave to appeal on points of law.

14. In a letter dated 4 November 2008 the Gorlivka Town Council informed the applicant that at that date no mechanism had been set up to handle the compensatory payments requested by him.

15. In letters dated 14 May and 2 July 2009 the Ministry of the Coal Industry of Ukraine informed the applicant that the mechanism for implementing section 43-8 of the Mining Act would be set up pursuant to a corresponding decision by the Cabinet of Ministers of Ukraine.

16. In a letter dated 17 August 2009 the Ministry of Labour and Social Policy of Ukraine informed the applicant that on 12 August 2009 the Cabinet of Ministers had adopted the corresponding decision, which was subject to approval by the Ministry of Finance.

17. In a letter dated 4 August 2010 the Ministry of Labour and Social Policy informed the applicant that he had no right to any compensation payments as the mine where he had been working in was in liquidation.

18. In October 2010 the applicant instituted court proceedings against the Tsentralno-Miskyy Department of Labour and Social Policy of the Gorlivka Town Council requesting recognition of his rights under sections 43-7 and 43-8 of the Mining Act and a declaration that the Department's inactivity was unlawful.

19. On 1 November 2010 the Donetskyy Regional Administrative Court refused to examine the applicant's claim and informed him that it should be lodged before a court of general jurisdiction. That decision was upheld on 7 December 2010 and on 28 September 2011 by the Donetsk Administrative Court of Appeal and by the Higher Administrative Court respectively.

II. RELEVANT DOMESTIC LAW

Mining Act, 1999

20. The Mining Act entered into force on 1 December 1999. Parts 7 and 8 of section 43 of the Act that were in force before 2 September 2008 read as follows:

Section 43. Rights and social guarantees of employees of mining enterprises

“Coal-mining enterprises shall provide free coal for everyday domestic needs in the amount determined by collective agreement for the following categories of persons:

pensioners who have worked in coal-mining enterprises for 10 years (men) and 7.5 years (women)...

Persons who have the right to receive free coal but live in houses with central heating shall be exempted from paying for electricity and gas, those costs being borne by the coal-mining (processing) enterprises, which shall transfer the funds to cover the costs to the local budget.”

21. Pursuant to the “Transitional provisions” Chapter of the Mining Act, the Cabinet of Ministers of Ukraine had to adopt the relevant legal mechanisms with a view to implementing the Act’s provisions within four months of the date of the Act’s entry into force.

22. In 2008 section 43-8 was amended as following:

“Persons who have a right to receive free coal but live in houses with central heating shall receive compensation for electricity, gas and heating payments by way of contributions paid from the State budget to the local budget.”

23. The procedure for granting the above compensation was determined by a decision of the Cabinet of Ministers of Ukraine (no. 887 of 12 August 2009).

THE LAW

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

24. The applicant complained that on 7 April 2004 the Tsentralno-Miskyy District Court had rejected his claim unlawfully. In his application he invoked Article 6 of the Convention.

25. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the above complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention, which reads 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.”

A. Admissibility

26. The Government did not submit any observations regarding the admissibility of the above complaint.

27. The Court notes, in view of the “significant disadvantage” admissibility criterion, that the exact amount of the applicant’s electricity and gas payments he requested reimbursement and exemption of, has been never specified in the national proceedings. Before this Court the applicant submitted only some of his bills for the period between December 1999 and April 2004 equalling 65 euros.

28. The Court reiterates that the above criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court (see *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010). The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case (see *Korolev*, cited above). The severity of a violation should be assessed taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case.

29. In the present case the Court considers that, since the applicant had presented only part of his bills, it cannot speculate on the total amount of losses sustained by the applicant as a result of the alleged violation.

The Court notes that this complaint 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. The parties' submissions

30. The Government submitted that there had been no court decision by which the applicant's claims had been satisfied and the applicant therefore had no "legitimate expectations" that might be considered to constitute a "possession" in the sense of Article 1 of Protocol No. 1.

31. In his observations in reply, the applicant submitted that, according to the Court's case-law, the concept of "possessions" was not limited to existing possessions but could also cover assets, including claims, in respect of which could be argued that the applicant had at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII).

32. Taking the above principles into account, the applicant noted that the Tsentralno-Misky District Court had, in its decision, acknowledged that, pursuant to the Mining Act, he should be exempted from electricity and gas payments – with such costs being borne by the mine – and had found against him merely because there had been no mechanism for covering those costs. No such mechanism had been adopted for four years, even though the Act itself provided that this should have happened within four months.

33. The applicant concluded that his proprietary interest had been recognised under Ukrainian law and was thus subject to the protection of Article 1 of Protocol No. 1.

34. The applicant noted that the State had positive obligations under Article 1 of Protocol No. 1 (see *Kotov v. Russia* [GC], no. 54522/00, §§ 109-113, 3 April 2012). He further asserted that the failure to adopt the necessary legal mechanisms with a view to implementing section 43 of the Mining Act had constituted an interference with his right to peaceful enjoyment of his possessions because his right to be exempt from electricity and gas payments had been breached.

35. The applicant thus argued that there had been a violation of Article 1 of Protocol No. 1.

2. The Court's assessment

36. The Court reiterates that if a Contracting State has in force legislation providing for the payment as of right of a welfare benefit –whether conditional or not on the prior payment of contributions –that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Stec and Others v. the United Kingdom* (dec.), § 54, no. 65731/01 and 65900/01, ECHR 2005-X)).

37. In the present case the applicant was employed in the mining industry for approximately thirteen years. The domestic law in force at the material time exempted him from electricity and natural gas payments.

38. The Court notes that the fact that the applicant was entitled to such an exemption was confirmed by the national authorities and, in particular, by the national courts (see paragraphs 8 and 10 above). Therefore, the applicant had a recognised pecuniary interest under Article 1 of Protocol No. 1.

39. The Court further notes that the applicant's claim for exemption from payments was, however, rejected since there was no mechanism for implementing the relevant legal provision, and this constitutes an interference with the applicant's right under Article 1 of Protocol No. 1.

40. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions must be lawful. This principle presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see *Beyeler v. Italy* [GC], no. 33202/96, §§ 108-109, ECHR 2000-I).

41. The Court also reiterates that it is primarily for the national authorities to interpret and apply domestic law. However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court's case-law (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 190-191, ECHR 2006-V).

42. The Court notes that the legal provision in question contains an explicit right to exemption from electricity and gas payments and does not make it contingent on the existence of a compensatory mechanism. It could be argued, however, that – given the Court’s subsidiary role – in the present case it was for the national courts to interpret the domestic law, which they did by establishing that the applicant’s claim could not be granted in the absence of a compensatory mechanism for his employer.

43. Assuming that such approach falls within the margin enjoyed by the domestic courts in interpretation of the national law, the Court accepts that in this case the requirement for the existence of a compensatory mechanism could be regarded as pursuing a legitimate aim, such as protection of the applicant’s employer’s property rights (see, *mutatis mutandis*, *Kirovogradoblenergo, PAT v. Ukraine*, no. 35088/07, 27 June 2013).

44. The Court notes, however, that in the present case the applicant was employed by a State enterprise. The Government did not provide any evidence to show to what extent the above entity had financial independence from the State (see, *mutatis mutandis*, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02 and foll., § 44, ECHR 2004-XII).

45. The Court further notes that the relevant provision exempting the applicant from certain payments was adopted in 1999 and according to that legislation the relevant mechanism for reimbursement had to be put in place within four months (see paragraph 21 above). However, it was introduced only ten years later. No arguments were provided to explain this inactivity.

46. Given the State’s prolonged failure to act and given that the applicant was employed by a State enterprise, the Court considers that, by failing to secure the exemption from payment to which the applicant was entitled by law within a reasonable delay, the State has put an excessive and disproportionate burden on him, thus falling short of its obligations under Article 1 of Protocol No. 1 (see, *Klaus and Iouri Kiladzé v. Georgia*, no. 7975/06, § 76, 2 February 2010).

47. The Court considers that there has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. The applicant complained of a violation of his right to a fair trial under Article 6 of the Convention. He also complained that the examination of the case by the Supreme Court of Ukraine had taken too long.

49. Having considered the applicant’s submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

50. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage and 14,550.27 Ukrainian hryvnias (UAH) (around EUR 1,302.52) in respect of pecuniary damage (compensation for electricity, gas and heating payments made between November 1999 and 18 July 2012).

53. The Government submitted that the applicant's claims were wholly unsubstantiated.

54. As regards the applicant's claims in respect of pecuniary damage, the Court notes that they concern reimbursement for his heating, electricity and gas payments between December 1999 and June 2012. The Court notes that the present application is limited to the refusal of the domestic courts to allow the applicant's claims relating to the period prior to April 2004. It is apparent from the available material that in the domestic proceedings the applicant claimed reimbursement of the payments made between December 1999 and April 2004.

55. Concerning the applicant's request for compensation for heating payments, the Court notes that it does not follow from the available material that the applicant should have been exempted from heating costs for the period in question (see paragraph 13 above). He also provided only part of his bills for his electricity and gas payments between December 1999 and April 2004.

56. Regard being had to the above considerations and to the documents in its possession, the Court, deciding on an equitable basis, awards the applicant EUR 65 in respect of pecuniary damage (gas and electricity costs incurred by the applicant between December 1999 and April 2004, as substantiated by the bills) and EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

57. The applicant also claimed UAH 335.88 (around EUR 33.47) in postage costs and EUR 1,702.40 in expenses related to his legal representation before it.

58. The Government submitted that the applicant had failed to substantiate part of his legal expenses and that they were in any event exorbitant. The applicant had also failed to substantiate part of his postage costs.

59. According to the Court's case-law, an applicant is entitled to 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 above criteria, the documents in its possession and the legal aid granted (EUR 850) the Court considers it reasonable to award the sum of EUR 885.87 covering costs for the proceedings before the Court.

C. Default interest

60. 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 complaint under Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
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 the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 65 (sixty-five euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 885.87 (eight hundred and eighty-five euros and eighty-seven cents), 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 24 April 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President