



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

SECOND SECTION

CASE OF KIPS DOO AND DREKALOVIĆ v. MONTENEGRO

(Application no. 28766/06)

JUDGMENT
(Just satisfaction)

Art 41 • Pecuniary damage • Loss of profits due to authorities' refusal to issue building permit for shopping centre • Assessment of loss on the basis of profits of a similar shopping centre built instead of the originally planned one

STRASBOURG

22 October 2019

FINAL

15/04/2020

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

In the case of KIPS DOO and Drekalović v. Montenegro,

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

Robert Spano, *President*,

Marko Bošnjak,

Valeriu Grițco,

Egidijus Kūris,

Ivana Jelić,

Arnfinn Bårdsen,

Saadet Yüksel, *judges*,

and Hasan Bakırcı, *Deputy Section Registrar*,

Having deliberated in private on 1 October 2019,

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

PROCEDURE

1. The case originated in an application (no. 28766/06) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by KIPS DOO, a company registered in Montenegro (“the first applicant”), and Mr Risto Drekalović, a Montenegrin national (“the second applicant”), on 16 July 2006. The second applicant is the first applicant’s founder and executive director. He owns 99.2698 % of its shares.

2. In a judgment delivered on 26 June 2018 (“the principal judgment”), the Court found, *inter alia*, a violation of Article 1 of Protocol No. 1 to the Convention on account of the respondent State’s refusal to issue the first applicant with a building permit for a shopping centre (see §§ 130-137 of the principal judgment).

3. Under Article 41 of the Convention, the first applicant originally claimed 30,764,542.22 euros (EUR) in respect of pecuniary damage: EUR 30,000,000 for loss of profits (*izmakla dobit*) “since 2005 up to an indefinite period in the future”, and the rest for the costs of a building permit, preparatory works for the construction, construction materials, goods for the shopping centre, the services of a public relations agency, advertising space in daily newspapers and the printing of brochures. In support of the claim for lost profits the first applicant submitted a report prepared by KPMG, an international network of firms providing audit, tax and financial consulting services. The report contained three different scenarios of business success of the planned shopping centre. Depending on the scenario the lost profits varied between around EUR 23,000,000 and EUR 37,000,000, the average being around EUR 30,000,000.

4. Since the question of the application of Article 41 of the Convention was not ready for decision as regards the exact amount of pecuniary

damage, the Court reserved it and invited the Government and the first applicant to submit, within three months from the date on which the principal judgment became final, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (§ 146 of the principal judgment, and point 6 of the operative provisions). At the same time, the Court awarded non-pecuniary damage to the second applicant, and costs and expenses to the applicants jointly.

5. In a letter of 5 October 2018 the Court informed the first applicant that the deadline of three months was for submitting observations concerning just satisfaction or explicitly confirming the claims submitted previously, if that was its intention. The letter also specified that if no reply was received within the specified time-limit, the Court might consider that it had implicitly renounced any claims submitted previously.

6. The first applicant and the Government each filed observations within the extended time-limit allowed to them, given that no friendly settlement had been reached.

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 parties’ submissions*

(a) **The first applicant**

8. In a new set of observations the first applicant submitted that its lost profits were “at least” EUR 39,558,137.18. It also submitted that default interest should be applied to this amount, based on the marginal interest rate of the European Central Bank, to which three percentage points should be added. In support of its claim, the first applicant submitted a new report dated 15 January 2019 prepared by the Forensic Research Centre (*Centar za forenzička istraživanja*) based in Novi Sad (Serbia). The basis of the calculation was the profits of the TC Cijevna shopping centre (see § 56 of the principal judgment) between 2008 and 2018 after taxation, increased by 11% on account of its different size:

- EUR 5,934,164.20 in 2008;
- EUR 2,417,263.33 in 2009;
- EUR 1,172,056.00 in 2010;
- EUR 1,925,952.12 in 2011;
- EUR 1,842,311.73 in 2012;

- EUR 2,309,708.45 in 2013;
- EUR 1,797,648.29 in 2014;
- EUR 920,525.59 in 2015;
- EUR 2,281,219.57 in 2016;
- EUR 3,353,463.20 in 2017;
- EUR 3,735,496.32 in 2018.

9. The report also specified that the profit of TC Cijevna between 2008 and 2018, after taxation, without the increase of 11%, was as follows:

- EUR 5,346,093.87 in 2008;
- EUR 2,177,714.71 in 2009;
- EUR 1,055,906.31 in 2010;
- EUR 1,735,092.00 in 2011;
- EUR 1,659,740.29 in 2012;
- EUR 2,080,818.42 in 2013;
- EUR 1,619,502.96 in 2014;
- EUR 829,302.33 in 2015;
- EUR 2,055,152.76 in 2016;
- EUR 3,021,138.01 in 2017
- EUR 3,365,312.00 in 2018.

10. Notably, the report specified that the surface area of TC Cijevna was 5,516m², whereas the surface area of the originally planned shopping centre would have been 6,131m². Given that the latter would have been 11% bigger, the amount of lost profits was accordingly increased by 11%. The calculation did not take into account the difference in location, even though the location for the planned shopping centre was considered better as it was closer to the city centre. The report assumed that the profits of the planned shopping centre in 2006 and 2007 would have been no less than the profits of TC Cijevna in 2008, that is to say EUR 5,346,093.87 (after taxation) increased by 11% (EUR 588,070.33), thus amounting to EUR 5,934,164.20 per year.

11. The first applicant made no reference whatsoever to the other forms of pecuniary damage that had been claimed previously (see paragraph 3 above).

(b) The Government

12. The Government submitted that the TC Cijevna shopping centre was bigger and alleged that its location was significantly better than where the first applicant had initially planned to build a shopping centre. Notably, the initial location would have required a further EUR 6.2 million investment for the necessary infrastructure (including traffic signals, streetlights, water, sewerage and so forth), and there would have been no possibility of further expansion, due to the surrounding streets and properties owned by other people. TC Cijevna, on the other hand, had been built by the motorway connecting the Port of Bar and the city centre of Podgorica, which

continued to the borders with Serbia and Albania. It was also fully equipped with the necessary infrastructure and accommodated other property owned by the first applicant, thus optimising storage costs and logistics. There was also 9,000m² of parking, all of which could not have been achieved at the initial location.

13. As regards the lost profits the Government submitted that the first applicant had not been deprived of its business, and had continued to operate, as the market leader, throughout the period 2006 to 2018. It had only been between 1 January 2006 and 31 December 2007 that it had not had the profits of the planned shopping centre. In the period thereafter the other shopping centre had been operative, thus mitigating the damage. Furthermore, the first applicant had had such a duty, according to a study by the American Institute of Certified Public Accountants on calculating lost profits, the relevant parts of which were submitted by the Government. In any event, certain costs and expenses, such as the costs of a PR agency, media space, brochure printing and so forth, had no causal link to the violations found.

2. *The Court's assessment*

14. The Court reiterates that a judgment in which it finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see, among other authorities, *Maharramov v. Azerbaijan*, (just satisfaction), no. 5046/07, § 12, 9 May 2019; *Hunguest Zrt v. Hungary* (just satisfaction), no. 66209/10, § 15, 16 January 2018; and *Bittó and Others v. Slovakia* (just satisfaction), no. 30255/09, § 20, 7 July 2015). If national law does not allow reparation or allows only partial reparation, Article 41 of the Convention empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.

15. The first applicant's request for a building permit for the initially planned shopping centre was refused because the first applicant had failed to meet two criteria: (a) to buy an adjacent plot of land, which had been attached to its land by means of a revised urbanistic plan, and (b) to pay the communal charges. The applicants had made a request to the local authorities as early as in January 2005 to buy the adjacent plot of land. Following several remittals the request was still pending in June 2017. They had also requested that the relevant authorities calculate the communal charges for their plot of land, but their request was refused. In the ensuing judicial review proceedings, the courts ruled in the applicants' favour and the authorities calculated the charges in 2008. By that time, however, the request for the building permit had been already refused (see §§ 17-47 and 130-137 of the principal judgment).

16. The Court firstly notes that the first applicant did not initially plan to build the TC Cijevna shopping centre. It was only built because the first applicant did not obtain a building permit for the originally planned shopping centre, and was based on the same plans. The Court therefore considers that TC Cijevna was built instead of the originally planned shopping centre. As TC Cijevna opened at the very end of 2007, which is not disputed by the parties, the Court considers that the first applicant actually suffered a loss of profits in 2006 and 2007 only.

17. The Court further notes that the surface area of the original shopping centre varies from one document to another. While the original plan indicated a surface area of 4,054m², the relevant decision on location and the relevant Urban Technical Conditions gave the surface area as 4,704m². The KPMG report submitted by the applicants referred to a surface area of 6,131m², specifying at the same time that that would have been the total surface area of both the planned shopping centre and administrative offices.

18. While both the KPMG and subsequent reports suggest that TC Cijevna had a surface of 5,516 m², it is noted that none of the officially issued documents contained in the file indicates this surface area. Its dimensions also vary from one document to another. However, it transpires from the file that its final surface was seemingly similar to initially planned shopping centre, for which the first applicant never obtained a building permit.

19. It is further noted that TC Cijevna is closer to the motorway than the initially planned shopping centre, but that is further from the city centre and at the time was remote from the suburb settlements around Podgorica. The Court cannot speculate on which location would be more convenient and therefore yield a higher profit, including whether the differences in the quality of the location and the surface area of the two shopping centres cancel one another out. Therefore, the Court will take profits of TC Cijevna as the basis for assessing the lost profits of the planned shopping centre, without any reductions or increases on account of possible differences in their size or location.

20. As the TC Cijevna shopping centre was not operative in 2006 and for most of 2007 (that is, until 21 December 2007) the Court has to, as a basis for the actual incurred loss, build on an assessment of what its profits most probably would have been had it been constructed earlier. Given that its profits varied from one year to another (see paragraph 9 above), the Court considers it only fair to take the average amount as the assumed profits per year, namely EUR 2,267,797.60. As the first applicant only actually suffered a loss of profits for two years, 2006 and 2007, the sum amounts to EUR 4,535,595.20.

21. As the first applicant made no reference to other forms of pecuniary damage, either explicitly or by referring to its earlier claim in that regard (see paragraphs 3, 8 and 11 above), the Court considers that it has

renounced its claim in that respect (see paragraph 5 above), and makes no award on that account.

B. Default interest

22. 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. *Holds*

- (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,535,595.20 (four million five hundred and thirty five thousand five hundred and ninety-five euros and twenty cents) in respect of pecuniary damage, plus any tax that may be chargeable;
- (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President