



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

SECOND SECTION

CASE OF DERKACH AND PALEK v. UKRAINE

(Applications nos. 34297/02 and 39574/02)

JUDGMENT

STRASBOURG

21 December 2004

FINAL

06/06/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Derkach v. Ukraine,

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

Mr J.-P. COSTA, *President*,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŖ,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Mrs E. FURA-SANDSTRÖM,

Ms D. JOČIENĖ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 30 November 2004,

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

PROCEDURE

1. The case originated in two applications (nos. 34297/02 and 39574/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Ms Valentyna Mykolayivna Derkach and Mr Mykola Ivanovych Palek (“the applicants”), on 22 August 2002 and 11 October 2002 respectively.

2. The Ukrainian Government (“the Government”) were represented by their Agents – Mrs V. Lutkovska, succeeded by Mrs Z. Bortnovska.

3. On 11 June 2003 the Court decided to communicate the applications to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the applications at the same time as their admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. Ms Valentyna Mykolayivna Derkach, is a Ukrainian national, who was born in 1962. Mr Mykola Ivanovych Palek, is also a Ukrainian national, who was born in 1957. Both applicants reside in the town of Vyshgorod, Ukraine.

5. In 2001-2002 the applicants instituted separate sets of proceedings in the domestic local courts seeking the recovery of salary arrears and other payments against their former employer-the State-owned “Atomspetsbud”

company which carried out construction work in Chernobyl, more precisely in the zone subject to compulsory evacuation.

6. By a decision of the Vyshgorodsky District Court of Kiev Region of 5 March 2002, Ms Valentyna Derkach was awarded UAH 9,133 (the equivalent of 1,405.08 euros [“EUR”]) in salary arrears and compensation. The decision came into force. On 22 April 2002 the Slavutsky District Department of the State Bailiffs' Service initiated enforcement proceedings.

7. By a decision of the Vyshgorodsky District Court of Kiev Region of 15 May 2002, Mr Mykola Palek was awarded UAH 15,476 (the equivalent of EUR 2,380.92) in salary arrears and compensation. The decision came into force. On 8 August 2002 the Bailiffs' Service instituted enforcement proceedings.

8. On 29 June 2002 the Ministry of Energy decided to wind-up the debtor company, given its unprofitability. On 18 July 2002 a liquidation commission was established.

9. In December 2002 the writs of execution in both cases were forwarded to the liquidation commission.

10. The judgments remain unenforced, in particular due to the fact that the debtor's property could not be attached to enforce the judgments. Attachment would have required a special authorisation of the Ministry for Emergencies due to the location of the debtor's property in the Chernobyl area, contaminated by radiation. Authorisation was not granted.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The Constitution (1996)

11. The relevant extract of the Constitution of Ukraine reads as follows:

Article 124

“... Judicial decisions are adopted by the courts in the name of Ukraine and are mandatory for execution throughout the entire territory of Ukraine.”

2. Civil Code of 18 July 1963 (repealed since 1 January 2004)

12. The relevant extracts of the Civil Code read as follows:

Article 32

Liability of a legal entity

“A legal entity shall be liable for its obligations to the extent of the property owned by it (attached to it), unless legislation provides otherwise.

The founder of the legal entity or the owner of its property shall not be liable for its obligations, and the legal entity shall not be liable for the obligations of the owner or the founder, unless legislation or the statutory documents of the legal entity provide otherwise.

A legal entity which is financed by the owner, and which has property attached to it on the basis of the operative management ..., shall be liable for its obligations to the extent of the funds in its possession. In the event of a lack of funds, the owner of the property shall be liable for the obligations of the entity.”

Article 33

Separation of liability between the State and State organisations

“The State shall not be liable for the obligations of State organisations which possess legal personality, and those organisations shall not be liable for the obligations of the State.

The conditions and procedure for providing funds to cover the debts of institutions and other State organisations which are funded by the State budget, if such debts could not be covered by their own budget, shall be established by the legislation of the USSR and the Ukrainian SSR.”

Article 38

Liquidation of State organisations which possess legal personality

“The liquidation of State organisations which possess legal personality shall be conducted by the body which created them.”

3. Civil Code of 16 January 2003 (in force since 1 January 2004)

13. The relevant extracts of the new Civil Code read as follows

Article 81

Types of legal entities

“... 2. Legal entities shall be divided into private-law legal entities and public-law legal entities, depending on the procedure governing their creation.

Private-law legal entities shall be established on the basis of statutory documents, in accordance with Article 87 of this Code.

Public-law legal entities shall be established by decision of the President of Ukraine, an empowered State body, an empowered body of the Autonomous Republic of Crimea or a body of local self-government.

3. This Code provides a procedure for the establishment of the organisational and legal forms, and the legal status of private-law entities.

The procedure for the creation and legal status of public-law entities shall be laid down by the Constitution of Ukraine and the law.”

Article 96

Liability of legal entities

“1. A legal entity shall itself be liable for its obligations.

2. A legal entity shall be liable for its obligations to the extent of all of its property.

3. The participant (founder) of a legal entity shall not be liable for the obligations of that entity, and the legal entity shall not be liable for the obligations of its participant (founder), unless the statutory documents or legislation provide otherwise ...”

Article 167

Legal forms of State participation in civil law relations

“1. In civil relations, the State shall act on an equal basis with other participants in such relations.

2. The State may create legal entities under public law (State enterprises, educational institutions, etc.) in the circumstances and according to the procedure established by the law.

3. The State may create legal entities under private law (entrepreneurial associations, etc.), to participate in their activities ... unless the law stipulates otherwise.”

Article 176

Separation of liability for the obligations of the State, the Autonomous Republic of Crimea, territorial communities and the legal entities established by them

“1. The State ...shall not be liable for the obligations of the legal entities established by them, unless the law provides otherwise.

2. Legal entities established by the State ... shall not be liable for the obligations of the State ...”

4. *Law of 27 March 1991 “on Enterprises” (repealed as of 1 January 2004)*

14. The relevant extracts of the Law read as follows:

Article 2

Types of enterprises

“Enterprises of the following type can operate in Ukraine: ...

- a State enterprise, founded on State property, including a public enterprise ...”

Article 10

Creation and use of the property

“... 3. The property, owned by the State and attached to a State enterprise (with the exception of a public enterprise), belongs to the enterprise with the right to its full economic control.

In exercising its right of full economic control, the State enterprise owns, uses and disposes of the above property at its discretion, performing any actions in relation to it which are not contrary to the legislation in force or the statute of the enterprise.

The property owned by the State and attached to a public enterprise belongs to it with the right of operational control.

In exercising its right to operational control, the public enterprise possesses and uses the above property.

The public enterprise shall be entitled to dispose of the property in its capital fund, owned by the State and given to the enterprise with the right to operational control, only with the permission of the body authorised to manage the relevant State property. The particularities of the disposal of the other property of the public enterprise shall be defined in its statute.”

Article 37

Particularities of the creation, liquidation, and reorganisation of a public enterprise

“1. The State-owned enterprise that shall not be subject to privatisation under the legislation of Ukraine can be transformed into a public enterprise by the decision of the Cabinet of Ministers of Ukraine.

2. The decision on transformation of the State-owned enterprise into a public enterprise shall be taken under one of the following conditions:

- the enterprise conducts manufacturing or other activities, that, under the legislation, can be performed only by the State-owned enterprise;
- the principal consumer of the production of the enterprise (more than 50 %) is the State;
- the enterprise is subject to natural monopolies.

3. The liquidation and reorganisation of the public enterprise shall be performed upon the decision of the Cabinet of Ministers of Ukraine in accordance with the legislation of Ukraine.”

Article 39

Particularities of the activities of the public enterprise

“3. The public enterprise shall be liable for its obligations by its funds and other property which it possesses, except for capital assets. In case of insufficiency of such funds and property, its owner shall be liable for its obligations.”

5. Law of 27 February 1991 “on the Legal Status of the Territory of Radioactive Contamination as a Result of the Chernobyl Disaster”

15. Article 6 of the Law provides that the Cabinet of Ministers of Ukraine determines the planning, the material and technical maintenance, the scope of financial contributions, as well as the salaries of employees of all companies involved in work on the elimination of the consequences of the Chernobyl catastrophe, regardless of the companies' status and ownership.

16. Article 12 of the Law prohibits the withdrawal of construction materials, equipment and other goods from the alienation zone and zone of compulsory evacuation without special permission from the Ministry for Emergencies. It equally requires the permission of that Ministry to carry out any economic activity, including construction, in the zone.

6. Law of 21 April 1999 “on Enforcement Proceedings”

17. Under Article 2 of the Law, the enforcement of judgments is entrusted to the State Bailiffs' Service. Under Article 85 of the Law, the creditor may file a complaint against actions or omissions of the State Bailiffs' Service with the head of the competent department for that Service or with a local court. Article 86 of the Law entitles the creditor to institute court proceedings against a legal person, entrusted with the enforcement of a judgment, for inadequate enforcement or non-enforcement of a judgement, through fault, and to receive compensation.

7. *Law of 24 March 1998 “on the State Bailiffs’ Service”*

18. Article 11 of the Law provides for the liability of bailiffs for any inadequate performance of their duties, as well as compensation for damage caused by a bailiff when enforcing a judgment. Under Article 13 of the Law, acts and omissions of the bailiff can be challenged before a superior official or the courts.

8. *Decree No. 8-92 of the Cabinet of Ministers of 15 December 1992 “on the Management of State-owned Property”*

19. The Decree provides that Ministries and other executive bodies are authorised to adopt decisions concerning the creation, reorganisation, and liquidation of enterprises, institutions, and organisations founded on State property. The Decree further provides that the Ministries shall not interfere directly in the activities of State-owned enterprises.

9. *Decree No. 306-p of the Cabinet of Ministers of 11 May 1998 “on the list of enterprises, institutions and organisations that are transferred to the management of the Ministry of Energy”*

20. The Decree provides for the transfer of a number of enterprises, including the “State Construction and Commerce Company “Atomspetsbud”, to the management of the Ministry of Energy due to changes in the Government's structure.

THE LAW

I. JOINDER OF THE APPLICATIONS

21. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

II. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

22. Relying on Article 13, and in substance Article 6 § 1, of the Convention, the applicants complained about the non-enforcement of the judgments given in their favour. They stated that they had no effective domestic remedy by which to recover the debts owed to them by the debtor company. Article 6 § 1 provides, in so far as relevant, as follows:

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

Article 13 states:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

(a) Exhaustion of domestic remedies

23. The Government maintained that the applicants did not lodge an action with the domestic courts to challenge the inactivity of the Bailiffs' Service and claim compensation for the deficiencies in the enforcement proceedings or loss in value of the amounts awarded to them.

24. The applicants contested that argument. They contended that the Bailiffs' Service, and this was confirmed by the Government, took all appropriate measures to enforce the judgments. There was therefore no point in lodging a complaint about the Bailiff Service. Moreover, they did not assert in the Convention proceedings their right to claim compensation for devaluation of the sums awarded to them. Accordingly, they were not required to pursue any remedy in this regard at the domestic level.

25. The Court reiterates that the purpose of Article 35 § 1 of the Convention is to afford Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. However, the only remedies to be exhausted are those which are effective. “Effective” means either preventing the alleged violation or its continuation, or providing adequate redress for any violation that has already occurred (see *Kudla v. Poland* [GC], no. 30210/96, § 158, ECHR-XI). It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see *Khokhlich v. Ukraine*, no. 41707/98, § 149, judgment of 29 April 2003).

26. In the instant case, the judgments in the applicants' favour have not yet been enforced notwithstanding the efforts made by the Bailiffs' Service (something the Government have conceded (see paragraph 35 below)). Furthermore, the Bailiffs' Service is no longer involved in the procedure for the recovery of the applicants' debts since the enforcement proceedings have been terminated and their claims have been transferred to a commission overseeing the liquidation of the debtor company (see paragraph 9 above). For the Court, the Government's objection must be dismissed since the remedy relied on cannot prevent the continuation of the alleged violation of the applicants' essential complaint, namely the continued non-enforcement of final judgment awards given in their favour.

27. Accordingly, the Court dismisses the objection.

(b) Compatibility ratione personae (responsibility of the State)

28. In their further observations, the Government maintained that, although the debtor company was a State-owned enterprise, it was a separate legal entity with the result that the State could not be held responsible for its debts under domestic law. Accordingly, the enforcement of the judgments at issue could not engage the responsibility of the State or its budget.

29. The applicants maintained that the State had created the enterprise at issue and could appoint its management, decide on its activities, and order its liquidation. It had sufficient assets to discharge its debts and should therefore be responsible for those debts.

30. The issue before the Court is whether, seen from the standpoint of the Convention, the State is liable for the debts of a State-owned company, albeit a separate legal entity, and can be held responsible for the ultimate failure of that company to pay the applicants the amounts awarded to the applicants.

31. In this respect the Court considers that the Government have not demonstrated that the “Atomspetsbud” company enjoyed sufficient institutional and operational independence from the State as to absolve the State from responsibility under the Convention for its acts and omissions (c.f., *mutatis mutandis*, (and with reference to Article 34 of the Convention) *Radio France and Others v. France* (dec), no. 53984/00, 23 September 2003).

32. The Court refers to its findings in the case of *Mykhaylenky and Others v. Ukraine* (judgment of 30 November 2004, nos. 35091/02, et seq.) which concerned the failure of the same company to execute final judgments given against it. The Court held, for the reasons given in paragraph 45 of its judgment, that the respondent State's Convention responsibility under Articles 6 and 1 of Protocol No. 1 was engaged on account of that failure. It sees no reason to depart from that conclusion in the instant case.

33. The Court finds, therefore, that the applicants' complaint is compatible *ratione personae* with the provisions of the Convention, and rejects the Government's objection in this respect.

(c) Conclusion

34. The Court concludes that this complaint 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 ground. It must therefore be declared admissible.

B. Merits

35. The Government noted that the Bailiffs' Service had sought to have the judgments enforced using its best endeavours. The Service could no longer be held responsible for non-enforcement or accused of inactivity in this connection once the decision to wind-up the company had been taken. They further stressed that the debtor's property was in the zone contaminated by radioactivity. Its property could not therefore be attached in the absence of authorisation, and such authorisation had been refused by the Ministry for Emergencies.

36. The applicants maintained that their complaint about non-enforcement of the judgments did not concern the alleged inactivity of the Bailiffs' Service, as the Government suggested. Their argument was that the State had sufficient control over its enterprises to ensure fulfilment of the latter's financial obligations.

37. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law, which the Contracting States undertook to respect when they ratified the Convention. The execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6 (see *Burdov v. Russia*, no. 589498/00, § 34, ECHR 2002-III).

38. It is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. However, it may not be such as to impair the essence of the right protected under Article 6 § 1 of the Convention (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V). In the instant case, the applicants should not have been prevented from benefiting from the success of their litigation.

39. The Court notes that the judgments given in favour of the applicants in 2002 have still not been executed, and it is not open to the Government to rely on the argument that the applicants' debts are currently being processed within the framework of the on-going liquidation proceedings. It remains

the case that the obligation to ensure the timely enforcement in full of final and binding pecuniary awards lay with the authorities.

40. By failing to take the necessary measures to comply with the final judgments in the instant case, the Ukrainian authorities deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

41. There has accordingly been a violation of Article 6 § 1.

42. The Court does not consider it necessary in the circumstances to rule on the same complaint under Article 13 of the Convention.

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

43. The applicants further complained that the State has infringed their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1 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.”

A. Admissibility

44. The Court refers to its reasoning under Article 6 § 1 of the Convention, for rejecting the Government's objections to the admissibility of the application (see paragraphs 23-34 above), which is equally pertinent to the applicants' claim under Article 1 of Protocol No. 1. Consequently, the Court finds that this complaint is not manifestly ill-founded or indeed inadmissible on any other ground mentioned in Article 35 of the Convention. It must therefore be declared admissible.

B. As to the merits

45. The Government agreed that the amount awarded to the applicants by the domestic courts constituted a possession within the meaning of Article 1 of Protocol No. 1. They acknowledged that the non-enforcement of the judgments could be considered an interference with the applicants' rights to the peaceful enjoyment of their possessions. However, the Government claimed that the interference was justified in the general interest, namely the need to control the export of contaminated materials

from the Chernobyl area. The large number of creditors of the company required the liquidation commission and the State to develop comprehensive measures in order to satisfy all the various claims.

46. The applicants submitted that the interference with their possessions had no basis in law. Having failed to pay their debts, the State deprived them of the actual possession of their property, in violation of Article 1 of Protocol No. 1. They maintained that the public interest justifications mentioned by the Government could not be relied on at their expense, and that it was for the State to find a solution for the payment of their salaries.

47. The Court recalls its case-law that the impossibility for an applicant to obtain the execution of a judgment in his or her favour constitutes an interference with the right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other judgments, *Burdov v. Russia*, previously cited, § 40, *Jasiūnienė v. Lithuania*, no. 41510/98, § 45, 6 March 2003).

48. The Court considers that the continuing impossibility for the applicants to obtain execution of their judgments (more than two years so far) constituted an interference with their right to the peaceful enjoyment of their possessions, within the meaning of the first paragraph of Article 1 of Protocol No. 1.

49. The interference might be considered justified in part by the prohibition on the export of the contaminated property of the debtor company from the Chernobyl zone subject to compulsory evacuation. However, in the Court's opinion, such a prohibition, undeniably involving the pursuit of a legitimate public interest, did not strike a fair balance between the State's interests and those of the applicant. In the event, the entire financial burden has fallen on the applicants and the Government have not explained to its satisfaction why funds could not be earmarked for honouring the debts owed to the applicants.

50. By failing to comply with the judgments given in favour of the applicants, the national authorities prevented and still prevent the applicants from receiving in full the money to which they were entitled.

51. Accordingly there has also been a violation of Article 1 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing, together with the relevant supporting documents, failing which the Court may reject the claim in whole or in part.

(a) pecuniary damage

54. Both applicants claimed the following amounts by way of just satisfaction in their cases¹:

- Ms Valentyna Derkach - UAH 9,133 (EUR 1,405.08);
- Mr Mykola Palek - UAH 15,476 (EUR 2,380.92).

55. The Government reiterated that the State should not bear responsibility under domestic law for the debts of its enterprises.

56. The Court recalls that it has already rejected this argument (see paragraphs 32-33).

57. In the light of the documents in its possession, the Court awards in full the amounts claimed by both applicants, corresponding to the outstanding debts owed to them (see *Zhovner v. Ukraine*, no. 56848/00, §§ 58-61, 29 June 2004).

(b) non-pecuniary damage

58. The applicants did not submit any claim under this head. The Court therefore makes no award.

B. Costs and expenses

The applicants did not submit any claim under this head either. The Court therefore makes no award.

C. Default interest

59. 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. *Decides* to join the applications;

¹ These sums correspond to the entirety of the awarded amount (cf. paragraphs 6 and 7 above)

2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that it is not necessary to rule on the applicants' complaint under Article 13 of the Convention;
5. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
6. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - to Ms Derkach, EUR 1,405.08 (one thousand four hundred and five euros and eight cents) in respect of pecuniary damage;
 - to Mr Palek, EUR 2,380.92 (two thousand three hundred and eighty euros and ninety-two cents) in respect of pecuniary damage;
 - (b) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (c) 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.

Done in English, and notified in writing on 21 December 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President