



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

SECOND SECTION

CASE OF DUBENKO v. UKRAINE

(Application no. 74221/01)

JUDGMENT

STRASBOURG

11 January 2005

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 Dubenko 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. TÜRMEŖEN,

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 an application (no. 74221/01) 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 Igor Samoylovich Dubenko (“the applicant”), on 25 May 2001.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Ms Valeria Lutkovska, succeeded by Ms Zoryana Bortnovska.

3. The applicant's complaints under Articles 6 § 1 of the Convention and Article 1 of Protocol No. 1 were communicated to the respondent Government on 9 May 2003. On the same date the Court decided that Article 29 § 3 of the Convention should be applied and the admissibility and merits of the complaints be considered together.

4. The applicant and the Government each filed observations on the merits (Rule 54A).

THE FACTS

5. The applicant, Mr Igor Samoylovich Dubenko, is a Ukrainian national, who was born in 1949 and currently resides in Artemivsk, the Donetsk Region.

I. THE CIRCUMSTANCES OF THE CASE

6. In March 2000 the applicant instituted proceedings in the Artemivsk City Court against the *Komsomolets* State Mine seeking to recover salary and compensation due to him.

7. On 26 April 2000 the Artemivsk City Court awarded the applicant UAH 5,270.38¹ in compensation (UAH 2,946.98 in salary arrears and UAH 2,323.4 in compensation for the delayed settlement).

8. On 10 May 2000 a writ of execution was issued and sent to the Mykytivsky District Bailiffs' Service of Gorlivka (the "Bailiffs") for the enforcement of the judgment.

9. The execution proceedings were initiated on 7 September 2000 by the Bailiffs, who instituted separate proceedings with regard to the payment of the salary arrears and the compensation for the delayed settlement.

10. On 15 September 2000 the writs of execution were presented to the Gorlivka branch of Bank *Nadra* where the mining company had its account.

11. On 24 April 2001 the Bailiffs informed the applicant that the judgment of 26 April 2000 could not be executed due to the mine's lack of funds. It also informed the applicant that he was no. 191 in the list of creditors who sought to recover their debts.

12. On 26 February 2002 the applicant informed the Court that the execution proceedings were still pending.

13. On 6 May 2003 the Bailiffs lodged an application with the Artemivsk City Court seeking to replace the debtor in the enforcement proceedings by the *Artemvugillia* State Company. On 20 June 2003 the court allowed this request. The *Artemvugillia* was ordered to pay the applicant UAH 2,946.98² in compensation.

14. On 24 June 2003 the Bailiffs discontinued the enforcement proceedings for the payment of UAH 2,946.98 and remitted the execution writs to the Gorlivka District Bailiffs' Service, which had the relevant jurisdiction.

15. On 1 July 2003 the writ of execution was assigned to a bailiff who, on 2 July, instituted enforcement proceedings in the applicant's case.

16. On 3 July 2003 the *Artemvugillia* transferred the funds due to the applicant to the deposit accounts of the Mykytivsky District and Gorlivka District Departments of Justice which were enforcing the two writs in the applicant's favour.

17. On 4 July 2003 the sum UAH 2,323.4 for the delay in settlement was transferred to the applicant's bank account in accordance with payment order no. 195.

1. EUR 1,048.34.

2. EUR 504.80.

18. On 7 July 2003 the enforcement of this part of the judgment was discontinued in view of its execution.

19. On 9 July 2003 the remainder of the sum due to the applicant (UAH 2,946.98) was transferred to the applicant's bank account in accordance with payment order no. 219.

20. On 21 January 2004 the applicant informed the Court that he had received the full amount of the award. However, he complained that he had received no compensation for the further delays in enforcement. He also complained that he had to pay bank fees for the transfer made to him.

II. RELEVANT DOMESTIC LAW

A. Relevant legislation

21. Some of the relevant domestic law is set out in the judgment of 27 July 2004 in the case of *Romashov v. Ukraine* (no. 67534/01).

22. The Law on the 2004 State Budget provided funds for the payment of compensation to the employees of State-owned mining enterprises. In particular, Article 28 of that Law provided a total sum of UAH 508,000¹ in compensation for unpaid benefits to the employees of such mines. In accordance with Article 34 of the Law, the State allocated a sum of UAH 5,122,161.9² to enforce its programme “Coal of Ukraine” (*Vugillia Ukrayiny*) for the reconstruction of the coal-mining industry. In particular, these funds were allocated to the payment of compensation (UAH 254,000³) ordered by court judgments to miners, and the salary debt (UAH 721,275.6⁴) of State-owned enterprises.

23. On 3 April 2003 Parliament decided that, during the first semester of 2003, all the funds which had accumulated on the current bank accounts of coal industry enterprises should be transferred to pay outstanding salary debts.

B. Decrees of the President

24. The Decree of 15 December 1999 created the Ministry of Fuel and Energy (the “MFE”), following the abolition of the Ministry of the Coal-Mining Industry of Ukraine which had previously had responsibility for the management of State-owned coal-mining enterprises.

1. EUR 78,600.6

2. EUR 792,529.

3. EUR 39,300.3.

4. EUR 111,600.

25. On 14 April 2000 the President, by decree, approved the Statute of the MFE.

26. In accordance with the Decrees of 25 May and 6 July 2004, the Cabinet of Ministers was ordered to intensify its work related to the State's support of the coal-mining industry. In particular, in his Decree of 6 July 2004, the President ordered the MFE to facilitate the payment of compensation provided by the State for the salary debt of State-owned enterprises.

C. Acts of the Cabinet of Ministers

27. In accordance with the Decree of the Cabinet of Ministers on “the management of State-owned property” of 15 December 1992, State-owned enterprises are prohibited from transferring property within their management to other enterprises or private persons.

28. In accordance with the Decree No. 397-p of the Cabinet of Ministers of 19 July 2002, the State was to pay the compensation awarded to miners as a result of damage caused by occupational disease. The MFE was allocated UAH 10,000,000 from the State budget for this purpose.

29. In accordance with the General Agreement between the Cabinet of Ministers, the All-Ukrainian Union of Employers and Entrepreneurs and the Professional Trade Unions of 19 April 2004, the State undertook to pay compensation for the salary debt owed to persons employed in the coal-mining industry before 1 November 2004.

D. Acts of the Ministry of Fuel and Energy

30. By Order No. 449 of 2 August 2004, the MFE reorganised the structure of the State Enterprise “*Artemvugillia*”.

31. Pursuant to Order No. 256 of the MFE, the Deputy Minister was made responsible for the control and management of State-owned coal-mining enterprises. A special Department within the MFE was created for this.

32. Pursuant to Order No. 598 of 15 October 2002, the MFE had the right to approve changes in the statutes of enterprises within its jurisdiction and appoint the managers of those enterprises, as well as to instruct them on the performance of particular duties.

THE LAW

33. The applicant complained of the failure of the State authorities to execute the judgment of 26 April 2000 given in his favour. He alleged an

infringement of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention, which provide, in so far as relevant, as follows:

Article 6

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

Article 1 of Protocol No. 1

“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.”

**I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS AS TO THE
ADMISSIBILITY OF THE APPLICATION**

A. The applicant's victim status

34. The Government stressed that as the judgment of 26 April 2000 had been executed by the national authorities in full, the applicant could no longer be considered a victim of a violation of his rights under Article 6 § 1. They therefore proposed that the application be declared inadmissible or struck out of the Court's list of cases.

35. The applicant disagreed.

36. The Court notes that this issue has already been discussed in a number of Court's judgments (see *Voytenko v. Ukraine*, no. 18966/02, judgment of 6 June 2004, § 35; *Shmalko v. Ukraine*, no. 60750/00, judgment of 20 July 2004, § 34). In these cases the Court found that the applicant may still claim to be a victim of an alleged violation of the rights guaranteed by Article 6 § 1 in relation to the period during which the decision of which he complained remained unenforced (see, *Skubenko v. Ukraine* (dec.), no. 41152/98, 6 April 2004). It therefore rejects the Government's objection as to the present applicant's lack of victim status.

B. Objection as to the exhaustion of domestic remedies

37. The Government contended that the applicant has not exhausted domestic remedies as he did not lodge a claim with the domestic courts to challenge the inactivity of the State Bailiffs' Service or seek to expedite the enforcement proceedings in his case.

38. The applicant contested this submission.

39. The Court recalls its recent case-law on this issue (see the *Voytenko* and *Shmalko* judgments cited above, §§ 28-31 and 37-39). It finds no reason to distinguish the present application from these previous decisions. It concludes therefore that the applicant was absolved from pursuing the remedy invoked by the Government and has therefore complied with the requirements of Article 35 § 1 of the Convention.

C. Conclusions as to the admissibility of the complaint under Article 6 § 1 of the Convention

40. The Court considers, in the light of the parties' submissions, that the applicant's complaint under Article 6 § 1 of the Convention raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that the complaint cannot be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

D. Admissibility of the applicant's complaint under Article 1 of Protocol No. 1 to the Convention

41. The Court refers to its reasoning under Article 6 § 1 of the Convention in relation to Articles 34 and 35 § 1 (paragraphs 36 and 39 above), which is equally pertinent to the applicant's claim under Article 1 of Protocol No. 1 (see the aforementioned *Voytenko* judgement, § 50). Consequently, the Court also finds that this complaint cannot be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

II. AS TO THE ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

42. The applicant complains, under Article 6 § 1 of the Convention about the State authorities' lengthy failure to execute the judgment of 26 April 2000.

43. The Government repeated that there was no infringement of Article 6 § 1 of the Convention in view of the enforcement of the judgment. They considered that the time taken to enforce it was reasonable. Furthermore, the original non-enforcement of the judgment was caused by the difficult financial situation of the State. The State Bailiffs took all necessary steps under domestic legislation to enforce the judgment.

44. The Court recalls that the rights secured by Article 6 § 1 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. 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 (*Hornsby v. Greece*, judgment of 19 March 1997, *Reports of judgments and decisions* 1997-II, p. 510, § 40).

45. The Court notes that the judgment of 26 April 2000 remained partially unenforced until 4 July 2003, when the full amount of the debt was transferred to the applicant's bank account, after the communication of the application to the respondent Government. However, the Court considers that the applicant should not have been prevented from benefiting from the decision given in his favour, which was of major importance to him, on the ground of the enterprise's alleged financial difficulties.

46. The Court considers therefore that by failing for three years and two and a half months to take the necessary measures to comply with the aforementioned judgment, the State authorities partly deprived the provisions of Article 6 § 1 of the Convention of their useful effect. It further considers that the Government have not advanced any valid justification for the delay in enforcement of the judgment from September 2000 until 6 May 2003 (the aforementioned *Shmalko* judgment, § 45).

47. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. AS TO THE ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

48. The applicant alleged that there had been an unjustified interference with his property rights, in breach of Article 1 of Protocol No. 1. The substantial delay in the payment of the debt had deprived him of the actual possession of his property.

49. The Government acknowledged that the judgment debt constituted a possession within the meaning of Article 1 of Protocol No. 1. Nevertheless, they maintained that it had not been violated since the applicant's entitlement to the award was not disputed and he was not deprived of his property. They further noted that the delay in payment was due to the insufficient funds of the defendant company.

50. 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 (the aforementioned *Voytenko* judgment, § 53).

51. The substantial delay of over three years and two and a half months to pay the judgment debt to the applicant is also an interference of this kind, for which the Government have not advanced any satisfactory explanation. The Court considers that the alleged lack of funds of a State-owned enterprise cannot justify such an omission. Accordingly, there has 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 and costs and expenses

53. The applicant claimed pecuniary damage related to the amounts awarded to him by the judgment. He further alleged that his non-pecuniary damage amounted to UAH 52,700 (EUR 10,000).

54. The Government did not agree with the applicant's claims. They alleged that they were unsubstantiated. Furthermore, they maintained that the judgment given in the applicant's favour was enforced.

55. The Court considers that the applicant's claims are excessive. Making its assessment on equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,520 in non-pecuniary damage and EUR 300 for costs and expenses.

B. Default interest

56. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,520 (one thousand five hundred and twenty euros) in respect of non-pecuniary damage and EUR 300 (three hundred euros) for costs and expenses, plus any tax that may be chargeable, these sums to be converted into the national currency of the respondent State 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 11 January 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President