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

SECOND SECTION

CASE OF SHARENOK v. UKRAINE

(Application no. 35087/02)

JUDGMENT

STRASBOURG

22 February 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 Sharenok 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. TÜRMEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs A. MULARONI,
Ms D. JOČIENĖ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 1 February 2005,

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

PROCEDURE

1. The case originated in an application (no. 35087/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Dmytro Mykolayovych Sharenok ("the applicant"), on 6 September 2002. The applicant having died on 16 September 2004, his widow and children expressed the wish to pursue the application.

2. The applicant was represented by Mr G. M. Avramenko, a lawyer practising in the city of Chernigiv. The Ukrainian Government ("the Government") were represented by their Agents – Mrs V. Lutkovska and Mrs Z. Bortnovska.

3. On 28 April 2003 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

4. The applicant was a Ukrainian citizen born in 1948 who died on 16 September 2004. By letter of 5 November 2004, the applicant's widow and children informed the Court that they wished to pursue the application.

I. THE CIRCUMSTANCES OF THE CASE

5. In 1997 the applicant instituted proceedings in the Novozavodsky District Court of Chernigiv seeking the recovery of salary arrears against his

former employer - the State-owned “Atomspetsbud” company which performed construction work at Chernobyl in the zone which had been compulsory evacuated. By a decision of the court of 7 October 1998, the applicant was awarded 4,964 Ukrainian hryvnas (UAH) in salary arrears. On 25 January and 18 August 2000 the applicant received UAH 147.28 and UAH 77.90 respectively. However, the judgment remains to a large extent unenforced, the outstanding debt being UAH 4,738.82 (the equivalent of 677 euros [“EUR”]).

6. By letter of 4 January 2003, the Ukrainian Government Agent informed the applicant's lawyer about the large number of execution writs pending against the debtor company, in the total amount of UAH 3,849,312[1]. Enforcement of the judgments by the attachment of property, however, required a special authorisation from the Ministry for Emergencies due to the location of the debtor's property in the Chernobyl area, contaminated by radiation. Such authorisation was not granted.

7. By the order of 27 June 2002 of the Ministry of Energy, the debtor company was liquidated and a liquidation commission established.

8. Accordingly, on 17 March 2003 the State Bailiffs' Service terminated the enforcement proceedings in the applicant's case and forwarded the execution writ to the liquidation commission as a creditor's claim. The liquidation proceedings are still pending.

II. RELEVANT DOMESTIC LAW

9. A description of the relevant domestic law can be found in *Mykhaylenky and Others v. Ukraine* (nos. 35091/02 and following, §§ 24-33, 30 November 2004).

THE LAW

I. AS TO THE *LOCUS STANDI* OF MRS SHARENOK, MR SHARENOK AND MS SHARENOK

10. The applicant died in September 2004. On 5 November 2004 the applicant's widow and children informed the Court that they wished to pursue the application.

11. The respondent Government pointed out that the Court did allow previously next of kin to stand in the proceedings before the Court (see

[1] EUR 549,901.71

Gayduk and Others v. Ukraine (dec.), nos. 45526/99 and following, ECHR 2002-VI). The Government therefore left the issue to the Court's discretion.

12. The Court notes that the present application concerns a property right which is in principle transferable to the heirs, and that there are next of kin of the applicant who wish to pursue the application. In these circumstances the Court considers that the widow and children of the applicant (hereinafter – the "heirs") have standing to continue the present proceedings in his stead. However, reference will still be made to the applicant throughout the ensuing text.

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

13. The applicant complained about the non-enforcement of the court decision in his favour under Article 6 § 1 of the Convention, 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

(a) Exhaustion of domestic remedies

14. The Government contended that the applicant had not exhausted domestic remedies as he did not lodge a claim with the domestic courts, challenging the inactivity of the Bailiffs' Service and claiming compensation for irregular enforcement proceedings, or for the devaluation of the awarded amount.

15. The applicant contested that argument, recalling that the main reason for the continued non-enforcement of the judgment given in his favour was the difficult economic situation of the debtor company, which required a solution at the State level.

16. 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 (see *Kudla v. Poland* [GC], no. 30210/96, § 158, ECHR-XI). In the instant case, the judgment in the applicant's favour remains unenforced in part despite the Bailiffs' considerable efforts, acknowledged by the Government (paragraph 23 below). Furthermore, the Bailiffs' Service is no longer involved in the debt recovery procedure since the enforcement proceedings were terminated and the applicant's claims transferred to the commission overseeing the liquidation of the debtor company (paragraphs 7-8 above). Therefore, the Court is of the opinion that this preliminary objection of the Government is irrelevant to the principal

complaint of the applicant and cannot be accepted, since the remedy the Government have invoked cannot prevent the continuation of the alleged violation.

17. Accordingly, the Court dismisses the objection.

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

18. In their further observations, the Government maintained that, although the debtor company was a State-owned enterprise, it was a separate legal entity and the State could not be held responsible for its debts under domestic law.

19. The applicant maintained that the company was a public enterprise working under State contract. The work performed by the company had not been paid by the Ministry for Emergencies in full. This situation created debts for the company. The applicant further maintained that, under domestic law, the owner was liable for the debts of an entity, if the entity lacked funds to honour its obligations.

20. The Court refers to its findings in the case of *Mykhaylenky and Others v. Ukraine* (cited above) 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 this conclusion in the instant case.

21. The Court therefore rejects the Government's objection in this respect.

(c) Conclusion

22. 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

23. The Government noted that the Bailiffs' Service had ensured the enforcement of the judgment in the applicant's favour as far as possible, and it had been executed in part. They submitted that the debtor's property was in the zone of radioactive contamination and therefore could not be attached without authorisation, such authorisation having been refused by the Ministry for Emergencies. The Government considered that the applicant's complaint about non-enforcement of the judgment in his favour due to the alleged inactivity of the Bailiffs' Service was unsound, since the Bailiffs' Service had taken all necessary measures to enforce the judgment and was

no longer responsible for the enforcement after the decision to liquidate the debtor company had been taken.

24. The applicant contested the Government's submissions. He maintained that his complaint about non-enforcement of the judgment was not limited to the alleged inactivity of the Bailiffs' Service, as the Government have suggested. The applicant noted that the judgment in his favour could not be executed without measures being taken at the State level. He further submitted that the company was a State-owned enterprise and the State should pay the debts of its enterprises.

25. 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. 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).

26. 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 applicant should not have been prevented from benefiting from the success of his litigation.

27. The Court notes that, to date, the judgment given in favour of the applicant in October 1998 remains largely unenforced. In the Court's opinion, given the finding of State liability for the debts to the applicant in the present case, the period of non-execution should not be limited to the enforcement stage only, but should include the ongoing period of debt recovery in the course of the liquidation proceedings. Therefore, the period of debt recovery in the applicant's case has so far lasted six years and three months.

28. By failing for more than six years to take the necessary measures to comply with the final judgment in the instant case, the Ukrainian authorities deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

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

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

30. The applicant further complained that the State had infringed his right to the peaceful enjoyment of his 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

31. The Court refers to its reasoning under Article 6 § 1 of the Convention, rejecting the Government's objections to the admissibility of the application (paragraphs 14-21 above), which is equally pertinent to the applicant's 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 cited in Article 35 of the Convention. It must therefore be declared admissible.

B. As to the merits

32. The Government in their submissions confirmed that the amount awarded to the applicant by the domestic court constituted a possession within the meaning of Article 1 of Protocol No. 1. They acknowledged that the non-enforcement of the judgment in favour of the applicant could be considered to be an interference with the applicant's right to the peaceful enjoyment of his possessions. However, the Government claimed that such 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 liquidated company required the liquidation commission and the State to develop comprehensive measures to satisfy all claims.

33. The applicant submitted that the State is liable for the outstanding debt due to him and, having failed to pay this debt, the State deprived him of the actual possession of his property, in violation of Article 1 of Protocol No. 1.

34. 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*, no. 59498/00, § 40, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 45, 6 March 2003).

35. In the instant case the Court is therefore of the opinion that the impossibility for the applicant to obtain the execution of his judgment for a considerable period of time (six years and three months) constituted an interference with his right to the peaceful enjoyment of his possessions, within the meaning of the first paragraph of Article 1 of Protocol No. 1.

36. Such interference was justified in part by the prohibition on exporting the contaminated property of the debtor company from the Chernobyl zone of compulsory evacuation. However, in the Court's opinion, such a prohibition, undeniably involving a legitimate public interest, did not strike a fair balance between the State's interests and those of the applicant, on whom the whole financial burden fell.

37. By failing to comply with the judgment given in favour of the applicant, the national authorities prevented the applicant and now prevent his heirs, for a considerable period of time, from receiving in full the money to which the applicant was entitled.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

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

40. The applicant claimed UAH 4,814 (the equivalent of EUR 688 in pecuniary damage. The applicant's heirs confirmed this claim.

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

42. The Court recalls that it has rejected this objection above (paragraphs 18-21). For the same reasons, the Court rejects this argument under Article 41.

43. In the light of documents in its possession, the Court awards the applicant's heirs, jointly, EUR 677 in respect of pecuniary damage. This sum corresponds to the outstanding debt to the applicant.

(b) non-pecuniary damage

44. The applicant claimed UAH 50,000 (EUR 7,143) for non-pecuniary damage suffered as a result of the failure of the authorities to enforce the judgment. The applicant's heirs confirmed this claim.

45. The Government submitted that the finding of a violation would constitute sufficient just satisfaction in the present case.

46. The Court takes the view that the applicant suffered some non-pecuniary damage as a result of the violations found which cannot be made good by the Court's mere finding of a violation. The particular amount claimed is, however, excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards to the applicant's heirs, jointly, EUR 3,000 with regard to the length of the period of non-enforcement in the applicant's case.

B. Costs and expenses

1. Domestic proceedings

47. The applicant did not submit any claim under this head within the set time-limit; the Court therefore makes no award.

2. Convention proceedings

48. The applicant claimed EUR 1,035 for the costs and expenses incurred before the Court. The applicant's heirs claimed EUR 1,800 instead.

49. The Government maintained that the applicant's claim was unsubstantiated and excessive. The Government submitted that the applicant had failed to submit details of the work performed by his lawyer, the hourly rates, etc. The Government noted that the lawyer submitted a joint reply to the Government's observations in this application together with observations in ten other applications[1] concerning the debt retrieval from the same company. The Government further submitted that, given the simple legal

[1] (see *Mykhaylenky and Others v. Ukraine* judgment, cited above)

issues of the application, the total amount claimed by the applicant was too high.

50. The Court reiterates that, in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

51. The Court finds it clear that the applicant incurred some costs and expenses for being represented before the Court. Regard being had to the information in its possession and to the above criteria, the Court considers it reasonable and equitable to award the applicant's heirs, jointly, EUR 300 for costs and expenses.

C. Default interest

52. 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. *Holds* that the applicant's heirs have standing to continue the present proceedings in his stead;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

5. *Holds*
(a) that the respondent State is to pay Mrs K. Sharenok, Mr M. Sharenok and Ms N. Sharenok, jointly, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 677 (six hundred and seventy-seven euros) for pecuniary damage, EUR 3,000 (three thousand euros) for non-pecuniary damage, and EUR 300 (three hundred euros) for costs and expenses;
(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;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President