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

SECOND SECTION

CASE OF SYCHEV v. UKRAINE

(Application no. 4773/02)

JUDGMENT

STRASBOURG

11 October 2005

FINAL

11/01/2006

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 Sychev 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 V. BUTKEVYCH,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 20 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 4773/02) 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 Viktor Grigoryevich Sychev ("the applicant"), on 12 March 2001.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mrs Valeria Lutkovska.

3. On 7 September 2004 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the non-execution of the judgments given in favour of the applicant and the lack of effective remedies in this respect 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

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1941 and lives in Gorlovka, the Donetsk Region.

5. On 14 September 1999 the Tsentralny District Court of Gorlovka awarded the applicant UAH 10,798.45 (approximately EUR 1,800) against the Lenina coal-mine (a State-owned entity, hereafter "the LCM") for arrears in industrial disablement benefits. The judgment became effective

and was sent for execution to the Gorlovka City Bailiffs' Service (hereafter "the Bailiffs' Service"). On 5 October 1999 the Bailiffs' Service instituted enforcement proceedings in the applicant's case.

6. On 31 October 2000 the Tsentralny District Court of Gorlovka, referring to the decision of the Donetsk Regional Court of Arbitration (hereafter "the Court of Arbitration") of 21 December 1998, whereby the LCM was declared bankrupt, ordered the Bailiffs' Service to transfer the writ of execution to the LCM's liquidation commission. According to the aforementioned decision of the Court of Arbitration the liquidation commission in issue was to be comprised of representatives of the LCM's main creditors, including the State Pension Fund, the State Property Fund, the State Tax Administration and several State owned companies.

7. On 17 November 2000 the applicant was informed by the Donetsk Regional Department of Justice that it was impossible to transfer the writ of execution to the liquidation commission as no such commission had in fact been created.

8. On 26 January 2001 the Court of Arbitration's judge, at the applicant's request, informed him that the commission had not produced the liquidation balance, as it was supposed to do under the bankruptcy law. The court, however, indicated that the national legislation envisaged no time-limit for that, neither did it provide any sanctions for the commission's inactivity.

9. On 8 February 2001 the Court of Arbitration ordered the liquidation commission to produce the abovementioned balance.

10. On 26 February 2001 the meeting of the LCM's creditors acknowledged that no liquidation commission had been established.

11. On 20 March 2001 the Court of Arbitration, at the request of the Ordena Zhovtnevoy Revolutsiyy State Company, suspended the bankruptcy proceedings pending the supervisory review of its decision of 21 December 1998.

12. On 27 March 2001 the applicant's writ of execution was sent to the newly created liquidation commission.

13. On 2 July 2001 the supervisory court quashed the decision of 21 December 1998 and remitted the case for fresh consideration.

14. On 29 August 2001 the Donetsk Regional Commercial Court (a former Donetsk Regional Court of Arbitration) extended the term of office of the liquidation commission and, following its proposal appointed a new trustee to run the bankruptcy programme. However, the writs of execution issued against the LCM were returned to the Bailiffs' Service without enforcement.

15. The Bailiffs' Service recommenced the enforcement proceedings in the applicant's case. On numerous occasions in 2001 and 2002 they attached the assets belonging to the LCM. In 2002 the applicant was paid a total of 7,533.55 (approximately EUR 1,245) in several instalments.

16. On 28 December 2002 the Ministry of Fuel and Energy ordered that several coal-mines, including the LCM, merge into the Artemvugillia State Company. Accordingly, the Bailiffs' Service undertook to replace the debtor in the applicant's enforcement case. The proceedings resumed in 20 May 2003 when the Bailiffs' Service levied on the Artemvugillia's bank accounts.

17. On 29 November 2004 the Bailiffs' Service terminated the enforcement proceedings as the judgment in the applicant's favour had been enforced in full. In his letter of 28 January 2005 the applicant alleged that that was not the case since the LCM still owed him UAH 927 (approximately EUR 155).

II. RELEVANT DOMESTIC LAW

1. Law of 14 May 1992 "on the Restoration of a Debtor's Solvency or the Declaration of Bankruptcy"

18. Under Article 22 of the Law (*Закон України "Про відновлення платоспроможності боржника або визнання його банкрутом"*), the decision to commence the liquidation proceedings is taken by the Commercial Court.

19. According to Article 24 of the Law the Commercial Court appoints a trustee to run the liquidation programme and members of the liquidation commission. The Commercial Court also considers the complaints about the actions and omissions of the trustee and the liquidation commission and performs other duties, conferred upon it by virtue of this Law.

20. Article 25 of the Law provides that the trustee controls the bankrupt's property, chairs the liquidation commission and directs the liquidation programme.

21. Under Article 32 of the Law, after having completed the liquidation programme, the trustee produces to the Commercial Court the account of his administration of the bankrupt's property and the liquidation balance.

2. Law of Ukraine of 24 March 1998 "on the State Bailiffs' Service"

22. 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.

3. Decrees of the President

23. 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.

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

25. 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.

4. Acts of the Cabinet of Ministers

26. 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.

27. 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.

28. 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.

5. Acts of the Ministry of Fuel and Energy

29. By Order No. 449 of 2 August 2004, the MFE reorganised the structure of the State Enterprise "*Artemvugillia*".

30. 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.

31. 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

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

32. The applicant complained about the non-enforcement of the judgment of the Tsentralny District Court of Gorlovka of 14 September 1999 given in his favour. He relied on Article 6 § 1 of the Convention, which in so far as relevant provides:

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

33. The Government contested that argument.

A. Admissibility

1. The applicant’s allegations that the judgment has not been enforced in full

34. In his letter of 28 January 2005 the applicant alleged that the State had failed to repay him UAH 927 (approximately EUR 155) awarded by the judgment of 14 September 1999.

35. The Court notes that according to the documents provided by the Government the judgment in issue was enforced in full in November 2004, when the coal mine transferred the remainder of the awarded amount to the applicant’s account.

36. The Court finds that the applicant’s allegations are not supported by the evidence. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant’s victim status

37. 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.

38. The applicant disagreed.

39. 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 those cases the Court found that the applicant could 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. It, therefore, rejects the Government's objection as to the present applicant's lack of victim status.

3. The exhaustion of domestic remedies

a. The submissions of the parties

40. The Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They maintained that the applicant had failed to challenge the liquidation commission's inactivity before the Court of Arbitration and apply to any domestic court against the Bailiffs' Service to challenge the allegedly inadequate enforcement of the judgment in his favour. With respect to the latter argument the Government supplied several examples where the creditors lodged successful claims against the bailiffs.

41. The applicant contested this submission, stating that he had no effective remedies to exhaust in his particular situation. He maintained that the non-enforcement of the judgment given in his favour had been caused by the lack of funds in possession of the State enterprise and insufficiency of allocations from the State budget for payment of salaries and benefits of the employees in the coal mining industry. Therefore, the applicant alleged that challenging the bailiffs' actions before the domestic court was redundant and ineffective.

b. The Court's assessment

42. The Court reiterates that the purpose of Article 35 § 1 of the Convention is to afford the 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. 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, 29 April 2003).

43. Insofar as the Government argue that the applicant should have challenged the inactivity of those involved in the LCM's liquidation procedure before the Court of Arbitration, the Court notes that on 26 January 2001 the Court of Arbitration's judge informed the applicant that the national legislation envisaged no time-limit for the liquidation commission to complete the liquidation programme, neither did the law provide any sanctions for the commission's inactivity. The Court observes that neither the Government's submissions before it, nor domestic legislation in force at the material time give any grounds to conclusively

rebut this argument. The Government, while giving examples of creditors' successful litigations against the Bailiffs' Service, were unable to present any such case regarding liquidation commissions.

44. The Court recalls in this respect its case-law according to which an applicant is excused from pursuing a domestic remedy if he/she shows that on the basis of well-established case-law it would be of no avail (see *Rudzinska v. Poland* (dec.), no. 45223/99, 7 September 1999). Therefore, the Government's argument must be dismissed.

45. To the extent that the Government contended that the applicant had not exhausted domestic remedies as he did not lodge a claim with the domestic courts to challenge the inactivity of the Bailiffs' Service, the Court recalls its recent case-law on this issue (see *Voytenko v. Ukraine,* cited above, §§ 28-31; *Shmalko v. Ukraine*, cited above, §§ 37-39). It finds no reason to distinguish the present application from these previous cases. In particular, the Court finds the examples supplied by the Government from the domestic case-law of limited assistance because they concerned procedural flaws attributable to the Bailiffs' Service, whereas in the present case the delay in the enforcement of the judgment was caused by the insufficiency of State funds allocated for the relevant purposes, rather than by the misconduct of a bailiff (see *Dubenko v. Ukraine*, no. 74221/01, §§ 13, 24-32 and 39, 11 January 2005).

46. Therefore, the Court concludes that the applicant was absolved from pursuing the remedies invoked by the Government and has therefore complied with the requirements of Article 35 § 1.

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

47. 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.

B. Merits

48. The Government maintained that until 29 August 2001, when the writ of execution was transferred from the LCM's liquidation commission to the Bailiffs' Service, the delay in the execution had been caused by the liquidation commission's inactivity, for which the State bears no responsibility under the Convention. They further considered that after the indicated date the State Bailiffs took all necessary steps under domestic legislation to enforce the judgment and the delay in its enforcement was

mainly due to the LCM and its successor, the Artemvugillia Company's lack of funds. The latter factor, in the Government's opinion, also could not be attributable to the authorities despite the State's ownership of those companies.

49. The applicant contested these arguments.

50. The Court, in the first place, 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).

51. The Court accepts the argument advanced by the Government that two separate periods should be distinguished in the enforcement proceedings in the applicant's case.

a. The enforcement proceedings before 29 August 2001

52. The Court observes that it is common ground that all writs of execution issued against the LCM had to be handled by its liquidation commission as from the moment the company was declared bankrupt (that is to say 21 December 1998). However, due to the inactivity of its court appointed members it was not until March 2001 that the liquidation commission commenced to operate. The Government argues that the liquidation commission was a private-law body and thus the State cannot be held accountable for its actions or omissions.

53. The Court recalls that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction (see, *mutatis mutandis*, *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 20, § 49). The State cannot absolve itself from responsibility *ratione personae* by delegating its obligations to private bodies or individuals (see, *mutatis mutandis*, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 58, § 27). The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (see *Z. v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V).

54. The Court does not find it necessary to embark on a discussion of whether the liquidation commission was or was not in itself a State authority for the purposes of Article 34 § 1 of the Convention. It suffices to note that the body in question exercised certain State powers at least as

regards the execution of court judgments. The Court notes in this respect that the fact that a State chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of State responsibility *ratione personae*. In the Court's view, the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law (see *Wos v. Poland* (dec.), no. 22860/02, ECHR 2005-...).

55. The Court further considers that the situation when a body to which the State powers to enforce court judgments were delegated enjoys unfettered discretion in its activity, namely, when it is not subject to any effective judicial or administrative control is unacceptable from the point of view of Article 6 § 1 read in conjunction with Article 1 of the Convention. In the present case the domestic legislation, while formally putting the activity of the liquidation commission under the Court of Arbitration's supervision, provided no sanctions for its failure to act, depriving this safeguard of any practical value in the present case.

56. The Court recalls that Article 6 § 1 imposes on Contracting States the duty to organise their legal systems in such a way that their authorities can meet its requirements (see, *mutatis mutandis*, *Podbielski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3395 § 38). In the light of the above facts and considerations the Court finds that the almost two-year period of total inactivity in the execution of a court judgment was due to the State's failure to establish an effective system of enforcement of court judgments given against the company undergoing bankruptcy proceeding.

b. The period after 29 August 2001

57. The Court notes that on 29 August 2001 the applicant's writ of execution was transferred to the Bailiffs' Office for enforcement, which was finally completed on 29 November 2004, that is to say after the communication of the application to the respondent Government. The Court recalls that a similar situation has already been examined by the Court in a number of judgments (see among many others *Romashov v. Ukraine*, no. 67534/01, § 43, 27 July 2004; and *Dubenko v. Ukraine*, no. 74221/01, § 45, 11 January 2005) where it was found that the applicant should not be prevented from benefiting from the decision given in his/her favour, which was of major importance to him/her, on the ground of the State enterprise's alleged financial difficulties. The Court finds no reason to reach a different conclusion in the present case.

c. The general conclusion

58. Having regard to the above consideration the Court is of the opinion that by failing for five years and two 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.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

60. The applicant next complained that he had no effective remedies in respect of his complaint under Article 6 § 1 of the Convention. He relied on Article 13 of the Convention, which provides as follows:

> "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."

61. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

62. The Government submitted that the applicant had an opportunity to challenge the liquidation commission's inactivity before the Court of Arbitration and to lodge a claim with the domestic courts to challenge the inactivity of the Bailiffs, or to seek compensation for material and moral damage.

63. The Court refers to its findings (at paragraphs 42-46 above) in the present case concerning the Government's argument regarding domestic remedies. For the same reasons, the Court concludes that the applicant did not have an effective domestic remedy, as required by Article 13 of the Convention, to redress the damage created by the delay in the present proceedings. Accordingly, there has been a breach of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant did not specify any fixed amount of damages, claiming compensation for the losses he allegedly incurred due to inflation for pecuniary damage and leaving the amount of non-pecuniary damage at the Court's discretion.

66. The Government found the applicant's claims unjustified.

67. Making its assessment on equitable basis, as required by Article 41 of the Convention, the Court considers it reasonable to award the applicant a global sum of EUR 2,480 in respect of damages

B. Costs and expenses

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

C. Default interest

69. 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 13 of 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 in accordance with Article 44 § 2 of the Convention, EUR 2,480 (two thousand four hundred and eighty euros) in respect of pecuniary and non-pecuniary damage, to 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;
(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;

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

S. NAISMITH	J.-P. COSTA
Deputy Registrar	President