



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

SECOND SECTION

CASE OF CHERGINETS v. UKRAINE

(Application no. 37296/03)

JUDGMENT

STRASBOURG

29 November 2005

FINAL

29/02/2006

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 Cherginets 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 8 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 37296/03) 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 Vladimir Ivanovich Cherginets (“the applicant”), on 26 September 2003.

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

3. On 9 September 2004 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1972 and lives in the village of Yelizavetovka, the Dnepropetrovsk Region.

5. On 20 November 2001 and 5 February 2003 the Dneprovsky District Court of Dneprodzerzhynks (hereafter “the District Court”) awarded the applicant a total of UAH 14,987¹ against the Dneprodzerzhynksy Zavod Elektroispolnitelnyh Mekhanizmov Company (hereafter “the Company”) in

¹ approximately 2,280 euros (“EUR”)

salary arrears. Both judgments became final and were sent to the Dneprovsky District Bailiffs' Service of Dneprodzerzhynks (hereafter "the Bailiffs") for compulsory enforcement.

6. On 14 May 2003 the District Court rejected the applicant's complaint about the Bailiffs' alleged inactivity. The court pointed out that the judgments given in the applicant's favour could not be executed in due time and in full on account of the debtor's lack of funds, the moratorium on the forced sale of the property of State-owned enterprises and a lien placed on the company's assets to secure the payment of taxes. On 22 July 2003 the Dnipropetrovsk Regional Court of Appeal quashed this decision and remitted the case for fresh consideration. On 11 December 2003 the proceedings were discontinued on the applicant's request.

7. On 11 November 2003 the judgment of 20 November 2001 was enforced in full. On 20 October 2004 the sum awarded to the applicant by the judgment of 5 February 2003 was transferred to his account. However, the amount of UAH 136.18 was deducted by the bank as a processing fee.

II. RELEVANT DOMESTIC LAW

8. The relevant domestic law may be found in the judgment of 26 April 2005 in the case of *Sokur v. Ukraine* (no. 29439/02, §§ 17-22).

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

1. Alleged violation of Article 4 of the Convention

9. The applicant complained of a violation of Article 4 § 1 of the Convention, referring to the fact that he was forced to work without receiving remuneration. The Court notes that the applicant performed his work voluntarily and his entitlement to payment has never been denied. The dispute thus involves civil rights and obligations, but does not disclose any element of slavery or forced or compulsory labour within the meaning of this provision (see *Sokur v. Ukraine* (dec.), no. 29439/02, 26 November 2002). In these circumstances, the Court considers that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Alleged violation of Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1

10. The applicant complained of the failure of the State authorities to execute the judgments of 20 November 2001 and 5 February 2003 given in his favour and about the lack of domestic remedies in respect to these grievances. He alleged an infringement of Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention which provide, in so far as relevant, as follows:

Article 6 § 1 of the Convention

“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 13 of the Convention

“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.”

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.”

11. The Government objected that the applicant could no longer be considered a victim, for the purposes of Article 34 of the Convention, as the judgments had been enforced.

12. The applicant disagreed, stating that the decisions remained unenforced for an unreasonably long period of time.

13. The Court recalls its case-law to the effect that, whilst the execution of the decision given in the applicant’s favour redressed the non-execution as such, it could not in itself remedy the undue length of the enforcement procedure (see *Romashov v. Ukraine*, no. 67534/01, § 27, 27 July 2004, and *Sokur v. Ukraine*, cited above, § 27). The Court considers, therefore, that the applicant may still claim to be a victim of an alleged violation of the rights guaranteed by Article 6 § 1 and Article 1 of Protocol No. 1 in relation to the period during which the judgments in his favour remained unexecuted.

14. The Court considers, therefore, that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds.

II. MERITS

1. Alleged violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1

a. Parties' submissions

15. The Government maintained that the lengthy failure to enforce the decisions in the applicant's favour had been caused by the debtor's lack of funds, for which the State bears no responsibility, holding only 48.9% of its share capital. The Government stated that the Bailiffs performed all necessary actions to enforce the judgments and could not be held liable for any delay. They considered that there was no infringement of Article 6 § 1 of the Convention in view of the ultimate enforcement of the judgments.

16. The applicant reiterated that the State was responsible for the enforcement delays. He also stated that he has not so far received the full amount of the 2003 award as the sum of UAH 136.18 was unfairly deducted from the money transferred to his bank account.

17. With regard to the latter issue, the Government maintained that the applicant, when opening his account at the bank signed a contract which, *inter alia*, stipulated the amount of processing fees. Thus the Government cannot be held accountable for this private contractual transaction.

b. The Court's assessment

18. The Court first notes the parties' disagreement as to the deduction of UAH 136.18 from the money transferred on 20 October 2004 to the applicant's bank account in the course of the enforcement of the judgment of 5 February 2003. The applicant claims that this sum is still owed to him by the Company and, therefore, the judgment has not been enforced in full. The Court notes that the applicant in his submissions did not deny that the initial amount of the transfer corresponded to the 2003 award, and that the bank's deduction complied with his account contract. Moreover, the applicant failed to challenge the deduction before any domestic court. The Court, accordingly, dismisses the applicant's argument.

19. The Court notes that the judgments of 20 November 2001 and 5 February 2003 remained unenforced until 11 November 2003 and 20 October 2004 respectively, i.e. periods of approximately two years and one year eight months. It observes that these judgments were enforced in

full after the communication of the application to the respondent Government.

20. The Court now turns to the Government's argument that the length of the non-enforcement in the present case was due to the financial difficulties of the respondent Company, which was not the responsibility of the State because it only possessed 48.9 % of the Company's share capital (cf. *Mihăilescu v. Romania*, decision of 26 August 2003, no. 47748/99).

However, the Court finds that the debtor was undoubtedly a State-owned enterprise within the meaning of Article 1 of the Law "on the Introduction of a Moratorium on the Forced Sale of Property" (see *Sokur v. Ukraine*, no. 29439/02, § 18, 26 April 2005). As such, it attracted the application of the moratorium (see paragraph 6 above), barring the attachment and sale of the capital assets of the Company. The Court recalls that domestic law does not offer a creditor like the applicant, or the Bailiffs, any possibility to challenge this restriction in case of abuse or an unjustified application. Nor can a compensation claim be made for the delay in enforcement caused by this restriction (see *Trykhlil v. Ukraine*, no. 58312/00, § 51, 20 September 2005).

21. The Court considers that, by delaying the enforcement of the judgments in the applicant's case, the authorities deprived the provisions of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 of much of their useful effect. The Court finds that the Government have not advanced any convincing justification for this delay (see *Sokur v. Ukraine*, cited above, § 36, and *Trykhlil v. Ukraine*, cited above, § 52).

22. There has accordingly been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

2. Alleged violation of Article 13 of the Convention

23. The applicant complained that he had no effective remedies whereby he could have obtained the relevant redress for his complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

24. The Government pointed out that the applicant had an opportunity (which he took) to challenge before the courts the actions and omissions of the Bailiffs. Such proceedings were discontinued on the applicant's own request, which, in the Government's view, demonstrated that the applicant had lost interest in pursuing the otherwise effective remedy.

25. The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Afanasyev v. Ukraine*, no. 38722/02, § 75, 5 April 2005). The Court reiterates that the domestic remedies must be "effective" in the sense either

of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR 2000-XI).

26. The Government referred to the possibility to challenge the inactivity or omissions of the Bailiffs and to seek compensation for any pecuniary and non-pecuniary damage caused by them. The Court notes that the applicant did have recourse to the domestic courts against the Bailiffs, which not only did not remedy, but also could not remedy the principal complaints under Article 6 § 1 of the Convention (see *Sokur v. Ukraine* (dec.), no. 29439/02, 16 December 2003). The facts of the case show that, throughout the period under consideration, the enforcement of the judgments in question was hindered by legislative measures, rather than by the Bailiffs' misconduct. In this respect the Court recalls its established case law that the claim for damages against the Bailiffs cannot be considered an effective remedy where the delay in the enforcement of the judgments was due to reasons beyond the Bailiffs' control (see, among many others, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, and the following, §§ 38-39, ECHR 2004-...).

27. 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 (see, *mutatis mutandis*, *Voytenko v. Ukraine*, no. 18966/02, §§ 46-48, judgment of 29 June 2004). Accordingly, there has been a breach of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. 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

29. The applicant claimed UAH 62,675.23¹ in respect of pecuniary and non-pecuniary damage.

30. The Government contested the applicant's claims as being unsubstantiated.

31. The Court considers that the applicant's claims are excessive. Making its assessment on an equitable basis, as required by Article 41 of the

¹ EUR 10,346.36

Convention, the Court awards the applicant a global sum of 1,400 euros (EUR) in pecuniary and non-pecuniary damage.

B. Costs and expenses

32. 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

33. 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 applicant's complaints under Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1 admissible and the remainder of the application inadmissible;
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* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. *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 1,400 (one thousand four hundred 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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Naismith
Deputy Registrar

J.-P. Costa
President