



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

SECOND SECTION

CASE OF GRACHEVY AND OTHERS v. UKRAINE

(Applications nos. 18858/03, 18923/03 and 22553/03)

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 Grachevy and others 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 K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM, *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 three applications (nos. 18858/03, 18923/03 and 22553/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Ukrainian nationals, Mrs Aleksandra Grachova, Mr Nikolay Grachev, Mr Anatoliy Yakovlevich Pedan and Mr Eduard Gennadyevich Kuznetsov (“the applicants”), on 20 May 2003.

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

3. On 21 June 2004 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. Mrs Aleksandra Gracheva was born in 1947; Mr Nikolay Grachev was born in 1936; Mr Anatoliy Yakovlevich Pedan was born in 1942 and Mr Eduard Gennadyevich Kuznetsov was born in 1969. All the applicants reside in the town of Zhovti Vody, the Dnipropetrovsk Region.

5. Between 1999 and 2001 the applicants instituted separate sets of proceedings in the Zhovti Vody City Court (hereafter “the City Court”),

seeking the recovery of salary arrears against their former employer - the State owned Electrongaz Company (hereafter “the Company”).

6. On 7 June 1999 and 30 March 2001 the City Court awarded Mrs Aleksandra Gracheva a total of UAH 6,759¹ against the Company.

7. By the City Court’s judgments of 7 June 1999 and 4 May 2001, and the Dnepropetrovsky Regional Court of Appeal’s decision of 15 August 2001, Mr Nikolay Grachev was awarded a total of UAH 5,358² against the Company.

8. On 31 March 2000 and 29 March 2001 the City Court awarded Mr Pedan salary arrears of UAH 7,027³ against the Company.

9. On 19 February 1999 the City Court ordered the Company to pay Mr Kuznetsov UAH 2,916⁴ in salary arrears.

10. All the judgments above became final and were sent to the Zhovti Vody City Bailiffs’ Office (hereafter “the Bailiffs”) for compulsory enforcement.

11. In letters dated 23 and 24 January 2003, the Bailiffs informed the applicants that the enforcement of the judgments in their favour was impeded by the entry into force of the Law on the Introduction of a Moratorium on the Forced Sale of Property 2001, which barred the attachment and sale of the Company’s capital assets.

12. On 7 March 2003 the Dnipropetrovsk Regional Commercial Court (hereafter “the Commercial Court”) instituted bankruptcy proceedings against the Company and issued an injunction, barring the debt recovery. On 10 October 2003 the Commercial Court approved the rehabilitation proposal and appointed a trustee to run the bankruptcy rehabilitation of the Company’s business.

13. On 21 October 2004 the Bailiffs terminated the enforcement proceedings in the applicants’ favour as the awards were paid to them in full.

II. RELEVANT DOMESTIC LAW

14. The relevant domestic law may be found in the judgments of 26 April 2005 in the case of *Sokur v. Ukraine* (no. 29439/02, §§ 17-22) and of 20 September 2005 in the case of *Trykhlil v. Ukraine* (no. 58312/00, §§ 25-32).

¹ approximately 1,052 euros (EUR)

² approximately EUR 834

³ approximately EUR 1,088

⁴ approximately EUR 452

THE LAW

I. JOINDER OF THE APPLICATIONS

15. 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. ADMISSIBILITY OF THE COMPLAINTS

1. Alleged violation of Article 17 of the Convention

16. The applicants complained that the introduction of the 2001 Law, barring debt retrieval from the State-owned enterprises violated Article 17 of the Convention. The Court finds no evidence whatsoever in the case file which might disclose any appearance of a breach of this provision. The Court, therefore, rejects this complaint, in accordance with Article 35 §§ 3 and 4 of the Convention, as being manifestly ill-founded.

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

17. The applicants complained of the failure of the State authorities to execute the judgments given in their favour. They 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 § 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 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.”

a. The applicants' victim status

18. The Government stressed that, as the judgments in the applicants' favour had been executed by the national authorities in full, the applicants could no longer be considered victims of a violation of their rights under the Convention.

19. The applicants disagreed.

20. The Court notes that this issue has already been discussed in a number of the 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 and Article 1 of Protocol No.1 in relation to the period during which the decision of which complaint is made remained unenforced. It therefore rejects the Government's objection as to the present applicants' lack of victim status.

b. Objection as to the exhaustion of domestic remedies

21. The Government submitted that the applicants had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, since they had not challenged the Bailiffs' alleged inactivity before the domestic courts, and had not applied to the Commercial Court for registration as creditors in the bankruptcy proceedings.

22. The applicants contested this submission, alleging that none of the indicated remedies had any prospect of success.

23. In so far as the Government refer to the applicants' failure to bring proceedings against the Bailiffs for their alleged inactivity, the Court notes that the facts of the case show that, throughout the period under consideration, the enforcement of the judgments was hindered by legislative measures, rather than by the Bailiff's 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-...).

24. As to the Government's submission about the applicants' failure to apply for registration as creditors in the bankruptcy litigation, the Court notes that, in the circumstances of the ongoing rehabilitation programme, resort to this remedy was redundant. The Court recalls in this respect its finding in the judgment of *Trykhlil v. Ukraine* (cited above, § 42) that, "the Government have failed to demonstrate that joining the bankruptcy litigation as a creditor would have given the applicant such advantages as to warrant giving up the ordinary enforcement procedure". It finds no reason to reach a different conclusion in the present case.

25. Therefore, the applicants were absolved from pursuing the remedies referred to by the Government and have therefore complied with the requirements of Article 35 § 1.

3. Conclusion

26. The Court concludes 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.

III. MERITS

27. The Government maintained that the lengthy failure to enforce the decisions in the applicants' favour had been caused by the ongoing bankruptcy proceedings against the debtor Company and its critical financial situation. The Government further maintained that the Bailiffs performed all necessary actions and cannot be blamed for the delay.

28. The applicants put in doubt the willingness of the Bailiffs to enforce the decisions in their favour. They maintained that the enforcement proceedings were barred first by the Law "on the Introduction of a Moratorium on the Forced Sale of Property" and then by the bankruptcy proceedings against the debtor. The applicants submitted that the steps taken by the State were insufficient to ensure their right to have court decisions given in their favour enforced without undue delay.

29. The Court must first address the Government's submissions regarding the ongoing bankruptcy proceedings. It observes that in the course of such proceedings the commercial court may block any debt retrieval from the bankrupt entity, and the latter remains immune from any penalties for delay in honouring its obligations for the duration of those proceedings. The Court recalls that it has already found in the *Trykhliv v. Ukraine* case (cited above, §§ 49-50) that this procedure, applied in similar circumstances, may lead to a violation of Article 6 § 1 of the Convention. The Court finds no reason to depart from such a conclusion in the present case.

30. In so far as the Government refer to the Company's critical financial situation, the Court recalls that it was a State-owned entity. As such, it attracted the application of the Law on the Introduction of a Moratorium on the Forced Sale of Property (see paragraph 11 above), barring the attachment and sale of the capital assets of State-owned enterprises. The Court observes that domestic law does not offer a creditor like the applicant, or the Bailiff, 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 *Sokur v. Ukraine*, cited above, § 35).

31. The Court finds, therefore, that the judgments in the applicants' favour remained unenforced until 21 October 2004, i.e. a period of debt

recovery lasting between three to five years, without any valid justification, thus depriving the provisions of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 of much of their useful effect. It further notes that the judgments in question were enforced in full after the communication of the applications to the respondent Government.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicants claimed the following amounts in pecuniary and non-pecuniary damage.

- Mrs Aleksandra Gracheva – EUR 2,210;
- Mr Nikolay Grachev – EUR 2,183;
- Mr Anatoliy Yakovlevich Pedan – EUR 3,123; and
- Mr Eduard Gennadyevich Kuznetsov – EUR 10,000.

35. The Government contested the applicants’ claims as being unsubstantiated.

36. The Court, making its assessment on equitable basis, as required by Article 41 of the Convention, awards the following global sums in pecuniary and non-pecuniary damage:

- EUR 2,210 to Mrs Aleksandra Gracheva;
- EUR 2,183 to Mr Nikolay Grachev;
- EUR 2,240 to Mr Anatoliy Yakovlevich Pedan; and
- EUR 2,720 to Mr Eduard Gennadyevich Kuznetsov.

B. Costs and expenses

37. The applicants 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

38. 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;
2. *Declares* the applicants' complaints under Article 6 § 1 of the Convention and Article 1 of the Protocol No. 1 admissible and the remainder of the applications inadmissible;
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 to the Convention;
5. *Holds*
 - (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, as follows:
 - to Mrs Aleksandra Gracheva, EUR 2,210 (two thousand two hundred and ten euros);
 - to Mr Nikolay Grachev, EUR 2,183 (two thousand one hundred and eighty-three euros);
 - to Mr Anatoliy Yakovlevich Pedan, EUR 2,240 (two thousand two hundred and forty euros); and
 - to Mr Eduard Gennadyevich Kuznetsov, EUR 2,720 (two thousand seven hundred and twenty 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 29 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President