



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

SECOND SECTION

CASE OF ILCHENKO v. UKRAINE

(Application no. 17303/03)

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 Ilchenko 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 an application (no. 17303/03) 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 Viktor Prokofyevich Ilchenko (“the applicant”), 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 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 1938 and resides in the town of Zhovti Vody, the Dnipropetrovsk Region.

5. On 28 May 1999 and 18 October 2000 the Zhovti Vody City Court (hereafter “the City Court”) awarded the applicant a total of UAH 5,712¹ against the State owned Electrongaz Company (hereafter “the Company”) in salary arrears. Both judgments became final and were sent to the Zhovti

¹ approximately 890 euros (EUR)

Vody City Bailiffs' Office (hereafter "the Bailiffs") for compulsory enforcement.

6. In a letter of 24 January 2003, the Bailiffs informed the applicant that the enforcement of the judgments in his 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.

7. On 7 March 2003 the Dnipropetrovsk Regional Commercial Court (hereafter "the Commercial Court") instituted bankruptcy proceedings against the Company and issued an injunction barring any 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.

8. On 21 October 2004 the Bailiffs terminated the enforcement proceedings in the applicant's favour as both awards were paid to him in full.

II. RELEVANT DOMESTIC LAW

9. 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 *Trykhlid v. Ukraine* (no. 58312/00, §§ 25-32).

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

1. Alleged violation of Article 17 of the Convention

10. The applicant complained that the introduction of the 2001 Law, barring debt retrieval from 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 part of the application, 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

11. The applicant complained of the failure of the State authorities to execute the judgments of 28 May 1999 and 18 October 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 § 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 applicant’s victim status

12. The Government stressed that, as the judgments in the applicant’s favour 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 the Convention.

13. The applicant disagreed.

14. 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 an 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 applicant’s lack of victim status.

b. Objection as to the exhaustion of domestic remedies

15. The Government submitted that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, since he

had not challenged the Bailiffs' inactivity before the domestic courts and had not applied to the Commercial Court for registration as a creditor in the bankruptcy proceedings.

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

17. In so far as the Government refer to the applicant's 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 Bailiffs' misconduct. In this respect the Court recalls its established case law that a 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, *Mykhaylenko and Others v. Ukraine*, nos. 35091/02, and the following, §§ 38-39, ECHR 2004-...).

18. As to the Government's submission about the applicant's failure to apply for registration as a creditor 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 *Trykhlib 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.

19. Therefore, the applicant was absolved from pursuing the remedies referred to by the Government and has complied with the requirements of Article 35 § 1 of the Convention.

c. Conclusion

20. The Court concludes that this part of the application 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 grounds.

II. MERITS

21. The Government maintained that the lengthy failure to enforce decisions in the applicant's 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.

22. The applicant put in doubt the willingness of the Bailiffs to enforce the decisions in his favour. He 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 applicant submitted that the steps taken by the State were insufficient to ensure his right to have the court decisions given in his favour enforced without undue delay.

23. 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 the delays 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 the violation of Article 6 § 1 of the Convention. The Court finds no reason to depart from this conclusion in the present case.

24. In so far as the Government refer to the Company's critical financial situation, the Court recalls that it was undoubtedly 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 2001 (see paragraph 6 above), barring the attachment and sale of the capital assets of State-owned enterprises. The Court recalls 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).

25. The Court finds, therefore, that the judgments of 28 May 1999 and 18 October 2000 remained unenforced until 21 October 2004, i.e. periods of approximately five years and five months and three years, respectively 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 these judgments were enforced in full after the communication of the application to the respondent Government.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. 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

28. The applicant claimed 3,182 euros (EUR) in respect of pecuniary and non-pecuniary damage.

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

30. 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 a global sum of EUR 2,600 in respect of pecuniary and non-pecuniary damage.

B. Costs and expenses

31. 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

32. 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 Article 6 § 1 of the Convention and Article 1 of the 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 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 in accordance with Article 44 § 2 of the Convention, EUR 2,600 (two thousand six 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;

5. *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