



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

SECOND SECTION

**CASE OF MIROSHNICHENKO AND GRABOVSKAYA
v. UKRAINE**

(Application nos. 32551/03 and 33687/03)

JUDGMENT

STRASBOURG

13 December 2005

FINAL

13/03/2006

*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 Miroshnichenko and Grabovskaya v. Ukraine,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr A.B. BAKA, *President*,

Mr I. CABRAL BARRETO,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Ms D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 22 November 2005,

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

PROCEDURE

1. The case originated in two applications (nos. 32551/03 and 33687/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ukrainian nationals, Ms Yekaterina Nikiforovna Miroshnichenko and Ms Tatyana Ivanovna Grabovskaya (“the applicants”), on 14 August 2003 and 29 September 2003, respectively.

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

3. On 15 March 2005 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. Ms Yekaterina Nikiforovna Miroshnichenko (the first applicant) and Ms Tatyana Ivanovna Grabovskaya (the second applicant) were born in 1948. Both applicants live in the town of Chuguyev, the Kharkiv region.

A. The background of the case

5. The State owns 32.67% of the shares in the Chuguyevskaya Toplivnaya Apparatura Company (the applicants' employer, hereafter "the Company"), which is therefore subject to the Law of 29 November 2001 "on the Introduction of a Moratorium on the Forced Sale of Property".

6. On 12 June 2002 the Chuguyev City Court (hereafter the "City Court") ordered that the Company's salary, social benefits and alimony arrears be paid by instalments. The court referred, *inter alia*, to the practical suspension of the enforcement proceedings due to the aforementioned moratorium Law.

B. The circumstances of the cases

7. On 25 November 2002 and 3 March 2003, the City Court awarded the first applicant a total of UAH 2,810¹ against the Company in salary arrears. On 3 March 2003 the City Court made a similar award in favour of the second applicant for the sum of UAH 2,178.35².

8. Both judgments became final and were sent to the Chuguyev City Bailiffs' Service (hereafter "the Bailiffs") for compulsory enforcement.

9. In a letter of 8 July 2003, the Kharkiv Regional Department of Justice (hereafter "the Department") informed the first applicant that the award could not be immediately enforced due to, *inter alia*, the moratorium Law. However, the Department indicated that the proceedings with respect to the assets of the Company not covered by the moratorium (i.e. bank accounts) were to continue. On 10 March 2004 the second applicant received a similar letter from the Bailiffs.

10. Numerous enforcement proceedings against the Company (including the applicants' cases) were impeded by the decision of the City Court of 12 June 2002. Therefore, on 30 July 2002 and 29 October 2002, the Bailiffs applied to the court, requesting the clarification of its decision. However, it was not until 9 April 2003, that the clarification, enabling the Bailiffs to carry out the enforcement, was delivered.

11. On a number of occasions between July 2002 and February 2004, the Kharkiv Regional Commercial Court instituted bankruptcy proceedings against the Company and issued an injunction barring further debt recovery. The last decision of this kind was taken on 19 February 2004.

12. According to a letter dated 5 May 2004 from the Department, the enforcement of the applicants' awards was hindered by both the City Court decision of 12 June 2002 and the bankruptcy proceedings against the Company. The latter caused the Bailiffs to stay the enforcement proceedings

¹ approximately 406 euros (EUR)

² approximately EUR 320

on a number of occasions (the last such suspension being made on 16 May 2003 and subsequently lifted on 16 January 2004).

13. The judgments in the applicants' favour remain unenforced.

II. RELEVANT DOMESTIC LAW

14. The relevant domestic law is summarised in the judgments of *Romashov v. Ukraine* (no. 67534/01, §§ 16-18, 27 July 2004) and *Trykhliv v. Ukraine* (no. 58312/00, §§ 25-32, 20 September 2005).

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. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

16. 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 which provides, 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. ...”

A. Admissibility

1. Objection as to the exhaustion of domestic remedies

17. 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' inactivity before the domestic courts.

18. The applicants contested this submission, alleging that this remedy had no prospect of success.

19. The Court notes that throughout the period under consideration, the enforcement of the awards 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, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, and the following, §§ 38-39, ECHR 2004-...).

2. Compatibility ratione personae (responsibility of the State)

20. The Government maintained that the Company was a separate legal entity and the State could not be held responsible for its debts under domestic law.

21. The applicants disagreed.

22. The Court recalls that the responsibility of a State is engaged if Convention rights and freedoms are affected as a result of the enactment of domestic legislation (see *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 20, § 49). The Court finds that in the present case the debtor company 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, barring the attachment and sale of the Company's assets. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.

3. Conclusion

23. The Court concludes that these applications 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.

B. Merits

24. The Government maintained that the lengthy failure to enforce the decisions in the applicants' favour had been caused by the debtor's lack of funds, for which the State bears no responsibility, holding only 32.67% of the Company's share capital. The Government also stated that the Bailiffs performed all necessary actions to enforce the judgments and could not be held liable for any delay. They concluded, therefore, that there was no infringement of Article 6 § 1 of the Convention.

25. The applicants disagreed.

26. The Court first notes that the domestic authorities on a number of occasions confirmed that the application of the moratorium Law

substantially impeded the enforcement proceeding against the Company (see paragraphs 6 and 9 above). It also recalls its previous findings that the domestic legislation does not offer a creditor like the applicant, or the Bailiffs, any possibility to challenge the restrictions imposed by the moratorium on the forced sale of property of State-owned entities 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*, cited above, § 51).

27. Secondly, the Court observes that a further delay in the enforcement of the applicants' awards was caused by the decision of the City Court on 12 June 2002, which substantially complicated any execution proceeding against the Company. However, despite the Bailiffs' repeated requests, it was not until April 2003 that the court clarified its decision, enabling the Bailiffs to carry out their duties. The Court finds that the Government have failed to advance any argument to justify this delay.

28. Thirdly, the Court notes that the bankruptcy proceedings against the Company further blocked the enforcement as the commercial court could prevent any debt retrieval from the bankrupt entity, and the latter would remain 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 aforementioned *Trykhlil* case (§§ 49-50) that this procedure, applied in similar circumstances, may lead to the violation of Article 6 § 1 of the Convention. The Court sees no reason to depart from this conclusion in the present case.

29. Finally, the Court observes that the judgments in the applicants' favour have so far remained unenforced for periods lasting some three years and two years eight months, respectively, without any valid justification, thus depriving the provisions of Article 6 § 1 of the Convention of much of their useful effect.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The first applicant claimed UAH 8,810¹ in respect of pecuniary and non-pecuniary damage; the second applicant claimed UAH 12,000² in respect of non-pecuniary damage.

33. The Government contested the applicant’s claims as being unsubstantiated.

34. In so far as the judgment debts in the applicants’ favour have not been paid, the Court notes that the State’s outstanding obligation to enforce these judgments is not in dispute. Accordingly, the Court considers that, if the Government were to pay the remaining debts owed to the applicants, it would constitute full and final settlement of the claims for pecuniary damage.

35. As regards the remainder of the applicants’ claims, the Court, making its assessment on equitable basis, as required by Article 41 of the Convention, awards EUR 1,440 to the first applicant (Ms Miroshnichenko) and EUR 1,280 to the second applicant (Ms Grabovskaya), respectively, for non-pecuniary damage.

B. Costs and expenses

36. 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

37. 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.

¹ approximately EUR 1,470

² approximately EUR 2,002

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the judgment debts still owed to them, as well as EUR 1,440 (one thousand four hundred and forty euros) to Ms Miroshnichenko in respect of non-pecuniary damage, and EUR 1,280 (one thousand two hundred and eighty euros) to Ms Grabovskaya, also in respect of 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 amounts 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 December 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President