



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

SECOND SECTION

CASE OF OLEYNIK AND BAYBARZA v. UKRAINE

(Application no. 5384/03)

JUDGMENT

STRASBOURG

20 December 2005

FINAL

20/03/2006

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 Oleynik and Baybarza 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 Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 29 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 5384/03) 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, Mr Vladimir Andreyevich Oleynik and Mr Dmitriy Nikolayevich Baybarza (“the applicants”), on 3 December 2002.

2. The applicants were represented by Mr I.A. Voron, a lawyer practising in Dneprodzerzhynsk. The Ukrainian Government (“the Government”) were represented by their Agent, Ms Valeria Lutkovska.

3. On 24 March 2005 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. Mr Vladimir Oleynik (the first applicant) and Mr Dmitriy Baybarza (the second applicant) were born in 1935 and 1941 respectively, and live in Zhovti Vody, the Dnipropetrovsk Region.

5. On 26 October 2000 the Zhovti Vody City Court awarded the first applicant UAH 7,929.74¹ against the Electron-Gaz Company (a State owned entity; hereafter “the Company”) in salary arrears. On 18 October 2000 the second applicant was awarded 7,040.03² against the Company. Both judgments became final and were sent to the Zhovti Vody City Bailiffs’ Service (hereafter “the Bailiffs”) for compulsory enforcement.

6. On 2 April 2002 the Zhovti Vody City Prosecutor informed the second applicant that the delay in the execution of numerous court judgments against the Company was due to the moratorium on the forced sale of the property of State-owned enterprises, which significantly limited the resources for refunding the Company’s salary arrears.

7. On 19 April 2002 the Department of Industry, Transportation and Communications of the Dnipropetrovsk Regional State Administration issued a letter, stating that improvement of the Company’s financial performance (including that of its salary payments) was a matter of concern for various State authorities. In particular, the State Property Fund was preparing the Company’s development plan which was to be presented at the next stockholders’ meeting.

8. 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 a rehabilitation proposal and appointed a trustee to rehabilitate the Company’s business.

9. The judgments given in the applicants’ favour remain unenforced.

II. RELEVANT DOMESTIC LAW

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

11. The applicants complained of the failure of the State authorities to execute the judgments given in their favour. They alleged an infringement

¹ approximately 1,200 euros (‘EUR’)

² approximately EUR 1,000

of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 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. Admissibility

a. The Government’s objections to admissibility

12. 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.

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

14. The Court notes that, throughout the period under consideration, the enforcement of the award 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-...).

b. Conclusion

15. The Court concludes that this 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.

B. Merits

16. The Government maintained that the lengthy failure to enforce 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 had performed all necessary actions and cannot be blamed for the delay.

17. The applicants doubted the willingness of the authorities to enforce the decisions in their favour. They maintained that the State, being practically the sole owner of the Company, assumed total responsibility for its financial and business performance.

18. The Court will 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 *Trykhlil* 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.

19. Insofar as the Government refer to the Company's critical financial situation, the Court recalls that it is undoubtedly a State-owned entity. As such, it attracts 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 its assets. The Court notes that the domestic law does not offer a creditor like the applicant, or the Bailiffs, any possibility to challenge this restriction in case of an abuse or unjustified application. Nor can a compensation claim be made for the delay in enforcement caused by this restriction (*ibid.* § 51).

20. The Court observes that the judgments of 26 October 2000 and 18 October 2000 given in favour of the first and second applicants respectively have still not been enforced (i.e. a total of over five years and one month's delay) without any convincing 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.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. 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

23. The applicants claimed 10,000 US dollars each in respect of pecuniary and non-pecuniary damage.

24. The Government considered that the applicants' claims for pecuniary damage should be rejected for non-exhaustion of domestic remedies as the applicants have failed to raise them before the domestic courts. As regards the moral damage claims, the Government stated that the applicants did not suffer any damage and that, in any case, their demands were excessive.

25. 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 them 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 their claim for material damage.

26. As regards the applicants' claims for non-pecuniary damage, the Court, making its assessment on equitable basis, as required by Article 41 of the Convention, awards each applicant a global sum of 2,440 euros (EUR).

B. Costs and expenses

27. 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

28. 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 of Protocol No. 1 to 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 2,440 (two thousand four hundred and forty euros) each 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 December 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President