



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

FIFTH SECTION

CASE OF KOZACHEK v. UKRAINE

(Application no. 29508/04)

JUDGMENT

STRASBOURG

7 December 2006

FINAL

23/05/2007

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 Kozachek v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 13 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 29508/04) 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 Dmitriyevich Kozachek (“the applicant”), on 15 July 2004.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 5 December 2005 the Court decided to give notice of 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 1948 and lives in the village of Kovsharivka, the Kharkiv Region.

A. First decision in the applicant's favour

5. On 24 July 1997 the labour disputes commission of the Joint Stock Company “Kupyanskiy Lyvarniy Zavod” (“the KLZ”), in which the State

held 66.18% of the share capital, ordered the company to pay the applicant UAH 1,017¹ in salary arrears.

6. In August 1997 the Kupyansk Town Bailiffs' Service instituted enforcement proceedings.

7. On 14 December 2004 the Bailiffs' Service informed the applicant that the judgment could not be enforced due to the moratorium on the forced sale of property belonging to State enterprises introduced by the Law of 29 November 2001 and the debtor's lack of funds.

8. On 3 February 2006 the decision of 24 July 1997 was enforced in full.

B. Second decision in the applicant's favour

9. On 24 September 2003 the Kupyansk Town Court ordered the Joint Stock Company “Kupyanskiy Chavunolyvarniy Zavod”, in which the KLZ held 49% of the share capital, to pay the applicant UAH 920.16² in salary arrears.

10. On 28 November 2003 the same court rejected the applicant's request for leave to appeal against the judgment of 24 September 2003 for failure to comply with procedural formalities. On 20 February 2004 the court rejected the applicant's appeal in cassation on the ground that the judgment was not appealed against under the ordinary appeal procedure.

11. The applicant did not apply to the Bailiffs' Service for the execution of the judgment of 24 September 2003. It remains unenforced.

II. RELEVANT DOMESTIC LAW

A. Law of Ukraine of 21 April 1999 “on Enforcement Proceedings”

12. Article 18 § 1 (1) of the Law of Ukraine of 21 April 1999 “on Enforcement Proceedings” provides that a creditor must apply to the Bailiffs' Service with a writ of execution to enable the latter to initiate enforcement proceedings in respect of the decision given in the creditor's favour.

B. Law of 29 November 2001 “on the Introduction of a Moratorium on the Forced Sale of Property”

13. The Law aims at protecting State interests on the sale of assets belonging to undertakings in which the State holds at least 25% of the share capital. A moratorium on the enforcement of judgment debts has been

1. Around 243 euros – “EUR”.

2. Around EUR 155.

introduced until such time as the mechanism for the forced sale of the property of such undertakings has been improved. No time-limit has been set.

14. Under Article 2, the moratorium applies to immovable property and other capital (fixed) assets, which ensure the production, as well as to the shares which belong to the State.

THE LAW

I. ADMISSIBILITY

A. Complaint about the length of the non-enforcement of the decisions of 24 July 1997 and 24 September 2003

15. The applicant complained about the State authorities' failure to enforce the decision of the labour disputes commission of 24 July 1997 and the judgment of the Kupyansk Town Court of 24 September 2003 in due time and, in respect of the latter decision, in full. He invoked Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, which provide, insofar as relevant, as follows:

Article 6 § 1

“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”

16. The Court notes that the above complaints concern the length of the non-enforcement of two decisions, one of which was submitted to the Bailiffs' Service for execution, while the other was not. Thus, the complaints about the length of the non-enforcement of each decision should be examined separately.

1. The applicant's complaint about the non-enforcement of the decision of 24 July 1997

17. The Court notes that the Government have not raised any objection as to the admissibility of this part of the application.

18. The Court considers that this part of the application raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It finds no ground for declaring it inadmissible.

2. The applicant's complaint about the non-enforcement of the judgment of 24 September 2003

19. The Government contended that the applicant had not exhausted domestic remedies as he had failed to lodge with the Bailiffs' Service an application, or an execution writ, for the initiation of enforcement proceedings in respect of the judgment of the Kupyansk Town Court of 24 September 2003. They further stated that the State was not responsible for the enforcement of that judgment.

20. The Court recalls that, in some cases, it held it inappropriate to require an individual who has obtained a judgment against the State at the end of legal proceedings to then bring enforcement proceedings to obtain satisfaction (see *Karahalios v. Greece* (dec.), no. 62503/00, 26 September 2003). These considerations can be equally pertinent to the enforcement of judgments against the companies, which did not enjoy sufficient institutional and operational independence from the State or in respect of which the ban on the attachment of property was applied (see, for instance, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02 and others, § 44, ECHR 2004-..., and *Rudenko v. Ukraine*, no. 11412/02, § 25, 29 November 2005). In the latter cases, the Court held that the enforcement of judgments was hindered because of the State's failure to take some budgetary or legislative measures, rather than by shortcomings in the enforcement procedure (see *Romashov*, no. 67534/01, § 31, 27 July 2004).

21. On the other hand, the Court has held on a number of occasions that the State could not be considered responsible for the lack of funds of a private company and its responsibility extended no further than the involvement of State bodies in the enforcement proceedings (see *Shestakov v. Russia* (dec.), no. 48757/99, 18 June 2002). In such cases, Article 35 of the Convention required the applicants to institute enforcement proceedings against the debtor, who failed to honour his judgment debt, and also to challenge before the courts the lawfulness of actions and alleged omissions of the State Bailiffs' Service in these proceedings, as well as to claim damages from that Service for the delays in the enforcement (see *Kukta v. Ukraine* (dec.), no. 19443/03, 22 November 2005).

22. In view of the above, the Court notes that the issues of the responsibility of the State for enforcement of a judicial decision and the exhaustion of domestic remedies are interdependent and, thus, must be examined together.

23. Turning to the circumstances of the present case, the Court observes the Joint Stock Company “Kupyanskiy Chavunolyvarniy Zavod” was a separate legal entity, in which the State held around 30% of the share capital through another company which was also partially owned by the State (see paragraphs 5 and 9). Therefore, as such, this company attracted the application of the Law “on the Introduction of a Moratorium on the Forced Sale of Property”, barring the attachment and sale of the company's real estate property and capital assets (see paragraphs 13-14 above). The Court further notes that in the Ukrainian legal system neither the courts nor the bailiffs have power to overrule the law or to compel the State to amend its Budget laws. Even assuming that the applicant instituted the enforcement proceedings, the execution of the judgment against that debtor company would be substantially impeded due to the above Law (see *Solovyeva v. Ukraine*, no. 32547/03, § 25, 13 December 2005).

24. Therefore, the Court finds that, in the particular circumstances of this case, the applicant should not have been required to lodge with the Bailiffs' Service an application, or an execution writ, for the initiation of enforcement proceedings. On the same grounds, the Court finds that such state of affairs engaged the responsibility of the State for enforcement of the judgment.

25. In view of the above considerations, the applicant cannot be reproached for not using the remedies invoked by the Government and has therefore complied with the requirements of Article 35 § 1. Accordingly, the Court dismisses the Government's contentions.

26. The Court concludes that this part of 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. Other complaints

27. The applicant further complained about a violation of Articles 1 and 4 of the Convention on account of the non-enforcement of the decisions in his favour.

28. The Court finds that this part of the application is unsubstantiated and must therefore be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

II. MERITS

29. In their observations on the merits of the applicant's complaint about the length of the non-enforcement of the decision of the labour disputes commission of 24 July 1997, the Government put forward arguments similar to those in the cases of *Romashov v. Ukraine* and *Voytenko v. Ukraine*, contending that there had been no violation of either Article 6 § 1 of the Convention or Article 1 of Protocol No. 1 (see *Romashov*, cited above, § 37, and *Voytenko v. Ukraine*, no. 18966/02, 29 June 2004, § 37). The Government did not comment on the merits of the applicant's complaint about the non-enforcement of the judgment of the Kupyansk Town Court of 24 September 2003.

30. The applicant generally disagreed.

31. The Court notes that the decision of the labour disputes commission of 24 July 1997 remained unenforced for around eight years and six months. The Court further notes that, to date, the judgment of the Kupyansk Town Court of 24 September 2003 has remained unenforced for around three years.

32. The Court recalls that it has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases raising issues similar to the present application (see, for instance, *Romashov*, cited above, §§ 42-46, and *Voytenko*, cited above, §§ 53-55).

33. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present case. 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

34. 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

35. The applicant submitted that he suffered pecuniary damage because of the length of the non-enforcement of the decisions in his favour, but he failed to specify the amount of his claim in this respect. He claimed UAH 2,535¹ in respect of non-pecuniary damage.

1. Around EUR 421.

36. The Government maintained that the applicant had not substantiated his claims and submitted that the finding of a violation would constitute sufficient just satisfaction.

37. The Court considers that the Government should pay the applicant the amount awarded to him by the judgment of the Kupyansk Town Court of 24 September 2003 in settlement of his pecuniary damage.

38. As to the applicant's claim in respect of non-pecuniary damage, the Court, making its assessment on an equitable basis, as required by Article 41 of the Convention, awards the applicant the requested amount of EUR 421.

B. Costs and expenses

39. The applicant did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

40. 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 Protocol No. 1 about the length of the non-enforcement of the decision of the labour disputes commission of 24 July 1997 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;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 421 (four hundred and twenty-one euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable on the date of settlement;

(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 7 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President