



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

FIFTH SECTION

**CASE OF KOOPERATIV KAKHOVSKIY-5 v. UKRAINE**

*(Application no. 20728/04)*

JUDGMENT

STRASBOURG

19 February 2009

**FINAL**

***14/09/2009***

*This judgment may be subject to editorial revision.*



**In the case of Kooperativ Kakhovskiy-5 v. Ukraine,**

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 January 2009,

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

## PROCEDURE

1. The case originated in an application (no. 20728/04) 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-based cooperative association “Kooperativ Kakhovskiy no. 5”.

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

3. The applicant association alleged, in particular, violations of Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1 on account of non-enforcement of a final judgment given in its favour against a public entity.

4. On 5 December 2005 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant association was registered in 1990 and is located in the town of Kakhovka, Kherson region.

6. In 1990 the applicant association entered into a contract with the Construction Department of the Kherson Regional State Administration (“the Department”; *Управління капітального будівництва Херсонської обласної державної адміністрації*), according to which the latter

undertook to construct a block of flats for the applicant association's members.

7. In January 2002 the applicant association instituted proceedings in the Commercial Court of the Kherson Region against the Department, seeking compensation for defaulting on the construction project.

8. On 5 April 2002 the court found in part for the applicant association and ordered the Department to pay it 144,066.74 Ukrainian hryvnias (UAH) in compensation. On 27 March 2003 the Commercial Court of Appeal of the Odessa Region quashed the decision of the first-instance court and adopted a new decision, ordering the Department to pay the applicant association UAH 2,227,269.40 in compensation.

9. On 20 June 2003 the Higher Commercial Court of Ukraine rejected the Department's request for leave to appeal in cassation for failure to comply with procedural requirements.

10. On 15 July 2003 the Commercial Court of the Kherson Region issued a writ of execution for the decision of the Commercial Court of Appeal of the Odessa Region of 27 March 2003.

11. On 11 August 2003 the Suvorovskiy District Bailiffs' Service of Kherson instituted enforcement proceedings.

12. By decisions of 22 September and 22 December 2003, the Higher Commercial Court of Ukraine rejected the Department's request for leave to appeal in cassation for being lodged out of time.

13. The decision of 27 March 2003 remains unenforced to the present date with reference to the debtor's lack of funds and realisable assets.

## II. RELEVANT DOMESTIC LAW

14. The relevant domestic law is set out in the judgment of 27 July 2004 in the case of *Romashov v. Ukraine* (no. 67534/01, §§ 16-19).

## THE LAW

### I. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

15. The applicant association complained that the fact that the judgment of 27 March 2003 given in its favour had remained unenforced for a considerable period of time had been incompatible with the guarantees set forth in Article 6 § 1 of the Convention and that it had no effective remedies in respect of the complaint about the length of the enforcement of this judgment as required by Article 13 of the Convention. Additionally, it

complained that the failure of the authorities to enforce the judgment at issue breached its rights under Article 1 of Protocol No. 1. The impugned provisions read, in so far 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 13**

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

**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 Government conceded that the authorities had done everything in their power to collect the debt due to the applicant association and had therefore not infringed its rights guaranteed by the Convention.

**A. Admissibility**

17. The Court considers that the applicant association’s complaints raise issues of fact and law under the Convention and finds no ground for declaring them inadmissible. The Court must therefore declare them admissible.

**B. Merits**

*1. Alleged violation of Article 6 § 1 of the Convention*

18. The Court reiterates that the judgment at issue in the present case has remained unenforced for a period exceeding five and a half years. The Government have not provided a plausible explanation for such a delay.

19. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see,

for instance, *Romashov v. Ukraine*, cited above, §§ 42-46, and *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, §§ 51-55, ECHR 2004-XII)).

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

21. Having regard to its case-law on the subject, the Court considers that in the instant case there has accordingly been a breach of Article 6 § 1.

### *2. Alleged violation of Article 13 of the Convention*

22. The Court notes that the Government have provided no reference to any effective domestic remedy, by way of which the applicant association could, as required by Article 13 of the Convention, have obtained a ruling upholding its right to have its claims finally settled within a reasonable time, as set forth in Article 6 § 1 of the Convention.

23. Regard being had to its case-law on the subject (see, for example, *Voytenko v. Ukraine*, no. 18966/02, §§ 46-48, 29 June 2004, and *Vasylyev v. Ukraine*, no. 10232/02, § 41, 13 July 2006), the Court finds that there has been a breach of Article 13.

### *3. Alleged violation of Article 1 of Protocol No. 1*

24. The Court reiterates the findings in its case-law that the impossibility for an applicant to obtain the enforcement of a judgment in his or her favour constitutes an interference with the right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 45, 6 March 2003 and *Voytenko v. Ukraine*, no. 18966/02, §§ 53-55, 29 June 2004). The Court finds no ground to depart from its case-law in the present case.

25. There has, accordingly, been a violation of Article 1 of Protocol No. 1.

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

26. The applicant association also relied on Articles 8, 10, 11 and 14 of the Convention with respect to the facts of the present case.

27. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that in so far as the matters complained of are within its competence they do not disclose any appearance of a violation of the rights and freedoms set out in the above provisions of the Convention.

28. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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. Pecuniary damage

30. In its initial application the applicant association claimed UAH 3,674,222.96 by way of compensation for pecuniary damage. This amount represented the judgment debt due to it and the remainder of the claim against the debtor, which had been rejected by domestic courts as unsubstantiated.

31. Within the time-limit allotted by the Court for submission of just satisfaction claims, the applicant association amended its initial submissions by seeking an additional EUR 25,000 for each of its members to buy an apartment as well as UAH 1,000,624.23 by way of default interest.

32. The Government found the initial claims exorbitant and unsubstantiated and did not comment on the amended claims.

33. Regard being had to the nature of the violations found in the present case, the Court finds that the Government should pay the applicant association the unsettled judgment debt by way of compensation for pecuniary damage.

34. As regards the remainder of the claim, the Court finds no causal link between the sums claimed and the violations found in the present case, regard being had, in particular, to the speculative nature of the applicant's submissions (see, *mutatis mutandis*, *Prodan v. Moldova*, no. 49806/99, § 73, ECHR 2004-III (extracts) and *Rakitin v. Ukraine*, no. 7675/04, § 30, 11 January 2007). The Court therefore rejects this part of the claim.

#### B. Non-pecuniary damage

35. The applicant association also claimed non-pecuniary damage in the amount of 1,000 euros (EUR) for each of its seventy members for each year during which the Department had defaulted on its obligations *vis-à-vis* the applicant association.

36. The Government contended that this claim was unsubstantiated and exorbitant.

37. The Court notes that the applicant association, being a legal entity, did not claim any non-pecuniary damage on its own behalf. In the circumstances of the present case the Court considers that the finding of a violation constitutes sufficient just satisfaction in respect of non-pecuniary damage.

### **C. Costs and expenses**

38. Initially the applicant association also claimed UAH 96,000 for the costs and expenses incurred before the domestic authorities in connection with numerous attempts to obtain value for the money invested in the construction project since 1993 and subsequently before the domestic authorities and the Court in connection with attempts to collect the judgment debt. Subsequently the claim was amended to UAH 110,000. The applicant association did not present any documents concerning the expenses incurred in connection with domestic enforcement or Convention proceedings.

39. The Government contested this claim as unsubstantiated and exorbitant.

40. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the fact that the applicant has presented no documents enabling the Court to identify the amount of expenses incurred in connection with attempts to redress the violations found in the present case (namely, the prolonged non-enforcement of the judgment), the Court rejects the claim for costs and expenses.

### **D. Default interest**

41. 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 complaints under Article 6 § 1 and 13 of the Convention and Article 1 of 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 13 of the Convention;
4. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant association;
6. *Holds*
  - (a) that the respondent State is to pay the applicant association, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the unsettled judgment debt still owed to it under the judgment of 27 March 2003;
  - (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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Peer Lorenzen  
President