



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

FIFTH SECTION

CASE OF OTYCHENKO AND FEDISHCHENKO v. UKRAINE

(Applications nos. 1755/05 and 25912/06)

JUDGMENT

STRASBOURG

12 March 2009

FINAL

12/06/2009

This judgment may be subject to editorial revision.

In the case of Otychenko and Fedishchenko v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in two applications (nos. 1755/05 and 25912/06) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mrs Natalya Yuryevna Otychenko and Mrs Valentyna Volodymyrivna Fedishchenko (“the applicants”), on 30 December 2004 and 14 June 2006 respectively.

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

3. On 11 September 2007 the Court decided to communicate the applicants’ complaints under Article 6 § 1 of the Convention to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Mrs Otychenko

4. The applicant was born in 1962 and currently lives in Sevastopol, the Autonomous Republic of the Crimea, Ukraine.

5. At the material time she worked at the Housing Maintenance and Utilities Enterprise “Kotelnikovo” (*Управління житлово-комунального господарства «Котельниково»*), a municipal enterprise set up and owned by local village council. The labour contract with the applicant was signed by that village council. Subsequently she resigned.

6. On 16 December 2002 the Krasnogvardeyskiy District Court of the Autonomous Republic of the Crimea awarded the applicant 3,151.25 Ukrainian hryvnias (UAH)¹ in salary arrears and other payments due to her by her former employer.

7. This judgment became final and on 30 January 2003 the State Bailiffs’ Service instituted proceedings to enforce it. According to the Government, in the course of these proceedings the total amount of UAH 357.97 was paid to the applicant. The applicant, in her turn, contested that she had ever been paid any sum under the judgment.

8. In September 2003 the applicant instituted another set of proceedings against her former employer seeking additional compensation for salary arrears. On 1 February 2005 the court dismissed her claim. The applicant did not appeal against this judgment.

9. On 15 December 2004 the enforcement proceedings were terminated for lack of funds of the debtor enterprise. The applicant did not challenge this decision before the domestic courts; nor had she reintroduced her writ of enforcement with the State Bailiffs’ Service.

10. On 26 January 2006 the Commercial Court of the Autonomous Republic of the Crimea initiated liquidation proceedings against the debtor enterprise. These proceedings were terminated on 26 February 2007 and the enterprise was removed from the relevant enterprises’ register. The applicant did not raise her creditor claims within these proceedings.

11. The judgment of 16 December 2002 remains unenforced.

B. Mrs Fedishchenko

12. The applicant was born in 1953 and lives in Pyatykhatky, the Dnipropetrovsk region, Ukraine.

13. On 11 April and 1 October 2003 the Pyatykhatky District Court of Dnipropetrovsk Region awarded the applicant UAH 1,705.14 and UAH 570.41², respectively, in salary arrears due to her by her former employer, the Pyatykhatky Municipal Plumbing Company (*Комунальне підприємство водопровідно-каналізаційного господарства в м. П’ятихатки*) set up, owned and managed by local town council.

¹ Approximately 596.77 euros (EUR) at the material time.

² Approximately EUR 305.93 and EUR 94.23 at the material time.

14. These judgments became final and on 30 April 2003 and 30 March 2004, respectively, the State Bailiffs' Service instituted proceedings to enforce them.

15. The applicant complained to various State authorities about lengthy non-enforcement of the judgments in her favour but to no avail.

16. On 15 May 2007 the awarded amounts were paid to the applicant.

II. RELEVANT DOMESTIC LAW

17. The general provisions of domestic legislation on enforcement of judicial decisions are set out in the judgment of 27 July 2004 in the case of *Romashov v. Ukraine* (no. 67534/01, §§ 16-19).

18. The provisions of the Civil Code of 18 July 1963 (repealed on 1 January 2004) and the Civil Code of 16 January 2003 (in force since 1 January 2004) on owner's liability for the obligations of its legal entity are set out in the case of *Mykhaylenko and Others v. Ukraine*, nos. 35091/02 and foll., §§ 25-26, ECHR 2004-XII).

19. Article 143 of the 1996 Constitution of Ukraine provides:

“Territorial communities of a village, settlement and city, directly or through the bodies of local self-government established by them, manage the property that is in municipal ownership; [...] establish, reorganise and liquidate municipal enterprises, organisations and institutions, and also exercise control over their activity; [...]”

20. Article 31 of the Property Act 1991 (repealed by the Act of 27 April 2007) provides that the State property includes the State property itself and the property of administrative-territorial units (municipal property).

21. By letter of 27 December 2004 the Ministry of Justice of Ukraine, having analysed the then current legislation, concluded, *inter alia*, that the State and municipal property were different types of property.

22. Article 78 “Municipal unitary enterprises” of the Commercial Code of Ukraine (in force since 1 January 2004) provides that municipal unitary enterprises are set up by competent body of local self-government and are managed by it. A municipal unitary enterprise holds assets under the right of economic management (for municipal commercial enterprises) or operative management (for municipal non-commercial enterprises). A municipal unitary enterprise is managed by the head of that enterprise appointed by the body which it is subordinate to.

THE LAW

I. JOINDER OF THE APPLICATIONS

23. 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

24. The applicants complained about the State authorities' failure to enforce the judgments taken in their favour in due time.

The Court will examine the complaints under Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

A. Admissibility

25. Relying on the provisions of national legislation (among others, the 1963 and 2003 Civil Codes, the 1991 Property Act and the 1997 Local Self-Government Act), the Government submitted that they were not responsible for the debts of the municipal enterprises. In particular, they maintained that the debtor enterprises had full economic control over property transferred to them by local authorities, which had founded them, and enjoyed the income from that property. They further stated that the debtor enterprises were independent in their commercial activity from the State (e.g. that they had their own financial balance, bank accounts; that the debtor enterprises were not funded from the State budget).

The Government further submitted that Mrs Otychenko had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. In particular, they maintained that she had not availed herself of the opportunity to be registered as creditor in the insolvency and liquidation proceedings pending against the debtor enterprise, and had failed to challenge the liquidation commission's inactivity before the relevant commercial court or apply to any domestic court against the Bailiffs' Service to challenge the allegedly inadequate enforcement of the judgment in her favour.

The Government also challenged the victim status of Mrs Fedishchenko as the awarded amounts had been already paid to her on 15 May 2007.

26. The Court recalls that a State is accountable for the debts of enterprises owned and controlled by its local authorities to the same extent

as it is accountable for the debts of State-owned enterprises (see, *mutatis mutandis*, *Aleksandrova v. Russia*, no. 28965/02, §§ 17 and 18, 6 December 2007). In this connection the Court notes that the debtor enterprises in the applicants' cases were of a municipal nature, that is, they were owned and controlled by local authorities (see paragraphs 5 and 13, respectively) the actions and/or omissions of which are attributed to the respondent State. Accordingly, the Court dismisses the Government's objection.

27. As regards the Government's objection that Mrs Otychenko had failed to exhaust domestic remedies, the Court notes that similar objections have already been rejected in a number of judgments adopted by the Court (see *Sokur v. Ukraine* (dec.), no. 29439/02, 16 December 2003; *Sychev v. Ukraine*, no. 4773/02, §§ 42-46, 11 October 2005; and *Trykhlil v. Ukraine*, no. 58312/00, §§ 38-43, 20 September 2005). The Court considers that this objection must be rejected in the instant case for the same reasons.

28. In so far as the Government object to the victim status of Mrs Fedishchenko, the Court notes that the fact that the judgments in question were enforced does not deprive the applicant of her victim status in relation to the period during which they remained unenforced (see *Romashov*, cited above, §§ 26-27). Accordingly, the Court dismisses the Government's objection.

29. The Court notes that the 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. They must therefore be declared admissible.

B. Merits

30. In their observations on the merits of the applicants' claims, the Government contended that there had been no violation of Article 6 § 1 of the Convention.

31. The applicants disagreed.

32. The Court notes that the judgments in the applicants' favour remained unenforced for five years and one month, at least.

33. The Court reiterates that it has already found violations of Article 6 § 1 of the Convention in cases like the present applications (see, among other authorities, *Kucherenko v. Ukraine*, no. 27347/02, § 25, 15 December 2005).

34. Having examined all the materials in its possession, 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.

35. There has, accordingly, been a violation of Article 6 § 1 of the Convention in respect of the lengthy non-enforcement of the judgments in the applicants' favour in the present applications.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. Mrs Otychenko claimed the outstanding debt under the judgment in her favour. She also asked that the judgment debt be indexed to the rate of inflation, though she did not indicate the sums in question. The applicant further claimed UAH 50,000³ in respect of non-pecuniary damage.

38. Mrs Fedishchenko claimed UAH 5,000⁴ in respect of non-pecuniary damage.

39. The Government contested these claims as excessive and unsubstantiated.

40. The Court finds, at the outset, that the Government should pay Mrs Otychenko the outstanding judgment debt by way of compensation for pecuniary damage. It further dismisses the claim by Mrs Otychenko for inflation adjustment as unsubstantiated (see, *a contrario*, *Maksimikha v. Ukraine*, no. 43483/02, § 29, 14 December 2006).

41. The Court further finds that the applicants must have suffered non-pecuniary damage on account of the violations found. Ruling on an equitable basis, it awards under this head Mrs Otychenko EUR 2,600 and Mrs Fedishchenko EUR 700.

B. Costs and expenses

42. Mrs Otychenko claimed 500 US Dollars for the costs and expenses she had incurred during the national proceedings. She did not provide any documents in support of this claim.

43. The Government contested this claim as unsubstantiated.

44. The Court reiterates that, in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

³ About EUR 7,370.94.

⁴ About EUR 737.09.

45. The Court considers that these requirements have not been met in the instant case. In particular, it notes that the claim by Mrs Otychenko is neither substantiated nor contains any details about its components. Accordingly, it rejects this claim.

C. Default interest

46. 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. *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, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
 - (i) the outstanding debt under the judgment of 16 December 2002 given in favour of Mrs Otychenko;
 - (ii) EUR 2,600 (two thousands six hundred euros) to Mrs Otychenko and EUR 700 (seven hundred euros) to Mrs Fedishchenko 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 to the applicants;
 - (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' claims for just satisfaction.

Done in English, and notified in writing on 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President