



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF OVCHAROV AND KHOMICH v. UKRAINE

(Applications nos. 32910/06 and 50081/06)

JUDGMENT

STRASBOURG

28 May 2009

FINAL

28/08/2009

This judgment may be subject to editorial revision.

In the case of Ovcharov and Khomich 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,

Mirjana Lazarova Trajkovska, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 5 May 2009,

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

PROCEDURE

1. The case originated in two applications (nos. 32910/06 and 50081/06) 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, Mr Stanislav Oleksiyovych Ovcharov and Mr Stepan Stepanovich Khomich (“the applicants”), on 13 July and 24 November 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 Articles 6 § 1 and 13 of the Convention 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

A. Mr Ovcharov

4. The applicant was born in 1936 and lives in Nova Kakhovka, Kherson region, Ukraine.

5. On 17 December 2003 the Nova Kakhovka Town Court awarded the applicant and his wife the total amount of 5,635.20 Ukrainian hryvnyas (UAH)¹ in damages caused by the Nova Kakhovka Housing Maintenance and Utilities Company, Komunservis, (*Новокаховське ЖКП «Комунсервіс»*), a company owned and controlled by the local community, by its failure to comply with contractual obligations. The awarded sum included joint compensation in respect of pecuniary damage inflicted on the applicant and his wife in the total amount of UAH 2,635.20 (the court did not specify the precise amounts owed to the applicant and his wife individually) and compensation in respect of non-pecuniary damage in the amount of UAH 1,500 each.

6. This judgment became final and on 20 April 2004 the State Bailiffs' Service instituted proceedings to enforce it. In the course of these proceedings the total amount of UAH 2,000 was paid to the applicant.

7. On 23 December 2004 the Kherson Commercial Court instituted liquidation proceedings against the debtor company.

8. In this regard on 4 January 2005 the State Bailiffs' Service terminated the enforcement proceedings against the debtor company and transferred the applicant's writ of enforcement to the liquidation commission for further processing.

9. On 29 August 2005 the debtor company was declared liquidated and subsequently was removed from the relevant companies' register.

10. Dissatisfied with the lengthy non-enforcement of the judgment in their favour, in January 2006 the applicant and his wife instituted proceedings in the Nova Kakhovka Town Court against the State Bailiffs' Service, claiming compensation in respect of pecuniary and non-pecuniary damage. However, on 23 January 2006 the court discontinued the proceedings as the defendant had been liquidated and the newly established State Bailiffs' Service had not succeeded the liquidated one. The applicant and his wife did not appeal against this decision.

11. The judgment of 17 December 2003 remains unenforced.

B. Mr Khomich

12. The applicant was born in 1948 and lives in Pryazovske, Zaporizhzhya region, Ukraine.

13. On 17 December 2001 the Pryazovske District Court awarded the applicant UAH 2,758.58² in salary arrears due to him by his former employer, the Pryazovske Housing Maintenance and Utilities Company (*Приязовське комунальне підприємство житлового господарства*) owned by the local village council.

¹ Approximately 881.72 euros (EUR) at the material time.

² Approximately EUR 570.65 at the material time.

14. On 20 December 2001 the village council decided to liquidate the debtor company and set up a liquidation commission.

15. The judgment in the applicant's favour became final and the State Bailiffs' Service instituted proceedings to enforce it. However, according to the Government, in February 2002 these proceedings were terminated and the applicant's writ of enforcement was transferred to the liquidation commission for further processing.

16. On 21 December 2004 the Zaporizhzhya Commercial Court instituted liquidation proceedings against the debtor company.

17. According to the Government, on 27 February 2006 the debtor company was liquidated.

18. The judgment of 17 December 2001 remains unenforced.

II. RELEVANT DOMESTIC LAW

19. 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, §§ 16-18).

20. 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 owners' liabilities for the obligations of their legal entities are set out in the case of *Mykhaylenko and Others v. Ukraine*, nos. 35091/02 and foll., §§ 25-26, ECHR 2004-XII).

21. 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; [...]”

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

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

24. 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 the 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 to which it is subordinate.

THE LAW

I. JOINDER OF THE APPLICATIONS

25. 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. COMPLAINTS UNDER ARTICLES 6 § 1 AND 13 OF THE CONVENTION ABOUT LENGTHY NON-ENFORCEMENT OF THE JUDGMENTS IN THE APPLICANTS' FAVOUR

26. The applicants complained about the State authorities' failure to enforce the judgments taken in their favour in due time and the lack of effective remedies in that respect. In this regard they relied on Articles 6 § 1 and 13 of the Convention, which read 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."

A. Admissibility

27. Relying on the provisions of national legislation (among others, the 1963 and 2003 Civil Codes and the 1997 Local Self-Government Act), the Government submitted that they were not responsible for the debts of the municipal companies. They further submitted that the applicants had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. In particular, they maintained that the applicants had not availed themselves of the opportunity to be registered as creditors in insolvency, if any, or liquidation proceedings pending against the debtor companies, and had failed to challenge the liquidation commission's inactivity before the relevant commercial court or to apply to any domestic court against the Bailiffs' Service to challenge the allegedly inadequate enforcement of the judgments in their favour.

28. The Government further drew the Court's attention to the fact that application no. 32910/06 was limited to the complaints by Mr Ovcharov only and did not concern the alleged violations of the rights of his wife, as she was not a party to the present proceedings.

29. The Court notes that the debtor enterprises in the applicants' cases were owned and controlled by local authorities (see paragraphs 5, 13 and 14, respectively). According to the established case-law of the Convention organs, agencies of local self-government are State organisations in the sense that they are governed by public law and exercise public functions vested in them by the Constitution and the laws. The Court reiterates that under the international law the term "State organisation" is not limited only to organs of the central Government. In cases where State power is decentralised it extends to any national authority which exercises public functions (see, for example, *Mikryukov v. Russia*, no. 7363/04, § 21, 8 December 2005 with further references). It follows that the actions and/or omissions of the local authorities are attributed to the respondent State and for these reasons the Court concludes that the latter is accountable for the debts of municipal enterprises to the same extent as it is accountable for the debts of State-owned enterprises. Accordingly, the Court dismisses the Government's objection.

30. As regards the Government's objection that the applicants 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 these objections must be rejected in the instant case for the same reasons.

31. As regards the Government's submission concerning application no. 32910/06, the Court notes that the fact that there were two beneficiaries under the judgment of 17 December 2003 (Mr Ovcharov and his wife – see paragraph 5 above) does not affect the applicant's right to have the judgment – in his part, at least – enforced within a reasonable time.

32. The Court notes that these complaints 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

33. In their observations on the merits of the applicants' claims, the Government contended that there had been no violation of Articles 6 § 1 or 13 of the Convention.

34. The applicants disagreed.

35. The Court notes that the judgments in the applicants' favour have remained unenforced for more than five years.

36. The Court reiterates that it has already found violations of Articles 6 § 1 and 13 of the Convention in cases like the present applications (see, among other authorities, *Kucherenko v. Ukraine*, no. 27347/02, § 27, 15 December 2005).

37. 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.

38. There has, accordingly, been a violation of Articles 6 § 1 and 13 of the Convention in the present applications in respect of the lengthy non-enforcement of the judgments in the applicants' favour and the lack of an effective remedy for their complaints in that respect.

III. OTHER COMPLAINTS

39. Mr Ovcharov also complained under Articles 6 § 1 and 13 of the Convention about the court's assessment of evidence and interpretation of the law and challenged the outcome of his proceedings against the State Bailiffs' Service.

40. Mr Khomich additionally complained under Article 8 of the Convention that the lengthy non-enforcement of the judgment in his favour had prevented him from receiving effective medical treatment and consequently affected his state of health.

41. Having carefully considered the applicants' 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 Convention.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. Mr Ovcharov claimed compensation in respect of pecuniary and non-pecuniary damage, but failed to specify the amounts.

45. Mr Khomich claimed EUR 10,000 in respect of non-pecuniary damage.

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

47. The Court finds, at the outset, that the Government should pay the applicants the respective judgment debts, where they remain outstanding, by way of compensation in respect of pecuniary damage.

48. 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 Mr Ovcharov EUR 1,600 and Mr Khomich EUR 2,600 under this head.

B. Costs and expenses

49. The applicants did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

50. 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 complaints under Articles 6 § 1 and 13 of the Convention in respect of the lengthy non-enforcement of the judgments in the applicants' favour and the lack of effective remedy in that respect admissible and the remainder of the applications inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *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 debts under the judgments given in the applicants' favour;
 - (ii) EUR 1,600 (one thousand six hundred euros) to Mr Ovcharov and EUR 2,600 (two thousand six hundred euros) to Mr Khomich 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;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 28 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President