



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

FIRST SECTION

CASE OF KOTOV v. RUSSIA

(Application no. 54522/00)

JUDGMENT

STRASBOURG

14 January 2010

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
03/04/2012**

This judgment may be subject to editorial revision.

In the case of Kotov v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 May 2006 and on 15 December 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 54522/00) against the Russian Federation lodged with the European Commission of Human Rights under the former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Vladimir Mikhaylovich Kotov (“the applicant”), on 15 July 1998.

2. The Russian Government (“the Government”) were represented by their Agent, Mr P. Laptev, representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that it had been impossible for him to obtain the effective repayment of money owed to him in the context of the liquidation of a private bank.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. On 4 May 2006 the application was declared partly admissible by a Chamber.

6. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1948 and lives in Krasnodar.

1. Proceedings against bank for recovery of assets

8. On 15 April 1994 the applicant deposited 3,330 new roubles (“roubles”) in a savings account with the commercial bank Yurak (“the bank”) offering an interest rate of 200% per annum. Between April and July 1994 he withdrew 555 roubles, representing interest that had accrued on that account. After the bank announced that it was changing the interest rate, the applicant requested the closure of his account in August 1994, but the bank informed him that it was unable to repay him his capital plus interest as its funds were insufficient.

9. The applicant brought proceedings against the bank, seeking repayment of the capital he had deposited, together with interest, a penalty payment at 3% per day and compensation for pecuniary damage (in connection with the construction of a house) and for non-pecuniary damage (on account of health problems).

10. On 20 February 1995 the Oktyabrskiy District Court of the town of Krasnodar partly upheld his claims. It established that on the closure of his account the bank owed the applicant 3,607 roubles, representing the capital deposited and the interest due for August 1994. After calculating the index-linked sum, it ordered the bank to pay the applicant 6,276 roubles. It further ordered a penalty payment of 3,330 roubles and awarded 500 roubles for non-pecuniary damage, making a total of 10,156 roubles.

11. That decision was upheld at last instance on 21 March 1995.

12. In a decision of the Oktyabrskiy court of 5 April 1996, the above-mentioned judgment debt was raised to 17,983 roubles in view of the failure to pay the 10,156 roubles and the rate of inflation.

13. In the meantime, on 16 June 1995, at the request of the Central Bank and the Russian Savings Bank, the Commercial Court for the Krasnodar region declared the bank insolvent.

14. On 19 July 1995 the insolvency procedure was opened by that court and a liquidator was appointed to oversee the liquidation.

2. First set of proceedings challenging the distribution of assets to creditors as unlawful

15. On 11 January 1996 the Commercial Court approved the provisional statement of affairs based on the bank’s financial situation at 28 December 1995.

16. On the basis of that statement the committee of creditors of the bank decided on 18 January and 13 March 1996 to distribute the assets in the first place to certain categories of creditors. Accordingly, disabled persons, Second World War veterans, individuals in need and persons having taken an active part in the liquidation process, that is to say 700 persons in total (about 10% of creditors), were reimbursed by the liquidator at 100% of the index-linked amount of their capital together with interest. It was decided to reimburse the other creditors in the same manner, as and when further assets became available.

17. The applicant sent the liquidator a request for the repayment of the 17,983 roubles owed to him. In response to that request, the sum of 140 roubles was paid to him on 6 April 1998.

18. On 22 April 1998 the applicant challenged, before the Commercial Court, the fact that other creditors had received repayment at 100%, whereas he, as a preferential creditor, had received only 140 roubles. Relying on sections 15 and 30 of the Corporate Insolvency Act 1992 ("the 1992 Act"), he sought the repayment of the remainder of the sum owed to him in accordance with the principle of proportional distribution. Section 30 of the Act provided that, where a company's assets were insufficient to satisfy all creditors, creditors of the same class would be paid in proportion to their respective claims. In the present case, at the date of the applicant's request, 2,305,000 roubles had been collected in the liquidation process and these funds had been used for 100% repayment to creditors in the various categories mentioned above (see paragraph 16 above).

19. On 6 July 1998 the applicant's action was dismissed at first instance on the ground that the amount owed to him (17,983 roubles) represented 0.78% of the assets totalling 2,305,000 roubles which, having been collected in the liquidation process, had been used to repay certain categories of creditor. According to the principle of proportional distribution he was therefore entitled to receive only 0.78% of 17,983 roubles, i.e. 140 roubles. That sum had already been paid to him on 6 April 1998, whilst the remainder would be paid as and when more funds became available in the course of the ongoing liquidation process.

20. Hearing the case on appeal, the Regional Commercial Court held on 26 August 1998 that, contrary to the requirements of section 27 of the 1992 Act, the liquidator's list of creditors had not identified those that had priority or the corresponding sums to be paid to them separately. On the basis of the documents produced by the liquidator it was not possible to establish the applicant's level of priority in relation to the other creditors, and the liquidator himself had stated orally that the applicant belonged to the fifth level of priority. The Regional Court took the view that, in deciding to repay certain categories of creditors at 100%, the creditors' committee had overstepped the limits of its remit under section 23 of the 1992 Act. By enforcing that decision and distributing the assets accordingly, the liquidator

had, in turn, disregarded the requirements of sections 15 and 30 of the Act. Pointing out that section 30 of the Act was not open to a broad interpretation of its provisions, the Regional Court ordered the liquidator to redress the violations thus observed within one month and to inform it of the measures taken in that connection.

21. The liquidator appealed on points of law to the Federal Commercial Court for the North Caucasus, arguing that he had distributed the assets pursuant to a decision of the creditors' committee, that the distribution had complied with Article 64 of the Civil Code and that it had not therefore been in breach of the requirements of section 30 of the 1992 Act (see paragraphs 33 and 34 below). On 12 November 1998 his appeal on points of law was dismissed. Upholding the decision of 26 August 1998, the court stated that the liquidator should not have enforced a decision by the creditors' committee that was in breach of the law.

22. The enforcement of the decision of 26 August 1998 and, in particular, the redressing of the applicant's financial situation, were not possible on account of the lack of assets.

3. Second set of proceedings challenging the distribution of assets to creditors as unlawful

23. In view of the failure to enforce the decision of 26 August 1998, the applicant filed a complaint with the Commercial Court on 2 September 1998, subsequently supplementing it with a complaint of 27 January 1999. He requested that the liquidator in person repay him the index-linked amount of the remainder of his award of 17,983 roubles, with interest and compensation for the non-pecuniary damage caused by his unlawful action.

24. The complaints in question were examined in the context of the insolvency procedure opened against the bank.

25. On 4 February 1999 the Regional Commercial Court rejected the applicant's request on the ground that, on 20 February 1995 and 5 April 1996, the Oktyabrskiy District Court had awarded the applicant the sum of 17,983 roubles to cover his claim and damages, and that it was not possible to rule on the same request a second time. The Regional Court established that the applicant appeared in the list of creditors under the number 519 and that, in respect of the actual capital deposited, the bank owed him a residual amount of 8,813 roubles. The court pointed out that this sum could be paid to him under the conditions laid down in Article 64 of the Civil Code.

26. On 31 March 1999 judges of the Regional Commercial Court, hearing the case on appeal, upheld the decision of 4 February 1999 and pointed out that, in accordance with an Act of 1998 that was in force at the time the applicant's complaints were examined, only those debts that had accrued in the course of the bank's operations could give rise to repayment. Accordingly, the requests for the payment of various sums to which the applicant was allegedly entitled after the bank's insolvency and during its

liquidation could not be granted. The appellate court found that, by virtue of the judicial decisions, the applicant had secured a judgment debt of 17,983 roubles, which corresponded to the damage caused to him by the bank before it became insolvent. It added that the applicant would be able to recover this sum once sufficient assets had been realised in the liquidation process. The applicant's complaint was confined, in the appellate court's view, to the seeking of the above-mentioned sum together with penalties for non-payment.

27. On 9 June 1999 the Federal Commercial Court for the North Caucasus dismissed the applicant's appeal on points of law on the following grounds:

"The decision of the creditors' committee and the liquidator's action concerning the 100% repayment of debts to only 700 creditors (out of the bank's 7,567 creditors, whose claims amounted to 24,875,000 roubles) admittedly breached the principle of proportional payment to creditors at the same level of priority, but did not cause Mr Kotov the damage he alleged, because the 100% satisfaction of all first-level creditors was not possible on account of the lack of assets available for distribution. The sum repaid to Mr Kotov was thus calculated in proportion to the amount of his claim and to the assets realised in the course of the liquidation ..."

28. The court further pointed out that the liquidation process was still pending and that the applicant's claim could thus be satisfied.

29. On 17 June 1999 the Regional Commercial Court confirmed the statement of affairs, as presented by the liquidator and approved by the general meeting of creditors, and closed the insolvency procedure on grounds of insufficient assets.

4. *Supervisory review procedure*

30. After the Government had been given notice of the application, the President of the Supreme Commercial Court of the Russian Federation lodged, on 31 January 2001, an application for supervisory review (*protest*) against the decisions of 4 February, 31 March and 9 June 1999 (see paragraphs 25-27 above), on the ground that they had been given in breach of Article 22 of the Code of Commercial Litigation, which determined the jurisdiction of the commercial courts. Among other things, he stated that the examination of the applicant's complaints of 2 September 1998 and 27 January 1999, in the context of the insolvency procedure opened against the bank, had been contrary to the 1992 Act governing such proceedings. Since those complaints had concerned a dispute between the applicant and the liquidator, they were not related to the insolvency procedure as such and the applicant should have submitted them to the courts of general jurisdiction.

31. On those grounds the President sought the annulment of the decisions at issue and the discontinuance of the proceedings concerning the above-mentioned complaints. On 17 April 2001 the Presidium of the

Supreme Commercial Court of the Russian Federation fully granted those requests, espousing the arguments raised in the application.

32. On 1 June 2001 the applicant submitted a request for revision of the 17 April 2001 decision to the same Presidium. On 4 July 2001 his request was dismissed as ill-founded by the Vice-President of the Supreme Commercial Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Civil Code of 1994

33. Under Article 63 of the Civil Code, after the expiry of the period within which creditors have to file their claims, the liquidation committee draws up a provisional statement of affairs containing information on the bankrupt's estate, the claims filed by the creditors and the results of the examination of those claims. The statement has to be approved by the body that has taken the decision to wind up the company. If the company's monetary assets are insufficient to satisfy the creditors' claims, the liquidation committee will sell off the estate by auction. The distribution of assets to the creditors may begin in accordance with the interim statement once it has been approved, except in respect of fifth-level creditors who will not be able to receive any money owed to them for one month following that approval. Once all the payments have been made, the final statement of affairs is drawn up and approved in the same manner. Should the assets prove insufficient, the unsatisfied creditors may request the courts to order the owner of the company to honour their claims out of his own personal funds.

Article 64 of the Civil Code, as in force prior to 20 February 1996, made a distinction between five classes of creditors, providing that payment could be made to a given class only when the creditors at the previous level had been satisfied. According to this classification the applicant belonged to the fifth class of "other creditors". Article 64 made no mention of a class of creditors who were pensioners, Second World War veterans or persons in need.

Under a new provision that was inserted into this Article on 20 February 1996, when a bank or other lending institution is wound up, private persons having made deposits with it are to be repaid as a first priority.

Article 64 further provides that where a legal entity in liquidation has insufficient assets, they must be distributed among creditors at the same level in proportion to their respective claims.

2. *Law of 19 November 1992 (“the 1992 Act”) on corporate insolvency, applicable to insolvency procedures opened prior to 1 March 1998*

34. Under section 3 §§ 1 and 2 of the 1992 Act, insolvency cases fall within the jurisdiction of the commercial courts, which examine them in accordance with the rules laid down in the Act or, where no such rule exists, in accordance with the Code of Arbitration Procedure of the Russian Federation.

Under section 15 of the Act, insolvency procedures are opened in order to satisfy the creditors’ claims on a *pari passu* basis, to declare the bankrupt released from his obligations and to protect the parties from unlawful actions against each other.

Section 18 § 2 provides that, after a company has been declared insolvent and an insolvency procedure has been opened against it, any claims against the company’s assets may be submitted only in the context of those proceedings.

Under section 19, the commercial courts appoint the liquidator and, in the cases provided for by the Act, examine the lawfulness of acts of the parties involved in the insolvency procedure. Article 20 lists those parties as the liquidator, the creditors’ committee, the creditor, etc.

Under section 21 § 1 the liquidator takes control of the bankrupt’s property, analyses the financial situation, examines the merits of the creditors’ claims, accepting or rejecting them, oversees the liquidation process to realise the assets, takes over the administration of the insolvent entity, sets up and heads the liquidation committee, and convenes the general meeting of creditors.

In accordance with section 21 § 2, taken together with section 12 § 4, candidates to the office of liquidator must be economists or lawyers or have experience of company management. They must not have a criminal record. No persons holding a position of responsibility in a company that is a debtor or creditor may be appointed. Candidates to the office of liquidator must declare their income and assets.

Under section 21 § 3 the liquidator may challenge any decisions of the general meeting of the creditors’ committee when those decisions fall outside the remit of that meeting.

Under section 27 § 1, after the expiry of a two-month period within which the creditors must submit their claims against the bankrupt, the liquidator will draw up a list of the accepted and rejected claims indicating the amounts for those that have been accepted and the level of priority for each one. The list must be sent to the creditors within a period of two months.

Section 30 establishes the various levels of priority for the distribution of the proceeds of the liquidation. Payment of the sums due to creditors at a given level is made once those at the previous level have been satisfied

(paragraph 3). If not enough assets are realised to pay in full the creditors at a given level, the money that is available will be paid to them *pari passu* in proportion to the amounts of their respective claims (paragraph 4). Section 30 makes no mention of a class of creditors who are disabled, Second World War veterans or persons in need. Paragraph 1 provides that any expenses of the liquidation, the liquidator's fees and the expenses of the debtor company's ongoing operations must take priority over the claims of first-level creditors.

Section 31 provides that a creditor may challenge before the commercial courts any decision of the liquidator which, in his view, breaches his rights and legitimate interests.

Under section 35 § 3, any claims that cannot be satisfied because the proceeds of the liquidation are insufficient will be regarded as extinguished.

Section 38 provides that the bankrupt will be regarded as wound up from the time of its exclusion from the corresponding national register, pursuant to the decision of the commercial court closing the insolvency procedure.

3. Federal Law of 8 January 1998 on insolvency ("the 1998 Act"), applicable to insolvency procedures opened after 1 March 1998

35. Section 21 § 3 of the 1998 Act provides that creditors are entitled to seek compensation from the liquidator in respect of any damage that the latter may have caused to them by an action or omission in breach of the law.

In accordance with section 98 § 1, sub-paragraph 7, of this Act, claims against the bankrupt may be submitted only in the context of the insolvency procedure (see also section 18 § 2 of the 1992 Act).

Section 114 provides for the same principles of distribution and *pari passu* repayment as section 30 of the 1992 Act.

4. Code of Commercial Litigation 1995, as in force at the material time

36. Under Article 131 of the Code, where a commercial court orders the defendant to carry out a specific act other than a transfer of property or payment of a pecuniary award, the court will indicate by whom, where and within what time-limit the act must be carried out.

Article 143 provides that insolvency cases are to be examined by commercial courts in accordance with the Code and with the specific provisions of the insolvency legislation.

5. Constitutional Court judgment of 12 March 2001

37. Paragraph 4, concerning the constitutionality of section 18 § 2 of the 1992 Act (section 98 § 1 in conjunction with sections 15 § 4 and 55 § 1 of the 1998 Act) reads as follows:

“... when examining the claims of creditors who are private persons ..., the commercial courts do not have jurisdiction to issue binding directions of a pecuniary nature to the liquidator, acknowledging the existence of a claim or right in favour of creditors This limitation ... must not be interpreted as preventing the courts of general jurisdiction from examining on the merits the pecuniary claims... of those creditors ..., in accordance with the legislation on insolvency.

Nor do the provisions at issue contain any clauses that would prevent the commercial courts from giving decisions that enable the persons concerned to secure in full their right to judicial protection in the context of insolvency procedures, especially as other provisions of the Federal Law on insolvency (bankruptcy) precisely provide for the settlement of disputes through the courts (sections 41, 44, 57, 107, 108 et al.).

The refusal by a commercial court to examine a complaint on the grounds that it does not have jurisdiction ... does not prevent the creditor from applying to the courts of general jurisdiction in order to secure the protection of his rights ... The right to judicial protection, as enshrined in the Constitution, must be upheld even in the absence of legislative norms establishing a division of jurisdiction between the commercial courts and the courts of general jurisdiction.

It follows from this interpretation that [the provisions at issue] do not prevent the courts of general jurisdiction from examining claims filed by non-corporate creditors against the liquidator and seeking ... compensation for damage, nor do they prevent the commercial courts from securing the enforcement, in accordance with the above-mentioned Federal Law, of the decisions taken by the courts of general jurisdiction. ...”

THE LAW

38. The applicant complained about his inability to obtain the effective payment of his claim on account of an unlawful distribution of assets by the liquidator. Article 1 of Protocol No. 1 reads as follows:

“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.”

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

39. The Government reiterated their objection as to admissibility, which had previously been rejected by the Court (see *Kotov v. Russia* (dec),

no. 54522/00, 4 May 2006), arguing that the applicant's complaint was barred by his failure to exhaust domestic remedies. In particular, they took the view that the applicant should have sued the liquidator personally in separate proceedings before the courts of general jurisdiction, in accordance with Chapter 59 of the Civil Code ("Obligations in respect of damage caused"), to complain of the unlawful distribution of the bank's assets. This was especially true as the decisions of 4 February, 31 March and 9 June 1999, in response to the applicant's complaints seeking compensation for the damage caused by the liquidator in person, had been annulled on 17 April 2001 because the commercial courts lacked jurisdiction to entertain the matter. As the unlawfulness of the liquidator's action had been acknowledged by the commercial courts in 1998, it would have been easier, according to the Government, to obtain compensation for the damage caused by suing the liquidator privately in ordinary proceedings.

40. The Court points out that the same arguments by the Government have already been examined in detail at the admissibility stage and that they were rejected in the following terms:

"... The decisions of 4 February, 31 March and 9 June 1999, which had become final, were annulled in 2001 following an application for supervisory review (*protest*). The Court emphasises that such a practice in itself creates a serious problem in terms of the principle of legal certainty, one of the fundamental elements of the rule of law (see *Brumărescu v. Romania* [GC], no. 28342/95, §§ 61 and 62, ECHR 1999-VII, and *Ryabykh v. Russia*, no. 52854/99, § 57, ECHR 2003-IX). Moreover, the annulment in question was pronounced in the case after the respondent Government had been given notice of the application and they used this to raise an objection on grounds of non-exhaustion of domestic remedies. The Court does not accept that such an objection may be validly derived from the annulment of the 1999 decisions, as in the preceding procedure the applicant had complained, in accordance with the law, about a breach of his right to the enjoyment of his possessions as a result of the liquidator's action.

In particular, under section 31 of the 1992 Act, which governed the insolvency procedure in the present case, the applicant claimed before the commercial courts that the distribution of assets by the liquidator had breached his legitimate rights and interests. In the context of those proceedings, which ended with the cassation decision of 12 November 1998, he was successful, as the commercial courts, at the appeal and cassation stages, recognised the breach of his rights by the liquidator. They first observed various defects in the liquidator's handling of the procedure, and secondly, they clearly stated that, having enforced the decisions taken by the creditors' committee in breach of the 1992 Act, the liquidator had been guilty of an unlawful distribution of the liquidation proceeds. They ordered that those violations be remedied within one month. It should thus be observed that the domestic courts, having jurisdiction in matters of insolvency, examined the applicant's claims on the merits. They not only recognised the breach of his rights, but further ordered that its consequences be remedied. ...

Having regard to the foregoing, the Court finds that, in spite of the annulment of the decisions given in 1999, the Government were unfounded in raising an objection on grounds of failure to exhaust domestic remedies, as the proceedings already brought before the commercial courts, ending with the cassation decision of 12 November

1998, were sufficient to meet the requirements of Article 35 § 1 of the Convention for the purposes of the complaint under Article 1 of Protocol No. 1.”

41. In view of the foregoing, and as there is no reason to depart from that conclusion, the Court rejects the Government’s preliminary objection.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

1. The Government’s submissions

42. In their further observations, the Government reiterated that the State bore no responsibility for a breakdown in commercial relations that had been entered into freely between the applicant and a private bank. The State had at no time interfered with the applicant’s right to the enjoyment of his possessions. The impugned interference in the present case came from the bank and the liquidator, and the State was not required by law to compensate the applicant for any losses sustained.

43. Moreover, the Government pointed out that Article 1 of Protocol No. 1 did not oblige the State to maintain the purchasing power represented by sums deposited in financial establishments (see, among other authorities, *Ryabykh v. Russia*, no. 52854/99, § 63, ECHR 2003-IX). In their view, the State’s responsibility was limited to establishing the rules of proportionality for the distribution of assets on the liquidation of private companies. The fact that, in spite of those rules, the applicant had not been able to recover the sums due to him, on account of the bank’s insolvency and the lack of sufficient assets, was not therefore attributable to the State.

44. The Government argued that the liquidator had been acting in a personal capacity and that, in accordance with section 21 of the 1992 Act, he was personally liable for any failure or shortcoming in the performance of his obligations. In 2002 an amendment to section 20 of that Act had in fact reinforced this mechanism by requiring liquidators to take out fault liability insurance. The fact that the State was not liable for any unlawful acts by liquidators had been confirmed, according to the Government, by the Constitutional Court in its judgment of 12 March 2001 and by the Presidium of the Supreme Commercial Court in its decision of 17 April 2001. Supervision of the liquidator’s acts and respect for the principle of proportional distribution of assets were matters for the commercial courts, which had jurisdiction to entertain disputes between the creditors and the liquidator during the liquidation process.

45. In sum, the Government’s submission was that the State had fulfilled its obligations under Article 1 of Protocol No. 1 by laying down the statutory rules for the fair division of assets and by creating remedies to cure

any defects in the liquidation process or to redress any unlawful acts committed during that process.

46. The applicant, although maintaining his application, did not submit any further observations (see paragraphs 5 and 6 above).

2. The Court's assessment

47. The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II).

48. The Court notes that in the present case, by virtue of the judicial decisions of 20 February 1995 and 5 April 1996 (see paragraphs 10 and 12 above), the applicant held an enforceable claim of 10,156 roubles, subsequently raised to 17,983 roubles, which constituted a “possession” within the meaning of Article 1 of Protocol No. 1 (see *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III). Moreover, this was not in dispute between the parties.

49. The Court further notes that the applicant was unable to obtain the payment of that debt as, in the meantime, on 16 June 1995, the debtor – a private bank – had been declared insolvent. A liquidator was then appointed on 19 July 1995 by the commercial courts to oversee the liquidation. Thus, following the insolvency order, the interference with the applicant’s right to the peaceful enjoyment of his possessions took the form of a control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Luordo v. Italy*, no. 32190/96, § 67, ECHR 2003-IX). Under section 15 of the 1992 Act, the purpose of the insolvency procedure was to pay off the creditors and also to protect the parties from any unlawful actions between them. The interference in question thus pursued a legitimate aim in the general interest, that is to say the protection of the rights of others (*ibid.*, § 68). In those circumstances, and having regard to the difficulties encountered in collecting the proceeds of the liquidation, the Court is not convinced that the applicant could have expected, with a reasonable degree of certainty, to recover in full his judgment debt as established by the courts of general jurisdiction on 20 February 1995 and then on 5 April 1996, even though the commercial courts, which had

jurisdiction in matters of insolvency, confirmed in a number of decisions that this debt amounted to 17,983 roubles.

50. In any event, in the Court's view, the issue in the present case does not lie in the insolvency procedure *per se* and is therefore not to be considered from the perspective of a "control of the use of property". It falls under the first paragraph of Article 1 of Protocol No. 1, in view of the final deprivation of property imposed on the applicant in the context of that procedure.

51. The Court, like the Government, has no doubt that the State cannot be held responsible for the obligations of a private establishment which, having become insolvent, is no longer able to pay off its debts (see *Bobrova v. Russia*, no. 24654/03, § 16, 17 November 2005). It should however be examined whether and to what extent the State's responsibility could be engaged on account of an act or omission by the liquidator, whose unlawful actions are complained of in the present case (see, *mutatis mutandis*, *Katsyuk v. Ukraine*, no. 58928/00, § 38 *in fine*, 5 April 2005). The applicant did not rely as such on any State responsibility in the contractual relations between him and the private bank. His complaints were based on the liquidator's illegal action and on his inability to assert his rights, the liquidator having misused his authority.

52. Unlike the Government, the Court takes the view that the liquidator may be regarded as a representative of the State, having regard in particular to his status as defined in sections 19 and 21 of the 1992 Act. Those provisions lay down the conditions to be fulfilled by candidates to the office of liquidator and the qualities required of them, without indicating whether the candidate must be a private person or a civil servant. Even if the liquidator is a private person, in view of the nature of his duties and the fact that he is authorised by the domestic courts to discharge them, the Court is not persuaded that the State could avoid responsibility by delegating its obligations to this person (see, *mutatis mutandis*, *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 27 *in fine*, Series A no. 247-C). According to the above-mentioned provisions, he is not a professional liquidator but an economist or lawyer authorised by the domestic courts to oversee the insolvency procedure. Those same courts in fact supervise his activities (contrast *Katsyuk*, cited above, § 39). In the context of his powers, which are thus defined by law, the liquidator discharges duties pertaining to public authority and is expected to achieve a "fair balance" between the demands of the general interest and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Luordo*, cited above, §§ 67-69). Consequently, in the Court's opinion, his acts and omissions engage, in the circumstances of the case, the responsibility of the State (see, *mutatis mutandis*, *Sychev v. Ukraine*, no. 4773/02, §§ 53 and 54, 11 October 2005).

53. The Court takes the view that the assets realised following the first liquidation operations (2,305,000 roubles) could have been sufficient to satisfy the applicant's claim, or at least a considerable part of it, if the liquidator had dealt with the applicant, a preferential creditor, in accordance with the law. The final impossibility for the applicant to recover any more than 140 roubles (see paragraph 17 above) stemmed directly from a misuse of power by the liquidator. That misuse made it impossible for the decisions of 20 February 1995 and 5 April 1996 to be enforced, even partly, and at the same time deprived the commercial court decisions of 26 August and 12 November 1998 of any useful effect (see paragraphs 20-22 above). Those decisions of 1998, in which the liquidator's action was found to have been unlawful and redress for the applicant's situation was ordered, could not be enforced as the liquidator, in 1996, had already distributed almost the entire proceeds of the liquidation.

54. Under Russian law, where the proceeds of the liquidation are insufficient to pay all creditors, those proceeds must be distributed among creditors of the same level in proportion to their respective claims. The creditors at a given level of priority cannot be paid before those at the previous level (see, in paragraphs 33 and 34 above, section 30 §§ 3 and 4 of the 1992 Act and Article 64 of the 1994 Civil Code).

55. Under Article 64 of the 1994 Civil Code, as amended on 20 February 1996, when a bank or other lending institution is wound up, private persons having made deposits with it are to be repaid as a first priority. The applicant was therefore, from 20 February 1996 onwards, a preferential creditor and the bank's obligations towards him should have been honoured accordingly. However, the money collected by the liquidator was distributed pursuant to decisions of the creditors' committee of 18 January and 13 March 1996 without any of it being paid to the applicant.

56. Even though, on 4 February 1999 (see paragraph 25 above), the applicant had a personal number on the list of creditors that were to be repaid, it can be seen from the decision of 26 August 1998 that, at that time, the liquidator had still not drawn up the list of creditors as required by section 27 of the 1992 Act, whereas the insolvency procedure had been opened on 19 July 1995. Thus, the applicant's level of priority remained unclear and, as a result, he was not able to foresee the repayment of his debt after the creditors at the previous level had been satisfied. The liquidator himself stated at the hearing of 26 August 1998 that he was a fifth-level creditor, which in the Court's view could possibly correspond to section 106 of the 1998 Act. However, the insolvency procedure in the present case was not governed by that Act but by the 1992 Act and the 1994 Civil Code (see paragraphs 20, 21, 30, 34 and 35, above).

57. Therefore, being a first-level creditor and having learnt that creditors of a certain category had received 100% payment of index-linked sums plus interest, the applicant approached the liquidator to claim the money due to

him. Following his request, on 6 April 1998 the applicant received 140 roubles, representing 0.78% of his claim, on the ground that his claim of 17,983 roubles represented 0.78 % of the liquidation proceeds of 2,305,000 roubles. However, under section 30 § 4 of the 1992 Act, in view of the lack of assets, creditors at the same level of priority as the applicant should have been repaid in proportion to their respective claims, and to determine the sum to be paid to each one the amount of each claim should have been calculated in relation not to the proceeds of the liquidation but to the total amount of the claims at a given level of priority.

58. The Court notes not only that was there a breach of the statutory principle of proportional distribution of assets among creditors of the same level, but also that neither section 30 of the 1992 Act nor Article 64 of the Civil Code provided for the category of creditors (the disabled, Second World War veterans, persons in need) who received 100% payment from the liquidator of index-linked sums plus interest. Those provisions do not indicate that the 700 creditors concerned belonged to the same class as the applicant. The Government did not provide any explanation in this connection. The first paragraph of the above-mentioned section 30 provides only that any expenses of the liquidation, the liquidator's fees and the expenses of the debtor company's ongoing operations must take priority over the claims of first-level creditors. Even supposing that "persons having actively participated in the liquidation process", who were also repaid in full by the liquidator, belonged to that class, the legal basis for repaying the other above-mentioned creditors in full and for depriving the applicant of the sum due to him according to the principle of proportional distribution has not been ascertained (see, *mutatis mutandis*, *Vasilescu v. Romania*, 22 May 1998, §§ 50-53, *Reports of Judgments and Decisions* 1998-III). The Court reiterates in this connection that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should have a legal basis (see *Gravina v. Italy*, no. 60124/00, § 79, 15 November 2005) and that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Iatridis*, cited above, § 58).

59. In these circumstances, the Court finds that in the present case the liquidator's actions can be regarded as a deprivation of possessions, even though the applicant was not formally deprived of his property (see *Papamichalopoulos and Others v. Greece*, 24 June 1993, §§ 41 and 42, Series A no. 260-B). Those actions were not compliant with the domestic law and could not be justified by a "public interest", as was confirmed by the domestic courts in their decisions of 26 August and 12 November 1998.

60. Therefore, having regard to the applicant's inability to obtain the effective payment of the money owed to him in accordance with the statutory principle of proportional distribution, as ordered by the domestic

courts on 26 August and 12 November 1998, whereas creditors of a certain category, whose existence was not even provided for by law, were satisfied in full, the Court takes the view that the applicant was unlawfully deprived of his property, in breach of his right to the peaceful enjoyment of his possessions.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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.”

63. On his application form the applicant stated that he estimated his pecuniary damage at 3,000 United States dollars (USD) and his non-pecuniary damage at USD 48,000. However, after the admissibility decision he failed to submit a claim, within the time allowed him for that purpose, under any head of damage or in respect of costs and expenses.

64. The Court reiterates that it does not make any award by way of just satisfaction where quantified claims and the relevant documentation have not been submitted within the time-limit fixed for that purpose by Rule 60 § 1 of the Rules of Court, even if the applicant had indicated his claims at an earlier stage of the proceedings (see *Fadıl Yılmaz v. Turkey*, no. 28171/02, § 26, 21 July 2005).

65. In accordance with these principles, the Court finds that there is no reason to make any award by way of just satisfaction in the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government’s preliminary objection;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds* that there is no reason to make an award by way of just satisfaction in the present case.

Done in French, and notified in writing on 14 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President