



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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 23938/05
by State Holding Company LUGANSKVUGILLYA
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on
27 January 2009 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 regard to the above application lodged on 17 June 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant is a legal entity, a state holding company, Luganksvugillya (*Державна холдингова компанія «Луганськвугілля»*), registered in Lugansk, Ukraine. It is represented before the Court by Mr Viktor Bilyk, a practicing lawyer.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 12 August 2004 the local department of the State Securities and Stock Market Commission imposed a fine on the applicant company for failure to comply with the legislation on market circulation of shares.

In August 2004 the applicant company lodged a complaint with the Lugansk Regional Commercial Court against the aforementioned resolution of the Commission to impose a fine on it.

On 5 October 2004 the court rejected this complaint as it was unsubstantiated. On 23 December 2004 the Lugansk Commercial Court of Appeal upheld that judgment.

The applicant lodged an appeal in cassation with the Higher Commercial Court, which on 11 March 2005 refused to examine it for the applicant's failure to comply with the formal requirements envisaged in the Code of Commercial Procedure for lodging such appeals.

On 28 April 2005 the Supreme Court refused to institute cassation proceedings upon the applicant's appeal in cassation lodged against the resolution of 11 March 2005.

B. Relevant domestic law

From extensive domestic law, including the acts of Parliament, normative acts of the Cabinet of Ministers and various ministerial decisions and orders it ensues that the applicant company is managed and fully controlled by the Government of Ukraine, through its various institutional structures, including formerly through the Ministry of Fuel and Energy of Ukraine and currently the Ministry of Coal Industry of Ukraine. The company exercised certain public functions in administration of funds allocated by the State for restructuring of the coal industry.

On 8 July 2008 the Ministry of Coal Industry of Ukraine by an order no. 326, acting in accordance with the Civil and Commercial Codes of Ukraine, the State Registration of Legal Entities and Entrepreneurs Act and the Management of State Property Act, ordered the liquidation of the state holding company Luganskvugillia. The liquidation proceedings are still pending.

COMPLAINTS

The applicant company alleges that the State failed to secure its rights. It refers in this respect to Article 1 of the Convention.

The company also complains that its right to appeal was not ensured as the Higher Administrative Court and the Supreme Court failed to examine its appeals in cassation, thus failing to comply with the requirements of the domestic law.

THE LAW

The applicant complained under Article 13 of the Convention of the alleged lack of effective remedies in respect of its appeals in cassation lodged with the Higher Commercial Court and the Supreme Court. It also alleged that Article 1 of the Convention had been infringed by the domestic judicial authorities. These provisions provide as follows:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

“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.”

The Court observes that a legal entity “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto” may submit an application to it (see, for example, *Agrotexim and Others v. Greece*, judgment of 24 October 1995, Series A no. 330-A, and *Société Faugyr Finance S.A. v. Luxembourg* (dec.), no. 38788/97, 23 March 2000), provided that it is a “non-governmental organisation” within the meaning of Article 34 of the Convention (see *RENFÉ v. Spain*, no. 35216/97, Commission decision of 8 September 1997, DR 90, p. 179). The idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court (see *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 81, ECHR 2007-...).

In particular, a company is “a non-governmental organisation” if it is governed essentially by company law, does not enjoy any powers beyond those conferred by ordinary private law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts (see *Islamic Republic of Iran Shipping Lines v. Turkey*, § 81, cited above). The term “governmental organisations”, as opposed to “non-governmental organisations” within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control.

In order to determine whether any given legal person falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from

the political authorities (see *Radio France and Others v. France* (dec.), no. 53984/00, ECHR 2003-X (extracts)).

In relation to legal entities operating in Ukraine, the Court has recognised that such entities could be considered “governmental organisations” if they performed specific public duties under the supervision of the State authorities (see *Novoseletskiy v. Ukraine*, no. 47148/99, § 82, ECHR 2005 II (extracts)), were public enterprises in various areas of State activities, including the mining, energy and transportation sectors (see *Romashov v. Ukraine*, no. 67534/01, §§ 46-47, 27 July 2004; *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, §§ 55 and 64, ECHR 2004-...; *Kucherenko v. Ukraine*, no. 27347/02, § 25, 15 December 2005), or if a majority or all shares belonged to the State such that the entities were fully dependent on, controlled and managed by the State (see *Regent Company v. Ukraine*, no. 773/03, § 7, 3 April 2008; *Ryzhenkov and Zaytsev v. Ukraine*, nos. 1805/03 and 6717/03, § 5, 13 December 2005; *Pomazanyy and Shevchenko v. Ukraine*, no. 9719/02, § 4, 4 April 2006).

In the case of a joint venture between Ukraine and a Region of the Russian Federation, the Court found that even though some of the articles of association suggested that the applicant company had a public-service mission (namely, to implement intergovernmental decisions in the field of business cooperation), the company was predominantly involved in ordinary business, it enjoyed institutional autonomy, was governed by company law, was under the control and management of its founders, and the State’s minority shareholding did not give to the State a greater role in the management of the company than other shareholders. The company could therefore still be considered a “non-governmental organisation” for the purposes of Article 34 of the Convention (see *Ukraine-Tyumen v. Ukraine*, no. 22603/02, § 27, 22 November 2007).

Turning to the facts of the present case, the Court observes that the applicant company is a legal entity that was registered as a corporation, owned and managed by the State, which participated in the exercise of governmental powers in the area of management of coal industry, having a public-service role in that activity of the State. The applicant company had no independent function, exercising certain public functions related to administration of State property owned in the coal mining industry that is heavily subsidised and regulated by the State (see *Dubenko v. Ukraine*, no. 74221/01, §§ 21 - 32, 11 January 2005). Moreover, as it ensues from the Order of the Ministry of Coal Industry of 8 July 2008, the applicant company, which existed as a separate legal entity, had to be liquidated on the basis of the decision of that ministry. The Court accordingly concludes that the applicant company is not a “person, non-governmental organisation

or group of individuals” within the meaning of Article 34 of the Convention.

It follows that the application is incompatible with the provisions of the Convention within the meaning of Article 35 § 3. The Court must therefore reject the application as being inadmissible *ratione personae*.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President