



## Immunity of a foreign State in relation to a private transaction should not have been absolute

In today's Chamber judgment in the case of [Oleynikov v. Russia](#) (application no. 36703/04), which is not final<sup>1</sup>, the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6** (access to court) of the European Convention on Human Rights

The case concerned a Russian national who complained about the refusal by the Russian courts to examine his claim concerning the repayment of a loan to the Trade representation of North Korea.

The Court held that the limitation of Mr Oleynikov's right of access to court had pursued the legitimate aim of promoting good relations between States through the respect of national sovereignty. However, it concluded that the Russian courts had failed to examine whether the nature of the transaction underlying the claim was of a private law nature and to take into account the provisions of international law in favour of restrictive immunity.

### Principal facts

The applicant, Vladimir Borisovich Oleynikov, is a Russian national who was born in 1946 and lives in Khabarovsk (Russia).

In May 1997, Mr Oleynikov lent USD 1,500 to the Khabarovsk Office of the Trade Counsellor of the Democratic People's Republic of Korea (the DPRK Trade Counsellor) on the understanding that it would be paid back. After the DPRK Trade Counsellor had failed to repay its debt, Mr Oleynikov and his counsel sent several letters of claim which remained unanswered. Mr Oleynikov's counsel subsequently wrote to the Russian Ministry of External Affairs, which considered that the DPRK Trade Counsellor had acted on the DPRK's behalf and therefore enjoyed immunity from a lawsuit. It advised Mr Oleynikov to obtain the consent of a competent North Korean authority before lodging a claim against the DPRK Trade Counsellor with the Russian courts. As the DPRK refused to answer, Mr Oleynikov lodged a claim against it with the Khabarovsk District Court in February 2004. The claim was returned without examination on the grounds that the Code of Civil Procedure provided for absolute immunity of a foreign State before the Russian courts. In March 2004, the Khabarovsk Regional Court upheld the decision on appeal.

<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

## Complaints, procedure and composition of the Court

Relying in particular on Article 6, Mr Oleynikov complained that both the Russian courts' refusal to examine his claim and the DPRK's failure to give its consent to the examination of the claim by the Russian authorities had constituted a violation of his right to a fair hearing. He also alleged a violation of Article 1 of Protocol 1 (protection of property).

The application was lodged with the European Court of Human Rights on 2 September 2004.

Judgment was given by a Chamber of seven judges, composed as follows:

Isabelle **Berro-Lefèvre** (Monaco), *President*,  
Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),  
Julia **Laffranque** (Estonia),  
Linos-Alexandre **Sicilianos** (Greece),  
Erik **Møse** (Norway),  
Ksenija **Turković** (Croatia),  
Dmitry **Dedov** (Russia),

and also Søren **Nielsen**, *Section Registrar*.

## Decision of the Court

### Article 6

The Court reiterated that it could not examine the part of the application directed against the DPRK since it was not a party to the European Convention. It further considered that the right of access to court could be subject to some restrictions, such as those generally accepted as part of the rule of State immunity. However, it would not be consistent with Article 6 if a State could arbitrarily remove from the jurisdiction of the courts a wide range of civil claims or confer immunities from civil liability on categories of persons. Therefore, the Court had to determine whether the restriction on the right of access to court of Mr Oleynikov had been justified by the circumstances of the case.

The Court held that the limitation had pursued the legitimate aim of complying with international law in order to promote comity and good relations between States through the respect of national sovereignty. Nevertheless, the Court reiterated that Russia had signed the 2004 Convention on Jurisdictional Immunities of States and their Property<sup>2</sup>, which endorsed the principle of restricted immunity when a State engages in a commercial transaction with a foreign natural person. Moreover, the President of Russia and the Supreme Commercial Court had both acknowledged that restrictive immunity had become a principle of customary law. Finally, the new Code of Commercial Procedure adopted in 2002 provided for restrictive immunity and the 1960 Treaty on Trade and navigation between the USSR and the DPRK provided for a waiver of immunity in respect of foreign trade transactions.

Despite the above-mentioned provisions, the Khabarovsk Regional Court had rejected Mr Oleynikov's claim without examination. Indeed, it had applied absolute State immunity from jurisdiction without trying to establish whether the claim had related to acts of the DPRK performed in the exercise of its sovereign authority or as a party to a transaction of a private law nature. Therefore, the Court concluded that the rejection by the Russian courts of Mr Oleynikov's claim concerning the repayment of his loan had

<sup>2</sup> The Convention on Jurisdictional Immunities of States and their Property was adopted by the United Nations General Assembly on 2 December 2004 and signed by Russia on 1 December 2006.

been disproportionate and had impaired the very essence of his right of access to a court, in violation of Article 6 § 1.

#### Article 1 of Protocol 1

The Court considered that Mr Oleynikov's other complaint under Articles 1 of Protocol 1 was manifestly ill-founded and had to be rejected.

#### Just satisfaction (Article 41)

The applicant neither made claim for compensation of non-pecuniary damage nor for costs and expenses. Accordingly, the Court made no such award.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.