CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

ADMISSIBILITY DECISION

KOTOV v RUSSIA, no. 54522/00, 4 May 2006

...

COMPLAINTS

The applicant complained that, in breach of Article 6 of the Convention, he had not had a fair hearing. Relying on Article 1 of Protocol No. 1, he complained that he had been unable to obtain the effective reimbursement of money owed to him on account of an unlawful distribution of assets by the liquidator.

LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

Without providing any details, the applicant complained that he had not had a fair hearing, contrary to the requirements of Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Court, finding that this complaint had to be examined in relation to the failure to enforce the judicial decisions of 26 August and 12 November 1998 (see *Guzzardi v. Italy*, 6 November 1980, § 63, Series A no. 39, and *Camenzind v. Switzerland*, 16 December 1997, § 50, *Reports of Judgments*

and Decisions 1997-VIII), gave notice of the application to the respondent Government under that head.

1. The parties' submissions

The Government submitted that this complaint was inadmissible for failure to exhaust domestic remedies. Whilst conceding that the decision of 26 August 1998, upheld on an appeal on points of law on 12 November 1998, had not been enforced, they confirmed that the non-enforcement was due to the lack of assets at the time those decisions were given. In any event, the Government criticised the applicant for neither initiating enforcement proceedings (Article 198 of the Code of Commercial Litigation, the "CCL") nor complaining of the non-enforcement to the competent authorities.

The applicant contested that argument.

2. The Court's assessment

The Court notes that the enforcement of the decision of 26 August 1998, upheld on an appeal on points of law on 12 November 1998, was not possible because the bank, a private company, had no assets left, and that this point was not in dispute between the parties. In those circumstances the applicant cannot validly be reproached for failing to bring enforcement proceedings, which, in the present case, would have resulted in the service of the enforcement notice on the bank concerned (Article 198 of the CCL), which was then under the administration of the liquidator (Article 21 of the 1992 Act). In view of the lack of funds and the fact that it had not been possible to release any other assets after the distribution in 1996 of the assets initially realised, the initiation of proceedings for the enforcement of the 1998 decisions would not have had the effect of remedying the alleged violation (see, *mutatis mutandis*, *Shestakov v. Russia* (dec.), no. 48757/99, 18 June 2002, and *Gerasimova v. Russia* (dec.), no. 24669/02, 16 September 2004). Article 35 § 1 of the Convention imposes the use of the remedies which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints (see, among other authorities, *Stögmüller v. Austria*, 10 November 1969, p. ..., § 11, Series A no. 9). The Government's objection that domestic remedies have not been exhausted must therefore be rejected.

The Court reiterates that the execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 (see *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III, and *Hornsby v. Greece*, 19 March 1997, § 40, *Reports* 1997-II). However, the State is not responsible for the debts that a private body is not able to pay back on account of insolvency (see *Bobrova v. Russia*, no. 24654/03, § 16, and *Katsyuk v. Ukraine*, no. 58928/00, § 38, 5 April 2005). The State's

responsibility for enforcement of a judgment against a private company extends no further then the involvement of State bodies, including the domestic courts, in the enforcement proceedings (see *Fuklev v. Ukraine*, no. 71186/01, § 67, 7 June 2005). The responsibility of the State ends once the enforcement procedure has been closed by the competent authority in accordance with the applicable legislation (see *Shestakov*, decision cited above).

In the present case there is no evidence that, following the full distribution in 1996 of the assets initially realised by the liquidator, the State, through the intermediary of the competent authorities, could or should have taken measures capable of enabling the applicant to receive, even partially, the sum to which he had been entitled in the context of that distribution. The bank had no more assets left and, for that reason, the Regional Commercial Court, on 17 June 1999, ordered its liquidation and the closure of the insolvency procedure. In those circumstances the State cannot be held responsible for the non-enforcement of the commercial court judgments of 26 August and 12 November 1998 (see *Reynbakh v. Russia*, no. 23405/03, § 18, 29 September 2005).

It follows that this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

The applicant contended that on account of the liquidator's conduct, he had been a victim of a violation of Article 1 of Protocol No. 1, which 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."

1. The parties' arguments

The Government submitted that the applicant had not fulfilled the requirement to exhaust domestic remedies. In their opinion the applicant should have relied on section 21 of the 1998 Act to bring separate proceedings before the ordinary courts in order to establish the liquidator's personal liability and challenge the allegedly unlawful distribution of the bank's assets. That principle had been confirmed by the Constitutional Court's judgment of 12 March 2001. The applicant, however, had

complained about the liquidator's action in the context of the insolvency procedure opened against the bank. As the decisions given in that procedure, on 4 February, 31 March and 9 June 1999 had been annulled on 17 April 2001, because the commercial courts had lacked jurisdiction to entertain the matter, it was still open to the applicant to sue the liquidator before the courts of general jurisdiction.

In addition, as the applicant had failed to bring proceedings for the enforcement of the decisions of 26 August and 12 November 1998, he had not fulfilled the requirement to exhaust domestic remedies for the purposes of Article 1 of Protocol No. 1.

Lastly, the Government contended that, following the decision of 17 June 1999 closing the liquidation procedure against the bank, it had been struck off the companies register of the Russian Federation. Consequently, in accordance with Article 85 § 4 of the CCL, it would be impossible to have the present dispute adjudicated by any domestic courts whatsoever.

The applicant replied that the right to adjudication of a complaint against a liquidator in the context of an insolvency procedure stemmed from section 31 taken in conjunction with sections 18(2) and 19(3) of the 1992 Act, which governed the insolvency procedure in the present case. That principle had been confirmed by the Constitutional Court in its judgment of 12 March 2001. Moreover, there was nothing in the CCL to prevent the victim of a liquidator's conduct from asserting his or her rights in the context of an insolvency procedure.

2. The Court's assessment

(a) As to the Government's objection

The Court notes that the second set of proceedings (see above, point 3 of the Facts) initiated by the applicant concerned the personal liability of the liquidator, whose alleged conduct had rendered impossible the enforcement of the decision of 26 August 1998 as upheld on an appeal on points of law on 12 November 1998 (see above, point 2 of the Facts). In that second set of proceedings, which gave rise to the decision of 4 February 1999, upheld on appeal on 31 March and on an appeal on points of law on 9 June 1999, the applicant was unsuccessful. The commercial courts refrained from ruling on the liquidator's personal liability or the damage caused by his allegedly unlawful action, despite the fact that the applicant had expressly asked them to do so, and dismissed his claims on the grounds that he had already won his case against the bank in 1995 and 1996. Nevertheless, the federal court did recognise, once again, that the statutory principle of proportionality had been breached to the applicant's detriment, before dismissing the grounds of appeal on points of law, which were insufficiently addressed.

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.

The Constitutional Court's judgment of 12 March 2001 moreover confirms that, whilst the commercial courts do not issue any mandatory instructions concerning recognition of a debt, which, in the present case, had been done by the ordinary courts in 1995 and 1996, they do have jurisdiction to adjudicate claims against the liquidator and to give decisions to allow creditors to exercise in full their right to judicial protection in the context of an insolvency procedure. In the Court's view, the commercial court proceedings, which were concluded in the present case by the cassation decision of 12 November 1998, follows that jurisdictional logic.

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 the objection that the applicant had failed 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.

(b) As to the applicant's complaint

In view of the consequences for the applicant arising from the distribution of assets by the liquidator, and after examining the parties' arguments in the light of its case-law on such matters, the Court takes the view that the complaint under Article 1 of Protocol No. 1 cannot be resolved at this stage of the proceedings and must be examined on the merits. Accordingly, it cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

On these grounds the Court, unanimously,

Declares admissible, without prejudging the merits of the case, the applicant's complaint under Article 1 of Protocol No. 1;

Declares the remainder of the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President