

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

THIRD SECTION

DECISION

Application no. 40544/08
by Anna MICHNICOVÁ
against Slovakia

The European Court of Human Rights (Third Section), sitting on 29 November 2011 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Mihai Poalelungi, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 30 July 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Anna Michnicová, is a Slovak national who was born in 1957 and lives in Bratislava. She was represented before the Court by Advokátska kancelária Ivan Syrový, s.r.o., a law firm with its registered office in Bratislava.

2. The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

A. The circumstances of the case

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

3. The applicant is a judicial enforcement officer (*súdny exekútor* – "JEO").

4. The status and powers of and procedures relating to JEOs are governed by the Enforcement Code (Law no. 233/1995 Coll., as amended - "the Code"), details concerning the remuneration of JEOs for carrying out enforcement proceedings being laid down in the Decree of the Ministry of Justice on Reimbursement and Compensation of JEOs (Decree no. 288/1995 Coll., as amended - "the Decree").

5. In her official capacity, the applicant acted on behalf of the municipal District of Bratislava – Staré mesto ("the claimant") in seeking the enforcement of an amount of money payable to the claimant by two individuals ("the defendants") under a judgment of the Bratislava II District Court (*Okresný súd*) of 13 September 2000. The sum payable arose in consideration for the sale of non-residential premises by the claimant to the defendants.

6. Under the Decree, as it then stood, the basis for calculating the applicant's remuneration was the amount of the claim that was being enforced (*vymáhané*). After the events complained of had taken place, this provision was changed in that the basis for the calculation of a JEO's remuneration was to be the amount of the claim that had actually been enforced (*vymožené*). Should the entire claim be enforced, the remuneration would be 20% of that base figure (see paragraphs 33 to 35 in the "Relevant domestic law and practice" section below).

7. On 28 August 2003 the claimant requested that the applicant enforce the judgment and late-payment penalties against the defendants. The accumulated claim amounted in total to the equivalent of 30,150 euros (EUR).

8. On 11 September 2003 a single judge of the District Court authorised the applicant to carry out the enforcement.

9. On 24 September 2003 the applicant issued a notice of enforcement (*upovedomenie o začatí exekúcie*) by which she notified the defendants that the enforcement proceedings had commenced and that, unless they settled their debt within fourteen days, the applicant intended to enforce the judgment and costs of the enforcement by establishing a mortgage over real property belonging to the defendants and by seeking a forced sale of that property.

10. On 8 January 2004 the applicant issued an order for enforcement (*exekučný príkaz*) of the judgment. By this order she directed the defendants' bank to deduct the judgment debt and costs of the enforcement from the defendants' account. By these means, amounts equivalent to some

EUR 1,450 and EUR 350 were recovered, respectively, for the benefit of the claimant and the applicant by way of her remuneration.

11. On 11 February 2004 the claimant and the defendants reached a settlement, in which:

(i) the defendants acknowledged their debt (equivalent to EUR 30,410), consisting of the principal amount (EUR 30,150) and legal fees payable by them (EUR 260);

(ii) the claimant waived one half of the debt on the condition that the defendants paid the remainder according to a payment schedule agreed upon, less the EUR 1,450 that they had already paid; and

(iii) the claimant undertook to withdraw its enforcement petition on the condition that the defendants "settle all provable expenses of [the applicant] that [had been] incurred in connection with the enforcement of the clam [referred to above]".

12. On 8 March 2004, the claimant lodged a request with the applicant for the enforcement to be discontinued. Reference was made to "an agreement on the payment of the owed amount".

13. Between 26 May 2004 and 22 February 2005, the applicant requested that the District Court discontinue the proceedings and rule on her costs and the District Court invited the applicant to submit further information. The applicant responded, specifying the amount of her outstanding claim for remuneration at the equivalent of EUR 7,300.

14. In a letter dated 14 February 2005 the claimant informed the applicant that the defendants had paid the outstanding amount of their debt.

15. On 9 May 2005 the District Court discontinued the enforcement proceedings and ruled that the defendants were to pay the applicant the equivalents of EUR 11 by way of remuneration and of EUR 100 exclusive of value-added tax ("VAT") by way of reimbursement for the costs of enforcement.

16. The District Court referred to Article 203 of the Code and to sections 5 and 16 of the Decree (see paragraphs 32 and 35 to 37 in the "Relevant domestic law and practice" section below). It based the calculation of the applicant's remuneration on the amount that had been actually obtained for the claimant through the direct involvement of the applicant (EUR 1,450). The amount of remuneration already paid (EUR 350) was deducted.

17. The decision of 9 May 2005 stated that it was not subject to appeal. Later on, the Code was amended so that a decision on the remuneration and reimbursement of a JEO's costs was made subject to appeal (see paragraph 30 in the "Relevant domestic law and practice" section below).

18. On 18 July 2005 the applicant challenged the ruling of 9 May 2005 concerning her remuneration by way of a complaint under Article 127 of the Constitution to the Constitutional Court (*Ústavný súd*) (see paragraph 27 in the "Relevant domestic law and practice" section below).

19. She relied on a judgment (*nález*) of the Constitutional Court of 17 December 2004 in case no. II. ÚS 31/04 (see paragraph 38 in the "Relevant domestic law and practice" section below) and argued, first of all, that her claim for remuneration constituted "possessions" for the purposes of Article 1 of Protocol No. 1.

20. The applicant further argued that there was no justification in law for limiting the amount of her remuneration by calculating it on the basis of the amount actually enforced through her direct involvement. She submitted that the object and purpose of the relevant rules had required that the amount of her remuneration should have been calculated on the basis of the total amount paid by the defendants to the claimant while the enforcement proceedings were pending. This was implied, *inter alia*, in section 5(2) of the Decree read in conjunction with Article 46 § 3 of the Code (see paragraphs 28 and 36 in the "Relevant domestic law and practice" section below), which regulated the remuneration of a JEO in the event that a defendant settled his or her debt voluntarily.

21. A different approach would allow any defendant to circumvent the law by delaying payment of his or her debt until enforcement proceedings commenced and then paying the debt directly to the creditor without having to bear the consequences, such as the costs of the enforcement.

A distinction between amounts paid through the involvement of a JEO and directly to the creditor without the involvement of a JEO was unfounded and unlawful.

22. Accordingly, the applicant asserted a violation of her rights under Article 1 of Protocol No. 1 and its constitutional counterpart.

23. On 23 October 2007 the Constitutional Court declared the applicant's complaint inadmissible as manifestly ill-founded.

24. The Constitutional Court observed that the applicant's entitlement to remuneration as such had not been contested but that what remained disputed was that remuneration's amount.

25. In those circumstances, her claim did not amount to an existing "possession". Neither could her hope of her entitlement being realised as a specific amount in accordance with her interpretation of the relevant laws be considered "legitimate" so as to amount to a "possession" under the applicable case-law.

26. The Constitutional Court accepted that the present decision was "at [a] certain variance" with its above-cited judgment in case no. II. ÚS 31/04. However, that judgment had concerned a specific problem relating to VAT. Even though it had not been expressly stated in that judgment, a JEO liable to pay VAT on his or her remuneration had a legitimate expectation to have that amount of tax reimbursed by a defendant. The present decision was thus fully in compliance with the Court's jurisprudence.

B. Relevant domestic law and practice

1. The Constitution (Constitutional law no. 460/1993 Coll., as amended)

27. Article 127 provides:

> "1. The Constitutional Court shall decide complaints by natural or legal persons alleging a violation of their fundamental rights or freedoms ... unless the protection of such rights and freedoms falls within the jurisdiction of a different court.
>
> 2. If the Constitutional Court finds a complaint justified, it shall deliver a decision stating that a person's rights or freedoms as set out in paragraph 1 have been violated by a final decision, specific measure or other act and shall quash such decision, measure or act. If the violation that has been found is the result of a failure to act, the Constitutional Court may order [the authority] which has violated the rights or freedoms to take the necessary action. At the same time it may remit the case to the authority concerned for further proceedings, order such authority to refrain from violating the fundamental rights and freedoms ... or, where appropriate, order those who have violated the rights or freedoms set out in paragraph 1 to restore the situation to that existing prior to the violation.
>
> 3. In its decision on a complaint the Constitutional Court may grant appropriate financial compensation to the person whose rights under paragraph 1 have been violated."

2. Enforcement Code

28. Under Article 46 § 3, as applicable at the relevant time, a JEO is to "abandon" (*upustí*) enforcement proceedings if the debtor has complied with its obligations as adjudicated and has settled the costs of the enforcement.

29. The supervising court is to discontinue (*zastaví*) the enforcement if the person who initiated the enforcement has so requested (Article 57 § 1 (c)).

30. Under the Code, as applicable at the relevant time, no appeal lay against a decision on costs upon the discontinuation of enforcement proceedings. However, on 1 September 2005 an amendment (Law no. 341/2005 Coll.) to the Code entered into force, pursuant to which such decisions are now subject to appeal (Article 58 § 5 of the amended Code).

31. In respect of enforcement carried out under the Code, a JEO is entitled to remuneration, reimbursement of costs and compensation for time spent on the matter. These expenses are normally to be borne by the debtor (Articles 196 and 197 § 1) (see also the Court's decisions of 28 June 2011 in the cases of *Mihal v. Slovakia* no. 23360/08 (§§ 24 and 25) and no. 31303/08 (§§ 36 and 37)).

32. If the creditor causes the discontinuation of enforcement proceedings, the court can order him or her to cover the necessary costs of the enforcement (Article 203 § 1). This provision implies that the court has

the ability, not an obligation, to make an order for costs against the creditor. Such an order presupposes an analysis of procedural responsibility (*zavinenie*) for the discontinuation. The provision confers discretion on the part of the court based on an assessment of the actions of the creditor and the degree and seriousness of the creditor's responsibility should it be established (a decision by the Constitutional Court of 23 March 2005 in case no. I. ÚS 48/05) (see also *Mihal v. Slovakia*, no. 3133/08, cited above, §§ 38-40).

3. Decree on Reimbursement and Compensation of Judicial Enforcement Officers

33. Under section 4(1), as applicable at the relevant time, the basis for calculating a JEO's remuneration was the amount of the claim that was being enforced (*vymáhané*).

34. With effect as from 1 May 2008, section 4(1) of the Decree was amended (Decree no. 141/2008 Coll.) to the effect that a JEO's remuneration was no longer to be calculated on the basis of the amount of claim that was being enforced (*vymáhané*), but rather on the basis of the amount of the claim that had actually been enforced (*vymožené*).

An introductory report (*predkladacia správa*) and an explanatory report (*dôvody*) on the amendment refer to "interpretative question marks" and "inconsistent practice in applying" the existing rules in respect of the basis for calculating the remuneration of judicial enforcement officers. The amendment has no retroactive effect.

35. Under section 5(1), a JEO's remuneration is to be 20% of the figure used as the basis for calculation.

36. In the event that defendants settle their debts themselves and the enforcement is consequently "abandoned" under Article 46 § 3 of the Code, the JEO's remuneration is to be reduced to one half of the amount calculated pursuant to the above-mentioned rules (section 5(2)).

37. If a JEO succeeds in enforcing part of a claim before its enforcement is discontinued, the JEO's remuneration is to be calculated on the basis of the amount actually enforced (*vymožené*) (section 16(2)). This provision applied at the relevant time and has remained unaffected throughout the subsequent legislative developments.

4. Relevant judicial practice

38. On 17 December 2004 the Constitutional Court gave a judgment (*nález*) in an unrelated case no. II. ÚS 31/04, concerning the applicability of VAT to the remuneration of JEOs. In this judgment, the Constitutional Court held that:

> "The term 'possessions' encompasses things, rights and claims. The Constitutional Court therefore considers that compensation in respect of costs of the proceedings,

> which is due to a [JEO] upon the discontinuation of enforcement proceedings, constitutes possessions, which are acquired by virtue of a final and binding ruling of an ordinary court awarding it. This claim fully enjoys the protection of [...] Article 1 of Protocol No. 1, because compensation in respect of costs of the proceedings is undoubtedly a claim of a party to the proceedings against another party to the proceedings, which is moreover enforceable as any other financial claim.
>
> A claim for compensation of costs of proceedings has to be allowed to the party concerned in the entire scope envisaged by statute, which includes [VAT] in so far as the party concerned is liable to pay that tax under the applicable statute on the amount awarded."

COMPLAINTS

39. The applicant complained under Article 1 of Protocol No. 1 that the domestic courts had erred in law by calculating the amount of her remuneration on the basis of the amount that had been enforced through her direct involvement, as opposed to the total amount obtained by the claimant from the defendants during the enforcement proceedings, and that her property rights had been violated as a result.

40. The applicant also complained under Article 6 § 1 of the Convention that she had been denied access to a court, in that the ruling in respect of her remuneration had not been subject to appeal.

THE LAW

A. Article 1 of Protocol No. 1

41. The applicant complained that the domestic courts had erred in law by calculating the amount of her remuneration with reference to the amount that had been enforced through her direct involvement, as opposed to the total amount obtained by the claimant from the defendants during the enforcement proceedings. She alleged a violation of her property rights under Article 1 of Protocol No. 1, which provides 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."

42. The Government relied on the findings of the District Court of 9 May 2005 and the Constitutional Court of 23 October 2007 and argued, first of all, that the applicant had had no possessions enjoying the protection of Article 1 of Protocol No. 1.

43. The Government further submitted that, in the present case, a special rule embodied in Article 203 of the Code had been applied with the effect that, as opposed to the general rule under Article 197 § 1 of the Code, the costs of the enforcement had been borne by the claimant. This had occurred because the discontinuation of the enforcement under Article 57 § 1 (c) of the Code had been attributable to the claimant, who had requested it. Furthermore, the Government pointed out that under section 16(2) of the Decree if a JEO was successful in enforcing part of a claim, the JEO's remuneration had always been required to be calculated on the basis of the amount actually enforced (*vymožené*). They concluded that the complaint should be rejected under Articles 35 §§ 3 and 4 of the Convention.

44. In reply, the applicant disagreed and reiterated her complaint. In particular, she pointed out that the pivotal point of the present case, and at the same time the point on which she was in direct disagreement with the domestic courts and the Government, was the interpretation of the term "amount actually enforced", which had served as the basis for the calculation of her remuneration. This term had no statutory definition and, according to her, there had neither been any legal justification nor logical reason for limiting it to the amount actually enforced through her direct involvement.

45. The Court considers that it first has to establish whether the present complaint falls *ratione materiae* within the ambit of Article 1 of Protocol No. 1.

46. For that matter, the Court reiterates that Article 1 of Protocol No. 1 does not guarantee the right to acquire property and that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decision(s) related to his or her "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (for a recapitulation of the relevant principles and further references see, for example, *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004 IX).

47. The Court recalls that in the case of *Van der Mussele v. Belgium* (23 November 1983, § 48, Series A no. 70) it held that:

> "[Mr Van der Mussele's] arguments do not bear examination in so far as they relate to the absence of remuneration. The text set out above is limited to enshrining the right of everyone to the peaceful enjoyment of "his" possessions; it thus applies only to existing possessions (see, *mutatis mutandis*, the above-mentioned *Marckx* judgment, Series A no. 31, p. 23, § 50). In the instant case, however, the Legal Advice and Defence Office of the Antwerp Bar decided on 18 December 1979 that

> no assessment of fees could be made, because of Mr. Ebrima's lack of means [...]. It follows, as the Commission unanimously inferred, that no debt in favour of the applicant ever arose in this respect.
>
> Consequently, under this head, there is no scope for the application of Article 1 of Protocol No. 1 [...]"

48. The Court also recalls that the tenet of *Van der Mussele v. Belgium* has recently been found in principle to be applicable to the remuneration of a lawyer (see *Šafárik v. Slovakia* (dec.), no. 380/08, 18 October 2011) and *mutatis mutandis* applicable to that of a JEO (see *Mihal v. Slovakia*, decisions in the cases nos. 23360/08 and 31303/08, cited above, §§ 60 and 94 respectively).

49. In so far as the applicant relied on the Constitutional Court's judgment of 17 December 2004 (see paragraph 38 in the "Relevant domestic law and practice" above) in arguing that her claim to remuneration fell within the substantive scope of Article 1 of Protocol No. 1, the Court observes first of all that that judgment concerned a specific problem relating to VAT, which is different from the present context. The Court also notes that, in the judgment of 17 December 2004, the Constitutional Court itself acknowledged that any "possession" inherent in a JEO's claim for remuneration would only be acquired upon a final and binding ruling of an ordinary court awarding it, which was not the case as regards the applicant in the present case. These distinctions were acknowledged and/or are in harmony with the content and tenor of the Constitutional Court's decision of 23 October 2007 in the present case. Therefore, the applicant's argument made in reliance on the Constitutional Court's judgment of 17 December 2004 cannot be sustained.

50. Nevertheless, the Court considers that, for the reasons specified below, the present complaint is inadmissible even assuming that Article 1 of Protocol No. 1 applies *ratione materiae* to it.

51. The Court observes that the entitlement of the applicant to remuneration as such was not disputed. What remained contested was the scope of that entitlement.

52. In that respect, the Court notes that the crux of the present case is the question of the lawfulness of the domestic courts' conclusions as regards the meaning of the term "amount actually enforced", which served as a basis for the calculation of the specific amount of the applicant's remuneration.

53. This is, however, a matter of interpretation and application of domestic law, which the Court has a limited power to review (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I).

54. The Court observes that the question of the applicant's remuneration was examined and decided upon by the District Court in its decision of 9 May 2005. In that decision, relying on Article 203 of the Code and sections 5 and 16 of the Decree, the District Court interpreted and applied the term "amount actually enforced" as meaning the amount that had

actually been enforced through the applicant's direct involvement as a JEO. The constitutionality of this assessment was subsequently subject to review by the Constitutional Court.

55. Guided by the subsidiary nature of its role (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I), the Court finds that nothing has been submitted by the applicant or otherwise established by the Court allowing it to conclude that the interpretation and application of the relevant law by the domestic courts was manifestly arbitrary so as to overstep the limits of lawfulness within the meaning of Article 1 of Protocol No. 1.

56. Therefore, even assuming that the applicant's complaint under that provision falls *ratione materiae* within the ambit of Article 1 of Protocol No. 1, it is in any event manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Remaining complaint

57. The applicant also alleged a violation of Article 6 § 1 of the Convention in that no appeal had been available to her in respect of the ruling concerning her remuneration.

58. The Court observes that the applicant did not raise this complaint before the Constitutional Court and that, in any event, she could have – and in fact partly had – had the impugned ruling reviewed by that court.

59. It follows that the remainder of the application is in any event manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President