

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

FIFTH SECTION

DECISION

Application no. 12394/05
VOLURM AND POPLAVSKYY
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 27 May 2014 as a Chamber composed of:

Mark Villiger, President,
Boštjan M. Zupančič
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, judges,

and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 24 March 2005,

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

Having deliberated, decides as follows:

THE FACTS

The first applicant is a Ukrainian private company, Volyurm. The second applicant, Mr Volodymyr Vasylyovych Poplavskyy, is a Ukrainian national, who was born in 1952 and lives in Kyiv. He owns 50% of the first applicant's shares and is its director. The applicants were represented before the Court by Mr I. Lozovyy, a lawyer practising in Kyiv.

The Ukrainian Government ("the Government") were represented by their Agent, most recently, Mr N. Kulchytskyy, of the Ministry of Justice of Ukraine.

A. The circumstances of the case

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

On 15 December 1994 the Minskyy District State Administration allowed the applicant company to set up a petrol station on Geroyiv Stalingradu Avenue in Kyiv. The petrol station started doing business in 1995.

On 28 July 1998 the Kyiv City State Administration gave the applicant company a seven-year lease of the plot of land on which the above-mentioned petrol station was situated.

On 2 April 1999 the applicant company signed a contract with a construction company, B., to upgrade the petrol station. According to the applicants, company B. had moved the petrol pumps away from the petrol storage tanks. Thus, the petrol station had been changed from a "container-type" petrol station (*автозаправна станція контейнерного типу*), with a moveable fuel storage tank above ground, to a "permanent-set" petrol station (*автозаправна станція стаціонарного типу*), with a fuel storage tank permanently stored underground.

Following the decision of 28 July 1998, on 20 July 1999 the applicant company and the Kyiv City State Administration signed a long-term lease agreement. It was noted that when fulfilling the contractual obligations the applicant company was obliged "to comply with the law in force".

On 7 September 1999 the State Environmental Safety Department of Kyiv ordered the applicant company to temporarily close down the petrol station with effect from 13 September 1999.

On 14 September 1999 the same entity ordered the applicant company to close the petrol station immediately as it was environmentally unsafe.

On 27 October 1999 the same Department informed the applicant company that it could reopen the petrol station since the shortcomings indicated in the order of 7 September 1999 had been corrected. In particular, the latter had received permission to reopen given the acceptable level of air pollution.

By a letter of 30 November 1999 the Minskyy District State Administration informed the second applicant that it had approved the documents concerning the development project in respect of the above-mentioned petrol station.

On 6 July 2000 the Kyiv City Council adopted a decision "on the closure of 'container-type' petrol stations in Kyiv and the improvement of the surrounding areas". Referring to the decision of the Cabinet of Ministers of Ukraine no. 1442 of 20 December 1997 (see Relevant Domestic Law below) and the conclusions of a petrol station inspection commission created in accordance with a decision of the Kyiv City State Administration of 28 March 2000, the City Council decided the following:

> "the executive body of the Kyiv City Council (namely, the Kyiv City State Administration) should undertake the necessary steps ... to prevent petrol stations, ... which are not licensed or are environmentally unsafe, from functioning and to ensure that they are closed in compliance with the current legal requirements".

The applicant company's petrol station figured among 133 petrol stations listed in the appendix to the above-mentioned decision. The appendix was presented as a table containing the names of the petrol stations, their types and compliance with four criteria (fire safety, the approval of the State Architecture and Planning Permission Department, an operational authorisation certificate (*акт введення в експлуатацію*) and documents certifying rights to a plot of land). In respect of the applicant company's petrol station, it was specified that it was a "permanent-set" petrol station, had documents certifying rights to a plot of land, but had no approval from the Kyiv State Architecture and Planning Permission Department, had no operational authorisation certificate and did not comply with fire-safety requirements.

By a letter of 4 October 2000 the Minskyy District State Administration informed the Kyiv Central Department for Land Improvement (*Головне управління контролю за благоустроєм міста Київської міської державної адміністрації*) that a number of petrol stations had stopped doing business. The applicant company's petrol station was on that list.

On 27 October 2000 the Minskyy District Prosecutor's Office informed the applicant company that, by virtue of the Kyiv City Council's decision of 6 July 2000, the petrol station belonging to the applicant company had to be dismantled. However, the applicant company failed to dismantle it or to bring it into compliance with section 51 of the Environmental Protection Act and with the Cabinet of Ministers' decision no. 1442 of 20 December 1997. Therefore, the applicant company was told "either to dismantle the petrol station or to bring it into compliance with legal requirements".

According to the applicant company, it had prepared a draft of the proposed changes necessary to bring the petrol station into compliance with the legal requirements, but the relevant State authorities had decided to dismantle the station. In particular, on 27 April 2001 the Head of the Minskyy District State Administration had instructed the Kyiv Central Department for Land Improvement, in writing, to dismantle the station. The letter in question read as following:

> "In accordance with the agreement on cooperation regarding the dismantling of abandoned and ownerless property, I request that you dismantle the petrol station ... in the Minskyy District situated at the following address: 1. MP "Volyurm" – 2, Geroyiv Stalingradu Avenue."

On 4 May 2001 the station was dismantled and on 18 June 2001 its equipment was returned to the applicant company. In the relevant document concerning the return of the equipment it was mentioned that some items were missing.

On 13 October 2003 the applicant company instituted proceedings in the Kyiv Commercial Court against the Obolon District State Administration (former Minskyy District State Administration) and the Kyiv Central Department for Land Improvement claiming 491,315.06 Ukrainian hryvnias (UAH) (equivalent, at the material time, to around 75,836.60 euros (EUR)) in compensation for pecuniary and non-pecuniary damage.

The applicant company stated that in 1999 the petrol station had been upgraded. Initially it had been a "container-type" petrol station, but later it had been upgraded and had become a "permanent-set" one. Following the Kyiv City Council's decision of 6 July 2000, the applicant company had asked to be allowed to further upgrade the station. However, by a letter of 27 April 2001 the Head of the Minskyy District State Administration had ordered the station to be dismantled. The petrol station's equipment had been damaged during the dismantling and the relevant decision to dismantle the station had been unlawful.

On 15 January 2004 the court found for the applicant company and awarded it the above-mentioned sum, to be paid by the Obolon District State Administration. In a court hearing the latter argued that the petrol station in question had been temporary and the Economic Department of the Kyiv City State Administration had not approved documents concerning the development project. Moreover, there had been plans to build housing on this piece of land for 2001-2004. Therefore, the applicant company had not received a permit to upgrade the existing petrol station. On 27 October 2000 the Minskyy District Prosecutor's Office informed the applicant company that the petrol station had to be dismantled.

The court found that the petrol station in question had been a "permanent-set" one and was environmentally safe, and that the Obolon District State Administration had therefore unlawfully refused to permit further upgrading of the station and that the Administration's request to dismantle the station had not been legal.

On 12 March 2004 the Kyiv Commercial Court of Appeal quashed that judgment and found against the applicant company. It held that the petrol station had been dismantled by the Kyiv Central Department for Land Improvement, which had been liquidated without any legal successor. Therefore, the court terminated the proceedings in the case in respect of the Kyiv Central Department for Land Improvement. It further found that on 14 September 1999 the applicant company had been ordered by the Kyiv State Environmental Safety Department to close the petrol station immediately as it was environmentally unsafe. By a letter of 27 April 2001 the Minskyy District State Administration had requested the Kyiv Central Department for Land Improvement to dismantle the station. The reference to an agreement on cooperation in matters of dismantling abandoned and ownerless property in the letter of 27 April 2001 had been erroneous. The petrol station equipment had been returned to the applicant company and

there was no evidence that the Obolon District State Administration had inflicted any damage on the applicant company.

The applicant company appealed against that judgment, but it did not challenge the termination of the proceedings with respect to the Kyiv Central Department for Land Improvement. In its cassation appeal, a copy of which was submitted by the applicant company to this Court, the issue of compliance with the request of 14 September 1999 was not addressed.

On 28 July 2004 the Higher Commercial Court of Ukraine upheld the judgment of 12 March 2004. The court found that the petrol station owned by the applicant company had been included in the list of stations which "were not licensed, were environmentally unsafe and were to be closed" annexed to the decision of the Kyiv City Council of 6 July 2000. The Minskyy District State Administration and the Minskyy District Prosecutor's Office had instructed the applicant company several times to dismantle the petrol station or bring it into compliance with legal requirements. However, the applicant company had not responded to those requests and recommendations. Moreover, "the letter of 27 April 2001 should be considered not as an instruction but as a request addressed to a structural subdivision of the Kyiv City State Administration to perform its functions in the Minskiy (Obolonskiy) district".

On 30 September 2004 the Supreme Court of Ukraine refused a request by the applicant company for leave to appeal in cassation.

The Government submitted a copy of an undated letter sent by the Minskyy District State Administration to the Head of the Kyiv Central Department of Architecture and Urban Planning. According to that letter, it was impossible to put a petrol station on a plot of land used by the applicant company since it was due to be built on.

B. Relevant domestic law

The rules of the retail petroleum trade are regulated by the decision of the Cabinet of Ministers no. 1442 of 20 December 1997. In accordance with those rules, "container-type" petrol stations were to be allowed only in particular places, such as car parks, industrial sites, motor boat moorings and so on. In cities only "permanent-set" petrol stations were allowed to be built. On 7 March 1998 the Cabinet of Ministers amended its decision by allowing "container-type" petrol stations which were situated in places other than those indicated in its decision of 20 December 1997 to continue to function until 1 July 1999. By a further decision of 21 July 1999 that deadline was extended to 1 January 2000.

Section 51 of the Environmental Protection Act 1991, in force at the material time, reads as follows:

"**Environmental Requirements of Installation, Design, Construction, Modernisation, Putting into Operation and Functioning of Enterprises, Constructions and Other Facilities**

In the process of designing, constructing and commissioning of new, and modernising operating, enterprises, structures and other facilities, improving existing and introducing new technologies and equipment, as well as in the process of operating these facilities, the environmental safety of the population, the rational use of natural resources and the observance of standards regarding the potentially harmful effects on the environment shall be ensured. In doing so, harmful substances and waste shall be captured, recovered and rendered harmless or completely liquidated, and other requirements shall be complied with so as to protect the environment and the health of the population.

Any enterprise, institution or organisation whose activity has a harmful impact on the environment, regardless of when commissioned, shall be equipped with installations, machines and devices to purify and neutralise all emissions and discharges and mitigate harmful factors, as well as with devices to control the quantity and composition of pollutants and characteristics of harmful factors.

Projects for commercial and other activities shall contain information assessing the effects on the environment and on the health of the population. The assessment shall be carried out taking due account of legal requirements for the protection of the environment, the environmental activity of a given territory, the condition of the environment where the facilities are planned to be sited, environmental forecasting, the socioeconomic prospects of the region`s development, the capacity and types of overall impact of harmful factors and facilities on the environment.

Enterprises, institutions and organisations which plan, design, build, reconstruct, modernise, and commission the construction of enterprises, facilities and other objects, as well as conduct research which they believe might negatively impact on the condition of the environment, shall submit a special application to this effect to the special central body of executive power responsible for environment and natural resources and its local bodies.

It shall be prohibited to commission enterprises, structures and other facilities which do not fully meet all the environmental requirements and measures provided for in the construction and reconstruction plans (expansion and technical modernisation)."

COMPLAINTS

The applicants complained that the petrol filling station owned by the first applicant had been dismantled unlawfully, in breach of Article 1 of Protocol No. 1.

The applicants also complained under Article 6 of the Convention that the court proceedings in their case had been unfair and the courts had not been independent and impartial as they had demonstrated an arbitrary and unreasonable approach to the facts of the case and their legal assessment.

THE LAW

A. The applicant company's complaint under Article 1 of Protocol No. 1

The applicant company complained that the petrol filling station owned by it had been dismantled unlawfully, in breach of Article 1 of Protocol No. 1. The invoked Article 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' submissions

The Government submitted that the applicant company's complaint under Article 1 of Protocol No. 1 was unsubstantiated. The applicant company lodged its complaint before the national courts which rejected it finding that the applicant company's complaint was unsubstantiated and not supported by appropriate evidence. Consequently, the national court solved the dispute in question. The Government referred to the Court's case-law which states that "it is not [the Court's] task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law. Furthermore, it is the domestic courts that are best placed to assess the credibility of witnesses and the relevance of evidence to the issues in the case" (see *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX).

The Government, however, further accepted that there had been an interference with the applicant company's right to peaceful enjoyment of its possessions since the petrol station which belonged to the applicant company had been dismantled.

The Government further stated that the relevant legal acts applicable in the present case were public and accessible to the applicant company. In particular, when signing the contract of 20 July 1999 it was aware of the Cabinet of Ministers' decision of 7 March 1998 and later learned about the Cabinet of Ministers' decision of 21 July 1999 by which all "container-type" petrol stations were to cease operating as of 1 January 2000. Following the decision of 21 July 1999, the Kyiv City Council had adopted the decision of 6 July 2000, which concerned the applicant. All of these legal acts were made public and published.

According to the Government, the applicant company should have received building permission for the design, reconstruction and conversion of the petrol station from a "container-type" petrol station to a "permanent-set" one. As appears from the court decision of 15 January 2004, the second applicant had requested that the Kyiv City State Administration and the District Administration grant a permit for such a reconstruction in 1999. By letters of 2 April 1999 and 26 April 1999 the second applicant had requested that both the city and the district State administrations grant the relevant permit. However, according to the Project on Planning of Petrol Station Sites in Kyiv approved by the Central Department of Architecture and Urban Planning the petrol station at issue was temporary. Therefore, the municipal authorities did not issue a permit for the reconstruction of this petrol station. In fact, the petrol station concerned was a temporary "container-type" station.

The Government further maintained that the petrol station had not complied with the environmental safety requirements. On 28 July 2000 the State Fire Safety Inspector decided that the petrol station should stop operating. Later, on 27 October 2000 the second applicant received an order issued by the Minskiy District Prosecutor's Office which stated that the applicant company had failed to comply with the Kyiv City Council's decision of 6 July 2000 and that the petrol station had to be dismantled. By a letter of 13 February 2001 the Kyiv City Land Resources Department had requested that the District Administration close the petrol station. Therefore, since the applicant company had failed to comply with numerous lawful requests of the authorities, the petrol station had been dismantled.

The Government finally noted that the dismantling of the petrol station in question had been legitimate since such stations were environmentally dangerous. Moreover, the applicant company had had three other locations proposed for the petrol station, but it had refused all of them. Also the applicant company had received delivery of the equipment for the petrol station and, at the material time, had no complaints about its state.

The applicant company maintained that it had received all the necessary permits for the reconstruction of the petrol station except for the permit from the Head of the Minskyy District State Administration. However, instead of granting such a permit the authority in question unlawfully instructed that the petrol station be dismantled.

The applicant company stated that there had been no prior notice that the station would be dismantled. Moreover, the station had not been operating, so there had been no need to dismantle it.

The applicant company further indicated that the Government had not specified the legal grounds for the dismantling of the petrol station. In particular, the decision of 6 July 2000 could not have served as grounds for this. The petrol station had been dismantled following a simple letter from the District State Administration, in the absence of any legal regulations on

the matter and in the absence of any proceedings. Thus, the decision to dismantle the petrol station had been clearly arbitrary.

The applicant company did not deny that three other locations for the petrol station had been proposed. However, as it has already invested a significant amount of time and resources in construction and then re-construction of the station, moving the petrol station to another site was not feasible from an economic standpoint.

2. The Court's assessment

The Court notes that the applicant company was the owner of a petrol station which had been dismantled by the authorities following a short written request lodged by the Head of the Minskyy District State Administration before the Kyiv Central Department for Land Improvement. The letter in question contained a reference to the agreement on cooperation regarding the dismantling of abandoned and ownerless property, so it can be concluded that the petrol station in question had been considered as abandoned and ownerless. The national court later found that such a reference had been erroneous. As for the real reasons and legal grounds for dismantling of the petrol station in question, the national courts had advanced the following.

Firstly, the Kyiv Commercial Court of Appeal referred to a request of 14 September 1999, according to which the applicant company had been asked to close down the petrol station. The court gave no further details in respect of this request, nor cited any legal provisions which could have served as a basis of such a request and the dismantling of the petrol station which ensued. The Court notes that the copy of the request in question has not been provided by the parties.

The Court further notes that the applicant company did not address the issue of compliance with the request of 14 September 1999 in its appeal in cassation against the decision of the Kyiv Commercial Court of Appeal. However, the Higher Commercial Court of Ukraine, having examined the above appeal, did not address this issue either.

It its decision, the Higher Commercial Court indicated different reasons for dismantling the applicant company's petrol station. It concluded that, in accordance with the Kyiv City Council's decision of 6 July 2000, the applicant company's petrol station had been listed among the petrol stations which "were not licensed, were environmentally unsafe and were to be closed". It further noted that the Minskyy District State Administration and the Minskyy District Prosecutor's Office had requested that the applicant company dismantle the station or bring it into compliance with law. The applicant company, however, had failed to do so.

The Court notes in this respect that the decision of 6 July 2000 contains only a general reference to the decision of the Cabinet of Ministers no. 1442 of 20 December 1997, which covers various aspects of the petrol

retail trade. However, the decision of 6 July 2000 was adopted following the conclusion of a petrol station inspection commission and contained sufficiently detailed information regarding the shortcomings of the applicant company's petrol station.

The Court further notes that, although there is no evidence when and how the applicant company learned about the decision of 6 July 2000, the applicant company did not claim that this decision was not public or that it did not comply with the requirements of lawfulness.

The Court also notes that the applicant company did not contest the fact that at the material time the petrol station which it owned did not comply with certain requirements. The Court observes that the applicant company argued before this Court and before the domestic courts that it had tried to comply with the requirements needed and had obtained all the necessary permits, except for the signature of the Head of the Minskyy District State Administration. However, the applicant company did not submit any documents in support of its statement that it had lodged all the necessary documents in order to bring the petrol station in question into compliance with requirements needed following the decision of 6 July 2000 and prescription of 24 October 2000.

The Court observes that in the present case the information submitted by both parties is inconsistent and incomplete. It is thus unclear whether the petrol station in question was a "container-type" or a "permanent-set" one, what particular shortcomings the applicant company tried to correct and when, and what type of permit it was seeking, and, in particular, whether the dismantling of the petrol station in question was caused by the applicant company's failure: 1) to rebuild it as a "permanent-set" one; 2) to comply with environmental safety (including fire safety) requirements; or 3) to accept the impossibility of having a petrol station on this plot of land in view of future construction plans.

Given the applicant company's failure to confirm that it had indeed tried to correct the indicated shortcomings, having in mind the Court's subsidiary role, and given that the applicant company had the opportunity to freely advance any necessary arguments in defence of its position before the national courts, the Court accepts the domestic courts' conclusion that the failure to comply with the shortcomings indicated in the decision of 6 July 2000 had lawfully resulted in the dismantling of the petrol station giving its hazardous nature.

It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Other complaints

The second applicant complained that the petrol filling station had been dismantled unlawfully, in breach of Article 1 of Protocol No. 1. The applicants also complained under Article 6 of the Convention that the court proceedings in their case had been unfair and the courts had not been independent and impartial as they had demonstrated an arbitrary and unreasonable approach to the facts of the case and their legal assessment.

Having considered the applicants' submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips	Mark Villiger
Deputy Registrar	President