SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 62608/00
by AGROTEHSERVIS
against Ukraine

The European Court of Human Rights (Second Section), sitting on 19 October 2004 as a Chamber composed of:

 Mr J.-P. Costa, *President*,
 Mr L. Loucaides,
 Mr C. Bîrsan,
 Mr K. Jungwiert,
 Mr V. Butkevych,
 Mrs W. Thomassen,
 Mrs A. Mularoni, *judges*,
and Mr T.L. Early, *Deputy* *Section Registrar*,

Having regard to the above application lodged on 30 June 2000,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

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

Having regard to the third party comments submitted on behalf of the Republic of Latvia,

Having deliberated, decides as follows:

THE FACTS

The applicant company, Agrotehservis, is a Latvian-Ukrainian joint venture based in Riga, with legal personality under Latvian law. It was represented before the Court by Mr A. Sidko, its president.

A.  The circumstances of the case

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

1.  Brief summary of the facts

In 1996 the applicant company (hereinafter “the applicant”) instituted proceedings against the Kherson Refinery for failure to honour its contractual obligations. These proceedings resulted in a judgment on 10 April 1998 favourable to the applicant. In 1998-1999, the General Prosecutor's Office lodged several extraordinary appeals, which resulted in the quashing of that judgment in January 2000. Several months later the majority share in the Refinery was bought by a Kazakh company.

In 2002, following changes in legislation, the court decision in the applicant's favour was reinstated by the Supreme Court of Ukraine. Since then the applicant has been unsuccessfully seeking to have the decision enforced and amended.

In 2002-2003 the decision in the applicant's favour was twice challenged in the course of review proceedings initiated by the defendant. The final outcome of both proceedings was favourable to the applicant.

The decision in the applicant's favour remains unenforced.

2.  Detailed summary

(a)  Origin of the dispute and original court proceedings

On 13 May 1992, under the intergovernmental agreement of 21 April 1992 between the Republic of Latvia and Ukraine, the applicant concluded a contract with the Kherson Refinery, which was later transformed into the “Khersonnaftopererobka” Joint-Stock Company (hereinafter – “the Refinery”). Under the contract the applicant was to supply oil to the Refinery and the latter had to provide it with oil products in return.

On 10 December 1996 the applicant lodged a claim with the Highest Arbitration Court of Ukraine (*Вищий арбітражний суд України*, hereinafter – “the HAC”) against the Refinery for failure to honour the contract.

On 7 February 1997 the HAC rejected the applicant's claim as time-barred. The applicant did not appeal against this decision.

On 2 September 1997 the panel of the Highest Arbitration Court for the review of judgments, orders and decisions (*судова колегія з перегляду рішень, ухвал, постанов Вищого арбітражного суду України*, hereinafter – “the Review Panel”) reviewed the decision of 7 February 1997 on its own motion. The latter decision was quashed and the case was remitted for a fresh consideration.

On 9 October 1997 the HAC rejected the applicant's claim as time-barred.

On 26 November 1997 the applicant appealed against this decision under the supervisory review procedure to the Review Panel. On 30 January 1998, the Panel quashed the decision of 9 October 1997 and remitted the case for a fresh consideration.

On 10 April 1998 the HAC found for the applicant. The court established that in June 1992 the applicant had supplied 60,000 tonnes of oil to the defendant and was to receive 17,852 tonnes of oil products from the defendant in return. As the oil products had not been supplied, the HAC awarded them to the applicant. The court also awarded the applicant UAH 10,000 in legal costs.

In August 1998 the applicant lodged a claim with the HAC to change the manner of enforcement of the judgment of 10 April 1998. On 26 August 1998 the court allowed the claim and ordered the Refinery to pay the applicant UAH 7,011,186[[1]](#footnote-1) in lieu of the 17,852 tonnes of oil products.

(b)  Extraordinary review proceedings

In April 1998 the director of the Refinery and the head of local State administration wrote letters to Mr V. Pustovoytenko, the then Prime Minister of Ukraine, asking him to protect the interests of the State enterprise and to give instructions for quashing the judgment of 10 April 1998.

On 2 June 1998 the General Prosecutor's Office of Ukraine (*Генеральна Прокуратура України*, hereinafter - “the GPO”) lodged an appeal for supervisory review with the Review Panel of the HAC seeking to quash the judgment of 10 April 1998. The GPO maintained that the applicant had lodged its original claim outside the time-limit and had not paid a court fee. It further maintained that the HAC had not taken certain documents into account.

On 17 July 1998 the Review Panel rejected the appeal as unsubstantiated.

On 31 August 1998 the GPO lodged an appeal for supervisory review with the Presidium of the HAC (*президія Вищого арбітражного суду України*) to quash the judgment of 10 April 1998 given in the applicant's favour. The GPO maintained that there was insufficient evidence that the applicant was the owner of the oil which had been supplied to the Refinery in 1992 and that the HAC had wrongly decided that the original claim was not time-barred.

On 9 October 1998 Mr O. Tkachenko, the then Speaker of the Ukrainian Parliament (*Verkhovna Rada*), wrote to Mr D. Prityka, the President of the HAC, asking him to intervene to protect the “lawful claims and rights” of the Refinery.

On 26 November 1998 the Presidium of the HAC ordered a forensic examination in the framework of the supervisory review proceedings.

On 30 December 1998 the experts of the Kiev Scientific and Research Institute of Forensic Examination gave their opinion, confirming the applicant's ownership of the oil supplied to the Refinery in 1992.

On 6 January 1999 (11 January – according to the Government) the Presidium of the HAC rejected the GPO's appeal as unsubstantiated and upheld the previous decisions of the HAC in the case.

The same day the Presidium of the HAC made a further ruling (*окрема ухвала*), informing the Cabinet of Ministers about the violation of legislation by the Refinery and the unsatisfactory work of the regional control and revision department (*контрольно-ревізійне управління*).

On 18 May 1999 the GPO lodged an appeal with the HAC for a review of the case in the light of newly discovered circumstances. The GPO maintained in particular that, at the time of the original proceedings, the courts had been unaware of the results of a forensic examination of 6 May 1999, and therefore the case should be reviewed.

On 15 June 1999 the HAC rejected this appeal as unsubstantiated. The court noted that the latest forensic examination confirmed the conclusions of the court in its decision of 10 April 1998 and were mentioned in the court's decision of 6 January 1999.

On 26 August 1999 the GPO lodged an appeal for review in the light of newly discovered circumstances with the Review Panel of the HAC. The GPO submitted the same arguments as it had in its appeal of 18 May 1999.

On 4 October 1999 the Review Panel of the HAC rejected the appeal as unsubstantiated and upheld the decision of 15 June 1999.

On 21 December 1999 the GPO lodged an appeal for supervisory review with the Presidium of the HAC to quash the judgment of 10 April 1998 in the applicant's favour. In support of its appeal, the GPO maintained that the court had erroneously rejected their previous appeals and that there was insufficient evidence to establish ownership of the oil by the applicant.

On 28 January 2000 the Presidium of the HAC allowed the extraordinary appeal and quashed the judgment of 10 April 1998 in the applicant's favour. The court found that the applicant had not provided sufficient evidence of its ownership of the 60,000 tonnes of oil supplied to the Refinery in 1992, and that its original claim was time-barred.

In January 2000 the applicant requested the General Prosecutor's Officeof the Republic of Latvia (*Latvijas Republikas* *Ģenerālprokuratūra,* hereinafter the “GPOL”) to institute criminal proceedings for the misappropriation of its property (oil and money) in Ukraine. On 28 February 2000, the GPOL instituted criminal proceedings for the large-scale misappropriation of property.

On 13 March 2000 the GPOL sent letters to the HAC and the GPO of Ukraine informing them that, in the course of the above criminal proceedings, the investigation had disclosed evidence that had not been available to the Ukrainian courts at the time of the supervisory review proceedings. The Latvian GPO requested the President of the HAC to examine the said evidence and to consider the possibility of reviewing the decision of 28 January 2000 at the Plenary of the HAC (*пленум Вищого арбітражного суду України*).

On 17 March 2000 the applicant also requested the President of the HAC to review the decision of 28 January 2000 at the Plenary of the HAC. By letter of 26 July 2000, the Acting President of the HAC rejected the applicant's request for lack of grounds.

On 20 November 2000 the GPOL requested legal assistance from the GPO of Ukraine and asked, in particular, that the Refinery be informed that it was the recognised civil defendant in the criminal case on the misappropriation of the applicant's oil.

On 11 December 2000 the GPOL informed the HAC of Ukraine of the developments in the criminal proceedings, and repeatedly asked it to consider the possibility of reviewing its judgment of 28 January 2000.

On 28 December 2000 the GPOL informed the GPO of Ukraine about the findings in the criminal proceedings, and requested the GPO of Ukraine to lodge an appeal for supervisory review with the Plenary of the HAC.

(c)  Revival of the judgment in the applicant's favour

In June 2001 the procedural legislation changed, allowing appeals in cassation to the Supreme Court of Ukraine (*Верховний Суд України*) against the decisions of the HAC (see the relevant domestic law below).

On 28 September 2001 (26 October – according to the Government) the applicant lodged an appeal under the new cassation procedure with the Supreme Court of Ukraine against the judgment of 28 January 2000.

On 30 October 2001 the applicant further requested the Supreme Court of Ukraine to institute criminal proceedings against the Refinery and the GPO for their role in the challenge to and quashing of the judgment of 10 April 1998 in its favour. The applicant based its request on the findings of the GPOL.

On 4 December 2001 the Supreme Court of Ukraine started cassation proceedings in the applicant's case.

On 14 December 2001 the Ministry of Foreign Affairs of the Republic of Latvia wrote to the Ministry of Foreign Affairs of Ukraine expressing its concern that the dispute between the applicant and the Refinery was still unresolved, and expressing the hope that the dispute would be resolved in an unbiased manner.

On 21 January 2002 the Supreme Court of Ukraine quashed the decision of the Presidium of the HAC of 28 January 2000 and confirmed the validity of the judgment of 10 April 1998 given in the applicant's favour. The court established that the prosecutors had not been competent to lodge the extraordinary appeals in the interests of the Refinery, and quashed all the decisions of the HAC given under the extraordinary review proceedings in 1998-2000.

According to the documents submitted by the applicant, on 9 February 2002 the Government of Kazakhstan wrote to the Prime Minister of Ukraine with the information that the “Kazakhoil” State Company had bought 60 % of the Refinery's shares in 2000. At that time the Refinery was not known to have had any outstanding debt to the applicant, and therefore they were surprised by the decision of the Supreme Court of 21 January 2002, which would have a negative impact on the economic activities of the Refinery and the other economic entities involved. The Kazakh Government expressed the hope of “a possibility to provide assistance in obtaining a review by the Supreme Court of Ukraine of this decision in accordance with the procedure established by Ukrainian legislation”.

In reply to this letter the Prime Minister of Ukraine wrote as follows:

“I have closely studied your letter, in which you express concern about the situation in the Khersonneftepererabotka JSC caused by the decision of the Supreme Court of Ukraine, ordering it to pay 7 million hryvnas to Agrotehservis JV (the Republic of Latvia) in compensation for oil that was allegedly supplied in 1992 ...

Upon instructions of the Cabinet of Ministers, the General Prosecutor's Office and the Highest Commercial Court of Ukraine[[2]](#footnote-2) have examined the case-file materials. In the course of this examination new circumstances have been established that are the basis for a review of the decision of the Supreme Court of Ukraine.

In this context we believe that the Khersonneftepererabotka JSC should request the Presidium of the Supreme Court of Ukraine to review this case and to suspend enforcement of the decision of the Supreme Court of Ukraine until the additional forensic examination is conducted.

The Government of Ukraine is ready to assist in the objective consideration of the impugned situation and confirm its commitment to the agreements ... in the sphere of greater economic co-operation, including oil and gas issues.

A concrete example of such relations is the purchase of 60% of the shares in the Kherson Refinery by the “Kazakhoil” national company ...”

On 31 May 2002 the GPO of Ukraine informed the applicant that the decision of the Supreme Court of Ukraine of 21 January 2002 was not a basis for instituting criminal proceedings.

(d)  Re-opening of the case under the transitional provisions of the Code of Commercial Procedure

On 14 June 2002 the Refinery lodged an appeal against the judgment of the HAC of 10 April 1998 with the Odessa Appellate Commercial Court. This appeal was based on the transitional provisions of the Code of Commercial Procedure that, according to the Government, envisaged that the decisions given at first instance by the HAC, if they had not been contested before, could be appealed under the new appellate and cassation procedure (see the relevant domestic law below).

On 23 July 2002 the Odessa Appellate Commercial Court started proceedings in the case. On 7 October 2002 it suspended the proceedings and ordered an additional forensic examination of the book-keeping documents, which it received on 18 March 2003. The “appellate” proceedings were resumed and, on 31 March 2003, terminated with the court finding that the Refinery's appeal was time-barred by Article 93 of the Code of Commercial Procedure.

On 24 April 2003 the Refinery lodged a cassation appeal with the Highest Commercial Court (hereinafter – the HCC) of Ukraine (*Вищий Господарський суд України*), which it withdrew on 15 May 2003, thus terminating the proceedings.

(e)  Review in the light of newly discovered circumstances

On 5 May 2003 the Kherson Regional Commercial Court granted the defendant company leave for a review of the decision of 10 April 1998 in the light of newly discovered circumstances.

On 21 May 2003 the Kherson Regional Commercial Court quashed the judgment of 10 April 1998 because of newly discovered circumstances and found against the applicant. At the same time the court rejected the Refinery's request for the termination of the enforcement proceedings in the case.

On 30 May 2003 the applicant appealed against this decision to the Zaporizhzhya Appellate Commercial Court.

On 3 June 2003 the applicant further complained to the HCC about the judge of the Kherson Regional Commercial Court who had reviewed its case.

On 28 July 2003 the Zaporizhzhya Appellate Commercial Court quashed the decision of 21 May 2003 and found for the applicant. The court also ordered a new writ of execution to be issued to the applicant pursuant to the ruling of the HAC of 26 August 1998, ordering the payment of money in lieu of oil products.

On 8 August 2003 the applicant requested the GPO to institute criminal proceedings against the judge of the Kherson Regional Commercial Court regarding his decision of 21 May 2003, as well as decisions on 13, 14, and 15 August 2003 with respect to enforcement proceedings (see below under sub-heading (f)).

On 19 August 2003 the Refinery lodged a cassation appeal with the HCC against the decision of the appellate court of 28 July 2003, which the HCC upheld on 30 October 2003.

On 24 November 2003 the Refinery lodged a cassation appeal[[3]](#footnote-3) with the Supreme Court of Ukraine against this decision of the HCC, but on 22 January 2004 a panel of three judges of the Supreme Court of Ukraine refused leave to appeal.

(f)  Enforcement proceedings

On 1 February 2002 the applicant requested the HCC to change the manner of execution of the decision of 21 January 2001 and to award it UAH 16,548,400[[4]](#footnote-4) in lieu of the oil products instead of the UAH 7,011,186[[5]](#footnote-5), awarded by the judgment of 10 April 1998 and the ruling of 26 August 1998. The HCC forwarded the applicant's request to the Kherson Regional Commercial Court.

On 29 March 2002 the Kherson Regional Commercial Court issued a duplicate of the execution writ for UAH 7,011,186.

On 5 April 2002 the Refinery appealed. Consequently, the Kherson Regional Commercial Court suspended the proceedings on 9 April 2002. The applicant did not appeal against the suspension, but wrote to the President of the Supreme Court of Ukraine complaining about its unlawfulness. On 16 April 2002 the Odessa Appellate Commercial Court refused to consider the Refinery's appeal as the issue of a duplicate writ of execution was not subject to appeal.

On 25 April 2002 the Embassy of the Republic of Latvia wrote a letter to the President of the Supreme Court of Ukraine, asking him to explain the position of the court on the suspension of the proceedings on 9 April 2002 by the Kherson Regional Commercial Court.

On 8 May 2002 the Kherson Regional Commercial Court resumed the proceedings regarding the applicant's claim to change the manner of execution of the judgment of 10 April 1998 in its favour.

On 13 May 2002 the Refinery lodged another appeal against the ruling of 29 March 2002 on the ground that the original writ of execution had been submitted by the applicant for execution outside the statutory time-limit.

On 20 May 2002 the Kherson Regional Commercial Court rejected the applicant's claim for a change in the manner of execution, because on 26 August 1998 the HAC had already made the change in its judgment of 10 April 1998. Although this judgment was subsequently quashed, it was reinstated on 21 January 2002 by the Supreme Court of Ukraine. The court further decided that, given the change in the manner of execution from payment in kind to payment in money, it could not again be changed to a pecuniary payment of a different amount. The court concluded that the applicant's claim was in fact a request to increase the amount awarded by the final judgment. The applicant did not appeal.

On 23 May 2002 the applicant requested the Komsomolsky District Bailiffs' Service (*Державна виконавча служба Комсомольського районного управління юстиції м. Херсона*) to start enforcement proceedings.

On 27 May 2002 the Odessa Appellate Commercial Court allowed the appeal of 13 May 2002 by the Refinery against the decision of 29 March 2002.

By letter of 1 June 2002, the Embassy of Kazakhstan in Ukraine wrote to the President of the Odessa Appellate Commercial Court as follows:

“... after the decision of the Supreme Court of Ukraine of 21 January 2002, the Khersonneftepererabotka JSC finds itself in a difficult situation without any possibility to challenge the above decision of the Supreme Court of Ukraine or to protect its rights and legitimate interests. The enterprise is under the threat of the forced execution of a writ of payment for UAH 7,011,186 in favour of Agrotehservis JV that would significantly complicate the economic activities of the Khersonneftepererabotka JSC ...

These court proceedings have attracted the attention of the heads of Governments of the two countries ... In a letter from the Prime Minister of Ukraine, Mr A. Pustovoytenko, to the Prime Minister of the Republic of Kazakhstan, Mr I. Tasmagambetov, the Government of Ukraine expressed its readiness to assist the objective examination of the current situation ...

With a view to the above, and given that the appeal of Khersonnneftepererabotka JSC will be examined by the Odessa Appellate Commercial Court that you preside, we would request your assistance in an objective examination of this case in order to prevent the unlawful withdrawal of monetary funds from the Refinery.”

On 6 June 2002 the Odessa Appellate Commercial Court quashed the decision of 29 March 2002 regarding the duplicate writ, because the applicant had failed to request a renewal of the time-limit fixed for issuing a writ of execution. It remitted the case for a fresh consideration. It also declared the duplicate writ null and void.

On 14 June 2002 the applicant requested the Kherson Regional Commercial Court to return the manner of execution to payment in kind, and to issue a writ of execution for the 17,582 tonnes of oil products, together with a seizure order. On 28 June 2002 the applicant informed the court that it had no intention of enforcing the writ for UAH 7,011,186, but would use it as the basis for a new compensation claim for the loss caused by inflation.

On 17 June 2002 the applicant requested the President of the Supreme Court to institute criminal proceedings against the Refinery and the lower courts for non-enforcement of the judgment in its favour.

On 1 July 2002 the Kherson Regional Commercial Court accepted the applicant's decision not to request a new duplicate of the writ of execution, and terminated proceedings in this part. The court further rejected the applicant's claim to reverse the manner of execution to payment in kind, because there were no circumstances calling for such a change. The applicant did not appeal against this ruling.

On 12 July 2002 the enforcement proceedings were terminated following a decision of the Odessa Appellate Commercial Court of 6 June 2002.

On 18 July 2002 the applicant complained to the Minister of Justice of Ukraine about the non-enforcement of the judgment in its favour by payment in kind (oil products).

On 24 July 2002 the Embassy of the Republic of Latvia in Ukraine wrote a letter to the Minister of Justice of Ukraine, asking him to comment on the actions of the courts which had led to the non-enforcement of the judgment in favour of the applicant.

On 27 July 2002 the Ministry of Justice of the Republic of Latvia asked the Ministry of Justice of Ukraine for information about the enforcement proceedings in the applicant's case.

On 23 October 2003 the Prime Minister of the Republic of Latvia wrote a letter to the Prime Minister of Ukraine, expressing his hope for the support of the Ukrainian Government in the enforcement of the judgment in the applicant's favour without further delay.

On 21 January 2003 the applicant requested the Head of the State Judicial Administration to institute disciplinary proceedings against the judges of the Odessa Appellate Commercial Court and the HCC for violations of the applicable procedural legislation. The next day the applicant lodged a similar request with the Highest Council of Justice.

On 7 February 2003 the applicant complained to the President of the Supreme Court of Ukraine about the non-enforcement of that court's decision of 21 January 2002 and the need to take measures against judges of the lower courts for their unlawful actions.

On 25 February 2003 the applicant lodged a claim with the Local Court of the Komsomolsky District of Kherson (hereinafter the Komsomolsky Local Court), requesting it to force the defendant to execute the decision of the Supreme Court of Ukraine, and to transfer to it the oil products awarded by the judgment of 10 April 1998. On 28 March 2003 the Komsomolsky Local Court held that it lacked the requisite jurisdiction.

On 24 March 2003 the applicant requested the Supreme Court to inform it of the reasons for the alleged violations of its rights guaranteed by the Constitution of Ukraine and the European Convention on Human Rights. By letter of 3 April 2003, the Supreme Court of Ukraine informed the applicant that it was not competent to consider such complaints, its jurisdiction in commercial cases being limited to the consideration of appeals against the HAC's decisions.

On 31 March 2003 the applicant requested the HCC to order the first instance court to issue a writ of execution for the decision of 10 April 1998 in respect of the 17,852 tonnes of oil products. This request was transferred to the Kherson Regional Commercial Court which informed the applicant that, by law, the court could not issue a new writ of execution but only a copy of the previous one (i.e. for payment in money).

On 13 May 2003 the Kherson Regional Commercial Court started the execution proceedings. On 14 May 2003 it rejected the applicant's claim for a writ of execution for oil products and the next day, on 15 May 2003, it issued a writ of execution for UAH 7,011,186.

On 21 May 2003 the applicant requested the HCC to order any local commercial court to issue a writ of execution for payment in kind. It repeated this request on 18 June and 16 July 2003, as well as a request for an order to seize the corresponding quantity of oil products.

On 5 August 2003 the Kherson Regional Commercial Court issued a new writ of execution for the payment in money.

On 29 August 2003 the Komsomolsky District Bailiffs' Service returned this last writ of execution as it lacked necessary data.

On 11 September 2003 the applicant repeated its request to the HCC for a writ of execution in kind.

On 12 September 2003 the Kherson Regional Commercial Court amended its decision of 5 August 2003, issuing a new writ of execution for payment in money on 15 September 2003.

On 25 October 2003 the applicant lodged a claim with the Kiev Commercial Court against the State of Ukraine seeking UAH 1,276,285,726 in compensation for material and moral damage in its case. On 11 November 2003, the court rejected the claim for lack of jurisdiction

On 24 December 2003 the Bailiffs' Service started enforcement proceedings on the basis of the writ of execution of 15 September 2003.

On 25 December 2003 the Refinery challenged the enforcement proceedings in the Komsomolsky Local Court and requested the Bailiffs' Service to suspend them. The latter refused this request, whereupon the Refinery lodged another claim with the same court against the head of the Bailiffs' Service.

On 29 December 2003 the court found for the Refinery and ordered the suspension of the enforcement proceedings.

On 31 December 2003 the Bailiffs' Service followed this order, informing the applicant of the suspension. However, on 15 January 2004 it appealed against the decision of 29 December 2003.

On 16 January 2004 the Bailiffs' Service ordered the seizure of the Refinery's funds. The next day this order was cancelled by the Komsomolsky Local Court. The court also prohibited any enforcement action until the court proceedings against the head of the Bailiffs' Service were completed.

On 19 January 2004 the Refinery lodged a complaint with the Kherson Regional Commercial Court against the Bailiff's Service with regard to the enforcement proceedings started on 24 December 2003. On 10 February 2003, the court rejected this claim as having been submitted too late.

On 27 January 2004 the Komsomolsky Local Court declared the decision of the Bailiffs' Service, to re-open the enforcement proceedings, null and void on the ground that the name of the applicant in the writ of execution did not correspond to its registered company name.

On 2 February 2004 the applicant requested the President of the HCC to cancel the writ of execution issued on 15 September 2003 on the ground that it was wrongly issued in pursuance of the ruling of 26 August 1998 (payment in money) instead of the judgment of 10 April 1998 (payment in kind). It further requested the HCC to inform the law-enforcement bodies about the allegedly unlawful actions of the judge of the Kherson Regional Commercial Court.

On 27 February 2004 the Komsomolsky District Bailiffs' Service lodged an appeal against the decision of 27 January 2004 with the Kherson Regional Court of Appeal. Those proceedings are still pending.

On 25 March 2004 the Bailiffs' Service ordered the termination of the enforcement proceedings on the basis of the court's decision of 27 January 2004. The order also referred to information about the striking out of the applicant from the Companies Register of the Republic of Latvia. However, on 5 April 2004 a certificate was issued maintaining the applicant in that Register.

On 7 April 2004 the Kherson Regional Court of Appeal quashed the decision of the Komsomolsky Local Court of 29 December 2003 and discontinued the proceedings because the dispute fell within the competence of the commercial courts.

On 23 April 2004 the applicant lodged a claim with the Kherson Regional Commercial Court against the Komsomolsky District Bailiffs' Service for the allegedly improper handling of the enforcement proceedings, and seeking UAH 7,011,186 in compensation from the Bailiffs' Service.

The same day the applicant lodged a complaint against the decision of the Bailiffs' Service on 25 March 2004.

On 27 April 2004 the Bailiffs' Service received information from the Latvian authorities that the applicant had not been struck out of the Latvian Companies Register.

On 28 April 2004 the Kherson Regional Bailiffs' Service renewed the enforcement proceedings in the applicant's case.

On 6 May 2004 the Bailiffs' Service suspended the enforcement proceedings again as its appeal against the decision of 27 January 2004 had not yet been examined by the Kherson Regional Court of Appeal.

On 28 May 2004 the Kherson Regional Commercial Court allowed the applicant's claim of 23 April 2004 against the Bailiffs' Service and initiated proceedings in the case. The Refinery, being the third party in the proceedings, lodged an appeal with the Zaporizhzhya Appellate Commercial Court.

On 16 June 2004 the Kherson Regional Commercial Court suspended proceedings in the applicant's case against the Bailiffs' Service in view of the Refinery's appeal. On 29 June 2004 the Zaporizhzhya Appellate Commercial Court rejected that appeal on the ground that the ruling of 28 May 2004 was not subject to appeal under domestic law.

On 13 July 2004 the Kherson Regional Commercial Court renewed the proceedings in the applicant's case against the Bailiffs' Service.

(g)  Bankruptcy proceedings

In September 1999, the judgment in its favour having remained unenforced, the applicant brought bankruptcy proceedings against the Refinery in the Kherson Regional Arbitration Court.On 7 September 1999, the Kherson Regional Arbitration Court initiated such proceedings. On 3 November and 10 December 1999 the court adjourned the case upon the request of the debtor in order to determine the Refinery's solvency. On 18 February 2000 the bankruptcy proceedings were resumed. On 21 March 2000 the court terminated the bankruptcy proceedings for lack of grounds, the judgment in favour of the applicant having been quashed on 28 January 2000.

On 8 February and 15 March 2002, after the revival of the judgment in the applicant's favour by the Supreme Court of Ukraine, the applicant requested the HCC to quash the decision of the Kherson Regional Arbitration Court of 21 March 2000 in the light of newly discovered circumstances, and to re-open the bankruptcy proceedings against the Refinery.

On 22 March 2002 the Kherson Regional Commercial Court re-opened the bankruptcy proceedings against the Refinery.

On 17 April 2002 the Kherson Regional Commercial Court quashed the decision of 21 March 2000 and terminated the bankruptcy proceedings as being premature because, at that time, no enforcement proceedings were pending as the applicant had not yet presented its duplicate execution writ, issued on 29 March 2002, for enforcement.

In 2002-2003 the applicant filed numerous complaints with different State institutions in Ukraine to challenge what it considered to be the continuous violation of its rights, and tried to bring criminal proceedings against the competent authorities.

(h)  Other events

On 17 July 2003 the Latvian Companies Registrar issued a certificate stating that the powers of the president of the applicant company had expired in April 1995. On this basis, the representative of the Refinery attempted to institute criminal proceedings against that person.

On 2 September 2003 the Companies Registrar informed the applicant that the certificate reflected a technical mistake in the Register's database and issued a new certificate confirming the powers of the president of the applicant to act as its representative.

On 30 October 2003 the applicant requested the GPO to institute criminal proceedings against the Refinery, the former Prime Minster of Ukraine, and the Kherson Regional Prosecutor's Office.

B.  Relevant domestic law and practice

*1.  Code of Arbitration Procedure of 6 November 1991 (as worded when the application was lodged)*

Article 91

“The lawfulness and merits of a judgment, order or decision of an arbitration court ... may be reconsidered under the supervisory review procedure on an application by a party or on an appeal by a prosecutor or his deputy, in accordance with this Code and other Ukrainian laws.

An application by a party for the review of a judgment, order or decision under the supervisory review procedure shall be examined by the President of the Arbitration Court of the Autonomous Republic of Crimea or his deputy, by the presidents of the regional arbitration courts, the Kiev City Arbitration Court or the Sebastopol City Arbitration Court or their deputies, or by a panel of the Highest Arbitration Court for the review of judgments, orders and decisions (hereinafter –the panel).

The following persons are empowered to lodge an appeal for supervisory review:

The Prosecutor General and his deputies ...;

The Prosecutor of the Autonomous Republic of Crimea, the prosecutor of a region and of the cities of Kiev and Sebastopol and their deputies ...”

Article 97

“The President of the Highest Arbitration Court, the Prosecutor General or his deputies shall be entitled to lodge an appeal with the Presidium of the Highest Arbitration Court, seeking the review of a judgment of the Panel of the Highest Arbitration Court in a commercial case. ...”

Article 112

“The arbitration court may review a judgment, order or decision given by it in the light of newly discovered circumstances of significant importance for the case that were not and could not have been known to the applicant.”

*2.  Code of Commercial Procedure of 6 November 1991 (former Code of Arbitration Procedure as renamed and amended on 21 June 2001)*

Article 85 of the Code provided that the decision of the first instance court came into force 10 days after its adoption, unless it was appealed against. In the latter case, the decision came into force after its review by the appellate court.

Article 93 of the Code provided that an appeal against the decision of the first instance court could be lodged with the appellate court within 10 days of the date when the decision was pronounced or notified in writing. Extension of the time-limit for belated appeals was permitted only within three months of the decision of the first instance court.

Article 114 of the Code provided that decisions given under the review procedure in the light of newly discovered circumstances could be appealed against to the higher courts under the general rules.

*3.  Law of 21 June 2001 introducing amendments to the Code of Arbitration Procedure*

This Law introduced amendments and renamed the Code of Arbitration Procedure as the Code of Commercial Procedure with effect from 5 July 2001.

The Final and Transitional Provisions of the Law provide:

“2. Cases that belong to the competence of the local commercial courts, initiated prior to the entry into force of this Law, shall be considered by these courts, acting at first instance, in accordance with provisions of the Code of Commercial Procedure of Ukraine.

3. Cases that according to this Law belong to the competence of the local commercial courts, initiated by the Highest Commercial Court of Ukraine prior to the entry into force of this Law, shall be transferred to the appropriate local commercial court for examination in accordance with the provisions of the Code of Commercial Procedure of Ukraine for consideration at first instance.

4. A judgment in a case which has not been appealed against to the president of the arbitration court can be appealed against to the commercial courts of the appellate or cassation instance in accordance with the procedure established by the Code of Commercial Procedure of Ukraine...

9. Decisions of the panel of the Highest Arbitration Court, decisions of the Presidium of the Highest Arbitration Court, not appealed against prior to the entry into force of this Law, and decisions of the Plenary of the Highest Arbitration Court are final and can be appealed against to the Supreme Court of Ukraine on the grounds and in accordance with the procedure laid down in the Code of Commercial Procedure.”

*4.  Law of 24 March 1998 “on the State Bailiffs' Service”*

Article 11 of the Law provides for the liability of bailiffs for any inadequate performance of their duties, as well as compensation for damage caused by a bailiff when enforcing a judgment. Under Article 13 of the Law, acts and omissions of the bailiff can be challenged before a superior official or the courts.

5.  Law of 21 April 1999 “on Enforcement Proceedings”

Article 33 of the Law provides that, in circumstances that hinder or prevent the enforcement of a judgment, the bailiff and the parties are entitled to request the court which issued the writ of execution to change the manner of enforcement.

COMPLAINTS

The applicant complained, under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, about the quashing of the final and binding judgment given in its favour. It alleged a lack of impartiality on the part of the domestic courts. Furthermore, the applicant complained about the re-opening of the case after the judgment in its favour had been revived, as well as the non-enforcement of that judgment.

THE LAW

A.  Objection of the Government as to the applicant's victim status

The Government submitted that the applicant could no longer claim to be a victim of a violation of the Convention with respect to its original complaint about the quashing of the judgment in its favour. The Government referred to the fact that, on 21 January 2002, the Supreme Court of Ukraine had revived the judgment, having found that the appeals of the General Prosecutor's Office for supervisory review were unlawful. The Government maintained that, by reinstating the applicant in its rights, the State authorities had offered it “redress” for any violation. The Government further maintained that “redress” in the applicant's case should be interpreted as the correction of the situation, unrelated to the pecuniary compensation.

The applicant contested this argument.

The Court recalls that a decision or measure favourable to an applicant is not, in principle, sufficient to deprive the individual of his or her status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Amuur v. France*, judgment of 25 June 1995, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36; *Dalban v. Romania*, judgment of 28 September 1999, *Reports* 1999-VI, § 44).

Turning to the facts of the present case, the Court notes that the quashing of the judgment given in the applicant's favour was found unlawful by the Supreme Court on the ground that the GPO had exceeded its competence by interfering in the property dispute between two private companies. The Court accepts that, in the instant case, the State authorities have acknowledged the misuse of the re-opening proceedings and reinstated the applicant in its title to the amount awarded, which means that the applicant's substantive rights have been recognised as a matter of domestic law. However, the Court is not persuaded that the applicant can be regarded as having been afforded adequate redress. On this point it observes that the domestic courts did not order payment of any compensation for the pecuniary or non-pecuniary damage sustained by the applicant as a result of the alleged violations.

The Court concludes that the applicant may still claim to be a “victim” within the meaning of Article 34 of the Convention. Accordingly, the Court dismisses the Government' objection.

B.  Admissibility of the applicant's complaints

1.  The applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 that the final and binding judgment of 10 April 1998 in its favour had been quashed following the supervisory review proceedings. Article 6 § 1 provides as relevant:

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

Article 1 of Protocol No. 1 provides as follows:

“Every ... 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 Government maintained that the proceedings in the applicant's case had ended in the applicant's favour by the decision of the Supreme Court of Ukraine. Moreover, the supervisory review procedure had been repealed in June 2001 following changes in Ukrainian legislation.

The applicant replied that the numerous appeals for review lodged by the GPO and the quashing of the judgment in its favour had violated its rights.

The Court considers, in the light of the parties' submissions, that this complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2.  The applicant next complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 that, despite the revival of the judgment in its favour by the Supreme Court of Ukraine, this judgment has not been enforced for a long time now.

The Government maintained that if the judgment has not yet been executed, it is the applicant's own fault for attempting to obtain an increase in the amount awarded to him in 1998 due to the increase in the price of oil products. It should have accepted the original award and then lodged a new claim for compensation.

The applicant alleged that the State authorities had committed deliberate, unlawful actions. It disputed the conclusions of the domestic courts regarding its claims for the recalculation of the award and the reimbursement of court fees. The applicant maintained that, after its requests for an increase in the award had been rejected, it had applied for the enforcement of the judgment, without success.

The Court notes that, after the revival of the judgment in the applicant's favour, it has remained unenforced for more than two years. However, the applicant has contributed to the delays in the enforcement proceedings seen as a whole by constantly seeking the revaluation of the original award of money. It has unsuccessfully attempted to reconvert the award into payment in kind (oil products) or to have the award substantially increased. Such attempts were indirect substantive appeals outside the scope of the enforcement of the original binding decision. Consequently, the effective enforcement of that decision began less than a year ago, on 24 December 2003, after the applicant had presented the correct writ of execution to the Bailiffs' Service. These proceedings are still pending.

The Court observes that the debtor in the present case is not a State authority but a private company. Thus the State's responsibility in the present case extends no further then the involvement of State bodies in the enforcement procedures (see *Shestakov v. Russia,* no. 48757/99, decision of 18 June 2002). The Court notes that Ukrainian legislation provides the possibility to sue the Bailiffs' Service for any inadequate performance of their duties, and to claim compensation accordingly. In the present case, the applicant lodged a complaint against the Bailiffs' Service with the Kherson Regional Commercial Court in April 2004. These proceedings are also still pending.

The applicant's complaint is therefore premature. Therefore the question arises whether the applicant may be said to have exhausted the domestic remedies available to him under Ukrainian law. However, this question does not require determination, as the Court finds that the delay of less than a year as regards this aspect of the case has not been excessive to date. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

3.  The applicant further complained under Article 6 § 1 of the Convention that the re-opening of the proceedings in its case, on two occasions after the decision of the highest judicial authority in Ukraine, violated the principle of legal certainty, as had the supervisory review proceedings.

The Court notes that after the reinstatement of the judgment in the applicant's favour by the Supreme Court, it was twice challenged in review proceedings initiated by the Refinery. Given the different nature of the two sets of proceedings, the Court will consider them separately.

a. “Appellate” proceedings

The Government maintained that the Supreme Court's decision had not rendered final the original judgment of 10 April 1998, which was thus subject to appeal in accordance with transitional provisions of the Code of Commercial Procedure. The Refinery had not appealed against the judgment at first, believing that the prosecutor would act on its behalf. Once it was realised that the GPO could not appeal, the Refinery was given the possibility to do so. The Government observed that the applicant had also benefited from the transitional provisions of the Code, in successfully seeking the revival of the judgment. Subsequently the proceedings were terminated as soon as the domestic court found that it had re-considered the proceedings by mistake. The Government noted that, given special nature of the former arbitration procedure, where the parties could appeal against a decision of the arbitration court after it had entered into force but within a prescribed time-limit, such an appeal had been found by the Court to be an effective remedy (see *Sovtransavto Holding v. Ukraine* (dec.), no. 48553/99, 27 September 2001). Hence, the transitional provisions provided an ordinary appeal remedy, in contrast to the transitional provisions of the Code of Civil Procedure, where any decision which had become binding, however long ago, could be appealed against to the Supreme Court of Ukraine within three months after the new cassation procedure had been established (see *Prystavska v. Ukraine* (dec.), no. 21287/02, *Reports* 2002-X).

The applicant maintained that the judgment of the highest judicial authority - the Supreme Court of Ukraine - could not be challenged in the lower courts and, therefore, the “appellate” proceedings conducted by the Odessa Appellate Commercial Court, after the judgment in its favour had been confirmed by the former, amounted to the unlawful re-opening proceedings.

The Court notes that the instant case concerns the transitional provisions of the Code of Commercial Procedure, applied to a case in which the original judgment was given in 1998. The 1998 judgment was not appealed against by the Refinery within the prescribed time-limits and therefore became final. When the Odessa Appellate Commercial Court, which had allowed the appeal, subsequently observed that it was time-barred by Article 93 of the Code of Commercial Procedure, it terminated the proceedings. In the Court's view, this suggests an erroneous application of the legislation in question rather than the extraordinary nature of the proceedings under the transitional provisions of the Code of Commercial Procedure. In the absence of any evidence to the contrary, the Court agrees with the Government that the appeal procedure under these transitional provisions could be regarded as having been a part of ordinary proceedings (see, *mutatis mutandis*, *Vorobyeva v. Ukraine* (dec.), 27517/02, 17 December 2002).

The Court also notes that the domestic court recognised its error in re-examining the applicant's case, and that such re-opening did not affect either the validity of the original judgment in the applicant's favour or the enforcement proceedings in the case.

Consequently, with respect to this “appellate” procedure, the Court considers that the applicant cannot claim to be a victim of a violation of Article 6 § 1, within the meaning of Article 34 of the Convention. It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

b. A review in the light of new circumstances

The applicant also complained that its case had been unlawfully re-opened in the light of purported new circumstances.

The Court notes that, unlike supervisory review proceedings, found on many occasions to be incompatible with the guarantees afforded by Article 6 § 1 of the Convention, the proceedings of which complaint is made involved a re-opening in the light of newly discovered circumstances. The Court notes that the re-opening of cases in which new evidence is discovered, in the absence of any abusive use, does not, as such, run counter to the Convention. Moreover, by way of comparison, it observes that Article 4 of Protocol No. 7 specifically permits a State to correct miscarriages of justice in criminal proceedings. However, the Court recalls that the concept of legal certainty intrinsic to the Convention presupposes respect for the principle of the finality of judgments. This principle implies that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a re-hearing and a fresh decision of the case (see *Ryabykh v. Russia*, no. 52854/99, §§ 51-52, ECHR 2003‑X).

In the present case, the first instance court allowed the claim of the Refinery in the light of newly discovered circumstances and quashed the judgment given in favour of the applicant. However, this decision was itself quashed as unsound by the higher courts, which upheld the validity of the original judgment. The proceedings were concluded by the decision of the Supreme Court of Ukraine on 22 January 2004. Accordingly, it appears from the case-file that these proceedings did not ultimately affect either the validity of the judgment in the applicant's favour or the enforcement proceedings in the case.

Consequently, the Court again considers that the applicant cannot claim to be a victim of a violation of Article 6 § 1, within the meaning of Article 34 of the Convention in respect of these particular proceedings. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

4.  The applicant next complained under Article 6 § 1 of the Convention that the courts were not impartial and independent in the consideration of its case. It submitted, in particular, that in 1998 the representatives of the State had been allowed to interfere in the proceedings. The same happened after the reinstatement of the judgment given in its favour when, in 2002, the Ukrainian and Kazakh authorities allegedly interfered with the course of the proceedings, seeking to dispense the Refinery from the obligation to pay its debts to the applicant.

The Government maintained that several letters to the Prime Minister of Ukraine, as well as the letter of the then Speaker of the Parliament directly to the Highest Arbitration Court in 1998, were written during a period when the latter court consistently confirmed the judgment given in favour of the applicant. Therefore there was no causal link between the alleged interference and the outcome of the proceedings in the case. As to such incidents in 2002, the Government maintained that any allegations about the possible influence of representatives of a foreign State were groundless, since Ukraine is an independent State and the public authorities of other countries had no means to control or influence the decisions of the Ukrainian judges. The Government also noted that all decisions taken were ultimately in the applicant's favour. Finally, the Government submitted that the Latvian Government, which had submitted observations to the Court in the present case, had, on several occasions, made requests to the Ukrainian authorities, including the courts and prosecutors, in the interests of the applicant.

The Government of Latvia expressed the opinion that the possible negative consequences for economic co-operation between Kazakhstan and Ukraine, should the applicant recover its debt from the Refinery, confirmed the interest of the Ukrainian authorities in reaching a decision favourable to the Refinery before the domestic courts. Moreover, the Kazakh Executive had tried to influence the Ukrainian courts, as appeared from the case-file. Finally, they maintained that the courts' behaviour in the present case also confirmed these concerns.

The applicant agreed with the Government of Latvia.

The Court notes that, in the present case since 1998, there were numerous, deplorable attempts by non-judicial authorities to intervene in the court proceedings in the interests of both parties. In view of the importance which the independence of the courts has in a society where the rule of law prevails, the Court cannot but condemn such interference in the strongest terms (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 80, ECHR 2002‑VII). However, the Court observes that the judicial proceedings were ultimately concluded in favour of the applicant. That being so, the applicant cannot claim to be a “victim”, within the meaning of Article 34 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

5.  Finally, the applicant complained, without reference to any Convention provision, that, despite the obvious unlawfulness of the actions of the Ukrainian courts and other State authorities, all its complaints about such actions were rejected and no criminal proceedings were initiated. It alleged that representatives of the Latvian Companies Register were twice bribed in order to provide Ukrainian authorities with falsified information about the applicant's company status.

The Government of Latvia in their submissions also observed that the Ukrainian authorities had fallen short of their obligations under the intergovernmental bilateral agreement of 21 April 1992.

The Government of Ukraine submitted in reply that the bilateral treaty referred to by the Latvian Government was not an issue before this Court and that there were other international mechanisms for the resolution of any dispute arising from the inter-governmental agreement.

The Court, having examined this complaint, finds nothing in the case file which might disclose any appearance of a violation of the Convention. It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* admissible, without prejudging the merits, the applicant's complaints concerning the quashing of the final and binding judgment of 10 April 1998 given in its favour;

*Declares* the remainder of the application inadmissible.

 T.L. Early J.-P. Costa
 Deputy Registrar President

1. EUR 1,096,598.4544 [↑](#footnote-ref-1)
2. previously the Highest Arbitration Court (name changed by amendments to the relevant Code on 21 June 2001) [↑](#footnote-ref-2)
3. The Code of Commercial Procedure provides for four levels of jurisdiction: first instance, appellate instance, and two cassation instances. [↑](#footnote-ref-3)
4. EUR 2,578,573.12 [↑](#footnote-ref-4)
5. EUR 1,096,598.45 [↑](#footnote-ref-5)