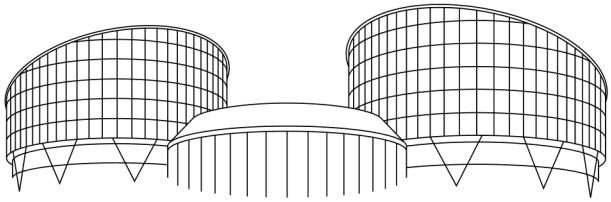

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

CASE OF BASARBA OOD v. BULGARIA

(Application no. 77660/01)

JUDGMENT
(merits)

STRASBOURG

7 January 2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Basarba OOD v. Bulgaria,

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges,*
Pavlina Panova, ad hoc *judge,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 1 December 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 77660/01) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian limited liability company, Basarba OOD ("the applicant company"), on 13 November 2001.

2. The applicant company was represented by Mrs N. Sedefova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Kotseva, of the Ministry of Justice.

3. The applicant company alleged that the authorities had failed to comply with a final court judgment in its favour and had deprived it of its legitimate expectation of acquiring a municipally-owned property.

4. On 4 January 2006 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. Judge Kalaydjieva, the judge elected in respect of Bulgaria, withdrew from sitting in the case. On 30 January 2009 the Government appointed in her stead Mrs Pavlina Panova as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant company was set up in 1991 and is based in Sofia.

7. On 1 October 1991 it entered into a lease agreement with a municipally-owned supermarket chain, under which it rented one of its shops ("the shop"). The term of the agreement was until 1 October 1994.

8. By a supplementary agreement of 1 September 1992 the term of the agreement was extended until 1 September 1997.

9. On 29 June 1995 the applicant company submitted a proposal to the Sofia Municipal Council to purchase the shop under the preferential privatisation procedure for lessees of State and municipally-owned properties provided for in section 35(1) of the Privatisation Act (see paragraph 20 below).

10. By a further supplementary agreement of 2 January 1996 the term of the lease agreement concerning the shop was amended and was set to expire on 2 July 1996.

11. In a decision of 27 September 1996 the Municipal Council rejected the applicant company's request of 29 June 1995 on the grounds that the conditions under section 35(1) of the Privatisation Act had not been met because the lease agreement for the shop "bore a date later than 15 October 1993".

12. On 24 October 1996 the applicant company appealed against the refusal.

13. In a judgment of 5 March 1998 the Sofia City Court found in favour of the applicant company, quashed the decision of the Municipal Council of 27 September 1996 and referred to it the matter for re-examination. It found that on 15 October 1993 the applicant company had been a lessee of the shop and that in rejecting its privatisation proposal on the ground that it had not been a lessee the Municipal Council had acted in contravention with the law.

14. The Municipal Council did not appeal against the judgment and it became final on 2 April 1998.

15. On 7 May 1998 the applicant company informed the Municipal Council of the judgment in its favour and invited the latter to implement the court's decision by selling it the shop in accordance with the applicable rules. No action was taken in response by the Municipal Council.

16. On 4 May 2001 the applicant company once again petitioned the Municipal Council to implement the City Court's judgment of 5 March 1998.

17. In response, by letter of 9 July 2001, the Sofia Municipal Privatisation Agency informed the applicant company that on 27 April 1998

the Municipal Council had transformed the municipally-owned supermarket chain and had spun off two companies from it; the shop had been included in the capital of one of these companies which had been privatised on 24 February 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. The Transformation and Privatisation of State and Municipally-Owned Enterprises Act (*Закон за преобразуване и приватизация на държавни и общински предприятия*: "the Privatisation Act"), adopted in 1992, provided for the transformation of public property and the privatisation of State and municipally-owned enterprises. In March 2002 it was superseded by other legislation.

19. Section 3 of the Act indicated the bodies competent to take decisions for privatisation. For municipally-owned property these were the respective municipal councils.

20. Section 35(1) of the Privatisation Act provided that lessees of State and municipally-owned property could propose to buy the properties rented by them, without a public auction or competition and for a price equal to the property's valuation prepared by certified experts in accordance with rules adopted by the Government. Those preferential conditions were applicable to lessees of State and municipally-owned property who had concluded lease contracts before 15 October 1993 and where the said contracts were still in force on the date of the respective privatisation proposal.

21. Section 35(2) of the Privatisation Act, as worded after October 1997, provided that where a refusal by the competent administrative body to initiate a privatisation procedure following a proposal by the interested party had been quashed by means of a final court judgment, the relevant administrative body was obliged, within two months of the judgment becoming final, to initiate the privatisation procedure, prepare the privatisation of the property at issue and offer to sell the property to the entitled party.

22. In a similar case, in a decision of 10 February 1998, the Supreme Administrative Court declared inadmissible an appeal against the Sofia Municipal Council's failure to act in implementing a final judgment against it with which an earlier refusal to initiate a privatisation procedure under section 35(1) of the Privatisation Act had been quashed. The Supreme Administrative Court found that the appeal concerned the lack of enforcement of an earlier judgment which was not subject to separate judicial review because it did not represent a new "refusal" to privatise (see decision no. 310 of 10 February 1998, case no. 929/1997).

THE LAW

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

23. The applicant company complained that the Municipal Council had failed to comply with the City Court's judgment of 5 March 1998 in its favour, in breach of Article 6 § 1 of the Convention, which, in so far as relevant, reads:

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

A. Admissibility

24. The Government urged the Court to dismiss the complaint as inadmissible for non-exhaustion of domestic remedies as the applicant company had not appealed against the failure of the Municipal Council to comply with the City Court's judgment of 5 March 1998. The applicant company contested this argument.

25. The Court recalls that it has often found it to be inappropriate to require an individual who has obtained judgment against the State at the end of legal proceedings then to bring enforcement proceedings to obtain satisfaction (see, for example, *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 198, ECHR 2006-V).

26. However, even if the present case is to be considered differently as the City Court's judgment of 5 March 1998 was an order to undertake particular actions, rather than a money judgment, the Government have not presented any domestic case-law or judgments in support of their assertion that this was a remedy that could have been successful. On the contrary, the domestic case-law that has been identified (see paragraph 22 above) indicates that such an appeal would not have even been examined by the courts. Accordingly, the Court does not see a reason to reach a conclusion different from the one in the cases above and dismisses the Government's objection on the basis of non-exhaustion of domestic remedies.

27. Furthermore, the Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The applicant company argued that the Municipal Council had been obliged, by virtue of section 35(2) of the Privatisation Act (see paragraph 20 above), to enforce the City Court's judgment of 5 March 1998 by initiating a privatisation procedure and selling it the shop. However, the Council had not only failed to do so but had in effect obstructed and rendered impossible the enforcement of the said judgment by selling the shop to another party.

29. The Government argued that the judgment of 5 March 1998 did not imperatively oblige the Municipal Council to sell the shop to the applicant company but left the decision to the Council's discretion. The Government considered that the Council had not failed to comply with the said judgment.

2. The Court's assessment

30. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by a court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 of the Convention (see *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 510, § 40, and *Burdov v. Russia (no. 2)*, no. 33509/04, § 67, ECHR 2009-...).

31. Turning to the case at hand, the Court, observing that the City Court's judgment of 5 March 1998 concerned the applicant company's alleged entitlement to acquire certain property under preferential conditions, is of the view that the said judgment was determinative for the applicant company's civil rights and obligations, within the meaning of Article 6 § 1 of the Convention. Therefore, Article 6 § 1 is applicable in the case.

32. Furthermore, the Court notes that on 5 March 1998 the City Court quashed the Municipal Council's refusal to initiate a privatisation procedure pursuant to the applicant company's proposal under section 35(1) of the Privatisation Act and referred the case to the Municipal Council for re-examination (see paragraphs 13-14 above). Thereafter, the Municipal Council not only had an obligation to comply with the said judgment but it also had a statutory obligation under section 35(2) of the Privatisation Act to initiate the preferential privatisation procedure within two months of the judgment becoming final, prepare the privatisation of the property at issue and offer to sell the property to the entitled party at the preferential price

equal to the property's valuation (see paragraphs 20 and 21 above). However, it failed to do so. What is more, by finalising a separate privatisation procedure and selling the property at issue to another buyer, it rendered any such enforcement impossible.

33. This is sufficient to enable the Court to conclude that in the case at hand there has been a violation of the applicant's company right to have a final judgment in its favour enforced, as an aspect of its right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

34. The applicant company further complained that the Municipal Council had infringed its statutory right to purchase the shop under the preferential conditions of section 35(1) of the Privatisation Act.

The Court finds that the complaint falls to be examined under Article 1 of Protocol No. 1, which reads:

> "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."

A. Admissibility

35. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

36. The applicant company considered that in its judgment of 5 March 1998 the City Court had recognised that it met the preconditions under section 35(1) of the Privatisation Act, that the Municipal Council had been obliged to sell to it the property and that it therefore had a legitimate expectation of buying the shop under the preferential conditions.

37. The Government contested this argument. They considered that the Municipal Council had enjoyed discretion as to what action to take pursuant

to the City Court's judgment of 5 March 1998 and that the applicant company had not had any legitimate expectation of being offered the shop for purchase.

2. The Court's assessment

(a) The existence of "possessions"

38. The Court reiterates that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "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 (see *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, § 74(c), ECHR 2005-V, and *Kopecký v. Slovakia* [GC], no. 44912/98, § 35(c), ECHR 2004-IX).

39. As the present case does not concern any existing possessions of the applicant company, it remains to be examined whether it could have had any "legitimate expectation" of realising a property right.

40. The Court reiterates in this respect that Article 1 of Protocol No. 1 does not guarantee the right to acquire property (see *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II, and *Kopecký*, cited above, § 35(b)). However, the Court notes that in restitution cases it has held that once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the Contracting State's ratification of Protocol No. 1 (see *Maltzan and Others v. Germany*, cited above, § 74(d) and *Kopecký*, cited above, § 35(d)).

41. The Court finds it appropriate to apply this standard in the present case, which does not concern restitution of formerly nationalised property but the right to privatise leased municipal properties under preferential conditions once the person satisfies certain criteria and requirements for the said entitlement.

42. In this respect, the Court observes that domestic law as in force at the time outlined the conditions allowing a lessee of municipally-owned property to benefit from the preferential procedure under section 35(1) of the Privatisation Act, namely the rent contract concerning the property at issue should have been concluded before 15 October 1993 and be still in force on the date of the respective privatisation proposal (see paragraph 20

above). The Court further notes that in its judgment of 5 March 1998 the City Court concluded that the applicant company met those conditions (see paragraph 13 above). The Court does not see a reason to doubt this conclusion, as it observes that the rent contract in the case was indeed concluded on 1 October 1991 and expired on 2 July 1996 (see paragraphs 7-8 and 10 above) whereas the privatisation proposal was made on 29 June 1995 (see paragraph 9 above), that is while the contract was still in force.

43. Furthermore, the Court notes that section 35(2) of the Privatisation Act, as in force at the time, provided that where the courts had quashed a refusal to initiate privatisation following a proposal by the interested party under section 35(1), as in the present case, the competent body was obliged to initiate privatisation procedure and to offer to sell the property to the entitled party (see paragraph 21 above). In view of the unequivocal wording of the provision of section 35(2), the Court cannot accept the Government's argument that domestic law left the Municipal Council any room for discretion. In fact, under domestic law the Municipal Council had no latitude as to whether to commence a privatisation procedure under section 35(1) of the Privatisation Act, or as to the conditions of the future transaction, including the price to be paid by the prospective buyer (see paragraph 20 above).

44. In view of the above, the Court concludes that the applicant company had a legitimate expectation consisting of the right to be offered to purchase the shop at issue under the preferential conditions of section 35(1) of the Privatisation Act (see paragraph 20 above). Accordingly, the applicant company had a "possession" within the meaning of Article 1 of Protocol No. 1.

(b) The existence of interference

45. The Court considers that the Municipal Council's failure to initiate a preferential privatisation procedure following the City Court's judgment of 5 March 1998 and to offer to sell the shop to the applicant company represented an interference with the latter's right to peaceful enjoyment of its possessions.

(c) The lawfulness of the interference

46. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 79, ECHR 2000-XII).

47. In the case at hand, following the judgment of 5 March 1998 the Municipal Council had a statutory obligation under section 35(2) of the Privatisation Act to initiate the preferential privatisation procedure within

two months of the judgment becoming final, prepare the privatisation of the property at issue and offer to sell the property to the entitled party at the preferential price equal to the property's valuation (see paragraphs 20 and 21 above). However, it failed to comply with its statutory obligation and instead finalised a separate privatisation procedure by selling the property at issue to another buyer.

48. Therefore, the interference with the applicant company's right to peaceful enjoyment of its possessions was not in accordance with domestic law and did not meet the requirement of lawfulness under Article 1 of Protocol No. 1.

49. It follows that there has been a breach of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

51. The applicant company claimed, in respect of pecuniary damage, the 2006 market value of the shop, reduced by the preferential price it would have paid had it been offered the property in 1996, plus interest. The applicant company submitted an expert report commissioned by it, assessing the market value of the shop in 2006 at 78,200 Bulgarian levs (BGN, 39,983 euros (EUR)), and the preferential price it would have paid in 1996 at BGN 9,962 (EUR 5,093). The difference claimed by the applicant company amounted therefore to BGN 68,238 (EUR 34,890).

52. The applicant company also claimed compensation for lost profit from the use of the shop in the amount of the market rent it would have received had it rented out the property between 1996 and 2006. On the basis of the above-mentioned expert report, it assessed its profit lost at BGN 49,463 (EUR 25,290).

53. The Government did not comment.

54. In the circumstances, the Court considers that the question of the application of Article 41 is not ready for decision in so far as it concerns the claims for damages, and reserves it, due regard being had to the possibility that an agreement between the applicant company and the respondent Government be reached (Rule 75 § 1 of the Rules of the Court).

B. Costs and expenses

55. For costs and expenses, the applicant company claimed EUR 1,100 for 22 hours of work by its legal representative, Mrs Sedefova, at an hourly rate of EUR 50. Furthermore, the applicant company claimed BGN 200 (EUR 100) for the cost of the expert report it submitted (see paragraph 51 above) and BGN 238 (EUR 120) for the translation of its observations in the present proceedings. In support of these claims it presented a contract for legal representation, a time sheet and the relevant receipts. It requested that any sum awarded under this head be transferred directly into the bank account of Mrs Sedefova.

56. The Government did not comment.

57. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

58. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers that the costs and expenses claimed were actually and necessarily incurred and reasonable as to quantum. It thus awards in full the amounts claimed, that is EUR 1,320 in total, to be transferred directly into the bank account of the applicant company's legal representative.

C. Default interest

59. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible and accordingly *dismisses* the Government's objection for non-exhaustion of domestic remedies;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

4. *Holds* that the question of the application of Article 41 is not ready for decision in so far as it concerns the claims for damages;
   accordingly,

(a) *reserves* the said question;
(b) *invites* the Government and the applicant company to submit, within two months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be;

5. *Holds*
(a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,320 (one thousand three hundred and twenty euros), plus any tax that may be chargeable on the applicant company, in respect of costs and expenses, to be transferred directly into the bank account of its legal representative, Mrs Sedefova;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 7 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President