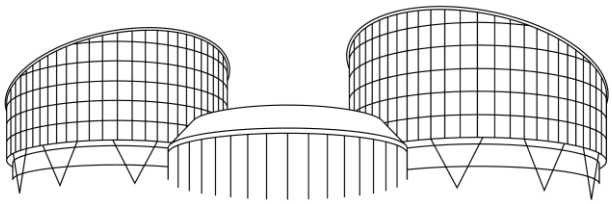

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 18297/08
by Mikhail BORISENKO and YEREVANYAN BAZALT LTD
against Armenia

The European Court of Human Rights (Third Section), sitting on 14 April 2009 as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura-Sandström,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Luis López Guerra,
Ann Power, *judges,*

and Stanley Naismith, *Deputy Section Registrar,*

Having regard to the above application lodged on 10 April 2008,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Mr Mikhail Borisenko, is an Armenian national who was born in 1950 and lives in Yerevan. The second applicant, Yerevanyan Bazalt Ltd, is a private company which was set up in 1995 and has its registered office in Yerevan (hereafter, the applicant company). They were represented before the Court by Mr A. Grigoryan, a lawyer practising in Yerevan.

A. The circumstances of the case

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

The first applicant is the director of the applicant company. The latter's capital was divided in various proportions among seven stakeholders, including the first applicant and a third person, Y.K.

On 1 October 2003 Y.K. passed away.

By the decisions of the applicant company's general assembly of 26 May and 2 June 2004 Y.K.'s share in the company's capital was found to constitute five per cent and the transfer of this share to Y.K.'s successors was approved.

On 8 April 2007 Y.K.'s successors instituted proceedings in the Commercial Court (*ՀՀ տնտեսական դատարան*) against the applicants and other stakeholders seeking to annul the above decisions, claiming that Y.K.'s share in the applicant company's capital amounted to 20 per cent.

On 16 July 2007 the Commercial Court granted the claim.

On 31 July 2007 the applicants' lawyer lodged an appeal on points of law with the Court of Cassation (*ՀՀ վճռաբեկ դատարան*). In his appeal the lawyer argued that a number of provisions of substantive and procedural law had been violated. As regards the admissibility grounds required under Article 231.2 § 1 of the Code of Civil Procedure (CCP), the lawyer did not indicate any of those grounds, arguing instead that this provision lacked legal certainty.

By a decision of 17 August 2007 the Court of Cassation decided to return the applicants' appeal on the ground that they had not indicated any of the grounds required under Article 231.2 § 1 of the CCP.

A copy of this decision was sent to the applicants on 11 October 2007.

B. Relevant domestic law

1. *The Constitution of 1995 (following the amendments adopted on 27 November 2005 with effect from 6 December 2005)*

On 27 November 2005 amendments were adopted to the Armenian Constitution which entered into force on 6 December 2005. As a result of these amendments the Court of Cassation was entrusted with a new role, namely to ensure the uniform application of the law. The relevant provisions of the amended Constitution read as follows:

Article 92

"...The highest judicial instance in Armenia, except for matters falling within constitutional jurisdiction, is the Court of Cassation which is called upon to ensure the uniform application of the law. ..."

2. The Code of Civil Procedure (in force from 1 January 1999)

In order to implement the above constitutional amendments, a substantial reform was introduced to the Armenian procedural law. As part of this reform substance-based admissibility requirements were introduced in respect of appeals on points of law lodged with the Court of Cassation. The relevant provisions of the CCP, as amended on 7 July and 25 December 2006 and 21 February 2007 and in force at the material time, read as follows:

Article 221.4: Entry into force of a judgment of the Commercial Court

"1. A judgment adopted by the Commercial Court following the examination of a case at first instance shall enter into force 15 days after delivery.

2. If an appeal on points of law is lodged against a judgment which has not entered into force, the judgment shall not enter into force until a decision is taken on admitting the appeal by the Court of Cassation. ..."

Article 221.6: Appeals against judgments and decisions of the Commercial Court

"Judgments and decisions of the Commercial Court can be contested through cassation proceedings..."

Article 222: Review of judicial acts through cassation proceedings

"1. Judgments of ... the Commercial Court which have not entered into force can be reviewed through cassation proceedings based on the appeals brought by persons indicated in Article 223 of this Code. ..."

Article 223: Persons entitled to bring appeals on points of law

"1. The parties to the proceedings and persons who were not parties to the proceedings but whose rights and obligations were affected by a judgment are entitled to lodge an appeal on points of law against a judgment of the Commercial Court which has not entered into force. ..."

Article 224: The court that examines appeals on points of law and the objective of its activity

"1. Appeals on points of law lodged against judgments of ... the Commercial Court which have not entered into force are examined by the Civil Chamber of the Court of Cassation (hereafter, Court of Cassation).

2. The objective of the Court of Cassation's activity is to ensure the uniform application of the law and its correct interpretation, and to promote the development of the law."

Article 225: **Grounds for lodging an appeal on points of law**

"An appeal on points of law can be lodged on the ground of ... a substantive or a procedural violation of the parties' rights..."

Article 228.1: **Time-limits for lodging an appeal on points of law**

"...2. An appeal on points of law against a judicial act adopted by the Commercial Court on cases examined at first instance can be lodged ... before the entry into force of the judicial act. ..."

Article 230: The c**ontent of an appeal on points of law**

"1. An appeal on points of law must contain (1) the name of the court to which the appeal is addressed; (2) the appellant's name; (3) the name of the court that has adopted the judgment, the case number, the date on which the judgment was adopted, the names of the parties, and the subject-matter of the dispute; (4) the appellant's claim, with reference to the laws and other legal acts and specifying which provisions of substantive or procedural law have been violated or wrongly applied ...; (4.1) arguments required by any of the subparagraphs of paragraph 1 of Article 231.2 of this Code; [and] (5) a list of documents enclosed with the appeal.

2. An appeal on points of law shall be signed by the appellant.

3. A document certifying payment of the State fee shall be attached to the appeal."

Article 231.1: **Returning an appeal on points of law**

"1. An appeal on points of law shall be returned if it does not comply with the requirements of Article 230 and paragraph 1 of Article 231.2 of this Code..."

Article 231.2: Admit**ting an appeal on points of law**

"1. The Court of Cassation shall admit an appeal on points of law, if (1) the judicial act to be adopted on the given case by the Court of Cassation may have a significant impact on the uniform application of the law, or (2) the contested judicial act contradicts a judicial act previously adopted by the Court of Cassation, or (3) a violation of the procedural or the substantive law by the lower court may cause grave consequences, or (4) there are newly discovered circumstances.

2. The Court of Cassation sitting as a panel composed of the President of the Court of Cassation and the judges of the chamber shall decide whether appeals on points of law lodged with the Court of Cassation comply with the requirements of Article 230 of this Code and paragraph 1 of this article and should be admitted.

3. An appeal on points of law shall be admitted if at least three of the judges of the Court of Cassation vote in favour of admitting it. This decision of the Court of Cassation is not subject to appeal. ..."

COMPLAINTS

1. The applicants complained under Article 6 § 1 of the Convention that they were denied access to the Court of Cassation. They argued that the admissibility requirements for an appeal on points of law to be admitted for examination on the merits, as set out in Article 231.2 § 1 of the CCP, were too vague and incompatible with the principle of legal certainty.

2. The applicants complained under Article 1 of Protocol No. 1 that, as a result of having been denied access to court, the interference with their

property rights was disproportionate and failed to strike a fair balance between the legitimate aim pursued and the protection of the right to property.

THE LAW

1. The applicants complained that they had been denied access to court and invoked Article 6 § 1 of the Convention which, in so far as relevant, provides:

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

The Court reiterates that the right to a court, of which the right of access constitutes one aspect, is not absolute but may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. Nevertheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 59, Series A no. 316-B; *Khalfaoui v. France*, no. 34791/97, § 35, ECHR 1999-IX, and *Papon v. France*, no. 54210/00, § 90, ECHR 2002-VII).

The Court further reiterates that, while Article 6 does not guarantee a right of appeal, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before the appellate courts the fundamental guarantees of Article 6. However, the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, among other authorities, *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134, and *Tolstoy Miloslavsky*, cited above). Thus, if a State makes provision for an appeal to a higher instance, it is entitled to lay down the conditions for such an appeal (see *Stepenska v. Ukraine* (dec.), no. 24079/02, 12 June 2006).

In the present case, the applicants were entitled to lodge an appeal with the Court of Cassation, subject to a number of requirements set out in Articles 230 and 231.2 § 1 of the CCP. However, their appeal was not admitted for examination on the merits because it did not contain any of the admissibility grounds required under the above Article 231.2 § 1. The Court notes that the requirement that an appeal on points of law must contain the grounds stipulated in that provision in order to be admitted by the Court of

Cassation for examination was introduced following the constitutional amendments of 27 November 2005. Pursuant to Article 92 of the Constitution and the accordingly amended Article 224 of the CCP, the Court of Cassation was entrusted with a new role, namely to ensure the uniform application and correct interpretation of the law and to promote its development. Thus, the introduction of the above admissibility requirements and their application in the instant case pursued the aim of ensuring that the Court of Cassation dealt only with such appeals and issues raised in them which would enable it to perform the role conferred on it by the Constitution and to avoid its case list being overloaded with unmeritorious appeals. The Court considers this aim to be legitimate in the interests of good administration of justice.

As regards the applicants' arguments that these legal requirements were too vague, the Court has held on numerous occasions that the concept of "law", which figures explicitly or implicitly in most of the articles of the Convention, implies qualitative requirements, including those of accessibility and foreseeability (see, *mutatis mutandis*, *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII). The latter requirement implies that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

In the present case, the applicants failed to raise in their appeal any of the admissibility grounds required by Article 231.2 § 1 of the CCP. It is obvious that the applicants were aware of the requirements of that provision and simply chose not to comply with them, instead questioning their quality. However, it was not the function of the Court of Cassation to examine the quality of the legal requirements in question but rather to interpret and apply them in each particular case, which it was prevented from doing in the instant case because of the applicants' failure to comply with those requirements. Nor is it the function of this Court to rule in abstracto on the compatibility with the Convention of certain legal rules (see *Golder v. the United Kingdom*, 21 February 1975, § 39, Series A no. 18). In such

circumstances, the Court considers that the decision of the Court of Cassation to return the applicants' appeal was proportionate to the legitimate aim pursued.

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

2. The applicants complained that their property rights had been violated and invoked Article 1 of Protocol No. 1 which, in so far as relevant, provides:

> "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 Court notes that under the terms of Article 35 § 1 of the Convention, it may only deal with a matter after domestic remedies have been exhausted. It notes that the Convention institutions have consistently taken the view that that condition is not satisfied if a remedy has been declared inadmissible for failure to comply with a formal requirement (see, among other authorities, *Ben Salah Adraqui and Dhaime v. Spain* (dec.), no. 45023/98, ECHR 2000-IV).

In the present case, appeals lodged with the Court of Cassation were required to contain at least one of the admissibility grounds stipulated by Article 231.2 § 1 of the CCP in order to be admitted for examination on the merits. The applicants, as already indicated above, did not raise any of those grounds in their appeal of 31 July 2007. They have therefore failed to comply with the formal requirements laid down by Armenian law, which resulted in their appeal being returned by the Court of Cassation without examination.

It follows that the applicants have failed to exhaust domestic remedies, and that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stanley Naismith	Josep Casadevall
Deputy Registrar	President