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

Seminar

"Binding Force: Institutional Dialogue Between the ECHR and The Committee of Ministers under Article 46 of The European Convention on Human Rights"

New domestic proceedings after a final judgment of the European Court of Human Rights

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Introduction

It is an honour to speak at this seminar which is not simply dealing with a crucial topic but is also very timely. And I would like to congratulate the Icelandic Chairmanship of the Committee of Ministers for choosing the topic and for organising this seminar together with the Department for the Execution of Judgments and with the Court. I think we had indeed very a rich morning session and a lot of inspiration can be taken from the presentations we have heard during that session.

I will specifically deal with just one aspect: the issue of reopening of domestic judicial proceedings following the European Court of Human Rights judgment.

Obviously, it's a key topic in the context of obligations of States stemming from Article 46 of the Convention and, I would say, also from their membership in the Council of Europe's system of collective protection and enforcement of human rights.

Today, I would like to share with (1) you some observations on the importance and the legal nature of reopening of domestic proceedings, and then (2) I will give you an example of the context I know quite well simply on account of my nationality, that is how Ukraine and its Supreme Court have been grappling with these matters and how the things evolved over time.

1. Importance and legal nature of the reopening of domestic proceedings after an ECHR judgment

The question of reopening of domestic proceedings is important for the European Court of Human Rights in a number of ways. *First*, for reasons mentioned earlier today, the Court must never lose sight of the effects of its judgments and their utility for upholding the Convention-based system of human rights protection.

Second, it is, of course, an important avenue for its interaction with domestic courts. Our Court can only do its job properly if it hears the domestic courts and does its utmost to understand their motives and reasoning behind their decisions. But equally the domestic courts could only be helpful in ensuring

their State's compliance with its obligations under the European Convention of Human Rights if they understand well what the European Court of Human Rights is saying in its judgments.

Consequently, and this is, perhaps, the *third* element here, the decisions on the reopening of domestic proceedings could be indicative of the way the European Court of Human Rights is perceived by the courts, and more broadly, by the states concerned.

There is no need for me to describe in detail the Court's case law in the application of Article 46, as this was brilliantly done by Judge Bošnjak this morning. Let me simply recall that the Strasbourg Court's function is to decide on the question of international legal responsibility of a State-party to the Convention for the compliance or non-compliance with its provisions. And here we deal with the question of international legal responsibility that was also mentioned this morning by Judge Bošnjak. In fact, if we look at general international law, *restitutio in integrum* is the most desirable way of discharging the State's responsibility for violation of an international legal obligation. And, of course, the most direct way of achieving that goal is very often the reopening of domestic legal proceedings.

Reopening is just one tool to achieve *restitutio in integrum*: the State is free to choose other tools to achieve it, insofar as they are speedy, efficient and respect the conclusions of the European Court.

One of such tools alternative to reopening is "just satisfaction" which in terms of general international law, is normally called "compensation". And these things go hand in hand in fact. And, I think, Judge Bošnjak has also passed very helpful comment regarding general measures being essentially the way of ensuring non-repetition of violations. That also shows something that is occasionally overlooked: that European Court of Human Rights is an international judicial institution, and it primarily deals with the question of States' responsibility under international law.

It must be kept in mind that as regards the reopening of proceedings, our Court does not have jurisdiction to order such a measure. And that was also mentioned this morning. This is certainly another confirmation of the axiom that the European Court of Human Rights is not a 'fourth-instance' court. As such, it does not 'quash' domestic court judgments and order the reopening of proceedings.

However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of the right to a fair trial (Article 6 of the Convention), the Court *may* indicate that a retrial or the reopening of the case, if requested by the applicant, represents *in principle* an appropriate way of redressing the violation. And I note here the non-categorical nature of such indications which should be reacted upon by the State concerned in good faith. Good faith is also an essential notion here, as it is underlying the entire system.

On the other hand, the Strasbourg Court has itself explicitly ruled out the reopening following a violation of Article 6 of the Convention of proceedings which were concluded domestically by final judicial decisions. To name just a couple of obvious examples from the case-law, judgments of the Grand Chamber: *Moreira Ferreira v. Portugal (no. 2)*, and also *Guðmundur Andri Ástráðsson v. Iceland*. The principles of legal certainty and *res judicata* lie behind this logic. And in fact, these principles are always to be kept in mind when we are talking about the reopening of domestic proceedings.

The Court has also considered the issue of reopening of proceedings where it found a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice). The Court noted in such cases that in the particular circumstances there was *no obligation* on the respondent State to reopen either set of proceedings, like in the case of *Tsonyo Tsonev v. Bulgaria (no. 4)*.

A lot has been said this morning already, and will further be developed by the next speaker, about the institutional dialogue within the Council of Europe here in Strasbourg. I must note that the Committee of Ministers has come up with extremely useful Recommendations on the issues of execution of judgments and in particular on the issue of reopening of domestic proceedings, first and foremost the

Recommendation issued in 2000, which provides guidance to the Contracting Parties to reopen especially where:

"the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and in cases where the judgement of the Court leads to the conclusion that

the impugned domestic decision is on the merits contrary to the Convention, or

the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

With this guidance from the Committee of Ministers the States have excellent material to develop domestic regulation of these matters. And they must take into account the logic that is very much behind the jurisprudence of the Court in the application of Article 46, but also what the Committee of Ministers is saying in its Recommendation and the Department for the Execution of judgments is so helpfully explaining in its materials, such as the respective thematic fact-sheets which I found to be brilliantly drafted.

The domestic practice varies even though in the vast majority of European jurisdictions there is a possibility to reopen criminal cases. It is more difficult with civil cases, even though some jurisdictions also allow for reopening civil cases.

2. Reopening of domestic proceedings: the case of Ukraine

And here I will turn to the second part of my today's intervention, namely the case of Ukraine. I think it is an interesting example. In 2006 Ukraine adopted domestic regulation on the matter: not simply on the reopening of proceedings, but more generally on the execution of ECHR's judgments. The Law on the execution of judgments and also on the application of the Court's case-law is as such an interesting piece of legislation, I would say, a positive one. Of course, its practical implementation is somehow another matter. But with time, I think, the situation has shown some signs of improvement.

Ukraine started soon after the adoption of that Parliament act with a rather sad story which is illustrated by the Grand Chamber judgment in *Bochan v. Ukraine* (No. 2). In that case, you might recall, the Supreme Court of Ukraine had, in its decision of March 2008, grossly misrepresented the European Court's findings in its judgment of 3 May 2007. In particular, it had recounted that the European Court had found the domestic courts' decisions lawful and well-founded and had awarded just satisfaction for the violation of the "reasonable-time" guarantee (when in fact that complaint had been rejected as manifestly ill-founded). Those affirmations were obviously incorrect. And the Supreme Court's reasoning did not amount merely to a different reading of a legal text. For the European Court, it could only be construed as being "grossly arbitrary" or as entailing a "denial of justice", in the sense that the distorted presentation of the 2007 judgment had the effect of defeating the applicant's attempt to have her property claim examined in light of that judgment in the framework of a cassation-type procedure provided for at that time under the domestic law. The impugned proceedings had thus fallen short of the requirement of a "fair trial" under Article 6 § 1 of the Convention.

Since then, the situation has changed a great deal and, luckily, such egregious violations were not repeated. On the contrary, with time the procedure for the enforcement of the Strasbourg Court judgments set out in the 2006 Law of Ukraine "On the Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights" was accepted and also transformed into concrete provisions of the Procedural Code. This Law specifically regulates relations arising from the state's obligation to execute judgments of the European Court of Human Rights, the need to address

the root causes of violations of the Convention, and to introduce, I quote the Law here, “European human rights standards into the practice of Ukraine’s courts”.

The Law follows generally the recommendations of the Committee of Ministers, envisaging both for individual and general measures for the enforcement of judgments and, to ensure the restoration of the claimant's violated rights, in addition to the payment of compensation, additional measures of an individual nature are envisaged.

They include restoration of the previous legal status (*restitutio in integrum*) and other measures provided for in the ECHR judgment. And restoration of the previous legal status of the applicant is achieved, in particular, by a re-consideration of the case by the court, including reopening of the proceedings; or re-consideration of the case by the administrative body.

Such measures must be implemented without delay and within the time-limit specified by the European Court's judgment and/or applicable law. And that part on the applicable domestic law is important because the Law does not provide clear guidance on the rules for the enforcement of European Court’s judgments by the domestic courts. So one has to take into account the relevant provisions of the domestic procedural laws.

And recently, in this context, one of the most difficult questions Ukraine’s Supreme Court has had to grapple with was the question of the reopening of time-barred proceedings in administrative, civil and criminal cases. In Ukraine, the procedural codes in general provide for the so-called preclusive term of 10 years following the final judgment at the domestic level, after which even an extraordinary review following a judgment of the European Court of Human Rights is time-barred. This provision is based on the principle of legal certainty, which is always there, and its corollary, the principle of *res judicata.*

Now I will not develop reasons explaining how it is possible that the Strasbourg Court can still from time to time come up with judgments that address issues adjudicated by the domestic courts more than 10 years ago – that would be a wholly different topic. There is always an explanation.

However, Ukraine’s Supreme Court has shown positive flexibility in agreeing to reopen certain cases even after the expiry of the 10 years term, basing this decision every time on the case-by-case analysis. This happened, for example, when the violation of the person's right was of a non-pecuniary continuing nature (in that case it was a violation of the right to work), which could be restored only as a result of a new trial, while the award of monetary compensation alone was not sufficient to achieve *restitutio in integrum.*

At the same time, in a recent and very detailed judgment that was issued in August 2022 the Supreme Court refused to reopen an administrative case on an essentially civil claim lodged by a former public employee concerning certain payments. The final judgment of the domestic courts had been adopted more than 10 years prior to the judgment of the European Court of Human Rights. The Supreme Court carried out an analysis of the nature of the claim and decided that it was not called to reopen the proceedings as the amount of just satisfaction awarded by the European Court of Human Rights was comparable to what he would be entitled to, had he been successful in the domestic courts. And here, coming back to the beginning of my presentation, we are talking about compensation rather than restitution.

Conclusion

These Ukrainian examples illustrate that reopening, whilst being desirable in many situations, also has its limitations. Here, as mentioned today by my colleagues, in particular by Judge Guyomar, the principle of subsidiarity, if applied properly at the domestic level, could help in finding the best way

forward in order for the state to comply with its obligations under the Convention, and to make our system of collective enforcement of human rights a success.

Thank you for your attention.