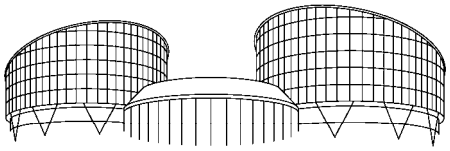

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF FIDANYAN v. ARMENIA

(Application no. 62904/12)

JUDGMENT

STRASBOURG

11 January 2018

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Fidanyan v. Armenia,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Aleš Pejchal, *President,*
Armen Harutyunyan,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 12 December 2017,

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

PROCEDURE

1. The case originated in an application (no. 62904/12) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Ms Yevgenya Fidanyan ("the applicant"), on 19 September 2012.

2. The applicant was represented by Ms Y. Nikoghosyan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Government of Armenia to the European Court of Human Rights.

3. On 24 May 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1950 and lives in Yerevan.

5. The applicant was employed by the State Revenue Service ("the Service"), division no. 2. On 23 February 2009 the head of the Service decided to terminate the applicant's employment.

6. On 2 April 2009 the applicant initiated proceedings in the Administrative Court against the Service seeking to 1) have the decision of 23 February 2009 annulled; 2) be reinstated in her previous position; and 3) recover her average salary starting from the moment of her dismissal until her reinstatement to the previous position.

7. On 17 September 2009 the Administrative Court granted the applicant's three claims. In particular, it annulled the decision of 23 February 2009, ordered the Service to reinstate her to her previous

position and to pay her her average monthly salary starting from 23 February 2009 until her reinstatement. It reasoned its decision, *inter alia*, by stating that while the Service had been under an obligation to offer the applicant another position within the Service before deciding to dismiss her, it had failed to do so, even though such a position had existed in the Service at the material time.

8. This judgment was upheld in the final instance by the Court of Cassation and it became final on 4 November 2009.

9. On 29 November 2009 the Service paid the applicant 1,197,748 Armenian drams (AMD) (approximately 2,131 euros (EUR) at the material time) as compensation for her unemployment during the period from 23 February to 29 November 2009.

10. On 11 December 2009 the Administrative Court issued a writ of execution.

11. On 25 February 2010 the Department for the Enforcement of Judicial Acts ("the DEJA") initiated enforcement proceedings. On the same day the DEJA gave a decision obliging the Service to comply with the writ of execution of 11 December 2009 within two weeks.

12. It appears that no further actions were taken by the DEJA and the Service in relation to the enforcement of the judgment of 17 September 2009 between the period of 25 February 2010 and 18 July 2011.

13. On 18 July 2011 the bailiff decided to discontinue the enforcement proceedings on the basis of section 41(1)(8) of the Enforcement of Judicial Acts Act. The bailiff reasoned that the Service had already paid the applicant AMD 1,197,748 while the reinstatement of the applicant in her previous position in the Service was impossible because that position was no longer vacant.

14. On 29 May 2012 the applicant asked the DEJA to resume the enforcement proceedings.

15. On 1 June 2012 the bailiff granted the applicant's request and decided to resume the enforcement proceedings. On the same day the bailiff gave a decision on obliging the Service to take certain actions. In particular, the bailiff obliged the Service to 1) annul the decision of the head of the Service of 23 February 2009; 2) reinstate the applicant to her previous position; and 3) pay her her average monthly salary for the period between her dismissal and her reinstatement to the previous position.

16. On 2 July 2012 the bailiff decided once again to terminate the enforcement proceedings on the basis of section 41(1)(8) of the Enforcement of Judicial Acts Act. In particular, the bailiff reasoned that the Service had already paid the applicant AMD 1,197,748 as ordered by the judgment of 17 September 2009 while the reinstatement of the applicant in her previous position in the Service was impossible because Division no. 2, where the applicant had previously worked, no longer existed.

II. RELEVANT DOMESTIC LAW

Compulsory Enforcement of Judicial Acts Act

17. Section 41 of the Act prescribes the grounds for termination of the enforcement procedure by the bailiff. According to paragraph 1(8), the bailiff must terminate the enforcement proceedings if, during the enforcement concerning non-proprietary claims, it becomes evident that the enforcement of the judgment is impossible.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

18. The applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention of the non-enforcement of the judgment of the Administrative Court of 17 September 2009. These provisions, in so far as relevant, read as follows:

Article 6

"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

"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."

19. The Government contested that argument.

A. Admissibility

1. The Government's preliminary objection

20. The Government argued that the applicant had not exhausted the effective remedies available to her. She should have challenged the bailiff's decision of 2 July 2012 on the discontinuation of the enforcement proceedings before the Administrative Court, a remedy which was both

available and effective. As she did not do so, her application should be declared inadmissible under Article 35 §§ 1 and 4 of the Convention for the non-exhaustion of domestic remedies.

21. The applicant argued that she had exhausted all possible remedies capable of providing redress; specifically, she had initiated enforcement proceedings before the DEJA, which had been the only State body authorised to ensure the enforcement of judgments. The Government had failed to explain how the challenging of the bailiff's decision of 2 July 2012 could have provided redress for the non-enforcement issue. Even if she had obtained another judgment favourable to her, it would only have meant having another writ of execution to enforce. Such an action would have produced only repetitive results.

2. The Court's assessment

22. The Court notes that the applicant twice requested that the DEJA enforce the Administrative Court's judgment of 17 September 2009. Both times the bailiff decided to discontinue the enforcement proceedings on the basis of section 41(1)(8) of the Enforcement of Judicial Acts Act since the applicant's reinstatement to her previous position in the Service was impossible because her position no longer existed (see paragraphs 13 and 16). Since the DEJA is the only State body authorised to ensure the enforcement of judgments and it had already partially executed the judgment by ordering the payment of AMD 1,197,748 for the applicant's forced absence, this remedy must be considered "effective" for the purposes of Article 35 § 1 of the Convention. The fact that there might have been other remedies to challenge the bailiff's decision to discontinue the enforcement proceedings leading to repetitive results does not mean that the applicant failed to exhaust domestic remedies. The Government's preliminary objection must therefore be rejected.

23. The Court therefore notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

24. The applicant argued that the domestic authorities had not taken all necessary measures to enforce the Administrative Court's judgment, since to date she had not been reinstated in her previous job and a part of the compensation for her forced absence still remained unpaid. The bailiff could

have taken a number of other measures which would have resulted in the enforcement of the judgment. The Service had had an opportunity to reinstate the applicant in her previous position after the judgment of 17 September 2009 had become final on 4 November 2009. Even if she could not have been reinstated to her previous position, or if no other position had been vacant, the Service had been obliged to offer her a similar position, but it had intentionally not done so. Her reinstatement had never been impossible since there had been vacant positions, nor had there been any need to create new positions to enforce the judgment. On the contrary, the bailiff could have, *inter alia*, obliged the Service to comply, set another deadline for doing so, or imposed a fine on the Service for the failure to comply with the enforcement measures.

25. As to the compensation, the applicant claimed that she should have been compensated for her forced absence from the date of her dismissal on 23 February 2009 until the date of her reinstatement to the job. She had been compensated only for the period until 29 November 2009. There had thus been a violation of her rights guaranteed under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

(b) The Government

26. The Government argued that the domestic authorities had undertaken all necessary measures to enforce the binding judgment. The applicant had been dismissed from her job because of the necessity to reduce the number of employees owing to the needs of the organisation, which, within domestic law, was a lawful basis for terminating an employment contract. Once the writ of execution had been presented to the DEJA – the only State body authorised ensure the enforcement of judicial acts – the bailiff had immediately instituted enforcement proceedings and requested that the Service comply with the requirements of the judgment. However, it had been impossible to reinstate the applicant to her previous job since the structure of the Service had been modified and the applicant's position no longer existed. The Administrative Court had ordered the applicant's reinstatement to her previous job and therefore she could not have been reinstated to a similar position within the Service. Moreover, the applicant had been paid, during the enforcement proceedings, AMD 1,197,748 for her forced absence between 23 February and 29 November 2009, even though her reinstatement to her previous job had become impossible even before the latter date.

27. The Government maintained that the courts should not put employers under an obligation of factual enforcement which was objectively impossible. Otherwise, employers would be forced to make additional commitments, specifically to create new structural units and new positions. The creation of such obligations would amount to violations of employers' constitutional rights and lead to restrictions on their legal rights.

The circumstances of the present case should be taken into account when assessing the duration of the enforcement proceedings, since, during those proceedings, the DEJA had taken all possible steps towards enforcing the Administrative Court's judgment. It was only because of objective and substantial facts that the enforcement of the judgment had been impossible. There had thus been no violation of the applicant's rights guaranteed by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

2. The Court's assessment

28. The right to a court protected by Article 6 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 (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The effective access to court includes the right to have a court decision enforced without undue delay.

29. In the same context, the impossibility for an applicant to obtain the execution of a judgment in his or her favour in due time constitutes an interference with the right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Voytenko v. Ukraine*, no. 18966/02, § 53, 29 June 2004). An unreasonably long delay in the enforcement of a binding judgment may therefore breach the Convention (see *Burdov v. Russia*, no. 59498/00, ECHR 2002-III; *Burdov v. Russia (no. 2)*, no. 33509/04, § 65, ECHR 2009; and *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, §§ 50-53, 15 October 2009).

30. Turning to the circumstances of the present case, the Court observes that, by the judgment of 17 September 2009, which became final on 4 November 2009, the Administrative Court found in favour of the applicant. On 11 December 2009 the Administrative Court issued a writ of execution in respect of that judgment. On 25 February 2010 the bailiff instituted the relevant enforcement proceedings, ordering the Service to comply with the requirements of the writ within two weeks. The applicant was paid AMD 1,197,748 for her forced absence, calculated from 23 February until 29 November 2009 (see paragraphs 7-11 above). On 18 July 2011 the bailiff decided to terminate the enforcement proceedings since the applicant's reinstatement was not possible due to the fact that her previous position was no longer vacant. However, the applicant requested that the DEJA resume the enforcement proceedings. On 2 July 2012 the bailiff's decided for the second time to terminate the enforcement proceedings owing to the impossibility of reinstating the applicant because division no. 2, where the applicant had previously worked, no longer existed (see paragraphs 13-16 above).

31. The Court notes that the parties seem to agree that the Administrative Court judgment of 17 September 2009 has remained partially unenforced for several years and that it still does: the applicant was paid compensation for her forced absence until 29 November 2009 but she has not, to date, been reinstated in her previous position or any position similar to her previous one. Nor has she been compensated for her forced absence until the date of her reinstatement to the job.

32. The judgment of 17 September 2009, which was favourable to the applicant, has remained partially unenforced from November 2009 until to date, that is, for more than seven years and eight months. The Government have failed to advance any argument to justify that delay. The Court therefore finds that the Armenian authorities, by failing to take the necessary measures to comply with the final judgment for several years, deprived the provisions of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention of all useful effect in the present case.

33. Accordingly, there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. The applicant claimed 26,535,233 Armenian drams (AMD) in respect of pecuniary damage and 19,000 euros (EUR) in respect of non-pecuniary damage.

36. The Government considered that the applicant's claim for pecuniary damage and interest was groundless and that it should be rejected. Were the Court of different opinion, the amount claimed for the period from December 2009 to the present day, AMD 13,858,285, was in any event excessive. The applicant should be compensated only for the period until her retirement age, that is to say for the period until 4 November 2013. As to the non-pecuniary damage, the Government considered that the amount claimed by the applicant was excessive and that it should be reduced.

37. The Court accepts that there is a causal link between the violation found and the pecuniary damage alleged. Taking into account the applicant's detailed calculations and the fact that the Government did not dispute the method of calculation employed by the applicant or the accuracy of her calculations (see *Yuriy Nikolayevich Ivanov*, cited above, § 106), the

Court awards her EUR 14,165 as compensation for pecuniary damage, covering the period from December 2009 until November 2013. Moreover, the Court finds that the applicant has suffered a certain amount of non-pecuniary damage as a result of the violation found. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

38. The applicant also claimed AMD 800,000 for the costs and expenses incurred both before the domestic courts as well as the Court.

39. The Government considered that the applicant's claim was unsubstantiated and that it should be rejected. No proof of the costs incurred before the domestic courts had been provided. In any event, the applicant had already been awarded compensation for the costs and expenses incurred before the domestic courts. Moreover, the costs and expenses incurred before the Court only amounted to AMD 702,970, together with postal expenses. However, the applicant had failed to specify the number of hours of work involved.

40. Regard being had to the documents in its possession and to its case-law, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,300 for the proceedings before the Court.

C. Default interest

41. The Court considers it appropriate that the default interest rate 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;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 14,165 (fourteen thousand one hundred and sixty-five euros), plus any tax that may be chargeable, in respect of pecuniary damage;
(ii) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(iii) EUR 1,300 (one thousand three hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Aleš Pejchal
Deputy Registrar	President