GRAND CHAMBER

**CASE OF BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. IRELAND**

*(Application no. 45036/98)* JUDGMENTSTRASBOURG30 June 2005

1.  The case originated in an application (no. 45036/98) against Ireland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a company incorporated in Turkey, Bosphorus Hava Yolları Turizm (“the applicant company”), on 25 March 1997.

3.  The applicant company alleged that the impounding of its leased aircraft by the respondent State had breached its rights under Article 1 of Protocol No. 1.

11.  The applicant company is an airline charter company incorporated in Turkey in March 1992.

12.  By an agreement dated 17 April 1992, the applicant company leased two Boeing 737-300 aircraft from Yugoslav Airlines (JAT), the national airline of the former Yugoslavia. … According to the terms of the lease, the crew were to be the applicant company's employees and the applicant company was to control the destination of the aircraft. While ownership of the aircraft remained with JAT, the applicant company could enter the aircraft on the Turkish Civil Aviation Register provided it noted JAT's ownership.

14.  From 1991 onwards the United Nations adopted, and the European Community implemented, a series of sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) – “the FRY” – designed to address the armed conflict and human rights violations taking place there.

16.  On 17 April 1993 the United Nations Security Council adopted Resolution 820 (1993), which provided that States should impound, *inter alia*, all aircraft in their territories “in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY]”. That resolution was implemented by Regulation (EEC) no. 990/93, which came into force on 28 April 1993.

19.  On 17 May 1993 one of the applicant company's leased aircraft arrived in Dublin. A contract with TEAM was signed for the completion of C-Check.

23.  … While awaiting air traffic control clearance to take off, the aircraft was stopped. … TEAM had informed him that it had been advised by the Department of Transport that it would be “in breach of sanctions” for the aircraft to leave.

28.  … By a letter dated 8 June 1993, the Minister for Transport informed the Dublin Airport managers that he had authorised the impounding, until further notice, of the aircraft ... .

33.  In November 1993 the applicant company applied for leave to seek judicial review of the Minister's decision to impound the aircraft. …

35.  On 21 June 1994 Mr Justice Murphy delivered the judgment of the High Court. The issue before him could,he believed, be simply defined as the question of whether the Minister for Transport was bound by Article 8 of Regulation (EEC) no. 990/93 to impound the applicant company's aircraft. … He found that:

“... it is common case that the transaction between JAT and [the applicant company] was entirely bona fide. There is no question of JAT having any interest direct or indirect in [the applicant company] or in the management, supervision or direction of the business of that company. ... It is, however, common case that [resolutions of the United Nations Security Council] do not form part of Irish domestic law and, accordingly, would not of themselves justify the Minister in impounding the aircraft. The real significance of the [resolutions of the United Nations Security Council], in so far as they relate to the present proceedings, is that [Resolution 820 (1993) of the United Nations Security Council] ... provided the genesis for Article 8 of [Regulation (EEC) no. 990/93]. ...”

36.  In interpreting Regulation (EEC) no. 990/93, Mr Justice Murphy had regard to its purpose. He found the aircraft not to be one to which Article 8 applied, as it was not an aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the former FRY, and that the decision of the Minister to impound was therefore *ultra vires*. …

52.  On 30 July 1996 the ECJ ruled that Regulation (EEC) no. 990/93 applied to the type of aircraft referred to in the Supreme Court's question to it. The ECJ noted that the domestic proceedings showed that the aircraft lease had been entered into “in complete good faith” and was not intended to circumvent the sanctions against the FRY.

53.  It did not accept the applicant company's first argument that Regulation (EEC) no. 990/93 did not apply because of the control on a daily basis of the aircraft by an innocent non-FRY party. Having considered the wording of Regulation (EEC) no. 990/93, its context and aims (including the text and aims of the United Nations Security Council resolutions it implemented), it found nothing to support the distinction made by the applicant company. Indeed, the use of day-to-day operation and control as opposed to ownership as a criterion for applying the regulation would jeopardise the effectiveness of the sanctions.

54.  The applicant company's second argument was that the application of Regulation (EEC) no. 990/93 would infringe its right to peaceful enjoyment of its possessions and its freedom to pursue a commercial activity because it would destroy and obliterate the business of a wholly innocent party when the FRY owners had already been punished by having their bank accounts blocked. The ECJ did not find this persuasive:

“It is settled case-law that the fundamental rights invoked by [the applicant company] are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community … . Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions. Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators. The provisions of [Regulation (EEC) no. 990/93] contribute in particular to the implementation at Community level of the sanctions against the [FRY] adopted, and later strengthened, by several resolutions of the Security Council of the United Nations. ... As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the [FRY], cannot be regarded as inappropriate or disproportionate.”

141.  … Article 1 of Protocol No. 1 comprises “three distinct rules”: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not “distinct” in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see *AGOSI*, cited above, p. 17, § 48).

142.  The Court considers that the sanctions regime amounted to a control of the use of property considered to benefit the former FRY and that the impugned detention of the aircraft was a measure to enforce that regime. While the applicant company lost the benefit of approximately three years of a four-year lease, that loss formed a constituent element of the above-mentioned control on the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is applicable in the present case … .

143.  … the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community's judicial organs are better placed to interpret and apply Community law. In each instance, the Court's role is confined to ascertaining whether the effects of such adjudication are compatible with the Convention … .

145.  Once adopted, Regulation (EEC) no. 990/93 was “generally applicable” and “binding in its entirety”, so that it applied to all member States, none of which could lawfully depart from any of its provisions. In addition, its “direct applicability” was not, and in the Court's view could not be, disputed. The regulation became part of domestic law with effect from 28 April 1993 when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation. …

Accordingly, the Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of Regulation (EEC) no. 990/93 applied. Their decision that it did so apply was later confirmed, in particular, by the ECJ … .

147.  … the answer to the interpretative question put to the ECJ was not obvious … the question was of central importance to the case … there was no previous ruling by the ECJ on the point … the ECJ ruling was binding on the Supreme Court … . Given the Supreme Court's question and the answer of the ECJ, the only conclusion open to the former was that Regulation (EEC) no. 990/93 applied to the applicant company's aircraft. …

**148.  For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93.**

149.  Since the second paragraph of Article 1 of Protocol No. 1 is to be construed in the light of the general principle enunciated in the opening sentence of that Article, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised … . In so determining, the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued … .

150.  The Court considers … that the general interest pursued by the impugned measure was compliance with legal obligations flowing from the Irish State's membership of the European Community.

… The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties …, which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations …. Such considerations are critical for a supranational organisation such as the European Community. This Court has accordingly accepted that compliance with Community law by a Contracting Party constitutes a legitimate general-interest objective within the meaning of Article 1 of Protocol No. 1 … .

152.  The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity … . Moreover, even as the holder of such transferred sovereign power, that organisationis not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party … .

153.  On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. … .

154.  In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliancewith obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards … .

155.  In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides .. . By “equivalent” the Court means “comparable”; … . However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

156.  If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights … .

159.  … While the founding treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it, and that the Convention had a “special significance” as a source of such rights. Respect for fundamental rights has become “a condition of the legality of Community acts” … and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments … .

This evolution has continued. The Treaty of Amsterdam of 1997 is referred to in paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and the Charter recognises the Convention as establishing the minimum human rights standards. … .

160.  However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance.

162.  It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their right under Article 184; and they have no right to bring anaction against another individual.

163.  It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a member State constitute important control of compliance with Community norms to the indirect benefit of individuals. Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions.

164.  Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for a breach of Community law … The ECJ maintains its control on the application by national courts of Community law, including its fundamental rights guarantees …

**165.  In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community.**

**166.  The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ, a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights. In the Court's view, therefore, it cannot be said that the protection of the applicant company's Convention rights was manifestly deficient, with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.**

Otázky k prípadu:

1. Aké pravidlá sú zakotvené v čl. 1 prvého protokolu k EDĽP? Ktoré z týchto pravidiel sa vzťahuje na prípad Bopshorus?
2. Kto je zodpovedný za porušenie EDĽP zmluvným štátom v súvislosti s výkonom povinností, ktoré mu vyplývajú z členstva v EÚ?
3. Za akých podmienok sa konanie zmluvnej strany vyplývajúce z jej členstva v medzinárodnej organizácii bude považovať za konanie v súlade s ustanoveniami EDĽP?