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

THIRD SECTION

CASE OF GALICH v. RUSSIA

(Application no. 33307/02)

JUDGMENT

STRASBOURG

13 May 2008

FINAL

26/01/2009

This judgment may be subject to editorial revision.

In the case of Galich v. Russia,

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

Josep Casadevall, *President,*
Elisabet Fura-Sandström,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Anatoly Kovler,
Alvina Gyulumyan,
Egbert Myjer, *judges,*

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 22 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 33307/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Boris Ivanovich Galich ("the applicant"), on 27 August 2002.

2. The applicant was represented by Ms M. Deryabina, a lawyer practising in Omsk. The Russian Government ("the Government") were represented by Mr P. Laptev, the former Representative of the Russian Federation in the European Court of Human Rights.

3. The applicant complained, in particular, that he had been unable to contest the reduction by the appeal court of the amount of statutory interest awarded by the first-instance court, and that the reasons adduced by the court of appeal in this connection had been insufficient.

4. By a decision of 6 April 2006, the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1952 and lives in Omsk.

7. In May 2000 the applicant lent a sum of money to a private person, Mr M. The amount of the debt was linked to the exchange rate of the United States dollar. Mr M. failed to repay the full amount in due time, and on 19 April 2001 the applicant brought a civil action against him. The applicant sought to recover 141,800 Russian roubles (RUB) on account of the outstanding debt, plus statutory interest for the period of delay (*проценты за неисполнение денежного обязательства*). The amount of statutory interest was calculated on the basis of the refinancing rate of the Central Bank of Russia.

8. In the domestic proceedings the applicant was represented by a lawyer. Mr M., the defendant, claimed that he had returned RUB 45,000 to the applicant. However, he acknowledged the remainder of the principal debt, and accepted the calculations of statutory interest.

9. On 15 January 2002 the Kirovskiy District Court of Omsk partially granted the applicant's claim. The court found that a part of the debt (RUB 45,000) had already been paid to the applicant. Given the exchange rate of the United States dollar at that moment, the court awarded the applicant RUB 106,500 (equivalent to 3,970 euros (EUR)) on account of the outstanding debt, plus RUB 34,611 (equivalent to EUR 1,290) as statutory interest under Article 395 of the Civil Code for 491 days of delay in paying the outstanding debt. To calculate the interest the court applied the annual refinancing rate of the Central Bank of Russia, which amounted to 25% at the time.

10. The applicant appealed. In the points of appeal he contested the finding of the first-instance court that a part of the principal debt had been returned to him.

11. On 27 February 2002 the Omsk Regional Court examined the appeal and dismissed it. The issue of statutory interest was not raised by the parties during the appeal proceedings. However, the court *proprio motu* reduced the amount of statutory interest awarded to RUB 10,000 (EUR 373), stating as follows:

> "In addition to the principal debt the court ordered recovery of statutory interest, in accordance with Article 395 of the Civil Code of the Russian Federation.
>
> At the same time, in the opinion of the court of appeal, the amount of interest – 34,611 roubles 44 kopeks – is disproportionate to the consequences of the breach of the obligation and is excessive.

> Consequently, the appeal court (*кассационная инстанция*) deems it necessary, pursuant to Article 333 of the Civil Code of the Russian Federation, to reduce the amount of the penalty to 10,000 roubles."

The overall amount awarded to the applicant was therefore reduced to RUB 116,500. That decision became final.

II. RELEVANT DOMESTIC LAW

A. Calculation of statutory interest

12. Article 395 of the Civil Code ("Responsibility for non-compliance with a monetary obligation") provided, insofar as relevant, as follows:

> "For the use of monetary assets belonging to another person, as a result of their unlawful withholding, or the failure to pay them back ... a [statutory] interest should be paid .... The amount of that interest is defined as the refinancing rate [of the Central Bank of Russia] ... applicable in the place of residence of the creditor ... on the day of the execution of the monetary obligation. If the monetary debt is recovered through the court, the court may award [statutory] interest on the basis of the refinancing rate applicable on the day of lodging of the claim, or on the day of the delivery of the judgment. These rules are applicable unless another rate has been fixed by the law or by an agreement [between the parties] ..."

13. Article 333 of the Civil Code ("The Reduction of the Penalty"), insofar as relevant, stipulates as follows:

> "If a penalty due [for a violation of a contractual obligation] is obviously out of proportion to the consequences of the violation of the civil obligation, the court has the right to reduce the amount of the penalty ..."

14. Pursuant to Joint Ruling no. 13/14 by the Russian Supreme Court and the Supreme Commercial Court of 8 October 1998, Article 333 is applicable to the statutory interest provided under Article 395. In deciding whether or not to reduce the statutory interest payable, the courts "should take into account the fluctuation of the refinancing rate of the Central Bank during the period of delay, as well as other circumstances which may affect the rates of interest".

B. Powers of the court of appeal

15. Article 294 ("Scope of review of the case by the court of appeal") of the Code of Civil Procedure of 1964, then in force, stipulated:

> "The [court of appeal] shall verify the legality and reasonableness of the first-instance court judgment within the scope of the appeal. It may examine new evidence and establish new facts. The court shall examine newly submitted evidence if it considers that the evidence could not have been submitted to the first-instance court.

In the interests of legality, the court of appeal may examine the decision of the first-instance court in its entirety."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained that the proceedings before the court of appeal had not been "fair" in that the court had reduced the amount of statutory interest payable by the defendant without hearing his submissions on the subject. He also complained that the court had not given reasons for its decision to reduce the amount of statutory interest awarded. Article 6 § 1 of the Convention, referred to by the applicant in this connection, reads in its relevant part as follows:

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

A. The parties' submissions

17. The Government submitted that the application of Article 333 of the Civil Code which allowed the court to reduce the amount of statutory interest payable clearly followed from the Ruling of the Supreme Court no. 13/14 of 8 October 1998, and had therefore been foreseeable. By virtue of Article 294 of the Code of Civil Procedure, the Regional Court had not been limited by the parties' arguments and could examine the case in its entirety. The applicant, through his representative, had had ample opportunity to present his arguments at the hearing before the court of appeal. Therefore, the proceedings had been fully adversarial.

18. Further, the Government submitted that the reasoning of the Regional Court's decision had been sufficient. The outstanding amount of the debt had been linked to the exchange rate of the US dollar. Therefore, the applicant had been sufficiently protected against the then high inflation of the Russian rouble. However, the first-instance court had applied the annual refinancing rate for the rouble credit, whereas the rate for the credit in US dollars was much lower. Furthermore, Mr M. had repaid part of the debt in time. All that led the Regional Court to conclude that the rate of statutory interest (25% annually) applied by the first-instance court had been too high.

19. The applicant maintained his complaints. In his words, the fact that the amount of debt was linked to the exchange rate of the US dollar was

intended to protect the interests of both parties, and not only those of the moneylender. In calculating the amount of statutory interest the first-instance court had applied the lowest rate that had existed at the moment of the litigation. However, even this rate had seemed too high to the Regional Court. Ruling no. 13/14, referred to by the Government, specified that in applying Article 333, the courts should take into account fluctuations of the lending rate of the Central Bank. However, the amount of interest set by the Regional Court (RUB 10,000) had clearly been nominal, pulled "out of thin air" and without any precise calculations.

20. Further, the Regional Court had gone beyond the scope of the appeal, which, according to the second part of Article 294 of the Code of Civil Procedure, was possible only for the sake of legality. The eventual reduction of the statutory interest payable had not been discussed by the parties before the court at either of the two instances. Finally, the overall amount awarded by the Regional Court (RUB 116,500) was even less than the sum recognised as due by the defendant before the District Court (RUB 137,392.88).

21. In his additional observations on the merits the applicant also alleged that the main reason for the reduction of the amount of statutory interest payable was that the defendant had experienced financial difficulties. However, Article 333 of the Civil Code did not allow for that aspect to be taken into consideration.

B. The Court's assessment

1. General principles

22. The applicant complained, under Article 6 § 1 of the Convention, that he had not had a fair trial in the proceedings before the court of appeal. That complaint had two limbs. Firstly, the applicant had not foreseen that the court would reduce the amount of statutory interest and, therefore, he had not been able to present his arguments in that connection. Secondly, the applicant complained that the reasoning of the court of appeal decision concerning the amount of interest payable had been insufficient. The Court will start by examining the applicant's first argument.

23. The Court recalls that the issue of unexpected alteration of the scope of a case was more often raised in the context of criminal proceedings. Indeed, the requirements inherent in the concept of a "fair hearing" are not necessarily the same in cases concerning the determination of civil rights – they are normally less stringent than in cases concerning the determination of a criminal charge (see *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, § 32). Nevertheless, the civil proceedings should also be "fair"; "fairness" implies that the proceedings be adversarial in nature, which, in turn, requires that a court should not base its

decision on evidence that has not been made available to each of the parties (see, *mutatis mutandis*, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, § 24).

24. The Court recalls that in the case of *Georgiadis v. Greece* (judgment of 29 May 1997, *Reports* 1997-III) it found a violation of Article 6 § 1 in that the applicant had not been given a chance to make submissions in the matter of compensation for his detention. In that case the issue of the State's liability was examined by the court *proprio motu*, together with the question of the applicant's guilt of draft evasion. The Court said, *inter alia*, that "a procedure whereby civil rights are determined without ever hearing the parties' submissions cannot be considered to be compatible with Article 6 § 1" (§ 40).

25. In sum, in civil proceedings the parties should also be given a reasonable opportunity to comment on all relevant aspects of the case. The Court does not need to decide *in abstracto* what "reasonable opportunity" means – whether or not it existed in a given case depends on too many factors. For instance, civil courts are not bound by the parties' legal arguments; the courts are free to choose the applicable law, to interpret evidence in a new way, and so on. On the other hand, judges should be more cautious when they are dealing with new facts or evidence which have not been discussed at the trial.

2. Application to the present case

26. The central question to answer in the present case is whether the re-calculation of the statutory interest due to the applicant was foreseeable. The Court notes in this respect that by virtue of Article 333 of the Civil Code the national judge has a wide discretion as to the amount of interest to be awarded to a claimant, where the interest stipulated in the contract or provided by the law are clearly unjust. The Government argued that, by virtue of Joint Ruling no. 13/14 of 8 October 1998, the courts had had the power to apply Article 333 (see the "Relevant domestic law" part above) on their own initiative. Therefore, in their words, such a development had been foreseeable and the applicant could have prepared additional arguments for that occasion.

27. The Court accepts that, as a matter of principle, the courts in Russia have the power to lower the amount of interest payable. The Court further accepts that, as such, this power of the domestic courts is not contrary to any other Convention provision – see the Court's findings under Article 1 of Protocol No. 1 in the admissibility decision of 6 April 2006. Therefore, a claimant in civil proceedings should be aware that there is a risk that the amount of statutory interest could be reduced under Article 333 of the Civil Code.

28. However, a distinctive feature of this case is that the first-instance court did not apply Article 333 and based its calculations solely on

Article 395 of the Code. Therefore, it has to be decided whether the decision of the court of appeal was foreseeable.

29. To answer this question the Court has to examine how the Russian law delimits the competence of the court of appeal. The first paragraph of Article 294 of the Code of Civil Procedure, referred to by the Government, stipulates that, as a general rule, the court of appeal should not go beyond the scope of the brief of appeal. Turning to the present case the Court notes that neither the applicant (the creditor), nor the debtor raised the issue of statutory interest before the court of appeal.

30. Indeed, the second paragraph of that article stipulates that the court of appeal is able to examine the case in its entirety. However, this power could be exercised only "in the interests of legality", and this is the crucial prerequisite. The Government did not explain what "legality" means in the Russian law and practice; in particular, the Government did not produce any case-law on the subject. Therefore, the Court will rely on its own understanding of the legality.

31. "Legality" is often understood as formal compliance with the legal order. The modern legal thinking also developed a theory of "substantive" legality, based on the respect for human rights and democracy. In the instant case, however, it is clear that the term "legality" used in Article 294 of the Code of Civil Procedure meant that the court decision should be in conformity with the body of applicable legal norms.

32. The Court notes that the first instance court, acting within its jurisdiction, awarded statutory interest as provided by Article 395 of the Civil Code. It did not apply Article 333 and did not reduce the statutory interest in line with the real losses suffered by the creditor. However, its application was a prerogative of the court, not an obligation. In any event, the court of appeal did not cast doubt on the legality of the lower court's decision. Therefore, the decision of the lower court in the present case was not "illegal" in the formal sense of this term.

33. Despite that, the court of appeal decided to recalculate the statutory interest due to the applicant. The court decided, of its own motion, that the amount of real loss sustained by the applicant was considerably less than the amount of statutory interest calculated under Article 395 of the Civil Code. The Court notes that the reasoning of the court of appeal was based on the notion of "proportionality" employed by Article 333. The court of appeal concluded that the decision of the lower court was not formally illegal, but, still, unfair in that the award made under Article 395 had not reflected the realities of the case.

34. It is doubtful whether under the Russian law the second instance court, in the circumstances of the case, had a power to go beyond the scope of appeal - the law lacked clarity in this respect. The Court is prepared to assume that the court of appeal was entitled to reduce the amount

of statutory interest payable. However, the Court finds that such a development was hardly foreseeable for the applicant.

35. The Court further emphasises the nature of the issue decided by the court of appeal. The applicant's claims were based on a calculation of the interest due to him at a rate defined by the Central Bank. In contrast, the application of Article 333 of the Civil Code was tantamount to a *de facto* evaluation of the actual losses of the applicant, which should have involved a more complex assessment of questions of fact. However, that issue was never raised in the proceedings.

36. Finally, the Court notes that the Omsk Regional Court did not give any reason why it considered the interest awarded by the first-instance court to be disproportionate to the damage sustained by the applicant. It is conceivable that certain matters may be decided by the court on the basis of the case file alone. However, for want of any reasoned decision in this respect, the Court is unable to make such a concession and concludes that the issue of the "proportionality" of the statutory interest awarded could not have been decided by the court of appeal without having consulted the parties.

37. The Court concludes that, assuming that the court of appeal was entitled to exercise its discretion to reduce the amount of statutory interest payable, in the specific circumstances of the case, by depriving the parties of an opportunity to be heard on the issue, which was not purely technical, it failed to exercise that discretion in a manner consistent with the requirements of Article 6 §1 of the Convention. The appeal court's judgment being final, there was no further ordinary instance at which the applicant could have advanced his defence against its findings (see, by contrast, *Feldman v. France* (dec.), no. 53426/99, 6 June 2002, and *Dallos v. Hungary*, no. 29082/95, §§ 50-52, ECHR 2001-II).

38. The Court considers that, given its findings above, it is not necessary to examine separately the complaint concerning the alleged inadequacy of the reasoning in support of the decision to reduce the statutory interest payable.

39. The Court therefore concludes that there has been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 5,000 euros (EUR) on account of non-pecuniary damage.

42. The Government stressed that the applicant did not show that he had suffered any distress or frustration in connection with the violation complained of. They considered that the amount awarded to him by the Omsk Regional Court was just and fully covered all his losses.

43. The Court notes that even though the applicant was awarded certain amounts in the domestic proceedings, that cannot by itself deprive him of his right to claim compensation under Article 41 of the Convention for the unfairness of those proceedings. The Court accepts that the applicant must have suffered a certain amount of frustration and a feeling of injustice as a consequence of the court's failure to invite him to comment on one of the important aspects of the case. It considers that the non-pecuniary damage suffered by the applicant cannot be adequately compensated by the finding of a violation alone. At the same time the Court considers that the amount of compensation claimed by the applicant is excessive. Making its assessment on an equitable basis, it awards the applicant EUR 1,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

44. The applicant did not make any claims for the costs and expenses incurred before the domestic courts and before the Court. Accordingly, the Court does not award anything under this head.

C. Default interest

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

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles, at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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;

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

Done in English, and notified in writing on 13 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President