



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

FIRST SECTION

CASE OF GUSAK v. RUSSIA

(Application no. 28956/05)

JUDGMENT

STRASBOURG

7 June 2011

FINAL

07/09/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gusak v. Russia,

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

Nina Vajić, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyeu,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 28956/05) 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, Ms Larisa Aleksandrovna Gusak (“the applicant”), on 27 May 2005.

2. The applicant was represented by Mr A. Gusak. The Russian Government (“the Government”) was represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that neither she nor her representative had been duly summoned to an appeal hearing in her case and that the appeal was considered in their absence.

4. On 20 March 2009 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1940 and lives in Sochi.

A. First set of proceedings

6. On 13 May 2002 the applicant's husband entered into an agreement with a building company. Under the terms of the contract the company had to build within twelve months an individual house in accordance with the approved project, and the applicant's husband had to pay them the price of the house in monthly instalments.

7. On 25 January 2003 the applicant's husband died.

8. The building company sued the applicant and her daughter (heirs to the applicant's husband) seeking to recover the contract arrears and to invalidate their title to the unfinished construction project.

9. On 20 December 2004 the Tsentralniy District Court of Sochi ("the District Court") granted the company's claims. The applicant appealed. The appeal hearing was scheduled for 21 April 2005.

10. During the hearing of 21 April 2005 the Krasnodar Regional Court ("the Regional Court") decided to postpone the appeal hearing at the request of the plaintiff. The applicant's representative was present. According to the applicant, the Regional Court did not specify the date of the next hearing.

11. On 27 April 2005 the court notified the applicant that the hearing had been adjourned to 12 May 2005. The applicant received that notification on 12 May 2005, the very date of the hearing. The postmark on the envelope submitted by the applicant showed that it had reached her on 12 May 2005. The Regional Court upheld the judgment on appeal in the absence of the applicant and her representative. It follows from the appeal decision of 12 May 2005 that the other party was present at the hearing and made oral submissions.

12. On 9 June 2005 the applicant requested the Regional Court to re-examine the case, alleging that she had not been duly notified of the appeal hearing of 12 May 2005.

13. On 29 September 2005 the Regional Court dismissed the applicant's request, finding that the materials of the case contained evidence that she had been properly notified. However, the Regional Court did not specify what evidence the case file contained.

B. Second set of proceedings

14. In 1999 the applicant's husband joined a building partnership with a view to acquiring a flat. From 1999 to 2002 he paid construction fees.

15. Following her husband's death in January 2003 the applicant brought proceedings against the partnership, seeking to join it as a member in her husband's stead.

16. On 17 October 2003 the District Court granted the applicant's claim. On 2 December 2003 the Regional Court upheld that judgment on appeal.

17. On 10 June 2004 the Presidium of the Regional Court quashed the above decisions by way of supervisory review and remitted the case for a fresh examination.

18. On 19 April 2005 the District Court granted the applicant's claim. However, on 21 June 2005 the Regional Court quashed the judgment on appeal and remitted the case for a fresh examination.

19. On 21 August 2006 the District Court dismissed the applicant's claims. On 26 October 2006 the Regional Court upheld the judgment on appeal.

II. RELEVANT DOMESTIC LAW

20. The Code of Civil Procedure of the Russian Federation ("the CCP", in force from 1 February 2003) reads as follows:

Article 113. Court summons and notifications

"1. Parties ... are to be summoned to court by a letter sent via registered mail with an acknowledgment of receipt, a court summons with an acknowledgment of receipt, a telegram, by phone or fax or by any other means of communication which guarantees recording of the fact that the court summons or notifications were received by the parties.

2. A court summons is one of the forms of court notification. Parties are notified by court summons of the date and place of a court hearing or of particular procedural actions ...

3. A summons or another form of notification is to be served on parties in such a way [as to ensure] that they have enough time to prepare their case and to appear at the hearing.

4. A court notification addressed to a party is to be sent to the address indicated by that party or his/her representative. If the party does not reside at the indicated address, the court summons may be sent to his or her place of work ..."

Article 115. Service of court summons and notifications

"1. Court summons and other notifications are to be sent by mail or delivered by a person authorised by the court to deliver them. The time of service is to be recorded as laid down by post office regulations or on a document which is to be returned to the court.

2. With a party's consent, a judge can serve him/her with summons or notifications to be delivered to another party. A person authorised by the judge to deliver a court summons or another notification is to return a counterfoil of the summons or a copy of the notification bearing the addressee's signature recording receipt."

Article 116. Receipt of a court summons

“1. A court summons ... to a person is to be served on him or her against his or her signature on a counterfoil of the summons, which is to be returned to the court ...”

Article 343. Actions of the first-instance court upon receipt of the statement of appeal

“1. Upon the receipt of the statement of appeal ... the judge shall:

1) send to the parties copies of the statement of appeal and the enclosed written documents not later than the day after their receipt;

2) notify the parties of the time and place of the appeal hearing ...”

Article 354. Consequences of failure of parties and representatives to attend an [appeal] hearing

“1. If a party to the case fails to appear and there is no evidence that the party was duly summoned, the hearing is to be adjourned ...”

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE ALLEGED NON-NOTIFICATION OF THE APPLICANT OF THE APPEAL HEARING**

21. The applicant complained that neither she nor her representative had been afforded an opportunity to attend the appeal hearing of 12 May 2005, in breach of Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...”

22. The Government claimed that the applicant had been notified of the appeal hearing of 12 May 2005 in good time and that the summons had been sent to the parties to the dispute on 27 April 2005. In support of their submissions, they provided the Court with a copy of the notification letter addressed, *inter alia*, to the applicant, with a stamp of dispatch on 27 April 2005. The Government further noted that the applicant’s allegation about the belated notification was examined by the domestic court. However, the applicant failed to produce in support of her allegations a certificate from the postal service confirming that the summons had not been delivered to her address or that it had been delivered in such a way that she had not had

enough time to prepare for the appeal hearing. Therefore, the court had found that the applicant had been duly notified of the appeal hearing. The Government also noted that the fact that the other party appeared at the appeal hearing proved that the parties had been duly summoned to the hearing.

23. The applicant maintained that the domestic courts had failed in their duty to inform her of the appeal hearing, that she received the notification only on 12 May 2005, and that the Government had not provided any evidence to the contrary. She noted that since the distance between her place of residence and the venue of the hearing was approximately 300 km she had had no opportunity to attend the hearing in person or to ensure the participation of her representative. The applicant also submitted that the requirement to prove non-receipt of the notification was absurd, since neither domestic law nor the Court's case-law imposed such a duty on litigants.

A. Admissibility

24. The Court notes that this complaint 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

25. The Court reiterates that the entitlement to a "public hearing" in Article 6 § 1 necessarily implies a right to an "oral hearing" (see *Fredin v. Sweden* (no. 2), 23 February 1994, §§ 21-22, Series A no. 283-A). The right to a public hearing would be devoid of substance if a party to the case were not apprised of the hearing in such a way so as to have an opportunity to attend it, should he or she decide to exercise the right to appear established in the domestic law (see *Yakovlev v. Russia*, no. 72701/01, §§ 21, 15 March 2005).

26. The Court observes that the Russian CCP provides for oral hearings before courts of appeal and that the jurisdiction of appellate courts is not limited to matters of law but also extended to factual issues. However, the parties' attendance is not mandatory and, if a party does not appear at the hearing without a valid reason after it had been duly notified thereof, the court could proceed with the examination of the appeal. The analysis of the provisions of Russian law on the service of court summons suggests that, whichever specific form of the parties' notification is chosen, the domestic courts should be in possession of evidence confirming the receipt of such notification by the addressee; otherwise the hearing is to be adjourned. It follows that the Government should have been in

possession of such evidence. The Government provided a copy of the notification letter dispatched on 27 April 2005. However, the Government did not present any evidence, such as an acknowledgement of receipt or an envelope bearing postmarks or similar showing that it had reached the applicant in good time. At the same time, the postmark on the envelope submitted by the applicant showed that it had reached her on 12 May 2005, on the very date of the appeal hearing.

27. The Court recalls that Article 6 cannot be construed as conferring on litigants an automatic right to obtain a specific form of service of court documents, such as by registered mail (see *Bogonos v. Russia* (dec.), no. 68798/01, 5 February 2004). Nevertheless, the Court considers that in the interests of the administration of justice a litigant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing. A formal dispatch of a notification letter without any confidence that it will reach the applicant in good time cannot be considered by the Court as proper notification. Moreover, the Court observes that there is nothing in the text of the appeal judgment to suggest that the appeal court examined the question whether the applicant had been duly summoned, and, if she had not been, whether the examination of the appeal should have been adjourned. It follows that the domestic authorities failed to demonstrate that they had taken a reasonable effort to duly summon the applicant to the hearing (see by contrast *Babunidze v. Russia* (dec.), no. 3040/03, 15 May 2007). In these circumstances the Court accepts the applicant's allegation that the domestic courts had failed in their duty to inform her of the appeal hearing. The Court also does not lose sight of the fact that the other party took part in the appeal hearing and made oral submissions. The participation in the hearing enabled the other party to submit observations on the applicant's appeal submissions, observations which were not communicated to the applicant and to which she could not reply orally.

28. The Court points out that it has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, among other authorities, *Yakovlev v. Russia*, cited above, §§ 19 et seq.; *Groshev v. Russia*, no. 69889/01, §§ 27 et seq., 20 October 2005; *Mokrushina v. Russia*, no. 23377/02, §§ 20 et seq., 5 October 2006; and *Prokopenko v. Russia*, no. 8630/03, §§ 17 et seq., 3 May 2007).

29. Having examined the materials in its possession, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. The Court has established that owing to the belated notification the applicant was deprived of the opportunity to attend the appeal hearing.

30. It follows that there has been a violation of the applicant's right to a fair hearing under Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

31. The applicant complained under Article 6 of the Convention and Article 1 of Protocol No.1 to the Convention that that both sets of the proceedings to which she had been a party had been unfair in that the domestic courts had incorrectly assessed the evidence, dismissed her arguments, failed to give reasons for their decisions and to make available to her copies of certain documents, and that the final judgement in her second case had been quashed by way of supervisory review. She also complained under Article 6 § 2 of the Convention that the domestic court had not presumed her husband innocent, because it had made reference to the fact that the former had obtained a certain document by abusing his official position.

32. Having regard to all the material in its possession and in so far as the complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed 18,371 euros (EUR) and EUR 187,727 in respect of pecuniary damage, representing the amount recovered from the applicant by virtue of the court judgment and the market value of the flat. She also claimed EUR 20,000 in respect of non-pecuniary damage.

35. The Government submitted that the applicant's claims were excessive and unsubstantiated.

36. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court considers that the applicant must have suffered frustration and a feeling of injustice as a consequence of the domestic

authorities' failure to apprise her of the appeal hearing of 12 May 2005 in good time. The Court finds that the applicant suffered non-pecuniary damage which would not be adequately compensated by the finding of a violation alone. Having regard to the nature of the violation found and making its assessment on an equitable basis, the Court awards the applicant EUR 1,800, plus any tax that may be chargeable on that amount.

B. Costs and expenses

37. The applicant also claimed 28,140.60 Russian roubles for costs and expenses. The sum represented travel expenses of the applicant's representative incurred for attendance at domestic court hearings, fees for translation and statistical data services.

38. The Government submitted that these expenses were unsubstantiated.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 128 for the costs and expenses incurred by the applicant in the proceedings before the Court, plus any tax that may be chargeable on that amount.

C. Default interest

40. 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. *Declares* the complaint concerning the domestic authorities' failure to apprise the applicant of the appeal hearing in good time admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable on the date of settlement:

- (i) EUR 1,800 (one thousand eight hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount;
- (ii) EUR 128 (one hundred and twenty-eight euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount;
- (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 7 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President