



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

FORMER FIRST SECTION

CASE OF DENISOVA AND MOISEYEVA v. RUSSIA

(Application no. 16903/03)

JUDGMENT
(Just satisfaction)

STRASBOURG

14 June 2011

FINAL

14/09/2011

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

In the case of Denisova and Moiseyeva v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 24 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 16903/03) 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 two Russian nationals, Ms Nataliya Mikhaylovna Denisova and Ms Nadezhda Valentinovna Moiseyeva (“the applicants”), on 8 July 2002. The application concerned the property rights of the wife (the first applicant) and daughter (the second applicant) of Mr Moiseyev who had been convicted of high treason and sentenced to a term of imprisonment and confiscation of his entire property, as an auxiliary form of punishment (see *Moiseyev v. Russia*, no. 62936/00, 9 October 2008). In subsequent civil proceedings the applicants attempted to vindicate their right to the spousal part of the property that had been removed from their home and to the personal computer that had been taken from the second applicant’s room. The Russian courts had rejected their claims by reference to the judgment that had been made in the criminal proceedings against Mr Moiseyev.

2. In a judgment delivered on 1 April 2010 (“the principal judgment”), the Court held that there had been a violation of Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights because the applicants had not had an opportunity to challenge effectively the confiscation measure imposed in the criminal proceedings to which they had not been parties (*Denisova and Moiseyeva v. Russia*, no. 16903/03, 1 April 2010).

3. Under Article 41 of the Convention the applicants sought just satisfaction in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicants to submit, within three months from the date on which the judgment would become final in accordance with Article 44 § 2 of the Convention, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, § 75, and point 3 of the operative provisions).

5. The applicants maintained their claims. The Government submitted their observations.

THE LAW

6. 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

1. The applicants' claims

7. The first applicant claimed the following amounts in respect of pecuniary damage:

- a) 6,657.50 euros (EUR) for the loss of rental income from the car garage and the land tax she was liable to pay on it;
- b) EUR 2,712.60 for one half of the depreciation cost of the VAZ car and the transport tax she was liable to pay on it; and
- c) EUR 3,537.80 for one half of the cash funds plus interest at the statutory lending rate.

8. The second applicant claimed EUR 800, representing the approximate value of a computer similar to hers.

9. The applicants also claimed EUR 30,000 and EUR 20,000 respectively in respect of non-pecuniary damage.

2. The Government's comments

10. The Government maintained at the outset that it had been conclusively established in the criminal proceedings against Mr Moiseyev that the contested property had been criminally acquired. In those circumstances, the Court had erroneously acted as a “court of fourth instance”. As to the specific claims made by the applicants, the Government

pointed out that the first applicant had not been the legal owner of the garage or the plot of land, that she had not been registered as a payer of land tax and that no records of any payment of the land tax existed. Moreover, the garage had not been confiscated. Similarly, the first applicant had not been registered as owner of the VAZ car and there is no evidence that she had ever paid any transport tax. In respect of the cash funds, the Government maintained that those had been criminally acquired and should not be reimbursed for the reasons of “social justice”. As to the second applicant’s computer, its real value was closer to EUR 100, as it was determined both in the forensic valuation report and stated in the applicants’ statement of claim in the domestic proceedings.

11. The Government further considered that the claim in respect of non-pecuniary damage was unreasonable as to quantum. They claimed that the applicants did not adduce evidence of the non-pecuniary damage.

3. The Court’s assessment

12. Where the Court has found a breach of the Convention in a judgment, the respondent State is under a legal obligation to put an end to that breach and make reparation for its consequences. If national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. The Court enjoys a certain discretion in the exercise of that power, as the adjective “just” and the phrase “if necessary” attest. In particular, if one or more heads of damage cannot be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proves difficult, the Court may decide to make a global assessment (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 29, ECHR 2000-IV).

13. The Court has established in the principal judgment that the first applicant’s claim to the spousal portion and the second applicant’s claim to the computer had a basis in the statutory law and in the case-law of the Russian Supreme Court (paragraphs 47-54 of the principal judgment). Since the applicants had not been parties to the criminal proceedings against Mr Moiseyev, they unsuccessfully attempted to vindicate their property claims in civil proceedings. The Moscow courts had not carried out a global assessment of the family property or the balancing exercise of the rights of family members which had been both required under the applicable domestic law provisions (*ibid.*, §§ 61-64).

14. The Court reiterates that the factual matters such as the extent of the first applicant’s spousal share should be best determined in the domestic proceedings on the basis of the evidence submitted by the parties. In the instant case the Russian courts did not carry out such a determination. However, it is noted that, pursuant to the Russian Constitutional Court’s judgment no. 4-P of 26 February 2010, the Court’s judgments are binding on Russia and a finding of a violation of the Convention or its Protocols by

the Court is a ground for reopening civil proceedings under Article 392 of the Code of Civil Procedure and review of the domestic judgments in the light of the Convention principles established by the Court (see *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, § 206, ECHR 2010-... (extracts)). In these circumstances, the Court considers that such a review would be the most appropriate means of remedying the violation it has identified in the principal judgment and that it is not necessary to award any amounts in respect of pecuniary damage.

15. As to non-pecuniary damage, the Court reiterates its constant position that an applicant cannot be required to furnish any proof of non-pecuniary damage he or she has sustained (see, among many others, *Antipenkov v. Russia*, no. 33470/03, § 82, 15 October 2009; *Pshenichnyy v. Russia*, no. 30422/03, § 35, 14 February 2008; *Garabayev v. Russia*, no. 38411/02, § 113, ECHR 2007-VII (extracts); and *Gridin v. Russia*, no. 4171/04, § 20, 1 June 2006). It further considers that the applicants must have suffered anxiety and frustration on account of the authorities' persistent failure to examine their civil claims. Making its assessment on an equitable basis, the Court awards the applicants jointly EUR 8,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

16. The applicants claimed jointly EUR 374.60 for legal fees in the domestic proceedings, EUR 122.20 for court fees and EUR 3,000 for their representation before the Court by Ms Kostromina.

17. The Government pointed out that only the legal costs in the domestic proceedings in the amount of EUR 450 were confirmed with appropriate documents. The applicants did not produce a legal-services agreement with Ms Kostromina.

18. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

19. On the basis of the materials in the case-file, the Court accepts the applicants' claim for the costs in the domestic civil proceedings and awards them EUR 496.80, plus any tax that may be chargeable to the applicants. However, there is no evidence in the file that any disbursements have been made to Ms Kostromina or that there is a legal obligation on the part of the applicants to make any such disbursements. Accordingly, this part of the claim is rejected.

C. Default interest

20. 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

1. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicants jointly, within three months from 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 at the date of settlement:
 - (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 496.80 (four hundred ninety-six euros and 80 cents), plus any tax that may be chargeable to the applicants, 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;
2. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Section Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge D. Spielmann is annexed to this judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN

I voted in favour of point 2 of the operative part of the judgment, rejecting the remainder of the applicants' claim for just satisfaction, under the head of pecuniary damage, because pursuant to the Russian Constitutional Court's judgment no. 4-P of 26 February 2010, a finding of a violation of the Convention or its Protocols by the Court is a ground for reopening civil proceedings under Article 392 of the Code of Civil Procedure and for a review of domestic judgments in the light of the Convention principles established by the Court (see paragraph 14 of the judgment).

However, the expressions "just" (French *équitable*) and "if necessary" (*s'il y a lieu*), as mentioned in paragraph 12 of the judgment, cannot be understood merely as conferring on the Court a discretion to use its powers under Article 41 to afford such satisfaction "as appears to it to be appropriate". A "necessity" to apply Article 41 exists "once a respondent government refuses the applicant reparation to which he considers he is entitled" (see *Ringeisen v. Austria* (Article 50), 22 June 1972, § 22, Series A no. 15). It should be recalled that the Court has frequently rejected Governments' submissions to the effect that the applicant can ask for compensation in domestic courts in respect of the violation found by the Court (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 40, Series A no. 330-B; *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 15-16, Series A no. 14; *Jalloh v. Germany* [GC], no. 54810/00, § 129, ECHR 2006-IX; and *a/s Diena and Ozoliņš v. Latvia*, no. 16657/03, § 92, 12 July 2007, and the references cited therein).

In the "Vagrancy cases" (see *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 16, Series A no. 14), the Court held as follows:

"...if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention."

(See also my concurring opinion, joined by Judge Loucaides, attached to the *Lo Tufo* judgment, with further references (*Lo Tufo v. Italy*, no. 64663/01, ECHR 2005-III)).

However, the execution of the Court's judgments today requires a sharing of the burden and the robust involvement of national authorities, including domestic courts. The positive development of Russian law (Constitutional Court's judgment of 26 February 2010) needs to be encouraged. That is the reason why I did not dissent on point 2 of the

operative part and why, albeit not without hesitation, I voted in favour of this point.