



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

THIRD SECTION

CASE OF KRAMAREVA v. RUSSIA

(Application no. 4418/18)

JUDGMENT

Art 6 § 1 (civil) • Fair balance between parties in proceedings on employment termination not upset by participation of a prosecutor, in context of Russian domestic law • Prosecutor an independent officer having no special powers and not attending court deliberations • No proof that prosecutor's opinion had undue influence on the courts which would diverge from principle of equality of arms • Adversarial proceedings safeguarded by parties having effective opportunity to make submissions in reply

STRASBOURG

1 February 2022

FINAL

20/06/2022

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

In the case of Kramareva v. Russia,

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

Georges Ravarani, *President*,

Georgios A. Serghides,

Dmitry Dedov,

Darian Pavli,

Peeter Roosma,

Andreas Zünd,

Frédéric Krenc, *judges*,

and Olga Chernishova, *Deputy Section Registrar*,

Having regard to:

the above application 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 Anastasiya Olegovna Kramareva (“the applicant”), on 19 December 2017;

the decision to give notice to the Russian Government (“the Government”) of the complaint concerning the prosecutor’s participation in the civil proceedings and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 19 October and on 14 December 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

THE FACTS

1. The applicant, Ms Anastasiya Olegovna Kramareva, is a Russian national who was born in 1990 and lives in Lyubertsy. She was represented before the Court by Ms V.V. Leonidchenko, a lawyer practising in Moscow.

2. The Government were initially represented by Mr M. Galperin, the former Representative of the Russian Federation to the European Court of Human Rights, and later by his successor in that office, Mr M. Vinogradov.

3. The facts of the case may be summarised as follows.

4. From 13 November 2015 the applicant was a part-time employee of the State company Mosecostroy (“the company”).

5. On 7 July 2016 the company terminated the applicant’s contract of employment on the grounds that another employee had been employed to perform the same duties on a full-time basis, in accordance with Article 288 of the Labour Code.

6. On an unspecified date the applicant brought proceedings against the company before the Preobrazhensky District Court of Moscow. She asked the court, firstly, to declare the termination of her employment contract unlawful and to reinstate her; secondly, to award her compensation for lost earnings

and non-pecuniary damage; and thirdly, to order the company to provide her with copies of some work-related documents.

7. At the hearing, the representatives of the applicant, the company and a third party, private company M., were present and made their submissions to the court. A prosecutor was also present. At the end of the hearing, the prosecutor gave an opinion that the applicant's claims should be allowed in part concerning the company's obligation to provide her with copies of documents and that the remainder of her claims should be dismissed.

8. Following the prosecutor's opinion, the parties orally presented their closing arguments. The applicant asked that her claims be granted, without specifically referring to the prosecutor's submissions. The defendant asked that the applicant's claims be dismissed in full and also objected to the part of the prosecutor's submissions which supported the applicant's claims.

9. On 11 October 2016 the District Court allowed the applicant's claims in part. It ordered the company to provide the applicant with copies of work related documents and awarded her compensation for non-pecuniary damage in that regard. Finding that the termination of the applicant's employment contract had been lawful in accordance with Article 288 of the Labour Code and that the relevant procedure for the termination had been complied with, it dismissed the remainder of the applicant's claims.

10. The applicant appealed. In her appeal she did not raise any arguments concerning the prosecutor's participation in the proceedings.

11. At the appeal hearing, the applicant and her representative maintained their claims, while the company's representative objected to the applicant's appeal. The prosecutor supported the judgment of the District Court. There is no evidence that the parties submitted any comments in reply to the prosecutor's opinion.

12. On 2 February 2017 the Moscow City Court upheld the judgment of the District Court.

13. The applicant lodged appeals on points on law with the Moscow City Court and the Supreme Court. On 28 June and 25 July 2017 respectively, the Moscow City Court and the Supreme Court dismissed the applicant's further appeals.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Russian Federation

14. Article 129 of the Constitution of the Russian Federation reads as follows:

"1. The prosecutor's offices of the Russian Federation shall be a unified federal centralised system of bodies monitoring compliance with the Constitution of the

Russian Federation, enforcement of laws and respect for human and civil rights and freedoms, ensuring criminal prosecution in accordance with its powers, and performing other functions. The powers and functions of the prosecutor's offices of the Russian Federation, their organisation and the procedure for [carrying out] their activities shall be determined by federal law." ...

B. Labour Code

15. Article 288 of the Labour Code of the Russian Federation provides that a contract of employment concluded with an employee working on a part-time basis may be terminated in the event that the employer hires an employee who will perform the work on a full-time basis.

C. Code of Civil Procedure

16. The relevant parts of the Code of Civil Procedure of the Russian Federation read as follows:

Article 45. Participation of a prosecutor in the proceedings

"1. A prosecutor shall be entitled to lodge an application with the court for the protection of rights, freedoms and lawful interests of citizens or an undefined group of persons, or the interests of the Russian Federation, subjects [constituent entities] of the Russian Federation and municipal entities ...

2. A prosecutor who has lodged an application shall enjoy all the procedural rights and bear all the procedural obligations of the plaintiff, except for the right to conclude a friendly-settlement agreement and the obligation to pay the court fees ...

3. A prosecutor shall join the proceedings and give an opinion in cases concerning eviction, reinstatement in employment, [or] compensation for harm caused to life or health, and in other cases provided for by the present Code and other federal laws, for the purpose of exercising his [or her] powers. The absence of a prosecutor [who has been] notified of the time and place of the hearing shall not constitute an impediment to the hearing of [such a] case."

Article 131. Form and content of a statement of claim

...

"3. In the statement of claim lodged by a prosecutor for the protection of the interests of the Russian Federation, subjects of the Russian Federation and municipal entities or for the protection of the rights, freedoms and lawful interests of an undefined group of persons, it should be indicated what exactly their interests are, [and] which right has been violated, and there should also be a reference to the law or other legal instrument providing for [such] means of protection of these interests. In the case of a prosecutor's application for the protection of the lawful interests of a citizen, the statement of claim shall contain either the grounds for the impossibility for the citizen to bring an action on his [or her] own or an indication that the citizen has applied to the prosecutor."

17. Articles 189 and 327 of the Code of Civil Procedure of the Russian Federation explicitly provide that once a prosecutor has given an opinion, the

other parties are to be afforded an opportunity to submit additional comments on it.

D. The Prosecutor's Offices Act 1992

18. The Prosecutor's Offices Act (Federal Law no. 2202-1 of 17 January 1992), as in force at the material time, provided:

Section 1. Prosecutor's offices of the Russian Federation

“ ...

3. In accordance with the procedural legislation of the Russian Federation, prosecutors shall participate in the hearing of cases by courts of law and commercial courts (hereinafter referred to as ‘the courts’) and shall challenge any court decisions, sentences and rulings which are contrary to the law ...”

Section 4. The principles of organisation and functioning of the prosecutor's offices of the Russian Federation

“1. The prosecutor's offices of the Russian Federation shall be a unified federal centralised system of bodies ... based on subordination of the lower-level prosecutors to superior prosecutors and the Prosecutor General of the Russian Federation.

2. The prosecutor's offices discharge their functions independently from the federal, subject of the federation, and municipal bodies and public associations ... in strict compliance with the legislation in force ...”

Section 5. Prohibition of interference with prosecutorial supervision

“1. Any action aimed at influencing ... the prosecutor in taking of his decision or at interfering with his actions shall be a ground for imposing a liability prescribed by law ...”

Section 35. Prosecutor's participation in court hearings

“1. The prosecutor shall take part in court hearings in the cases provided for by the procedural legislation of the Russian Federation and other federal laws.

...

3. The prosecutor, in accordance with the procedural legislation of the Russian Federation, shall be entitled to make an application to the court or to join a case at any stage of the proceedings if the protection of civil rights and lawful interests of society or the State so requires.

...”

E. Clarifications by the Constitutional Court

19. Several rulings of the Constitutional Court of the Russian Federation (no. 831-O-O of 18 December 2007 (point 2.1); no. 589-O-O of 28 May 2009 (point 2.1); and no. 200-O of 25 February 2013 (point 2)) have clarified that the provisions of Article 45 of the Code of Civil Procedure in conjunction

with Article 35 of the Prosecutor's Offices Act, specifying the powers assigned to the prosecutor's offices by Article 129 of the Constitution, constitute procedural safeguards for the exercise by the prosecutor's offices of their powers. The prosecutor's opinion cannot predetermine the position of the court in a case, which must be determined on the basis of all the circumstances of the case, as well as an impartial, comprehensive and complete examination of the arguments and evidence submitted by the parties. The prosecutor's participation in such cases does not prevent the parties from fully exercising their rights; it does not upset the balance between the parties, nor does it infringe the principle of adversarial procedure.

II. RELEVANT COUNCIL OF EUROPE DOCUMENTS

20. As early as 2000, the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, which laid out the common European principles for legislation and practice in that field. On 27 May 2003 the Parliamentary Assembly of the Council of Europe, referring to the above-mentioned Recommendation, adopted Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, which predominantly dealt with the role of prosecutors in safeguarding the rule of law, fighting against crime and overseeing investigative bodies. It also stated the following:

“7.5 as to non-penal law responsibilities, it is essential:

- a. that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights;
- b. that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and
- c. that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions ...”

At the same time, paragraph 8.3 urged the Committee of Ministers to undertake a detailed study with a view to preparing a recommendation to member States on those aspects of the role of the public prosecutor not addressed in Recommendation Rec(2000)19, including the Assembly's recommendation mentioned in paragraph 7.5.

21. On 4 February 2004 the CM adopted its reply to the Assembly's Recommendation, highlighting the following in particular:

- “3. The Committee of Ministers underlines the variety of public prosecution models in different countries, resulting from legal traditions and the different organisation of

criminal justice systems. Each system has its own checks and balances and it is difficult to treat one single element – the role of the public prosecutions services, for instance – in isolation from other elements of the system. Besides, the Committee of Ministers is not in a position to endorse, without extensive additional debate at least – some of the Assembly’s ideas in relation to the public prosecution services, such as ... the confinement of the role of public prosecutors to the criminal justice system. The Committee of Ministers finds no reason to request that the principle of legality be abandoned by those European jurisdictions where it is applied or to prevent prosecutors from exercising certain functions outside the criminal justice system, as it is the case in many legal systems.”

22. At its 63rd plenary session (10-11 June 2005), the European Commission for Democracy through Law (Venice Commission) adopted an Opinion on the Russian Prosecutor’s Offices Act, the relevant part of which states the following:

“54. Chapter III of the Law entitled ‘Prosecutorial supervision’ is devoted to the detailed instruments whereby the prosecutor exercises supervision and endows the prosecutor with extremely broad rights ...

56. Against this background the Commission would support a very different approach to the powers of the prosecutor’s office which results from [the Recommendation] adopted by the Parliamentary Assembly ...

57. While this represents the Parliamentary Assembly’s opinion, it does not necessarily reflect the practice within the majority of Council of Europe Member States. It is, of course, clear that the Russian Office of the Prosecutor General is among those Offices which does not conform to the model which the Parliamentary Assembly considered to be essential. Moreover, in respect of the Prosecutor’s predominant role in the Russian administration, which can hardly be described as limited or exceptional, the Prosecutor’s Office does not seem to conform to the tests proposed by Varga [author of a reflection document presented to the Conference of Prosecutors General of the Council of Europe].

58. On the whole, a possible solution would seem to lie in separating the function of ensuring compliance with the law by state authorities from the function of criminal prosecution. In the existing scheme of things it is difficult to avoid the conclusion that the supervisory power predominates over that of criminal prosecution.”

23. On 15-17 October 2008 the Consultative Council of European Prosecutors, an advisory body set up by the Committee of Ministers, adopted Opinion no. 3 (2008) on the role of prosecution services outside the criminal law field, which used as its main references the case-law of the Court as well as the concluding documents of the four Conferences of Prosecutors General of Europe held between 2003 and 2008. The relevant parts of the Opinion read as follows:

“4. A great variety of systems exist in Europe regarding the role of the prosecution services, including outside the criminal law field, resulting from different legal and historical traditions. It is for member States to define their legal structures and their functioning, provided they fully respect human rights and fundamental freedoms, the rule of law principle and their international obligations, including those under the Convention for the Protection of Human Rights and Fundamental Freedoms ... The role of public prosecution services and the extent of [their] competences, including the

KRAMAREVA v. RUSSIA JUDGMENT

protection of human rights and public interest, are defined by the domestic legislation of member States. The presence or absence and extent of non-penal functions of public prosecutors are deeply rooted in the cultural heritage, the legal tradition and the constitutional history of nations.

...

16. Prosecution services in the majority of the Council of Europe member States have at least some tasks and functions outside the criminal law field. The areas of competence are varied and include, *inter alia*, civil, family, labour, administrative [and] electoral law as well as the protection of ... environmental [rights], social rights and the rights of vulnerable groups such as minors, disabled persons and persons with very low income.

...

25. The aims of non-penal activities of prosecutors, irrespective of their substantive or procedural differences, are much more concordant: ensuring rule of law (integrity of democratic decisions, legality, observance of law, remedy against violation of law), protection of rights and liberties of persons (mostly of those incapable [of protecting] their rights – minors, persons with unknown domicile, mentally [incapable]), protection of assets and interests of [the] State, protection of public interest (or of public order), harmonisation of jurisdiction of courts (special remedies against final court decisions in the best interest of law, action as parties in such proceedings [at] the highest court levels).

...

29. Nowadays activities of prosecution services outside the criminal law field are determined, first of all, by the needs of society to properly ensure human rights and public interest.

...”

24. Recommendation CM/Rec(2012)11, adopted by the Committee of Ministers on 19 September 2012, established common principles for member States on the role of the prosecutor’s offices outside the criminal justice system and noted the absence of common international legal standards regarding the role of prosecution services outside the criminal justice system, the existence in legal systems of the various functions of the prosecutor’s offices aimed at the protection of the general or public interest as well as the rights of vulnerable persons, and the need to ensure fair-trial standards as defined in the Court’s case-law. The relevant parts of the Recommendation provide as follows:

“B. Mission of public prosecutors

2. Where the national legal system provides public prosecutors with responsibilities and powers outside the criminal justice system, their mission should be to represent the general or public interest, protect human rights and fundamental freedoms, and uphold the rule of law.

C. Common principles

3. The responsibilities and powers of public prosecutors outside the criminal justice system should in all cases be established by law and clearly defined in order to avoid any ambiguity.

4. As in the criminal law field, public prosecutors should exercise their responsibilities and powers outside the criminal justice system in full accordance with the principles of legality, objectivity, fairness and impartiality.

...

D. Principles applicable to specific responsibilities and powers of public prosecutors outside the criminal justice system

...

In relation to court proceedings where the public prosecutor is a principal party

12. The powers of the public prosecutor to initiate legal proceedings or act as a defendant should not compromise the principle of equality of arms between the parties to litigation.

13. The public prosecutor should not withhold evidence relevant to the issues in dispute.

...

15. In cases where an individual's interests are represented by the public prosecutor, that person should be entitled to be a party to the proceedings. This should not prevent the public prosecutor from remaining a party to the proceedings when the general or public interest is involved.

16. The rights of the public prosecutor to appeal or otherwise have a decision of a court reviewed by a superior court should be no different from those available to the other parties to the proceedings and also subject to the same conditions, including the time limits for lodging the appeal.

In relation to court proceedings where the public prosecutor intervenes or is joined as a party

17. The parties to the proceedings should be informed either by the public prosecutor or by the court of the decision of the public prosecutor to intervene or be joined to the proceedings.

18. Where the public prosecutor presents a written opinion before the court hearing, the opinion should be made available to all parties in sufficient time to be considered. Otherwise, the hearing may be adjourned.

19. The parties to the proceedings should have the opportunity to comment on the opinion of the public prosecutor and to submit counter-arguments.

20. The public prosecutor should neither participate in the deliberations of the court, nor give the impression of doing so.

..."

25. According to the 2020 European judicial systems evaluation report by the European Commission for the Efficiency of Justice (CEPEJ), prosecutors intervene in civil cases in 33 member and observer States, in administrative cases in 25 States and in insolvency cases in 18 States.

26. On 8 July 2021 a Final Document was adopted by the Heads of Prosecutor's Offices of European States during a high-level conference organised jointly by the Prosecutor General's Office of the Russian Federation, the Council of Europe and the International Association of

Prosecutors in St Petersburg from 6 to 9 July 2021. In the part relevant to prosecutors' participation in proceedings outside the criminal-law field, it states the following:

“5. States have a margin of appreciation in determining the structure and powers of the prosecution service, as well as the mechanisms for exercising its competence, in order to promote the public interest and to achieve the highest possible level of compliance with – and protection of – human rights and freedoms, to uphold the principle of the rule of law, and to fulfil their international legal obligations. Nevertheless, states must take into account the values of a democratic, rule-of-law and social state ...

6. In line with the principle of the rule of law, the functions of the prosecution service should be defined by law and exercised with strict respect for the democratic principles and values of the Council of Europe, and notably the provisions of the European Convention on Human Rights. In those countries where the legislation entrusts the prosecution service with functions outside the criminal justice system, such functions should be clearly defined in law and exercised, if necessary, in coordination with other authorities established to protect the public interest in specific areas ...”

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicant complained under Article 6 § 1 of the Convention that a fair balance between the parties had not been respected in view of the prosecutor's participation in the proceedings. The relevant part of Article 6 reads as follows:

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

A. Admissibility

28. The Court notes that the parties have not challenged the admissibility of the complaint. It finds that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

29. The Government submitted that the prosecutor had participated in the proceedings in accordance with the law and that her participation had been justified by the public interest. In cases where the prosecutor's participation was provided for by law, the prosecutor carried out the main function of prosecutor's offices, namely ensuring the lawfulness and the uniformity of legal practice and protecting human rights and legitimate State interests. The

performance by prosecutor's offices of functions outside the criminal-law field was in compliance with common European principles and practice. The Government further highlighted that the procedural rules for the prosecutor's participation in the present case had been clearly defined by law and that the prosecutor had not been afforded more rights than other parties. The prosecutor had not acted in favour of any party to the proceedings, her opinion had not been binding on the court and her involvement had not had any significant impact on the outcome of the proceedings. Thus, the Government maintained that the participation of the prosecutor in the proceedings had not violated the principle of equality of arms, or in any other way undermined the fairness of the proceedings.

30. The applicant maintained her complaint. She submitted that the prosecutor's participation had not been justified and that the mere presence of a prosecutor in civil proceedings, whether active or passive, had to be considered a violation of Article 6 § 1 of the Convention. In the applicant's opinion, the prosecutor had in each instance supported the opposing party, thus creating a feeling of inequality and placing the applicant at a substantial disadvantage. Lastly, she submitted that the repetition by the prosecutor of the company's arguments had been aimed at influencing the court and it could not be said that the court had not been bound by the prosecutor's opinion.

2. General principles and overview of the Court's case-law

31. The principle of equality of arms is one element of the broader concept of fair trial, within the meaning of Article 6 § 1 of the Convention. It requires "a fair balance between the parties": each party must be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (see, among other authorities, *Yvon v. France*, no. 44962/98, § 31, ECHR 2003-V, and *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

32. The Court has already on several occasions examined the role of independent members of the national legal service, such as the public prosecutor, the advocate-general, the government commissioner or similar officers, in proceedings outside the criminal-law field. In this connection, the Court has considered that the mere fact that such an officer participated in the proceedings cannot as such give rise to an issue under Article 6 (see, *mutatis mutandis*, *Todorov v. Bulgaria* (dec.), no. 39832/98, 14 March 2002) and that the fact that a similar point of view is defended before a court by several parties does not necessarily place the opposing party in a position of "substantial disadvantage" when presenting his or her case (see *Yvon*, cited above, § 32). Therefore, the Court must analyse the part actually played in the proceedings by the officer concerned (see *Kress*, cited above, § 71, and *Van Orshoven v. Belgium*, 25 June 1997, § 39, *Reports of Judgments and Decisions* 1997-III); where the independence and impartiality of that officer are not in question under the Convention (see *Kress*, cited above, § 71), it

remains to be ascertained whether, in view of the participation of such an officer in the proceedings, the “fair balance” that ought to prevail between the parties was respected (see *Yvon*, cited above, § 33).

33. In the past the predominant focus of the Court’s case-law on the matter was on the existence and exercise of special powers by prosecutors and similar public officers. For instance, the Court has concluded that the mere presence of such officers at a court’s deliberations after public hearings, whether “active” or “passive”, gave rise to a breach of Article 6 § 1 of the Convention (see *Martinie v. France* [GC], no. 58675/00, § 53, ECHR 2006-VI, with further references), since it could raise concerns that such an officer, after he or she had expressed an opinion at a public hearing, would be able, if only to outward appearances, to further influence the court in private without opposition from the other parties. Significantly, the Court has stated that regardless of the acknowledged objectivity of the officers concerned, their presence at the deliberations upsets a fair balance between the parties (*ibid.*; see also *Kress*, cited above, §§ 81-82, and *Vermeulen v. Belgium*, 20 February 1996, § 34, *Reports* 1996-I).

34. Furthermore, the Court has repeatedly held that the concept of a fair trial implies the opportunity for the parties to the proceedings to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service (see, among other authorities, *Yvon*, cited above, § 38, and *Kress*, cited above, § 74, with further references), and that therefore any such submissions should be public and open for opposing comments. From that standpoint, in *Göç v. Turkey* ([GC], no. 36590/97, §§ 55-58, ECHR 2002-V), the Court found that the non-communication to the applicant of the public prosecutor’s opinion, and the impossibility for the applicant to have knowledge of and reply to it in the absence of an oral hearing, violated Article 6 of the Convention. Similarly, in *Martinie* (cited above, § 50), Article 6 was breached on account of State Counsel’s privileged position, since he or she could attend hearings and express opinions orally before the Court of Audit, without being contradicted by the parties, with that imbalance being accentuated by the fact that the hearing was not public. In contrast, in *Yvon* and *Kress* (both cited above, § 39 and § 76 respectively) the Court considered that, since the parties had been informed of the Government Commissioner’s submissions and had been able to reply to them, the principle of adversarial procedure had been observed.

3. *The Court’s practice in cases against Russia*

35. In cases against Russia, the Court, following the established general principles, has considered that the mere fact that a prosecutor participated in civil proceedings cannot as such give rise to an issue under Article 6 (see, *mutatis mutandis*, *Chernysheva v. Russia* (dec.), no. 77062/01, 10 June 2004) and that the fact that a similar point of view is defended before a court by several parties does not necessarily place the opposing party in a position of

“substantial disadvantage” when presenting his or her case (see *Korolev v. Russia* (no. 2), no. 5447/03, § 30, 1 April 2010, and *Batsanina v. Russia*, no. 3932/02, § 25, 26 May 2009).

36. In *Menchinskaya v. Russia* (no. 42454/02, § 39, 15 January 2009) the Court, referring to the above-mentioned recommendation of the Parliamentary Assembly and the opinion of the Venice Commission (see paragraphs 20 and 22 above), concluded that the prosecutor’s intervention in the appeal proceedings undermined the principle of equality of arms, particularly owing to the fact that only the prosecutor, but not the parties, had submitted arguments orally before the appeal court. In *Korolev* (cited above, §§ 11 and 15) the Court, in the light of the above-mentioned instruments, reached a similar conclusion, since, among other factors, the applicant had not been afforded an opportunity to comment on the statement made by the prosecutor at the end of the appeal hearing, because the law in force at the time had not provided for it. Recently the general approach of the above judgments has been followed in the case of *Gruba and Others v. Russia* (nos. 66180/09 and 3 others, §§ 96-99, 6 July 2021). In that case the focus of the Court’s scrutiny has been placed on the existence of special circumstances justifying a prosecutor’s participation in the proceedings rather than on the legal basis for such participation or the actual effect it had on the requisite fair balance.

37. In *Batsanina* (cited above, § 27), the Court, having regard to Opinion no. 3 (2008), adopted by the Consultative Council of European Prosecutors (see paragraph 23 above), confirmed that a prosecutor’s participation in civil proceedings could be justified in certain circumstances, for instance for the protection of vulnerable persons who were unable to protect their interests themselves, or where numerous citizens were affected by the wrongdoing concerned, or where identifiable State assets or interests needed to be protected. Relying on the premise that the prosecutor acted in pursuance of the public interest, the Court noted that the prosecutor’s involvement in the case under examination had neither unduly influenced the court nor prevented the applicant from bringing an effective defence, and therefore a fair balance between the parties had been respected (see *Batsanina*, cited above, § 27).

4. Application of the above principles

38. As a starting-point, the Court notes that since the adoption of the above-mentioned judgments in cases *Menchinskaya* and *Batsanina* (both cited above), the common principles on the role of the prosecutor’s offices outside the criminal justice system have been set out for the member States in Recommendation CM/Rec(2012)11, adopted by the Committee of Ministers on 19 September 2012 (see paragraph 24 above). The Recommendation reaffirmed that, where the national legal systems provide for the participation of prosecutors in civil cases, it should be in pursuance of the general or public interest, the protection of human rights and fundamental

freedoms, and the upholding of the rule of law. A prosecutor's participation in such proceedings should be provided for by law, should ensure equality of arms and the fairness of the proceedings, he or she should be afforded no special powers in comparison to other parties, and his or her opinions should be open to comments from the other parties to a case (*ibid.*). The Court further notes that these principles are consistent with its case-law on the matter (see paragraphs 31-34 above), stem from the existing practice in the member States (see paragraphs 25 and 26 above) and reflect the diversity of their legal traditions (see paragraph 23 above).

39. The Court further notes that the Russian civil procedure law affords the parties an opportunity to submit their written or oral comments after the prosecutor's intervention in the proceedings (see paragraph 17 above).

40. Under Russian domestic law, the prosecutor is an independent officer with legal expertise and his or her participation in certain categories of civil cases is provided for by law (see paragraph 16 above), if the protection of the civil rights and lawful interests of society or the State so requires (see paragraph 18 above). Furthermore, as explicitly provided by sections 4 and 5 of the Prosecutor's Offices Act 1992 prosecutors act independently and any action aimed at influencing them in discharge of their functions is punishable by law (see paragraph 18 above). As highlighted by the Constitutional Court, the prosecutor's opinion cannot predetermine the position of a court in a case and his or her participation as such does not prevent the parties from fully exercising their rights; neither does it upset the balance between the parties or infringe the principle of adversarial procedure (see paragraph 19 above). The prosecutors enjoy no special powers in civil proceedings, they do not attend courts' deliberations and their opinions are public and open for comments (contrast paragraphs 33-34 above).

41. A prosecutor's intervention is not a rule in Russian civil proceedings and is foreseen only in cases specifically provided for by federal law, such as cases concerning eviction, reinstatement in employment or compensation for harm caused to life or health (section 3, Article 45 of the Code of Civil Procedure). Moreover, even in such cases a prosecutor's participation is not compulsory and is reserved for the proceedings where the protection of civil rights and lawful interests of society or the State so requires (section 5 of the Prosecutor Office's Act 1992).

42. Turning to the present case, the Court observes that the crux of the applicant's complaints is the fact of the prosecutor's participation in the proceedings and not any of the procedural defects which had previously resulted in finding a violation of Article 6 § 1 of the Convention by the Court in the cases cited above. In this connection the Court notes the existence of various approaches to the examination of this issue in the case-law (see paragraphs 31-37 above), as well as the variety of models of prosecutorial participation in civil proceedings across Europe. However, despite certain divergences in the manner in which the Court had previously examined

similar issues, the existing approaches are neither irreconcilable nor calling for any general pronouncement on the compatibility of any model of prosecutorial intervention in civil cases with the requirements of Article 6 of the Convention. The Court considers it most appropriate to follow here the approach flowing from the general principles common to its case-law on participation of independent legal officers in civil proceedings in the light of the specific considerations previously identified in the Russian cases (compare with *Yvon*, cited above, § 32, and *Todorov*, cited above). Accordingly, the Court must necessarily ascertain whether, in view of the prosecutor's participation, the principles of equality of arms and of adversarial proceedings has been adequately safeguarded in the case at hand and, therefore, whether the "fair balance" that ought to prevail between the parties was respected.

43. In the instant case the applicant's arguments that the prosecutor's opinion had unduly influenced the courts, had special significance over and beyond submissions of the parties and that the courts had been bound by that opinion do not go beyond pure speculation and are not supported by any specific and tangible proof. These arguments are not supported by any reference to relevant legal provisions either. Therefore, in the Court's opinion there are no grounds to infer any divergence from the principle of equality of arms in the present case. The prosecutor gave an opinion that the applicant's central claim concerning her reinstatement should be dismissed, since in the prosecutor's opinion, that claim had no legal basis in domestic law. Nothing proves that in doing so the prosecutor acted as the applicant's adversary in the proceedings or acted *ultra vires* in securing public interest (see similarly *Manzano Diaz v. Belgium*, no. 26402/17, §§ 43-44, 18 May 2021). The Court further notes that in line with the principle of adversarial proceedings the prosecutor's opinion was made public and has been put on record, the parties knew its contents and in law and in practice had an effective opportunity to make submissions in reply to it. The material in the case file demonstrates that the applicant actively participated in the proceedings, either in person or through her representative, and made use of the procedural opportunities to counter the arguments of other participants of the proceedings, which had been afforded to her by domestic law.

44. In the absence of further arguments by the applicant on how the prosecutor's participation affected the fairness of the proceedings, either in terms of equality of arms or in terms of safeguarding the principle of adversarial process, the Court finds no grounds to conclude that that opinion unduly influenced the courts, prevented the applicant from bringing an effective defence or otherwise upset the fair balance between the parties.

45. There has accordingly been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 1 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova
Deputy Registrar

Georges Ravarani
President

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

G.R.
O.C.

DISSENTING OPINION OF JUDGE SERGHIDES

Whether the prosecutor’s participation in the proceedings has led to a violation of the applicant’s right to a fair hearing under Article 6 of the Convention

1. I respectfully disagree with the judgment in its conclusion that the public prosecutor’s participation in the proceedings – which were civil in nature and concerned an employment case – did not upset the fair procedural balance between the parties and that it has not therefore led to a violation of Article 6 of the Convention.

2. As stated in the judgment (paragraph 43) “[t]he prosecutor gave an opinion that that the applicant’s central claim concerning her reinstatement should be dismissed, since in the prosecutor’s opinion that claim had no legal basis in domestic law” (see also paragraph 7 of the judgment). The District Court, before which this opinion was given, endorsed the said opinion and rejected the applicant’s claim that the termination of her employment contract was unlawful and that she should be reinstated. On appeal before the Moscow City Court, the prosecutor supported the judgment of the District Court and it was upheld (see paragraphs 10-12 of the judgment).

3. In my view, the prosecutor’s intervention in the proceedings breached the principle of adversarial proceedings and the principle of equality of arms.

4. The judgment argues that the applicant did not prove that the domestic courts were bound by the prosecutor’s opinion (see paragraph 43).

5. I submit that it is immaterial whether the domestic courts were or were not bound to accept the prosecutor’s opinion. The crux of the matter is – or should be – that the domestic courts might be influenced by the opinion of the prosecutor, who being a State organ and not a party to the proceedings, intervened therein with the aim of influencing those courts (at both first instance and on appeal) and the outcome of the case before them.

6. The judgment also argues that it was not proven that the prosecutor acted as the applicant’s “adversary” (ibid.).

7. In my view, this is incorrect since the prosecutor argued before the domestic courts that the applicant’s claim was legally unfounded and should be rejected, thus procedurally and substantively acting as the adversary of the claimant.

8. Furthermore, the judgment considers that the principle of adversarial proceedings was respected because the prosecutor’s opinion was made public and put on record and that both parties had an opportunity to make submissions in reply to it (ibid).

9. With all due respect, that argument is somewhat irrelevant. In my view, what undermined the principle of adversarial proceedings in the present case was the fact that the prosecutor intervened in the proceedings by taking a

stance which was against the applicant's claim and in favour of her opponent's position, and, by doing so, tipped the balance to the applicant's disadvantage.

10. Lastly, the judgment concludes that “[i]n the absence of further arguments by the applicant on how the prosecutor's participation affected the fairness of the proceedings, either in terms of equality of arms or in terms of safeguarding the principle of adversarial process, the Court finds no grounds to conclude that that opinion unduly influenced the courts, prevented the applicant from bringing an effective defence or otherwise upset the fair balance between the parties” (see paragraph 44).

11. In my submission, this conclusion is incorrect for the reasons explained above. What is more striking for me is that the Court, in reaching that conclusion, overlooked the apparent influence that the prosecutor's opinion might have on the domestic courts and placed the burden on the applicant to prove that the prosecutor's participation had influenced the fairness of the proceedings. However, that influence was self-evident and needed no proof.

12. In addition, one may wonder what would be the aim of the prosecutor's joining the proceedings and giving an opinion if the purpose of doing so was not to persuade the domestic courts! The provision giving this power to the prosecutor is Article 45 of the Code of Civil Procedure (cited in paragraph 16 of the judgment), paragraph 3 of which provides that “[a] Prosecutor shall join the proceedings and give an opinion in cases concerning ... reinstatement in employment ...”. However, the initial decision on whether or not to intervene appears to be discretionary. Indeed, the majority state (paragraph 41) that “even in such cases a prosecutor's participation is not compulsory”.

13. In any event, this statutory participation of the prosecutor is not prescribed without a purpose; its aim is to influence the domestic courts and this cannot be done without harming the party against which the prosecutor's opinion is directed.

14. The very fact that the prosecutor, by virtue of Article 45, chooses to “join” the proceedings, and thus to become somehow a party thereto, makes it even more apparent that the principles of adversarial proceedings and of the fair balance between the parties are undermined.

15. Paragraphs 43-44 of the judgment indeed treat the prosecutor as a party to the proceedings and on this basis they argue that the applicant could have brought an “effective defence” against the prosecution's opinion. The applicant is thus placed in a negative situation where she was expected to defend herself as regards the prosecutor's opinion, in addition to asserting her claims against her former employer. In the present case, in addition to there being a breach of the right to a fair hearing under Article 6 § 1 of the Convention, blatant disregard has been shown for the rule of law and the principle of effectiveness.

16. The principle of effectiveness requires that human rights secured by the Convention must be interpreted and applied in a manner that is practical and effective and not theoretical or illusory (see on this principle, Georgios A. Serghides, *The Principle of Effectiveness and its Overarching Role in the Interpretation and Application of the ECHR – The Norm of all Norms and the Method of All Methods*, Strasbourg, 2022). A human right, in the present case the right to a fair trial, cannot be practical and effective if when it is exercised there is a third party, a State organ (i.e., the public prosecutor), which joins the proceedings with the aim of influencing the court as to the outcome of the case.

17. It is also my submission that the rule of law is automatically violated every time the requirement of fairness and the principle of effectiveness are disregarded (see on the interconnection between the rule of law and the principle of effectiveness, Serghides, cited above, pp. 664-669, 714-719).

18. The Court, in the present case, though referring to its case-law (see paragraph 33 of the judgment), nevertheless does not seem to follow the relevant findings (which it regards as relating to the focus “in the past”, *ibid.*), whereby the mere presence of a prosecutor, Government commissioner or comparable officer at a court’s deliberations, “be it ‘active’ or ‘passive’”, is deemed to be a violation [of Article 6 § 1 of the Convention]” (see *Martinie v. France* [GC], no. 58675/00, § 53, ECHR 2006). Despite the above contrary case-law of the Grand Chamber – which in my view reflects the case-law at present and also applies to such interventions at a court’s hearings – the Court in the present case has mainly based its judgment on a decision of the First Section of the Court, namely *Chernysheva v. Russia* ((dec.), no. 77062/01, 10 June 2004), to support its view that the fact that a prosecutor participated in civil proceedings cannot as such give rise to an issue under Article 6. However, the Court in the present case has overlooked the fact that in *Chernysheva* the public prosecutor was a plaintiff in civil defamation proceedings and not a third party joining a dispute between two private parties, as the prosecutor did in the present case.

19. In addition, the Court, though referring to the relevant recommendation of the Parliamentary Assembly and the opinion of the Venice Commission, as well as to the relevant judgment, namely *Menchinskaya v. Russia* (no. 42454/02, § 39, 15 January 2009), which endorsed those instruments and concluded that the prosecutor’s intervention in appeal proceedings had undermined the principle of equality of arms (see paragraphs 20, 21 and 36-37 of the judgment), nevertheless ultimately overlooked them.

20. There is no doubt that the role of the prosecutor in the present case was not a passive one (a mere presence) but an active one and that it turned out to be very influential for the domestic courts and the outcome of the case. Nor is there any doubt that in the present case there were no special circumstances, such as the protection of vulnerable persons unable to defend

their own interests, which would justify a prosecutor's participation in the proceedings (see *Batsanina v. Russia*, no. 3932/02, § 27, 26 May 2009, and *Gruba and Others v. Russia*, nos. 66180/09 and 3 others, §§ 96-99, 6 July 2021, also referred to in paragraphs 36 and 37 of the judgment, respectively).

21. In the light of what has been said above, I conclude that the prosecutor's participation in the proceedings has led to violation of the applicant's right to a fair hearing. Consequently, there has been a violation of Article 6 of the Convention. It would be appropriate in the present case to award, under Article 41 of the Convention, an amount for non-pecuniary damage in favour of the applicant, but since I am in the minority there is no point in determining the extent of such damage.