



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

FIRST SECTION

CASE OF MARKIN v. RUSSIA

(Application no. 59502/00)

JUDGMENT

STRASBOURG

30 March 2006

FINAL

13/09/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Markin v. Russia,

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

Mr C.L. ROZAKIS, *President*,

Mr P. LORENZEN,

Mrs N. VAJIĆ,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV, *judges*,

and Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 9 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 59502/00) 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 Mikhail Nikolayevich Markin (“the applicant”), on 1 July 2000.

2. The applicant, who had been granted legal aid, was represented by Mr Y. Kareyev, a lawyer practising in Ufa. The Russian Government (“the Government”) were represented by their Agent, Mr P. Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that following an unlawful confiscation of his car a customs board had failed to return his car or pay him compensation.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 16 September 2004, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1936 and lives in Kumertau in the Republic of Bashkortostan.

A. Confiscation of the applicant's car

9. In September 1994 the applicant purchased an imported second-hand car from a third person. Subsequently, the Bashkir Customs Board ("the Customs") discovered that the car had been customs cleared by its previous owner on the basis of forged documents for which reason, on 13 May 1997, it confiscated the car pursuant to Article 280 of the Customs Code.

10. Upon the applicant's challenge on 15 May 1997 to the Customs' decision, seeking to declare the decision to seize the car unlawful, the Sovetskiy District Court of Ufa upheld the Customs' decision on 24 June 1997. The judgment was final and not subject to appeal.

11. On an unspecified date the applicant requested the Supreme Court to examine the case anew under a supervisory-review procedure. On 5 February 1999 the Presidium of the Supreme Court of Bashkortostan allowed the application, set aside the judgment and remitted the case for re-examination.

12. By judgment of 19 March 1999 the Sovetskiy District Court held in the applicant's favour. It found it established that the applicant had not known that the customs clearance was improper for which reason the court quashed the Customs' decision of 13 May 1997 as unlawful. The judgment was final and not subject to appeal.

13. Following a subsequent successful supervisory-review request submitted by the Customs, the above judgment of 19 March 1999 was quashed and the case remitted once more to the Sovetskiy District Court for consideration. By judgment of 28 April 2000 this court held in favour of the Customs and dismissed the applicant's challenge to the Customs' decision of 13 May 1997.

14. Following yet another supervisory review the Supreme Court of the Russian Federation on 3 June 2002 quashed the above judgment of 28 April 2000 and re-instated the judgment of 19 March 1999 which granted the applicant's complaint that the Customs' decision of 13 May 1997 was unlawful.

B. The State's failure to return the applicant's car

15. According to the applicant, since his request for recovery of the car lodged with the Customs on 24 April 1999 had been to no avail, on 3 June 1999 he unsuccessfully attempted to file a suit against the Customs before the Sovetskiy District Court of Ufa seeking, *inter alia*, the restitution of his car and non-pecuniary damages. He then unsuccessfully attempted to bring many actions against courts, including the Sovetskiy District Court of Ufa, and individual judges accusing them of libel, incompetence, and obstruction of justice. However, he has failed, according to information available to the Court, properly to institute proceedings with a view to obtain compensation for the relevant losses.

16. According to the Government, the car was not returned to the applicant because it had been sold following its confiscation in accordance with the legislation of the Russian Federation.

II. RELEVANT DOMESTIC LAW

17. Article 280 of the Customs Code of 1993 establishes the responsibility for non-compliance with the rules for importing goods:

“Transportation, storage and acquisition of goods and vehicles imported into the customs territory of the Russian Federation without due customs control, or avoiding such control, or with fraudulent use of documents or identification means, or with a violation of declaration rules... shall be penalised by a fine in the amount ranging from fifty to two hundred per cent of the cost of the goods and vehicles, which are the object of the offence, with or without their confiscation, or with the recovery of the cost of such goods and vehicles, or with or without the revocation of a licence.”

18. The applicant's appeal of 15 May 1997 against the Board's decision of 13 May 1997 was lodged under Article 239 of the then Code of Civil Procedure which introduced judicial review of executive decisions. Article 239 in force at the material time read as follows:

Article 239. Decision of Court taken upon appeal

A court, having established that the order of an administrative agency or official is unlawful, shall take a decision to allow the appeal.

If the amount of the imposed fine exceeds the limit set by the legislation, the court shall reduce the amount of the fine down to the set limit. If the fine is imposed without consideration of the seriousness of the committed malefaction, personal characteristics of the guilty person and his economic situation, the court may reduce the amount of the fine.

If acts of an administrative agency or official are lawful, the court shall take a decision to deny the appeal.

19. The Federal Law N 4866-1 On Judicial Appeal against Acts and Decisions Infringing Individual Rights and Freedoms dated 27 April 1993, provides for a judicial avenue for claims against public authorities. It states that any act, decision or omission by a state body or official can be challenged before a court if it encroaches on an individual's rights or freedoms or unlawfully vests an obligation or liability on an individual. In such proceedings the court is entitled to declare the disputed act, decision or omission unlawful, to order the public authority to act in a certain way vis-à-vis the individual, to lift the liability imposed on the individual or to take other measures to restore the infringed right or freedom. If the court finds the disputed act, decision or omission unlawful this gives rise to a civil claim for damages against the State.

20. Damage caused to an individual as a result of an unlawful imposition of administrative penalty in the form of arrest or corrective works is compensated pursuant to Article 1070 of the Russian Federation Civil Code, and in all other instances of damages caused to an individual by unlawful acts (inaction) of the State agencies or officials thereof is compensated according to the rules set by Article 1069 of the Russian Federation Civil Code. These provisions read as follows:

Article 1070. Liability for harm caused by unlawful actions of agencies of inquiry, preliminary investigation, the prosecutor's office and the court

1. Harm caused to an individual as a result of unlawful conviction, unlawful bringing to criminal responsibility, unlawful application as a measure of restraint of remand in custody or of a written undertaking not to leave a specified place, unlawful imposition of an administrative penalty in the form of arrest or corrective labour, shall be compensated in full at the expense of the treasury of the Russian Federation and in cases, stipulated by law, at the expense of the treasury of the subject of the Russian Federation or of the municipal authority, regardless of the fault of the officials of agencies of inquiry, preliminary investigation, prosecutor's offices or courts in the procedure established by law.

2. Harm caused to an individual or a legal entity as a result of the unlawful activity of agencies of inquiry, preliminary investigation, prosecutor's offices, which has not entailed the consequences, specified by paragraph 1 of this Article, shall be compensated on the grounds and in the procedure, provided for by Article 1069 of this Code. Harm caused during the administration of justice shall be compensated in cases, if the fault of a judge has been established by the court's judgment that has entered into legal force.

Article 1069. Liability for harm caused by state bodies, local self-government bodies, and also their officials

Harm caused to an individual or a legal entity as a result of unlawful actions (inaction) of state and local self-government bodies or of their officials, including as a result of the issuance of an act of a state or self-government body inconsistent with the law or any other legal act, shall be subject to compensation. Harm shall be compensated at the expense, respectively, of the treasury of the Russian Federation,

the treasury of the subject of the Russian Federation, or the treasury of the municipal authority.

21. The above damage is compensated pursuant to a procedure established by law. Until now the procedure has not been established by the legislature. In practice, while deciding upon such issues the courts are guided by the Decree of the Presidium of the USSR Supreme Soviet of 18 May 1981 on Compensation of damage caused to citizen by unlawful acts of state and non-government organisations, as well as by officials while performing their official duties. Regulations on procedure to compensate damage were approved by that Decree.

22. Pursuant to the above compensation of damage is effected pursuant to an application of an individual to a court or any other authority which has the responsibility to order compensation.

THE LAW

23. The applicant complained under Article 1 of Protocol No. 1 to the Convention that, despite the final judgment of the Sovetskiy District Court of 19 March 1999, the Customs Board had neither returned the car to him, nor had it – in the alternative – compensated him in the form of damages equivalent to the car's value at the relevant time. Article 1 of Protocol No. 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

THE GOVERNMENT'S PRELIMINARY OBJECTION

24. As it did prior to the Court's decision on admissibility of 16 September 2004 the Government maintained that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. They contended that proceedings instituted by the applicant pursuant to Article 239 of the Code of Civil Procedure only determined the lawfulness of the Customs' decision of 13 May 1997. By judgment of 19 March 1999 the Customs' decision was found unlawful. The question of the consequences of such a finding of the court was not resolved in those proceedings. In the Government's view, in order to comply with Article 35

§ 1 of the Convention, the applicant should have, subsequently, lodged a separate civil action under Article 1069 of the Civil Code and the Decree of 18 May 1981.

25. It appears from the applicant's submissions that in his view he had exhausted all domestic remedies as he had tried, though unsuccessfully, to file a suit against the Customs for restitution of his car and non-pecuniary damages and then various suits against courts and individual judges.

26. The Court recalls from its decision as to the admissibility of the present application of 16 September 2004 that the question of exhaustion of domestic remedies was joined to the merits. Therefore, the Court is now requested to examine this issue before embarking, if necessary, on an examination of the merits of the complaint under Article 1 of Protocol No. 1.

27. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. While in the context of the machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

The object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address the allegation made of a violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

28. The Court observes that the facts of the case now before it look as follows. The applicant's car was confiscated by the customs in 1997, before the Convention came into force in respect of Russia. The judicial review of the customs' decision following the applicant's appeal resulted in upholding that decision. About two years later following the applicant's successful application for reopening the case the national court found the customs' decision unlawful and quashed it. The latter judicial decision was then quashed, but reinstated three more years later, in 2002. The car was not recovered by the applicant as it had been sold to third persons following its confiscation, "in accordance with the legislation" as the Government claim. The materials in the Court's possession do not contain information as to when and in what circumstances the car had been sold. In particular, it is unclear, whether it had been sold at the time of the courts' verdict upholding

the confiscation order or at the time of the courts' verdict to the contrary. The applicant has failed to institute proceedings with a view to obtaining compensation equal to the value of the car and other possible losses.

29. On the basis of the latter circumstance the Government submitted that the applicant had failed to exhaust domestic remedies. The Court notes that in reply the applicant argued that he had tried to do so. Following his failure properly to institute such proceedings before the Sovetskiy District Court of Ufa he tried, equally unsuccessfully, to sue this court and then other judicial authorities which had dealt with his case.

30. The Court observes that the applicant's initial concern was the confiscation of his car by the customs authority. The national court eventually declared this decision unlawful and quashed it. It was from that moment that the applicant received a right to restitution of his property and reimbursement of his losses, if any. In order to exercise that right he requested the customs authority, as it appears from his submissions though unsupported by any documentary evidence, to return his car to him. The State did not voluntarily discharge its corresponding obligation. Thus, it did not return the car as the latter had been sold to third persons following its confiscation. Having regard to the system of domestic remedies, the Court considers that it would be reasonable to expect that the applicant would next try to assert his right in court in accordance with the formal requirements and time-limits laid down in domestic law. Thus, it was open to the applicant, by virtue of Article 1069 of the Civil Code of the Russian Federation, to file a civil suit with a view to obtain compensation for the damage caused by the deprivation of his car. As the judgment of the Sovetskiy District Court of Ufa of 19 March 1999 established that the car had been confiscated as a result of the unlawful actions of the customs, it appears that such an action would not lack real prospects of success. However, the applicant failed to do so through his own fault and chose to complain to this Court.

31. In the absence of any plausible objection from the applicant in respect of the availability or effectiveness of this remedy, the Court considers that the applicant did not provide the Russian courts with the opportunity which is in principle intended to be afforded to a Contracting State by Article 35 of the Convention, namely the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it (see, among other authorities, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33, and *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 571, § 33). The objection that the relevant "effective" domestic remedy was not used by the applicant in the instant case is therefore well-founded.

32. Consequently, the Court cannot consider the merits of the case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Accepts the Government's preliminary objection and therefore *holds* that it cannot consider the merits of the case.

Done in English, and notified in writing on 30 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President