



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

FIRST SECTION

CASE OF KANAYEV v. RUSSIA

(Application no. 43726/02)

JUDGMENT

STRASBOURG

27 July 2006

FINAL

27/10/2006

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 Kanayev v. Russia,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 6 July 2006,

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

PROCEDURE

1. The case originated in an application (no. 43726/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Igor Valentinovich Kanayev (“the applicant”), on 3 December 2002.

2. The Russian Government (“the Government”) were represented by their Agent, Mr P. A. Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged a violation of Article 6 § 1 and Article 1 of Protocol No. 1 in that the respondent State failed to enforce final judicial decision in his favour.

4. On 25 November 2003 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. The applicant and the Government each filed observations on the admissibility and merits (Rule 54A § 1).

THE FACTS

6. The applicant is an active officer of the Russian navy, third rank captain. He was born in 1963 and lives in Kronshtadt, Leningrad Region.

7. The applicant was involved in a dispute with his employer, the Ministry of Defence of the Russian Federation, concerning the amount of compensation of his travel expenses. On 7 March 2002 the Kronshtadt

Garrison Military Court awarded him arrears in the amount of 598 Russian Roubles (RUR) and RUR 202 in compensation of legal expenses. This decision was not appealed against and on 17 March 2002 became final.

8. On 21 March 2002 the court issued a writ of execution. The applicant forwarded it with accompanying documents to the State treasury office. On 2 April 2002 the writ was returned to the applicant unexecuted. The treasury office explained that the debtor had no available funds which could be used for paying the judgment debt. The applicant was advised to address the writ of execution to the head office of the Ministry of Finance, which the applicant did on 10 April 2002. However, the judgment remained unexecuted.

9. On 2 July 2002 the applicant wrote a new letter to the Ministry of Finance, requesting an explanation as to why the judgment remained unexecuted to that date. On 26 August 2002 the Ministry of Finance informed the applicant that the writ of execution had been transmitted to the Ministry of Defence with a view to prepare a budget call for the respective amount. They also informed the applicant that the Ministry of Finance had no power to enforce the judgment and write off the money from the accounts of the Ministry of Defence without their acceptance.

10. On 31 December 2002 the Ministry of Finance transferred to the applicant RUR 598 with reference to the arrears due pursuant to the judgment of 7 March 2002. On 1 March 2004 the applicant received the rest of the amount awarded by the court (RUR 202).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

11. The applicant complained that the lengthy non-enforcement of the court judgment in his favour rendered by the Kronshtadt Garrison Military Court on 7 March 2002 constituted a breach of his right to a court and his right to peaceful enjoyment of his possessions. Article 6 § 1 and Article 1 of Protocol no. 1 to the Convention, relied on by the applicant, insofar as relevant, read as follows:

Article 6

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

Article 1 of Protocol no. 1

“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.”

12. The Government contested that argument. They indicated that the judgment against the applicant was fully enforced in 2002 and in 2004. On this ground they conclude that the applicant’s rights under the Convention were not violated.

13. The applicant maintained his submissions. In his view, the delay in the execution of the judgment of 7 March 2002 was unlawful and unjustified.

A. Admissibility*1. Scope of the case*

14. In his initial application the applicant complained about the non-payment of the amount awarded to him by the Kronshtadt Garrison Military Court on 7 March 2002. The Court notes that, once the applicant had brought proceedings to Strasbourg, the domestic authorities executed the above judgment. The Court, therefore, agrees with the Government that, in so far as the applicant complained about the non-enforcement as such, he could not any longer claim to be a victim within the meaning of Article 34 of the Convention.

15. However, the Court notes that it took the domestic authorities nine months and fourteen days to pay the amount of arrears awarded by the court (RUR 598). As to the rest of the judgment debt (RUR 202), it was paid one year, eleven months and fifteen days after the judgment had become final and enforceable. These delays do not seem insignificant, and they may, in principle, raise an issue from the standpoint of both Article 6 and Article 1 of Protocol no. 1 to the Convention (see *Gorokhov and Rusyayev v. Russia*, no. 38305/02, § 38 read in conjunction with §§ 24 – 29, 17 March 2005). From that point of view the Court considers that the applicant may claim to be a “victim” within the meaning of Article 34 of the Convention.

2. Article 6 § 1 of the Convention

16. The Court notes that at the moment of the events the applicant was an active military officer. In this respect the Court recalls that employment

disputes between the authorities and public servants whose duties typify the specific activities of the public service, in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State, are not “civil” and are excluded from the scope of Article 6 § 1 of the Convention (see *Pellegrin v. France* [GC], no. 28541/95, §§ 65-67, ECHR 1999-VIII). Therefore, the question arises whether the Court has competence *ratione materiae* to examine the complaint from the standpoint of Article 6 of the Convention.

17. The Court recalls that in the above mentioned *Pellegrin* judgment it adopted a functional test for the purposes of determining the applicability of Article 6 § 1 to employment disputes involving public servants, based on the nature of the employee’s duties and responsibilities. An employment dispute is excluded from the scope of Article 6 § 1 if it concerns a public servant whose duties typify the specific activities of the public service in so far as he or she acts as the depository of public authority responsible for protecting the general interests of the State.

18. In the present case the applicant was an active officer of the Russian navy, a third rank captain, and thus in this capacity, “wielded a portion of the State’s sovereign power” within the meaning that could reasonably be conferred on this notion in the light of the *Pellegrin* judgment.

19. In the light of the above the Court concludes that Article 6 § 1 of the Convention is not applicable to the dispute between the applicant and his command and the ensuing enforcement proceedings, which must be regarded as an integral part of the “trial” for the purposes of Article 6 (see *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III, and *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, p. 510, § 40).

20. It follows that the applicant’s complaints under this provision must be rejected as being incompatible *ratione materiae* within the meaning of Article 35 §§ 3 and 4 of the Convention.

3. Article 1 of Protocol no. 1 to the Convention

21. The Court considers, in the light of the parties’ submissions, that the complaint under Article 1 of Protocol no. 1 to the Convention about the lengthy non-enforcement of the judgment of 7 March 2002 in the applicant’s favour, raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. Merits

22. The parties’ arguments on the merits do not differ from their arguments as to the admissibility of this case (see above).

23. As regards the applicant's complaint under Article 1 of Protocol no. 1 to the Convention, the Court reiterates that a "claim" can constitute a "possession" within the meaning of Article 1 of Protocol no. 1 if it is sufficiently established to be enforceable (see *Burdov v. Russia*, cited above, § 40; *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 59). In the present case, the applicant's right to the amount sought was established by a final court judgment. The Court further considers that the impossibility for the applicant to have the judgment in his favour fully enforced, which persisted for a relatively long period of time, constituted an interference with his right to peaceful enjoyment of his possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol no. 1.

24. Furthermore, the Court notes that by virtue of the judgment of 7 March 2002 the Ministry of Defence, through the Ministry of Finance, was to pay to the applicant the amount of travel expenses, as well as compensate him his legal costs. The terms of the judgment were sufficiently clear and required a prompt action on the part of the authorities.

25. The Court observes that the principal amount of the judgment debt (RUR 598) was paid to the applicant on 31 December 2002, which, in the circumstances of the case, may arguably be recognised as a tolerable delay; however, as regards the amount of legal expenses (RUR 202), also awarded by the domestic court, it was paid to the applicant only on 1 March 2004.

26. Therefore, the judgment remained unenforced, at least in part, for almost two years. In the view of the Court, for this interference with the applicant's "possessions" within the meaning of Article 1 of Protocol no. 1 to the Convention the Government has to advance a plausible justification. The lack of funds, referred to by the domestic instances, cannot justify such an omission (see *Burdov v. Russia*, cited above, § 41). Whereas it cannot be excluded that certain budgetary arrangements has to be made in order to enforce a judgment of monetary nature against the State, the delay in executing the judgment of 7 March 2002 in the present case cannot be explained by this factor.

27. The Court further observes that the Government did not submit any precise information on what specific measures were taken in order to allocate money for execution of the judgment. They did not advance any other explanation for the delay in paying the judgment debt.

28. In the light of the above, the Court finds that the fact that it was impossible for the applicant to obtain the full execution of the judgment until 1 March 2004 constituted an interference with his right to peaceful enjoyment of his possessions, which was not justified in the circumstances of the case.

29. Accordingly, there has been a violation of Article 1 of Protocol no. 1 on account of the lengthy non-enforcement of the judgment in the applicant's favour.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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.”

31. The applicant claimed a default interest for the delay occurred in the payment of the judgment debt, without, however, indicating any exact rate of this interest. He further claimed EUR 5,000 for non-pecuniary damage sustained by him as a result of lengthy non-enforcement of the judgment.

32. The Government maintained that, in order to claim a default interest, the applicant had to claim it beforehand before the domestic courts, which he had not done. Therefore, the applicant did not exhaust domestic remedies in this respect.

33. As regards non-pecuniary damages, the Government suggested that a finding of a violation would of itself constitute sufficient just satisfaction. Alternatively, they suggested that a compensation similar to the one awarded in the case *Burdov v. Russia* (cited above, § 47) would suffice. In any event, in their view, the amount of this compensation should not exceed EUR 2,500.

A. Pecuniary damage

34. As regards any possible material losses sustained by the applicant as a result of the lengthy non-enforcement of the judgment at issue, the Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part.

35. Insofar as the applicant’s claim relate to the “default interest” which should be recovered from the State, the Court notes that the applicant has not presented any calculation of this “default interest” and has not explained why he failed to do so. Therefore, the Court makes no award in this respect.

B. Non-pecuniary damage

36. As regards compensation for non-pecuniary damage, sought by the applicant, the Court recalls that in *Burdov* the judgment at issue concerned the Chernobyl-victim’s pension payable as compensation for health damage leading to disability, which represented the applicant’s main source of income. In the present case the court award was of a different nature (compensation of travel expenses and legal costs), and, in the Court’s view, less vital for the applicants than in *Burdov*. Moreover, the amount due to the

applicant was not very significant. In view of the above, the Court concludes that the finding of a violation constitutes in itself a sufficient just satisfaction for any damage which could have been suffered by the applicant.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 1 of Protocol no. 1 to the Convention admissible;
2. *Declares* by five votes to two inadmissible the remainder of the application;
3. *Holds* unanimously that there has been a violation of Article 1 of Protocol no. 1 to the Convention;
4. *Holds* by six votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.
5. *Dismisses* by six votes to one the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 27 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Loucaides;
- (b) concurring opinion of Mrs Tulkens;
- (c) partly dissenting opinion of Mr Kovler.

S.N
C.L.R.

PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the finding in the judgment that Article 6 § 1 of the Convention is not applicable in the present case. The majority based their finding on *Pellegrin v. France* (no. 28541/95, §§ 65-67, ECHR 1999-VIII), which established the rule that “employment disputes between the authorities and public servants whose duties typify the specific activities of the public service, in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State, are not ‘civil’ and are excluded from the scope of Article 6 § 1 of the Convention” (see paragraph 16 of the judgment).

As I understand it the philosophy behind this rule is that disputes involving questions of public authority or relating to the general interests of the State as governed by public law and government policies should not be the subject of judicial disputes. The Court however proceeded to state in the present case that on the basis of the same case-law, Article 6 § 1 of the Convention is also not applicable “to the dispute between the applicant and his command and the ensuing enforcement proceedings, which must be regarded as an integral part of the ‘trial’ for the purposes of Article 6” (see paragraph 19 of the judgment). That is exactly where my approach differs from that of the majority.

The “ensuing enforcement proceedings” concern the execution of the judgment. The relevant judicial proceedings ended with a judgment debt, which legally amounts to a separate autonomous legal act which by itself creates rights or duties and whose execution is unrelated to the legal or other principles and considerations involved and applied by the court in adopting the initial judgment. Indeed, the execution of a judgment is governed by different legal principles and considerations.

Therefore, the grounds which were given by the majority and which amount to the *raison d’être* of the *Pellegrin* jurisprudence do not apply in this case. A judgment may of course be considered procedurally to be part of a trial but that does not, in my opinion, mean that its execution is governed, or even influenced, by the principles which led to its adoption. Seeing that the principles which lead to the conclusion that a certain judicial dispute is not to be regarded as “civil” do not extend to the separate autonomous act of the enforcement of the judgment, I cannot see why such enforcement must necessarily be regarded itself as not “civil” purely because it concerns a judgment delivered following the dispute in question.

What creates the requirement for the execution of the judgment is simply the separate obligation resulting directly and exclusively from the judgment itself (as with any other judgment), regardless of the preceding judicial examination or even the reasons on which it was based.

In other words, here we are simply concerned with the enforcement of a right to collect a judgment debt by virtue of a judgment delivered by a

competent court that had acquired the force of *res judicata*. This situation in my opinion is unaffected by the *Pellegrin* case and falls within the concept of the “determination of a civil right” for the purposes of Article 6 § 1 of the Convention. It is useful to point out here that the *Pellegrin* rule amounts to a jurisprudential restriction of the principle of access to a court and must therefore be interpreted narrowly.

CONCURRING OPINION OF JUDGE TULKENS

(Translation)

I voted for the non-applicability of Article 6 in this case solely in deference to the Grand Chamber judgment *Martinie c. France* of 12 April 2006.

PARTLY DISSENTING OPINION OF JUDGE KOVLER

My dissenting opinion concerns, first of all, the question of the applicability of Article 6 § 1 of the Convention to the dispute between the applicant and the Ministry of Defence. In my view, the previous case-law in this respect, especially the *Pellegrin v. France* case ([GC]. no. 28541/95, ECHR 1999-VIII), raised more questions than gave answers.

First, it should be noted that at the moment of the events the applicant was an active military officer. In this respect the Court recalled that employment disputes between the authorities and public servants whose duties typify the specific activities of the public service, in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State, are not "civil" and are excluded from the scope of Article 6 § 1 of the Convention (see *Pellegrin v. France*, cited above, §§ 65-67). In the *Pellegrin* case the Court further noted that the manifest example of such activities was provided by the armed forces and the police. Therefore, the question has arisen whether the Court had competence *ratione materiae* to examine the complaint from the standpoint of Article 6 of the Convention.

The Court's reasoning in *Pellegrin* was based on the idea of "a special bond of trust and loyalty" existing between the State and certain categories of State officials. The Court recognised that the State had almost unlimited discretion in administration of its personnel. Consequently, industrial disputes between the State and its employees exercising public functions may escape the Strasbourg control.

At the same time the *Pellegrin* judgment contained an important reservation. It stated that "disputes concerning pensions all come within the ambit of Article 6 § 1 because on retirement employees break the special bond between themselves and the authorities; they [...] then find themselves in a situation exactly comparable to that of employees under private law in that the special relationship of trust and loyalty binding them to the State has ceased to exist and the employee can no longer wield a portion of the State's sovereign power" (§ 67).

Therefore, the "functional approach", introduced by *Pellegrin*, requires that Article 6 be applicable to the disputes where the position of the applicant, even a State official, does not differ from the position of any other litigant, or, in other words, where the dispute between the employee and the employer is not marked by the "special bond of trust and loyalty".

This line of reasoning was later adopted in the case *Novikov v. Ukraine* (dec., no. 65514/01, 17 September 2002), where the Court concluded that the dispute between a dismissed military officer and his command concerning certain payments due to him for the period of his service (emphasis added) was of a purely pecuniary nature, and, therefore, Article 6 applied.

I share the position of my colleagues judges Tulkens, Maruste and Fura-Sandström, expressed in their joint concurring opinion in the Grand Chamber's judgment of *Martinie* case:

“On a more general level, the fact is that the Court is more and more frequently confronted with the question of the scope or, more specifically, the limits or frontiers of the *Pellegrin* judgment.

In this case the issue that needs to be determined is whether *any dispute* between a public servant and the authorities employing him or her falls outside the scope of Article 6 where the post involves “direct or indirect participation in the exercise of powers conferred by public law” or only *disputes relating to the post* of the person concerned. Thus, for example, in the former case a policeman or police officer who is in litigation with the authority employing him on grounds of the insalubrious condition of his official residence could not, on account of his status, rely on Article 6 § 1 to claim a right of access to a tribunal. Nor, for example, could a soldier who has obtained judgment awarding him a transport allowance rely on Article 6 § 1 to seek enforcement of it, on account of his status as soldier. Taken out of context, a literal interpretation of *Pellegrin*, which refers to “no disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law” (*ibid.*, 67), might well lead to results that are unreasonable and contrary to the purpose and aim of the Convention.” (*Martinie v. France* [GC], no. 58675/00, judgment 12 April 2006).

I could also mention two Greek cases, where the applicants, retired State officials, complained about the failure of the authorities to comply with the court judgments. In these cases the Court found that Article 6 was applicable, *inter alia*, because the applicants' claims concerned not the dispute over the increase of the amounts of their pensions, but the non-enforcement of courts' judgments recognising their right to this increase (*Logothetis v. Greece* (dec.), no. 46352/99, 9 March 2000; *Marinacos v. Greece* (dec.), no. 49282/99, 29 March 2001).

Turning to the circumstances of the present case I would like to note the following. The application of Article 6 to the proceedings initiated by the applicant against the military command may be contested (see *Amoxopoulos and other v. Greece*, (dec.), no. 68141/01, 6 February 2003). However it may be, once the case had been resolved and the court had established the State's obligation to pay a certain amount to the applicant, his situation became identical to that of any other successful claimant in a civil dispute. I see no reason, and the Government did not advance any arguments to the contrary, to depart from its position in the cases *Logothetis* and *Marinacos*.

In any event, even without dissociating the enforcement proceedings from the main dispute, I would like to note that the “functional” approach, in my view, introduced by the *Pellegrin* judgment, should be applied with

due regard to the nature of the dispute. In the present case the judgment to be enforced concerned the non-payment of travel expenses and legal costs incurred during the domestic proceedings. I do not see how this dispute related to the sphere of special relationships between a public servant and his employer, the State, which Pellegrin was supposed to protect.

Finally, as regards applicability of Article 1 of Protocol no. 1 to the Convention, the Court reiterated that a “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable (see *Burdov v. Russia*, cited above, § 40; *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 59). In the present case, the applicant’s right to the amount sought was established by a final court judgment. The impossibility for the applicant to have the judgment in his favour fully enforced, which persisted for a relatively long period of time, constituted an interference with his right to peaceful enjoyment of his possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1.

The Court holds in its reasoning that “there has been a violation of Article 1 of Protocol 1 on account of the lengthy non-enforcement of the judgment in the applicant’s favour” (§ 29). Thus, it is quite inevitable to recognise that the Article 6 § 1 is not only applicable, but violated if we strictly follow the Court’s case-law.

For these reasons I am not persuaded that finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage. The long-term dispute between military and State officials inevitably provoked distress and frustration resulting from this conflict. The fact that the amount due to the applicant was not very significant (§ 36) is not relevant in this particular circumstances.