



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

SECOND SECTION

CASE OF RIZHAMADZE v. GEORGIA

(Application no. 2745/03)

JUDGMENT

STRASBOURG

31 July 2007

FINAL

31/10/2007

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 Rizhamadze v. Georgia,

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŖ,

Mr M. UGREKHELIDZE,

Mr V. ZAGREBELSKY,

Mr D. POPOVIĆ, *judges*,

and Mrs F. ELENŞ-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 10 July 2007,

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

PROCEDURE

1. The case originated in an application (no. 2745/03) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Avtandil Rizhamadze, a Georgian national, on 10 May 2002. He was represented by Ms N. Kashibadze.

2. The Georgian Government (“the Government”) were represented by their Agent, Ms I. Bartaia of the Ministry of Justice.

3. On 14 October 2005 the Court decided to communicate to the Government the complaint concerning the absence of an oral hearing in cassation proceedings. 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.

4. The Government filed their observations on the admissibility and merits of the application (Rule 54A of the Rules of Court). The applicant did not produce any observations in reply. On 15 June 2006, however, he reiterated his intention to pursue the proceedings.

5. On 29 June 2006 the Court decided to proceed with the examination of the application on the basis of the existing case file.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

6. The applicant was born in 1970 and lives in Tbilisi.

7. The applicant worked as an officer at a regional branch of the Customs Department (hereafter “the old customs office” of “the Department”), an agency of the Ministry of Finance. Due to the structural reorganisation of the Department on 30 June 1995, he was released by an administrative order of 5 August 1995, together with some other people. This order noted that the discharged officers were to be transferred to another, newly established regional customs office (“the new customs office”).

8. On 5 August 1995 the applicant requested the Department's authorisation to take up his duties at the new customs office. No reply was forthcoming. For the next six years, he complained on numerous occasions before various governmental agencies about the inability to continue his service.

9. In a letter of 21 March 2001, the Department informed the applicant that, after its reorganisation on 30 June 1995, staff had been significantly reduced and, in so far as he had continuously been absent from the old customs office without authorisation, the administration had decided not to employ him any longer. The lawfulness of such a decision, the letter noted, was assured by the provisions of the Labour Code (“the LC”), the sole legislative act which regulated civil servants' labour disputes at that time. The applicant was invited to visit the Department's human resources office, in order to obtain the order for his dismissal and the work log.

10. On 23 May 2001 the applicant sued the Department for unfair dismissal, requesting reinstatement to his position and compensation for loss of salary.

11. In a first instance judgment of 22 November 2001, the Isani-Samgori District Court in Tbilisi found in the applicant's favour. However, in an appellate decision of 15 April 2002, the Tbilisi Regional Court rejected his action as time-barred. The appellate court first noted that, in so far as the Civil Service Act of 31 October 1997 had not been enacted at the time of the applicant's dismissal, only the provisions of the LC had been applicable to the dispute. Given the fact that the applicant had continuously been complaining before various authorities, except for the courts, about his inability to pursue his duties as a customs officer, the appellate court found that he had been well aware of the alleged breach of his rights since his dismissal took effect in 1995. In such circumstances, it concluded that the applicant had failed to comply with the one-month time-limit for lodging an employment action, as required by Article 204 § 1 of the LC.

12. In May 2002 the applicant lodged a cassation claim, in which he called into question the appellate court's assessment of the circumstances of the case and certain evidence. It appears from the case file that the respondent Department did not submit any reply to that claim.

13. On 12 June 2002 the Civil Affairs Chamber of the Supreme Court of Georgia (“the Chamber”) at an oral hearing attended by the applicant,

started the examination of the case but, due to the absence of the Department's representative, adjourned it. The Chamber also decided to dispense with an oral hearing in the further proceedings.

14. On 13 June 2002 the applicant, complaining about the absence of an oral hearing, requested the President of the Supreme Court to change the Chamber's composition. In a decision of 18 June 2002, the Chamber dismissed this request as unsubstantiated.

15. In a decision of 19 June 2002, adopted under the written procedure, the Chamber dismissed the applicant's cassation claim. Having confirmed the appellate court's interpretation of the LC, it stated that it lacked jurisdiction to inquire into matters of fact, in so far as the applicant had not raised any “additional and well-founded cassation argument” (Article 407 § 2 of the Code of Civil Procedure).

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The Code of Civil Procedure (“the CCP”), as it stood at the material time

Pursuant to Article 393 §§ 1 and 2, only the lawfulness of an appellate judgment could be challenged in a cassation claim. The disputed judgment could be found to be unlawful if the appellate court had wrongly applied or interpreted legislative provisions.

Article 396 § 1 (f) required the appellant to mention in his or her cassation claim those facts which supported the alleged breaches of procedural law if the cassation claim was calling into question not only substantive but also procedural legal provisions.

Article 404 § 1

“The cassation court shall review the [disputed] judgment only in so far as challenged in the cassation claim. The cassation court cannot go beyond the facts referred to under Article 396 § 1 (f) and inquire of its own motion into other procedural breaches.”

Article 407 §§ 1 and 2

“The cassation court shall take into account the party's submissions only in so far as disclosed by the case file or the appellate judgment; only the facts submitted under Article 396 § 1 (f) can be taken into account.

The establishment of the facts [by the appellate court] is binding on the [cassation] court, unless an additional and well-founded cassation argument has been raised.”

Article 408 § 3

“In the event the cassation court finds it appropriate..., it can decide the case without an oral hearing. The parties shall be notified of such a decision.”

Article 411

“The cassation court shall take a [final] decision itself if the circumstances of the case have been established by the appellate court without procedural breaches and there is no need for additional fact finding.”

Article 412 § 1 and 2

“If it is not possible for the cassation court to decide the case in accordance with Article 411, it shall quash the appellate judgment and remit the case for a retrial.

If the cassation court quashes the disputed judgment because of the legal assessment, it shall indicate to the appellate court which circumstances of the case require additional examination, what kind of evidence has to be collected further and what other procedural acts are to be conducted.”

17. The Constitutional Court's judgment of 3 July 2003 in the case of Rizhamadze and Mumladze v. the Parliament of Georgia

The Constitutional Court dismissed the applicant's complaint challenging Article 408 § 3 of the CCP, which provided for the possibility to dispense with an oral hearing in cassation proceedings.

The Constitutional Court noted that, unlike an appellate court which established facts, the cassation court could only review the application of legal provisions. It could however examine, on the basis of Articles 396 § 1 (f) and 411 §§ 1 and 2 of the CCP, the facts which have been explicitly raised by the appellant in relation to the alleged violations of procedural law.

Consequently, whilst the scope of the review was mostly limited to the assessment of the application of procedural and substantive law, the Constitutional Court concluded that the right to an oral hearing in cassation proceedings was not absolute.

18. The Supreme Court's practice

In its judgment of 28 February 2006 in the case of “*Gokhi*” v. “*Telasi*” JSC, the Supreme Court defined the notion of an “additional and well-founded cassation argument” (Article 407 § 2 of the CCP), as follows:

“...‘An additional and well-founded cassation argument’ is ... a reference to those procedural breaches which, having been committed by the appellate court during the examination of the case, have resulted in an erroneous assessment of the matters of fact and/or the incorrect interpretation and application of substantive legal provisions.”

19. *Legislation regulating labour relations at the material time*

(a) **The Labour Code of 27 June 1973 (“the LC”)**

The LC regulated all types of private labour relations between employers, employees and labour unions. Pursuant to Article 1 § 2, pending the adoption of the Civil Service Act, the LC was fully applicable to the civil service.

Pursuant to Article 203 § 1 of the LC, the dismissed employee had the right to apply to a court with a reinstatement claim. Under Article 204 § 1 of the LC, the limitation period for lodging such a claim was one month and it started to run from the moment the employee concerned received the relevant order of dismissal.

(b) **The Civil Service Act**

The Civil Service Act was enacted on 31 October 1997 and became the *lex specialis* with regard to civil servants' relations with the State, including labour disputes. The Act did not have retroactive force.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained that the Supreme Court had dispensed with an oral hearing of his cassation claim. He called into question the outcome of the domestic proceedings, claiming that the domestic courts had incorrectly assessed certain evidence and the circumstances of the case. The applicant invoked Article 6 § 1 of the Convention, which, in its relevant part, reads as follows:

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

A. Admissibility

1. As to the complaint about the outcome of the proceedings

21. By calling into question the outcome of the proceedings, the applicant requests the Court to act as an appeal court of “fourth instance”. However, the Court reiterates that the domestic courts are best placed for assessing the relevance of evidence to the issues in the case and for

interpreting and applying rules of substantive and procedural law (see, amongst many authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32; *Gurepka v. Ukraine*, no. 61406/00, § 45, 6 September 2005). Insofar as the relevant domestic decisions do not disclose any manifestly arbitrary reasoning (cf., *a contrario*, *Donadze v. Georgia*, no. 74644/01, § 32, 7 March 2006), the Court considers that this limb of the applicant's complaint under Article 6 § 1 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. As to the absence of an oral hearing

(a) The parties' submissions

22. The Government submitted that the applicant, as a customs officer, occupied a position involving participation in the exercise of the State's sovereign power conferred by public law. Noting further that the proceedings in question represented an employment dispute between the applicant and a State agency of which the applicant was a part, the Government contended that Article 6 § 1 of the Convention was not applicable to this case (*Pellegrin v. France* [GC], no. 28541/95, §§ 64-67, ECHR 1999-VIII).

23. The applicant did not reply to this objection (see paragraphs 4 and 5 above).

(b) The Court's assessment

24. The Court notes at the outset that the proceedings before the Supreme Court, bearing on the applicant's compliance with the statutory limitation period, did not constitute a dispute over the applicant's "civil rights" as such. However, their outcome was directly decisive for the examination of the merits of the applicant's action concerning his labour rights and the resulting pecuniary claim (see, amongst other authorities, *Zander v. Sweden*, judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22; *Moreira de Azevedo v. Portugal*, judgment of 23 October 1990, Series A no. 189, p. 17, § 66).

25. As to the Government's objection concerning the incompatibility of the complaint on account of the applicant's position as a civil servant, the Court recalls that its Grand Chamber has recently adjusted the "functional criterion" which has been relied on since the aforementioned *Pellegrin* judgment (see *Vilho Eskelinen and Others v. Finland*, no. 63235/00, §§ 50-56, 19 April 2007). Accordingly, the presumption is now that Article 6 § 1 of the Convention applies to civil servants' ordinary labour disputes. The mere fact that the applicant, by virtue of his or her public office, participates

in the exercise of the State's sovereign power is no longer decisive (*ibid.* § 62).

26. Instead of the “functional criterion” of the *Pellegrin* case, there is now a two-tier test. Thus, in order for the respondent State to be able to plead an exception from the protection embodied in Article 6 § 1 of the Convention which, as a rule, is enjoyed by every civil servant, the respondent Government must show, first, that the bar on access to a court for the post in question has been explicitly prescribed by domestic law. Once this “lawfulness” requirement is fulfilled, the respondent Government must then demonstrate the existence of an objective State interest, independent from that of “a special bond of trust and loyalty” between the official and the State, which justifies the limitation on the right to a court (see *Vilho Eskelinen and Others*, cited above, §§ 61 and 62).

27. In the present case it is a common ground between the parties that the applicant had access to a domestic court. He was not precluded by the domestic law from suing the State for his dismissal and, moreover, the domestic courts explicitly acknowledged that, at the material time, it was through the provisions of the Labour Code, regulating private law employment disputes, that the applicant should have sought redress (see paragraphs 11, 15 and 19 above). In other words, the applicant as a civil servant was placed by the national authorities on the same footing as any other private law employee.

28. In these circumstances, and in view of the principle of subsidiarity inherent in the machinery of the Convention, the Court cannot take the place of the competent national authorities and assume that the State was immune from civil liability vis-à-vis the applicant, in respect of his claim for unfair dismissal and loss of salary (see *Vilho Eskelinen and Others*, cited above, §§ 61 and 62). Consequently, the Government's objection is rejected.

29. The Court finds therefore that Article 6 § 1 applies to this dispute. No other grounds for declaring this part of the application inadmissible have been established. The Court therefore declares it admissible.

B. Merits

1. The parties' submissions

30. The Government submitted that, under Georgian law, the primary role of the Supreme Court in cassation was to review the lawfulness of appellate decisions. The cassation court was not competent to examine the facts of the case, except for those which had been specifically referred to in the cassation claim to demonstrate the alleged breaches of procedural law. In the event that the Supreme Court found that the factual circumstances of a case had been established by the appellate court in the face of procedural

violations and, consequently, an additional examination of evidence was required, it would remit the case for a retrial.

31. According to the Government, it was because of the aforementioned nature of cassation proceedings that Article 408 § 3 of the CCP had been enacted. Thus, where the cassation court could not inquire into the circumstances of the case and was only called on to assess the already established facts from a legal point of view, the parties' participation at an oral hearing might not always be necessary. This rule was also justified, in the Government's view, by such legitimate considerations as the right to a hearing within a reasonable time and the demands of economy.

32. As to the present case, according to the Government, the Supreme Court had only to inquire into the lawfulness of the appellate judgment. It could not re-examine the factual circumstances of the case, as requested by the applicant in his cassation claim. The cassation court was not even called on to assess the facts relating to procedural breaches, as no such "cassation argument" (*sakasacio pretenzia*) had been raised by the applicant. In the Government's view, the inquiry into the points of law in the light of the already established facts was fully possible on the basis of the applicant's written observations and case materials. Furthermore, the applicant had been informed in advance of the decision to dispense with an oral hearing.

33. In the light of the foregoing, the Government claimed that the absence of an oral hearing before the Supreme Court could not be said to have breached any of the guarantees of a fair hearing.

34. The applicant did not reply to the Government's arguments (see paragraphs 4 and 5 above).

2. The Court's assessment

35. The Court recalls that the entitlement to a "public hearing" in Article 6 § 1 necessarily implies a right to an "oral hearing". However, the obligation under Article 6 § 1 to hold an oral hearing is not an absolute one. Thus, the absence of such a hearing may be compatible with the requirements of Article 6 when the issue which is to be decided raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see, *mutatis mutandis*, *Fredin v. Sweden* (no. 2), judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, pp. 20-21, § 44).

36. The Court further recalls that, in proceedings before a court of first and only instance, there is normally a right to an oral hearing (see, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64). However, the absence of a hearing before a second or third instance may be justified by the special features of the proceedings at issue, provided a hearing has been held at first instance (see,

for instance, *Helmers v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, p. 16, § 36)

37. As regards the Supreme Court of Georgia when sitting in cassation, the Court observes that its role was primarily to examine the lawfulness of the appellate decisions. It follows from the Government's submissions, undisputed by the applicant and supported by the domestic law and practice, that the cassation court was not competent to decide on matters of fact, but could only review the interpretation and application of substantive and procedural legal provisions. However, an appellant could still challenge the established facts by raising "an additional and well-founded cassation argument" that they had been determined by the lower courts in breach of procedural norms (see paragraphs 16-18 and 30-32 above).

38. The Court notes that, in his cassation claim, the present applicant requested a review of the circumstances of his case. However, he did not specify the procedural shortcomings of the appellate court's factual assessment of his situation (see paragraph 12 above). In these circumstances, the Court observes that the Supreme Court, lacking the necessary competence either to examine whether the disputed decision was factually well-founded or to take new evidence, legitimately refused to inquire into the circumstances of the case and instead endorsed the appellate court's determination under Article 407 of the CCP. Reviewing the validity of the appellate court's legal reasoning only (Article 404 § 1 of the CCP), the cassation court ruled on the applicability and mode of calculation of the limitation period in accordance with Article 204 § 1 of the LC.

39. In so far as the issue of the limitation period had already been subject to examination at an oral hearing by the appellate court, the applicant's right to another hearing on the same issue may reasonably be considered to have been less important. Consequently, in view of the nature of the cassation proceedings in question, this right could, in principle, be outweighed by other legitimate considerations (see *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, p. 14, § 31; *Helmers*, cited above, § 36). In this connection, the Court accepts the Government's reference to the demands of diligence and economy.

40. The Court considers that, given the issue to be decided, the Supreme Court was fully capable of properly reviewing the lower court's interpretation of the pertinent legal provisions on the sole basis of the parties' written submissions and other materials in the case file. Legal arguments, as well as those relating to technical factual matters, may be presented just as effectively in writing rather than orally (see, for example, *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, § 30; *Coorplan-Jenni GmbH and Hascic v. Austria*, no. 10523/02, § 63, 27 July 2006;

Salomonsson v. Sweden, no. 38978/97, § 39, 12 November 2002; *Göç v. Turkey* [GC], no. 36590/97, § 51, ECHR 2002-V).

41. Furthermore, the Court attaches special significance to the fact that, in the present case, the absence of an oral hearing did not undermine the applicant's right to adversarial proceedings, a matter undisputed by the applicant.

42. Having regard to the materials in its possession, the Court notes that the Department did not submit any reply to the applicant's cassation claim. The latter, therefore, cannot claim that the absence of an oral hearing stripped him of the possibility to obtain knowledge of and, if necessary, comment on the other party's submissions before the delivery of a final judgment (see, *a contrario*, *Lobo Machado v. Portugal*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I, § 31; *Vermeulen v. Belgium*, judgment of 20 February 1996, *Reports* 1996-I, § 33; *Fretté v. France*, no. 36515/97, § 47, ECHR 2002-I). Finally, the Court attaches importance to the fact that the applicant was not caught unaware by the Supreme Court's decision to dispense, in the course of the cassation proceedings, with an oral hearing, as it had been duly announced to him prior to the examination of the case (see paragraph 13 above).

43. In sum, there is nothing in the case file suggesting that the written procedure offered to the applicant by the Supreme Court in lieu of an oral hearing either lacked transparency or disclosed other reasonable grounds to doubt its fairness.

44. In the light of the above considerations, the Court concludes that the absence of an oral hearing before the cassation court did not amount to a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. The applicant complained under Article 10 of the Convention that, by dispensing with an oral hearing, the Supreme Court had limited his right to freedom of expression. Invoking Article 13 of the Convention, he claimed that the domestic judicial proceedings, in view of their alleged unfairness, did not constitute “an effective remedy”.

46. However, the Court considers that, in the light of its findings above (see paragraphs 43-44 above), after a thorough examination of the case under Article 6 § 1 of the Convention, that these complaint do not require a separate examination.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the absence of an oral hearing in cassation admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 31 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELEN-PASSOS
Deputy Registrar

F. TULKENS
President