



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

FIRST SECTION

CASE OF TETSEN v. RUSSIA

(Application no. 11589/04)

JUDGMENT

STRASBOURG

3 April 2008

FINAL

03/07/2008

This judgment may be subject to editorial revision.

In the case of Tetsen v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 13 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 11589/04) 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 Oleg Yuryevich Tetsen (“the applicant”), on 15 March 2004.

2. The Russian Government (“the Government”) were represented by Mrs V. Milinchuk, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained about non-enforcement of the judgment in his favour.

4. On 21 June 2007 the Court decided to give notice of 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.

THE FACTS

5. The applicant was born in 1979 and lives in Vizinga in the Komi Republic.

6. From 14 June 2001 to 31 July 2003 the applicant was employed in the military commander’s office in the Chechen Republic. On the commander’s orders, he took part in counter-terrorist operations. For his participation he was paid an additional compensation of 55,807.70 Russian roubles (RUB) for a period of eighty-five days.

7. The applicant applied to a court, claiming that the additional compensation should be paid for the entire duration of his employment in the military commander's office. He submitted original employment contracts and orders signed by the military commander.

8. The military commander's office did not send a representative to take part in the proceedings and asked the court to hear the case in his absence.

9. On 25 August 2003 the Military Court of the Rostov-on-Don Garrison accepted the applicant's claim and awarded him RUB 444,965.37 against the military commander of the Chechen Republic.

10. No appeal having been lodged against the judgment, it became enforceable ten days later.

11. On 6 September 2003 the applicant obtained a writ of execution and submitted it to the Ministry of Finance.

12. On 23 August 2005 a representative of the military commander's office asked the Military Court of the Rostov-on-Don Garrison to quash the judgment of 25 August 2003 on account of newly discovered circumstances. He claimed that it had been founded on "unreliable evidence" (*недостоверные доказательства*).

13. By decision of 20 October 2005, a judge of the Military Court of the Rostov-on-Don Garrison set aside the judgment of 25 August 2003 on account of newly discovered circumstances. The parties did not make available a copy of that decision to the Court. According to the applicant, it did not specify why the evidence in the original judgment was considered "unreliable". The Government indicated that it was unreliable because "the applicant's calculations of the indebtedness [had] had no legal effect".

14. In the re-opened proceedings the applicant's claims were rejected in full. Copies of these judgments were not made available to the Court.

THE LAW

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

15. The applicant complained about non-enforcement of the judgment of 25 August 2003. He relied on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, the relevant parts of which read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time ... 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...”

A. Admissibility

16. The Government, relying on the Court’s judgment in the case of *Pellegrin v. France* ([GC], no. 28541/95, ECHR 1999-VIII), argued that the applicant’s complaint under Article 6 of the Convention was inadmissible *ratione materiae* because the applicant was a military officer and the judgment award had concerned wage arrears for his military service.

17. The Court recalls that in the *Pellegrin* judgment it attempted to establish an autonomous interpretation of the term “civil service”. To that end the Court introduced a functional criterion based on the nature of the employee’s duties and responsibilities. However, in its recent judgment in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, 19 April 2007), the Court found that the functional criterion, adopted in the *Pellegrin* judgment, did not simplify the analysis of the applicability of Article 6 in proceedings to which a civil servant was a party or brought about a greater degree of certainty in this area as intended (§ 55). For these reasons the Court decided to further develop the functional criterion set out in *Pellegrin* and adopted the following approach (see *Vilho Eskelinen*, cited above, § 62):

“To recapitulate, in order for the respondent State to be able to rely before the Court on the applicant’s status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State’s interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in the *Pellegrin* judgment, a ‘special bond of trust and loyalty’ between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified”.

18. Turning to the facts of the present case, the Court notes that the applicant had access to a court under national law. He made use of his right and introduced an action against his former employer. The Military Court of the Rostov-on-Don Garrison examined the applicant's claims and accepted them, awarding wage arrears to the applicant. Neither the domestic courts nor the Government indicated that the domestic system barred the applicant's access to a court. Accordingly, Article 6 is applicable (compare *Dovguchits v. Russia*, no. 2999/03, § 24, 7 June 2007) and the Government's objection must be dismissed.

19. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

20. The Government pointed out that the judgment of 25 August 2003 had been eventually quashed on account of "unreliable evidence" produced by the applicant. They submitted that there had been no impairment of the *res judicata* principle because the applicant could not legitimately expect the stability of a judicial decision founded on "unreliable evidence". Likewise, he could not legitimately expect that the judgment would be enforced because he had been aware that his claims had been based on "unreliable evidence". Defects in the evidentiary base had not been known to the defendant in due time because its representative had not taken part in the hearing on 25 August 2003.

21. The applicant submitted that the judgment should be enforced once it became enforceable. There had been no reasons justifying the two-years delay in the enforcement of the judgment of 25 August 2003. As regards the re-opening of the proceedings, he pointed out that the certificates he had produced bore the signatures and stamps of the military commander's office. All of his evidence had come from the official bodies.

22. The Court observes that on 25 August 2003 the applicant obtained a judgment by which the military commander of the Chechen Republic was to pay him a sum of money. The judgment was not appealed against and became enforceable ten days later. From that moment on, it was incumbent on the debtor, a State official, to comply with it. On 20 October 2005 a judge of the Military Court of the Rostov-on-Don Garrison set the judgment aside. It follows that at least from September 2003 to 20 October 2005 the judgment of 25 August 2003 was enforceable and it was incumbent on the State to abide by its terms (compare *Dovguchits*, cited above, § 41, and *Velskaya v. Russia*, no. 21769/03, § 18, 5 October 2006).

23. The Court is not convinced by the Government's claim that the applicant could not have a legitimate expectation that the judgment would

be enforced because it had been founded on “unreliable evidence”. The Military Court examined the evidence produced by the applicant and granted his claim. There was no indication in the judgment that the court had considered the evidence insufficient or unreliable. Nor were there any allegations of forgery. The judgment itself was valid and enforceable without any legal defect. There was thus no justification for the State authorities’ failure to comply with the judgment.

24. As regards the eventual quashing of the judgment on account of newly discovered circumstances, the Court reiterates its constant approach that “the quashing of the judgment which did not respect the principle of legal certainty and the applicant’s ‘right to a court’, cannot be accepted as a reason to justify the non-enforcement of the judgment” (see *Velskaya*, cited above, §§ 19-21, and *Sukhobokov v. Russia*, no. 75470/01, § 26, 13 April 2006). The Court accordingly has to determine whether the principle of legal certainty was respected in the instant case. It observes that the judgment of 25 August 2003 was set aside more than two years later, further to an application by the military commander’s office. In granting the application, the judge determined that the original judgment had been premised on “unreliable evidence”. In the Government’s submission, unreliability of the evidence was a newly discovered circumstance because a representative of the military commander’s office had been absent from the original proceedings.

25. The Court reiterates that “the procedure for quashing of a final judgment presupposes that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome of the proceedings. The person applying for rescission [on account of newly discovered circumstances] should show that there was no opportunity to present the item of evidence at the final hearing and that the evidence is decisive” (see *Pravednaya v. Russia*, no. 69529/01, § 27, 18 November 2004). The Government did not point to any exceptional circumstances that would have prevented the commander’s office from challenging the evidence at either first or appeal instance. On the contrary, it transpires that the military commander’s office expressly waived its right to take part in the proceedings before the Military Court and subsequently chose not to avail itself of the right of appeal against the first-instance court’s judgment. It follows that the commander’s office’s request to re-open the case due to the discovery of the new circumstances was in essence an attempt to re-argue the case on points which the office had been able, but had failed, to raise in the original proceedings. The Court therefore considers the office’s request to be an “appeal in disguise” rather than a conscientious effort to make good a miscarriage of justice (compare *Pravednaya*, cited above, § 32). The Court furthermore notes an exceptionally long period of time which preceded the office’s application for rescission of the judgment of 25 January 2003. No justification for that delay was put forward by the Government. In these

circumstances, the Court finds that the quashing of the judgment of 25 August 2003 breached the principle of legal certainty and that, in any event, it may not serve as a justification for the authorities' failure to execute a valid and enforceable judgment in the preceding period.

26. Having regard to its case-law on the subject (see *Burdov v. Russia*, no. 59498/00, ECHR 2002-III; and, more recently, *Poznakhirina v. Russia*, no. 25964/02, 24 February 2005; *Wasserman v. Russia*, no. 15021/02, 18 November 2004, and also the *Dovguchits* and *Velskaya* judgments, cited above), the Court finds that by failing to comply with the judgment of 25 August 2003 in the applicant's favour the domestic authorities violated his right to a court and prevented him from receiving the money which he legitimately expected to receive.

27. There has therefore been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of the non-enforcement of the judgment of 25 August 2003.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

29. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage and the money which had been awarded to him under the judgment of 25 August 2003.

30. The Government considered his claim to be "manifestly excessive and groundless".

31. The Court recalls that in the instant case it found a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, in that the judicial decision in the applicant's favour was not enforced. The Court notes that the most appropriate form of redress in respect of a violation of Article 6 is to ensure that the applicant as far as possible is put in the position he would have been had the requirements of Article 6 not been disregarded (see *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12). The Court finds that in the present case this principle applies as well, having regard to the violations found (compare *Poznakhirina* § 33, and *Sukhobokov*, § 34, both cited above). The applicant was prevented from receiving money he had legitimately expected to receive under the judgment of 25 August 2003. The Court, accordingly,

awards the applicant EUR 12,600 in respect of pecuniary damage, plus any tax that may be chargeable on that amount.

32. The Court further considers that the applicant must have suffered distress and frustration resulting from the State authorities' failure to enforce the judgment in her favour. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on the above amount.

B. Costs and expenses

33. The applicant did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum under this head.

C. Default interest

34. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 of the Convention and Article 1 of Protocol No. 1;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 12,600 (twelve thousand six hundred euros) in respect of pecuniary damage;
 - (ii) EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President