



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

FIRST SECTION

CASE OF NEKHOROSHEV v. RUSSIA

(Application no. 45017/04)

JUDGMENT

STRASBOURG

10 April 2008

FINAL

10/07/2008

This judgment may be subject to editorial revision.

In the case of Nekhoroshev v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

Giorgio Malinverni, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 20 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 45017/04) 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 Yuriy Sergeyevich Nekhoroshev (“the applicant”), on 19 November 2004.

2. The Russian Government (“the Government”) were initially represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mrs V. Milinchuk.

3. On 12 October 2006 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1931 and lives in Moscow.

5. In November 2001 the applicant, a retired military officer, brought proceedings against the Military Service Commission of Moscow (*Военный комиссариат г. Москвы* – “the Commission”) for recalculation of his pension as from 1993 to take account of the fact that he served in the extreme north of Russia which made him eligible for a higher pension.

6. On 3 December 2002 the Tverskoy District Court of Moscow granted the applicant's claim, adjusted his pension by a coefficient 1.4 and awarded him 221,913.54 Russian roubles (RUB) in arrears.

7. The Commission did not lodge an ordinary appeal against the judgment and it became binding and enforceable on 16 December 2002.

8. On 26 December 2002 the defendant enforced the judgment in a part concerning the lump sum of RUB 221,913.54. The monthly pension payments were calculated based on a coefficient of 1.4 in accordance with the judgment of 3 December 2002 during the period from December 2002 until August 2004.

9. On 3 December 2003 the Commission filed an application for supervisory review, claiming that the civil-law provisions on which the court based its judgment were not relevant to the applicant.

10. On 18 May 2004 the applicant was informed about the initiation of the supervisory-review procedure.

11. On 20 May 2004 the Presidium of the Moscow City Court held a supervisory-review hearing. It held that the first-instance court had erroneously applied the substantive law. On that ground it quashed the judgment of 3 December 2002 and remitted the matter for a fresh examination. Before the announcement of the judgment the applicant was asked to wait outside the courtroom. At the same time the respondent remained there. The decision of the court was announced to the applicant by the bailiff. The applicant received a copy of the final decision on 6 August 2004.

12. On 28 February 2005 the Tverskoy District Court of Moscow dismissed the applicant's claim for recalculation of his pension. At the same time, the court rejected the Commission's claim for recovery of the sum already paid to the applicant in arrears pursuant to the judgment of 3 December 2002, since such recovery was not possible under the domestic law. On 10 June 2005 the Moscow City Court upheld the judgment on appeal.

II. RELEVANT DOMESTIC LAW

A. Code of Civil Procedure of the Russian Federation

13. The Code of Civil Procedure of the Russian Federation ("the new Code") was enacted on 14 November 2002 and replaced the RSFSR Code of Civil Procedure ("the old Code") from 1 February 2003. It provides as follows:

Article 362. Grounds for quashing or altering judicial decisions by appeal courts

“1. The grounds for quashing or altering judicial decisions by appeal courts are:

...

(4) violation or incorrect application of substantive or procedural legal provisions.”

Article 376. Right to apply to a court exercising supervisory review

“1. Judicial decisions that have become legally binding, with the exception for judicial decisions by the Presidium of the Supreme Court of the Russian Federation, may be appealed against ... to a court exercising supervisory review, by parties to the case and by other persons whose rights or legal interests have been adversely affected by these judicial decisions.

2. Judicial decisions may be appealed against to a court exercising supervisory review within one year after they became legally binding...”

Article 381. Examination of an application for supervisory review

“2. Having examined an application for supervisory review, the judge issues a decision on –

(1) obtaining the case file if there exist doubts as to the lawfulness of the judicial decision...

4. If a decision to obtain the file has been made, the judge may suspend enforcement of the judicial decision until the supervisory-review proceedings have been completed...”

Article 384. Decision on remitting the case for examination on the merits by a supervisory-review court

“1. A judicial decision on remitting the case for examination on the merits by a supervisory-review court must contain:

(7) a reasoned description of the grounds for remitting the case for examination on the merits...”

Article 387. Grounds for quashing or altering judicial decisions by way of supervisory review

“Judicial decisions of lower courts may be quashed or altered by way of supervisory review on the grounds of substantial violations of substantive or procedural legal provisions.”

Article 390. Competence of the supervisory-review court

“1. Having examined the case by way of supervisory review, the court may ...

(2) quash the judicial decision issued by a court of first, second or supervisory-review instance in whole or in part and remit the matter for a fresh examination; ...

(5) quash or alter the judicial decision issued by a court of first, second or supervisory-review instance and issue a new judicial decision, without remitting the matter for a fresh examination, if substantive legal provisions have been erroneously applied or interpreted.”

B. Resolution of the Plenary Supreme Court of the Russian Federation

14. Resolution no. 2 of the Plenary Supreme Court of the Russian Federation of 20 January 2003, “On certain issues arising in connection with adoption and coming into force of the Code of Civil Procedure of the Russian Federation”, provided that

“22. ... The [one-year] time-limit for lodging an application for supervisory review of judicial decisions that became legally binding before 1 February 2003, shall run from 1 February 2003.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 ON ACCOUNT OF THE QUASHING OF THE JUDGMENT

15. The applicant complained that the act of quashing had violated his “right to a court” under Article 6 § 1 of the Convention and his right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1. The relevant parts of these provisions 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 Court considers that this complaint 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

1. Alleged violation of Article 6 of the Convention

17. The Government submitted that the supervisory-review proceedings in the applicant's case fully complied with the domestic law: the application for supervisory review was lodged within the prescribed time-limit by a party to the proceedings with a view to correcting the judicial error committed by the District Court by wrongful application of the substantive provisions of the domestic law. There had therefore been no violation of the principle of legal certainty.

18. The applicant maintained his claims.

19. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania*, judgment of 28 October 1999, *Reports of Judgments and Decisions* 1999-VII, § 61).

20. This principle insists that no party is entitled to seek re-opening of the proceedings merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power to quash or alter binding and enforceable judicial decisions should be exercised for correction of fundamental defects. The mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see, *mutatis mutandis*, *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-X, and *Pravednaya v. Russia*, no. 69529/01, § 25, 18 November 2004).

21. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final and binding judicial decision to be quashed by a higher court on an application made by

a State official whose power to lodge such an application is not subject to any time-limit, with the result that the judgments were liable to challenge indefinitely (see *Ryabykh*, cited above, §§ 54-56).

22. The Court reiterates that it has found a violation of an applicant's "right to a court" guaranteed by Article 6 § 1 of the Convention in many Russian cases in which a judicial decision that had become final and binding was subsequently quashed by a higher court on an application by a State official or a party to the proceedings, especially when a rather long period of time lapsed from the date the judgment in the applicant's favour had become binding to the date the supervisory-review proceedings were instituted (see *Roseltrans v. Russia*, no. 60974/00, §§ 24-28, 21 July 2005; *Volkova v. Russia*, no. 48758/99, §§ 32-37, 5 April 2005; *Ryabykh*, cited above, §§ 51-58; *Borshchevskiy v. Russia*, no. 14853/03, §§ 41-50, 21 September 2006; *Nelyubin v. Russia*, no. 14502/04, §§ 22-30, 2 November 2006; *Sergey Petrov v. Russia*, no. 1861/05, §§ 21-29, 10 May 2007; and *Zvezdin v. Russia*, no. 25448/06, §§ 26-32, 14 June 2007).

23. The Court observes that on 3 December 2002 the applicant obtained a judgment in his favour. No appeal was lodged against the judgment, and it became binding and enforceable. However, on 20 May 2004 that judgment was quashed within the supervisory-review procedure on the ground that the District Court had incorrectly applied the substantive law.

24. The Court stresses that a binding and enforceable judgment should only be quashed in exceptional circumstances rather than for the sole purpose of obtaining a different decision in the case (see the case-law cited in paragraphs 20 and 22 above). The fact that in the present case the Presidium disagreed with the assessment made by the District Court was not, in itself, an exceptional circumstance warranting the quashing of a binding and enforceable judgment and re-opening of the proceedings on the applicant's claim (see *Kot v. Russia*, no. 20887/03, § 29, 18 January 2007).

25. The Court further observes that in the Russian legal system the grounds for quashing or altering judgments by appeal courts largely overlap with those for quashing or altering judgments by way of supervisory review (compare Article 362 § 1 (4) and Article 387 of the Code of Civil Procedure). Thus, the situation calling into question the binding judgment in the applicant's favour could have been avoided, had the Commission lodged an ordinary appeal. It is noteworthy, however, that the Russian Codes of Civil Procedure, both that of RSFSR and that of the Russian Federation, permitted a party to apply for supervisory review even if it had not previously exhausted an ordinary appeal. In the present case the Commission failed to exercise its right to lodge an ordinary appeal and permitted the statutory ten-day time-limit to expire without challenging the judgment of 3 December 2002. The Government did not point to any exceptional circumstances that would have prevented the Commission from exposing its arguments to the District Court or making use of an ordinary

appeal in good time (see *Nelyubin*, cited above, §§ 27-28; *Sergey Petrov*, cited above, § 29; and *Zvezdin*, cited above, §§ 30-31).

26. Having regard to the above considerations, the Court finds that, by granting the Commission's request to set aside the judgment of 3 December 2002, the Presidium of the Moscow City Court infringed the principle of legal certainty and the applicant's "right to a court" under Article 6 § 1 of the Convention. There has accordingly been a violation of that Article.

2. Alleged violation of Article 1 of Protocol No. 1

27. The Government denied that there had been a violation of the applicant's property rights because after the quashing of the judgment of 3 December 2002 by way of supervisory review there had been no legal grounds for an increase of the applicant's pension.

28. The Court reiterates that the existence of a debt confirmed by a binding and enforceable judgment furnishes the judgment beneficiary with a "legitimate expectation" that the debt would be paid and constitutes the beneficiary's "possessions" within the meaning of Article 1 of Protocol No. 1. Quashing of such a judgment amounts to an interference with his or her right to peaceful enjoyment of possessions (see, among other authorities, *Brumărescu*, cited above, § 74, and *Androsov v. Russia*, no. 63973/00, § 69, 6 October 2005).

29. The Court observes that by virtue of the judgment of 3 December 2002 the applicant's pension was considerably increased. The quashing of the enforceable judgment frustrated the applicant's reliance on a binding judicial decision and deprived him of an opportunity to receive the money he had legitimately expected to receive. In these circumstances, the Court considers that the quashing of the judgment of 3 December 2002 by way of supervisory review placed an excessive burden on the applicant and was therefore incompatible with Article 1 of Protocol No. 1. There has therefore been a violation of that Article.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

30. The applicant complained under Article 6 § 1 of the Convention about various procedural defects of the hearing before the Presidium of the Moscow City Court.

31. The Court finds that, having concluded that there has been an infringement of the applicant's "right to a court" by the very use of the supervisory review procedure, it is not necessary to consider whether the procedural guarantees of Article 6 of the Convention were available in those proceedings (see *Ryabykh*, cited above, § 59). It therefore rejects this part of the application pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 115,200 Russian roubles in respect of pecuniary damage. This sum represents the 40% increase to the applicant's current pension underpaid to him during three years after the quashing of the judgment of 3 December 2002 by way of supervisory review. The applicant did not make a claim for non-pecuniary damage.

34. The Government claimed that no award should be made because the applicant's claim had been rejected by the domestic courts.

35. 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 final judgment in the applicant's favour had been quashed in supervisory-review procedure. 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, and, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003). The Court finds that in the present case this principle applies as well, having regard to the violations found (see *Dovguchits v. Russia*, no. 2999/03, § 48, 7 June 2007). In the present case the Court recalls that the applicant received the arrears of his pension on 26 December 2002 and also, until August 2004, an increase based on a coefficient of 1.4. It was not, however, until 10 June 2005 that the Moscow City Court finally dismissed the applicant's claim for an increase to his pension which means that the quashing of the previous judgment deprived the applicant of the 1.4 coefficient increase from August 2004 until 10 June 2005. Having regard to this the Court awards the applicant 950 euros in respect of pecuniary damage.

B. Costs and expenses

36. The applicant did not make any claims for the costs and expenses incurred before the domestic courts and the Court.

37. Accordingly, the Court does not award anything under this head.

C. Default interest

38. 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 applicant's complaint concerning the act of quashing of the final judgment in his favour admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 of the Convention and Article 1 of Protocol No. 1 on account of the quashing of the judgment of 3 December 2002 by way of supervisory review;
3. *Holds*
 - (a) that the respondent State, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, is to pay the applicant EUR 950 (nine hundred fifty euros) in respect of pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of the settlement, plus any tax that may be chargeable to the applicant;
 - (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.

Done in English, and notified in writing on 10 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President