



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

FIRST SECTION

CASE OF KABKOV v. RUSSIA

(Application no. 12377/03)

JUDGMENT

STRASBOURG

17 July 2008

FINAL

17/10/2008

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 Kabkov 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 26 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 12377/03) 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 Nikolay Ivanovich Kabkov (“the applicant”), on 13 March 2003.

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

3. On 15 March 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 1933 and lives in the town of Sergiyev Posad in the Moscow Region.

A. Employment dispute

5. In 1988 the applicant gave up his post in the Zagorskiy engineering plant in order to be appointed to a similar position in a car manufacturing enterprise, ATP-11 (“ATP-11”). The latter refused to appoint the applicant to the position sought.

6. On an unspecified date in 1988 the applicant sued ATP-11, seeking that it complied with the agreement for his appointment to the post.

7. On 4 January 1989 the Zagorsk Town Court dismissed his claims. The Moscow Regional Court upheld the judgment on 2 February 1989. On 4 May 1989 the Presidium of the Regional Court quashed the judgments by way of supervisory review and remitted the case for a new examination.

8. By a judgment of 27 June 1989, the Town Court rejected the applicant’s claims. On 14 July 1989 the Regional Court upheld the judgment.

9. On 7 June 1990 the Supreme Court of the Russian Soviet Federative Socialist Republic (“the RSFSR Supreme Court”) quashed the judgments of 27 June and 14 July 1989 and remitted the case to the Town Court for a fresh examination.

10. On 28 December 1990 Judge M. of the Town Court listed a hearing for 9 January 1991.

11. At a hearing of 23 January 1991 the applicant amended his claims and claimed compensation for forced absence from work due to the ATP-11’s unlawful refusal to appoint him to the post.

B. Criminal proceedings against the applicant

12. On 7 May 1991 judge M. instituted criminal proceedings against the applicant on suspicion that he had stolen the case file concerning his employment dispute.

13. On 1 November 1991 the deputy prosecutor of the Moscow Regional prosecutor’s office informed the applicant that there were no reasons to set aside the decision of 7 May 1991. He also noted that the local justice department had been ordered to take immediate measures to restore the materials of the case file in respect of the applicant’s employment dispute.

14. On 19 March 1998 the Mytishchi Town Court of the Moscow Region acquitted the applicant for lack of evidence. The judgment became final on 27 March 1998.

C. The applicant's requests to restore the case file

1. *Requests to restore the case file made in 1991-1998*

15. In the meantime, on 8 April 1992 the applicant requested the President of the Town Court (renamed the Sergiyev Posad Town Court after the town of Zagorsk had been renamed Sergiyev Posad) to restore the case file regarding his employment dispute and to pursue its examination of his claims against ATP-11. The applicant submitted the receipt card showing that the request had been received by the Town Court on 14 April 1992. On 6 May 1992 the President informed the applicant that his employment claims would be adjudicated after the examination of the criminal case against him.

16. On 1 June 1993 and 1 March 1994 respectively the Regional Court forwarded to the Town Court repeated requests by the applicant for restoration of the case file (*заявление о восстановлении утраченного судебного производства*) with a view to proceeding with the examination of his employment dispute, further to the decision of 7 June 1990. Those requests were accompanied by the documents from the file preserved by the applicant. In its letter of 1 March 1994 the court noted that in case of dismissal of the applicant's request to restore the case file the courts were to advise the applicant on his right to re-submit his employment dispute to the courts by means of ordinary civil proceedings. It appears that no action was taken in response to the above requests.

17. By decision of 1 April 1994, the Town Court refused to examine the applicant's requests to restore the case file, as formulated in his application of 20 January 1994 and a telegram of 26 March 1994 respectively. The court referred to the ongoing criminal proceedings and held that it could not examine the applicant's requests until his exculpation.

18. On 13 October 1994 the Presidium of the Regional Court quashed the decision of 1 April 1994 and remitted the matter to the Town Court for a fresh examination.

19. By letter of 20 February 1995, the Supreme Court of the Russian Federation advised the applicant that the Presidium of the Regional Court had forwarded his request for restoration of the case file to the Town Court for a fresh examination.

20. On 25 September 1996 the Regional Court forwarded to the President of the Town Court a complaint by the applicant about the failure to examine his request for restoration of the case file, as ordered by the decision of 13 October 1994. The Regional Court noted that, according to the Town Court's registry, the related proceedings were still pending before the Town Court.

21. On 5 May 1998 the Convention entered into force in respect of Russia.

22. On 6 July 1998 the Regional Court forwarded to the Town Court a further complaint by the applicant about the failure to examine his requests for restoration of the case file. It ordered the Town Court to take all necessary measures with a view to pursuing the examination of the applicant's request.

2. First refusal to restore the case file

23. By decision of 10 November 1998, the Town Court refused to restore the case file concerning the applicant's employment dispute. The court noted that it had returned to the applicant the documents lodged in March 1994 after the decision of 1 April 1994 had become legally binding. The applicant had not complied with the court's requests to re-submit them. Instead of rectifying the shortcomings, the applicant had chosen to complain to higher courts, declaring that the documents were already with the Town Court. In the absence of the relevant documents and any intention on the part of the applicant to submit them, it had to terminate the proceedings. It advised the applicant that it was open to him to re-submit his employment dispute to the Town Court.

24. It appears that the applicant was not present at the hearing and was not served with a copy of the decision of 11 November 1998. The decision was not appealed against and became final on 22 November 1998.

3. Second refusal to restore the case file

25. On 10 February 2002 the applicant renewed his request to the Town Court to restore his case file and to adjudicate his employment dispute.

26. By a decision of 26 August 2002 the Town Court dismissed the applicant's request. It noted that the applicant had asked it to restore the file and had submitted copies of documents related to his employment dispute. However, those documents had not been duly certified. They had been partly typewritten and partly handwritten by the applicant, which cast doubt on their authenticity. The applicant had not submitted any other documents and the court itself had been unable to obtain any documents. ATP-11 had been declared insolvent. Eleven years had passed since the case file had been stolen and the applicant had requested to restore it only in 2002. It was impossible to examine authentic written exhibits (evidence) related to the applicant's labour action. The court finally noted that it was open to the applicant to re-submit his employment dispute to the Town Court.

27. On 14 October 2002 the Regional Court upheld the decision. It appears that the applicant was provided with both decisions in due time.

II. RELEVANT DOMESTIC LAW

A. Time-limits for examination of civil disputes

28. Article 99 of the 1964 Code of Civil Procedure, as in force at the material time, provided that civil cases were to be prepared for a hearing no later than seven days after the action had been lodged with the court. In exceptional cases, this period could be extended for up to twenty days. Civil cases were to be examined no later than one month after the preparation for the hearing had been completed.

B. Restoration of lost case files

29. Annex No. 2 to the 1964 Code of Civil Procedure, as in force at the material time, provided that courts were to restore lost case files on their own initiative, upon a request from any of the parties to the case or a prosecutor (Article 1). A request to restore the case file was to be lodged with the court which had examined the case on the merits (Article 3). It was to contain detailed information about the case and to be accompanied by all relevant documents or their copies from the file, preserved by the interested person, even if they were not duly certified (Article 4).

30. In examining the request, the court was to use the remaining documents, documents handed over from the case file to third persons or organisations, and copies of those documents and other certificates relevant to the case. It could also examine as witnesses persons who could provide information on procedural steps taken in the course of the proceedings, including members of the court, when necessary (Article 5).

31. If the materials accumulated during the proceedings were insufficient for an adequate restoration of the case file, the court terminated the proceedings by means of a decision (*определение*). In that case it was open to the interested person to re-submit his/her civil claims to the courts by way of ordinary proceedings (Article 6).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained under Article 6 § 1 of the Convention that his employment dispute had not been determined within a “reasonable time”. In so far as relevant, Article 6 § 1 reads:

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

A. Arguments by the parties

33. The Government argued that the applicant had never claimed compensation in respect of pecuniary or non-pecuniary damage in the proceedings against ATP-11. Thus, the proceedings had solely concerned his employment relations with the defendant and had not determined his “civil rights and obligations”. Consequently, the Government invited the Court to dismiss his application as incompatible *ratione materiae* with Article 6 of the Convention. As an alternative, they submitted that the proceedings had lasted from 5 May 1998, the date of entry of the Convention into force in respect of Russia, until 10 November 1998, the date on which the Town Court refused to examine the applicant’s request for restoration of the case file, and their length had not been unreasonable. The applicant had been advised to re-submit his claims but had failed to do so.

34. The applicant submitted that the proceedings against ATP-11 had been decisive for his eventual claim for unpaid salary. Besides, he claimed compensation in respect of his absence from work. In 1992, 1993 and 1994 he had submitted requests for restoration of the case file, accompanied by the relevant documents. In 1994 and 1998 the Regional Court had forwarded some of his requests to the Town Court. Hence, the courts had not lacked the relevant documents to restore the case file. The applicant had not been notified of or present at the hearing on 10 November 1998. Finally, he stressed that his employment dispute had never been examined, the last decision in his case being that of 7 June 1990 when the RSFSR Supreme Court had remitted the case at first instance.

B. The Court’s assessment

1. Admissibility

35. As to the Government’s argument that the application was incompatible *ratione materiae* with Article 6 § 1, the Court reiterates that, for this provision, in its “civil” limb, to be applicable there must be a dispute (*contestation*) over a “right” that can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious. It may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Moreover, the outcome of the proceedings must be directly decisive for the civil right in question (see,

among others, *Stojakovic v. Austria*, no. 30003/02, § 38, 9 November 2006, and *Frydlender v. France* [GC], no. 30979/96, § 27, ECHR 2000-VII).

36. The Court considers, and this was not contested by the parties, that there was a “dispute” over a right recognised under domestic law, that the dispute was genuine and serious and that the outcome of the proceedings was directly decisive for the right concerned. That dispute related to a right which was civil by its nature because it was an employment dispute between two private parties, an employer and an employee (see *Frydlender*, *ibid.*). As to the Government’s submission that the applicant had omitted to lodge any claims for compensation, the Court reiterates that such an omission does not of itself deprive the proceedings of their “civil” nature (see *Reinprecht v. Austria*, no. 67175/01, § 50, ECHR 2005-...). Finally, the Court observes that, contrary to the Government’s submission and according to the verbatim record of the hearing submitted by the applicant, he requested the Town Court to award him monetary compensation against the defendant (see paragraph 11 above). Consequently, the Court dismisses the Government’s objection.

37. The Court finds 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.

2. Preliminary issues regarding the scope of the case

38. From the outset the Court observes that the applicant lodged his employment claims in 1988 and the domestic courts examined them in two rounds of proceedings. On 7 June 1990 the RSFSR Supreme Court quashed previous judicial decisions and remitted the case for a new examination to the Town Court. On an unspecified date in 1991 the case file was lost. Having regard to the decisions of the domestic courts, the Court considers that upon the loss of the case file the applicant had two options to have his employment dispute determined by them: to re-submit his claims or to request the restoration of the case file. Taking into account that the regional prosecutor’s office had already requested that the case file be restored and the Regional Court had directed the Town Court to examine the applicant’s requests for its restoration (see paragraphs 13 and 18 above), the Court does not find it unreasonable that the applicant pursued the second option.

39. The Court further notes that the Convention entered into force in respect of the Russian Federation on 5 May 1998 and it will limit its examination of the present application to the question as to whether the events occurring after that date disclosed a breach of the Convention (see, among other authorities, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 19, § 52). However, it must take into account the state of the proceedings by this critical date (see *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, p. 20, § 58). In this

connection the Court observes that after the applicant's employment dispute had been remitted for a fresh examination at first instance and the file had been lost, there was no judicial decision which would determine the merits of the dispute or discontinue the proceedings regarding it (see *Dubinskaya v. Russia*, no. 4856/03, § 30, 13 July 2006). Hence, the Court finds that the proceedings should be considered pending on the date of entry into force of the Convention in respect of the Russian Federation, which was undisputed by the parties. Furthermore, in so far as the Government argued that the domestic courts had dismissed the applicant's requests for restoration of the case file by their decision of 10 November 1998, the Court observes that they furnished no evidence to the effect that this decision had ever been served on him (compare *Sukhorubchenko v. Russia*, no. 69315/01, § 50, 10 February 2005). Thus, the Court is satisfied that the applicant learnt about the refusal of the domestic courts to restore the case file when he was served with the decision of 26 August 2002, which was upheld on 14 October 2002.

40. Accordingly, the Court will examine the conduct of the authorities during the entire period from 5 May 1998 until 14 October 2002, while having due regard to the state of the proceedings on the former date.

3. Merits

41. Having regard to the submissions of the parties, the Court considers that the application foremost raises an issue as to the applicant's right of access to a court (see *Gorbachev v. Russia*, no. 3354/02, § 40, 15 February 2007) which it will examine first.

(a) Right of access to a court

42. The Court reiterates that the procedural guarantees laid down in Article 6 secure 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 (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36). However, the institution of proceedings does not, in itself, satisfy all the requirements of Article 6 § 1 and the right of access to a court includes not only the right to institute proceedings but also the right to obtain a "determination" of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings (see *Dubinskaya*, cited above, § 41; *Multiplex v. Croatia*, no. 58112/00, § 45, 10 July 2003; and *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II).

43. Turning to the facts of the present case, the Court notes that the applicant lodged his claims in 1988 and, after the loss of the case file,

reasonably pursued the proceedings for its restoration with a view to having his employment dispute determined by the domestic courts (see paragraph 38 above). However, his dispute was never determined.

44. The Court further observes that the Government did not contest or disprove that the applicant had submitted to the Town Court several requests to restore the case file and pursue the examination of his employment dispute. Neither did they dispute that all the applicant's requests had been received by the court and that at least two of them had been accompanied by those documents from the case file which the applicant had been able to preserve (see paragraphs 15 - 22 above). However, on 10 November 1998, the Town Court refused to restore the case file because of lack of the relevant documents. The Court notes that the Town Court returned to the applicant the documents lodged in January and March 1994, as it is stated in its decision. Nevertheless, it does not appear that it returned to him the documents lodged in April 1992 and those forwarded to it by the Regional Court in 1993 and 1994 (see paragraphs 15 and 16 above). Even assuming that those documents were lacking, the Government did not furnish any evidence that the applicant had ever been requested to re-submit them (compare *Dubinskaya*, cited above, § 35).

45. The Court further emphasises that by 5 May 1998 the proceedings for restoration of the case file concerning the applicant's employment dispute had been pending for six years after his first request for its restoration and for four years after the decision of 13 October 1994, explicitly ordering the Town Court to examine the matter. What is more, even when the court took its decision of 10 November 1998, the applicant was not notified of it.

46. As to the decisions delivered in 2002 and having regard to what was said above, the Court is struck by the domestic courts' finding that the applicant had not requested them to restore the file until 2002. Furthermore, in 2002 the courts refused to restore the case file because, among other things, the documents submitted by the applicant had not been duly certified. In this connection the Court cannot but note that Article 4 of the Annex No.2 to the 1964 Code of Civil Procedure expressly provided that documents from a lost case file preserved by the interested party were not to be certified.

47. Finally, the Court takes note of the Government's argument that it was open to the applicant to introduce his employment action anew. However, in the Court's opinion, it would place an excessive and unreasonable burden on him to require him to re-submit his claims more than thirteen years after he had validly introduced them for the first time (see *Dubinskaya*, cited above, § 44). In any event, the Court considers that the decision of 26 August 2002, as upheld on appeal, made it clear that in 2002 any chance of the applicant's ever having his employment dispute determined was practically non-existent. In particular, the national courts

established that the defendant had meanwhile become insolvent. The Town Court itself was unable to obtain any relevant documents concerning the circumstances of the applicant's dismissal and the possibility of examining authentic evidence was reduced to nothing.

48. Having regard to the above, the Court finds that the continued failure of the domestic courts to determine the applicant's employment dispute impaired the very essence of his right of access to a court. There has accordingly been a violation of Article 6 § 1 of the Convention.

(b) Length of proceedings

49. The Court notes that the gist of the applicant's complaint was the domestic courts' continued failure to determine his employment dispute. Having regard to its findings on that point, the Court finds that it is not necessary to examine separately the issue of the length of proceedings (see *Dubinskaya*, cited above, §§ 45-46, and *Sukhorubchenko*, cited above, §§ 55-56).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage and asked the Court to recommend the Russian Federation authorities to examine his claims against the engineering plant with a view to be reinstated in his previous position.

52. The Government contested the applicant's claim as unreasonable and excessive and submitted that a finding of a violation would constitute sufficient redress.

53. The Court notes that it has examined the applicant's complaint about the proceedings against ATP-11 to which the engineering plant had not been a party. It thus cannot discern any causal link between the violation found and the claim made by the applicant.

54. On the other hand, the Court accepts that the applicant may have experienced frustration as a result of the breach of his right to a court which cannot be compensated by the Court's finding of a violation. The particular amount claimed is, however, excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court

awards the applicant the sum of EUR 3,000, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

55. The applicant did not claim reimbursement of any costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

56. 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 § 1 of the Convention on account of the domestic courts' continued failure to examine the applicant's employment dispute;
3. *Holds* that no separate examination of the issue of the length of proceedings is required;
4. *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, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles, at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President