



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

FIRST SECTION

CASE OF KAZAKOV v. RUSSIA

(Application no. 1758/02)

JUDGMENT

STRASBOURG

18 December 2008

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Kazakov 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 Hajiyeu,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 27 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 1758/02) 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 Aleksandr Nikolayevich Kazakov (“the applicant”), on 18 July 2001.

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 9 September 2005 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 1948 and lives in the town of Karachev in the Bryansk Region.

5. In January 1999 the applicant, a former military officer, sent a letter to the commander of military unit no. 64176, who supervised the command of unit no. 92919. The letter read as follows:

“On 24 December 1998 the command of military unit no. 92919 held a meeting of war veterans ... who live in the military compound. The meeting adopted an open letter to the Ministry of Defence of the Russian Federation with a request to return the town baths to the compound residents and to stop discrimination against the residents on account of their social or official status ...

Commanders of the military unit conduct themselves as ‘usurpers, invaders and occupants’. In a short period of time the new commander of military unit no. 92919, Colonel Shatov, destroyed the town dance hall and the warehouse for vegetables, locked up the leisure centre of the unit, performed an unauthorised dismantling of the bus park and threw everyone out of the bathhouse which he converted into a ‘brothel’ for a narrow circle of chosen ones.”

6. Mr Shatov lodged a defamation action against the applicant, claiming that the letter of January 1999 had impaired his honour and dignity. He sought compensation in respect of non-pecuniary damage and a written apology, enclosing its proposed text.

7. By judgment of 13 July 2000, the Karachevskiy District Court of the Bryansk Region found for the plaintiff. It established that the dance hall and the warehouse had been indeed dismantled, but the materials had been used for the needs of the military unit, that the leisure centre was open, and that the soldiers and officers and their family members could still use the baths. The court noted that the document the applicant produced to prove the dismantling of the bus park could not be used in evidence as it bore no stamp.

8. The District Court found that the information stated in the letter of January 1999 had been untrue and damaging to Mr Shatov’s honour and dignity, and ordered as follows:

“Pursuant to Articles 152 § 5 and 151 of the Civil Code, the court orders [the applicant] to pay Mr Shatov 500 Russian roubles in respect of non-pecuniary damage because the allegations about Mr Shatov’s ‘discrimination against citizens, [his acting as an] usurper, invader, occupant, destruction of the dance hall and the warehouse, unauthorised dismantling of the bus park and throwing everyone out of the bathhouse which he converted into a ‘brothel’ for a narrow circle’ have impaired Mr Shatov’s honour and dignity...

...to order that [the applicant] make a written apology to Mr Shatov within one month, worded as follows: “In January 1999 I, [the applicant], sent to the commander of military unit no. 64176 a letter containing information on your professional activities, which was untrue and damaging to your honour and dignity. This fact was established by the Karachevskiy District Court on 13 July 2000. I apologise to you for having disseminated such information, for undermining your authority in the eyes of your subordinates and superiors, compound residents and the Karachev town residents, and for causing you personal suffering”;

...and to make an apology to the commander of military unit no. 64176 of Moscow worded as follows “In January 1999 I, [the applicant], sent you a letter containing information on the professional activities of the commander of military unit no. 92919, Mr Shatov, which was untrue and impaired Mr Shatov’s honour and dignity. This fact was established by the Karachevskiy District Court on 13 July 2000.

I apologise for misleading the command of military unit no. 64176 by giving untrue information.”

9. The applicant appealed against the judgment of 13 July 2000. He claimed that the letter of January 1999 contained his own value judgments, which were not amenable to proof. On 15 February 2001 the Bryansk Regional Court upheld the judgment, endorsing the reasons of the first-instance court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Freedom of expression and defamation

10. Article 29 of the Russian Constitution guarantees the freedom of expression. Article 33 provides that Russian citizens shall have the right to petition in person, as well as to submit individual and collective appeals to, State authorities and local self-government bodies.

11. Article 12 of the Civil Code is a general provision containing a list of the forms of redress which can be obtained in respect of civil rights. It includes recognition of a right, *restitutio in integrum*, compensation in respect of pecuniary or non-pecuniary damage and other forms of redress prescribed by law. Article 152 of the Code reads in its relevant parts as follows:

“1. A citizen shall have the right to claim through the court that the information discrediting his honour, dignity or business reputation be refuted, unless the person who has disseminated such information proves its truthfulness ...

2. If the information discrediting the honour, dignity or business reputation of the citizen has been disseminated by the mass media, it shall be refuted by the same media ...

3. The citizen with respect to whom the media have published the information infringing upon his rights or protected interests shall have the right to publish his reply in the same media ...

5. The citizen with respect to whom the information discrediting his honour, dignity or business reputation has been disseminated shall also have the right, in addition to the refutation of the given information, to claim compensation in respect of pecuniary and non-pecuniary damage caused by the dissemination.

6. If the person who has disseminated the information ... cannot be identified, the citizen shall have the right to turn to the court with a demand that it recognise the disseminated information as untruthful ...”

12. Resolution no. 11 of the Plenary Supreme Court of 18 August 1992 (as amended on 25 April 1995, in force at the material time) established that the notion “dissemination of information” employed in Article 152 of the

Civil Code was understood as the publication of statements or their broadcasting, inclusion in professional references, public speeches, applications to State officials and communication in other forms, including oral, to at least one another person. It specified, however, that “communication of such information to the person whom it concerned could not be treated as dissemination”.

13. In their Resolution of 24 February 2005, the Plenary Supreme Court recalled that under Article 29 § 3 of the Constitution no one can be compelled to express his opinions or beliefs or compelled to refrain from expressing them. It thus instructed the courts below that an apology, whatever its form, was not prescribed under Russian law, including Article 152 of the Civil Code, as redress (point 18). The above does not exclude the possibility for a judge to approve a friendly-settlement agreement the terms of which require such an apology. The Supreme Court also instructed the other courts that when a citizen lodges a complaint with a public authority alleging, for instance, that a criminal offence has been committed and when such an allegation proves to be unfounded, the latter fact cannot serve as a basis for an action under Article 152 of the Civil Code. The Supreme Court explained that civil liability could not arise in such a situation in view of the applicant’s exercise of his right of petition to a public authority, which was to carry out an inquiry, and that such a situation did not equate to dissemination of false defamatory information (point 10). A defamation action may only succeed if a court has established that the petition to the public authority lacked any foundation and was intended to cause damage to another person, thus amounting to an abuse of the right (*ibid*).

B. Administrative complaints procedure

14. Until 2006 the general administrative complaints procedure was prescribed by Decree no. 2534-VII issued by the Presidium of the USSR Supreme Council on 12 April 1968, as subsequently amended in 1980 and 1988, in so far as it was compatible with the 1993 Constitution and the 1993 Judicial Review Act. A number of public authorities had individual regulations on the matter.

15. According to the 1968 decree, a written petition or complaint should be signed by the complainant and should indicate his or her full name and place of residence (point 1). A petition or complaint should be submitted to the official or authority who is the immediate superior of the official or authority against whom the complaint is directed (point 3). The filing of defamatory petitions or complaints should be punishable by the law (point 15).

16. The Petition Procedure Act of 2 May 2006 (Federal Law no. 59-Φ3) sets up a new framework for administrative complaints and petitions. According to its section 11 § 3, a petition containing obscene or insulting

phrases, threats to life or limb of an official or his or her family members, may be left without examination on the merits; in such cases the complainant should be warned against the abuse of the right.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicant complained under Article 10 of the Convention that he had been punished for the lawful criticism of a public official and that the domestic courts had forced him to change his opinion by ordering him to make written apologies. Article 10 reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

18. The Court notes 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

19. The Government conceded that Article 152 of the Civil Code, as interpreted by the Supreme Court in its Resolution of 24 February 2005 (see paragraph 13 above), did not authorise an apology as a remedy in a defamation action, except in certain circumstances, for instance under the terms of a friendly-settlement agreement between the parties to a civil litigation. The Government contended, however, that before the above Resolution all other courts could interpret Article 152 differently. The Government considered with reference to that provision that the interference with the applicant’s freedom of expression had been prescribed by law and

was aimed at protecting the reputation of other persons. The fine imposed on the applicant was derisory and the obligation to make an apology could not be judged as harsh.

20. The applicant maintained his complaint.

21. The Court observes that it is common ground between the parties that the judgment pronounced in the defamation action itself constituted an interference with the applicant's right to freedom of expression protected by Article 10 § 1 and pursued a legitimate aim, that is, protecting the reputation of others. The Court finds no reason to reach a different conclusion. At the same time, the Court observes that the applicant alleged that one of the penalties imposed on him, namely, the requirement to issue an apology, had been unlawful. Thus, an issue arises as to whether the interference was prescribed by law, notably Article 152 of the Civil Code.

22. The Court reiterates in that connection that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the person to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-...). Those consequences need not be foreseeable with absolute certainty. Indeed, whilst certainty is desirable, it may bring in its train excessive rigidity while the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. However clearly drafted a legal provision may be, there will inevitably be a need for interpretation by the courts, whose judicial function is precisely to elucidate obscure points and dispel any doubts which may remain regarding the interpretation of legislation (see *Öztürk v. Turkey* [GC], no. 22479/93, § 55, ECHR 1999-VI). The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see, among others, *Dzhavadov v. Russia*, no. 30160/04, § 36, 27 September 2007).

23. The Court considers that the notion of foreseeability applies not only to a course of conduct, of which an applicant should be reasonably able to foresee the consequences, but also to "formalities, conditions, restrictions or penalties", which may be attached to such conduct, if found to be in breach of the national laws (see, *mutatis mutandis*, *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008-...). Thus, the Court has to determine whether the applicant in the present case could reasonably foresee that he would have to issue an apology, if found civilly liable.

24. The Court further reiterates that the domestic courts are best placed for interpreting and applying rules of substantive and procedural law (see, among many authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32). The wording of Article 152 of the Civil Code provides for three types of redress: an obligation to issue a refutation, an award of damages or an obligation to publish the plaintiff's reply, if the respondent is part of the mass media. The Court observes that in 2005 the Plenary Supreme Court issued a ruling by which it instructed the courts below that an apology, whatever its form, was not prescribed under Russian law, including Article 152 of the Civil Code, as redress (see paragraph 13 above). It appears that this ruling was intended to harmonise the divergent case-law of the Russian courts on that matter (see, for instance, the findings made by Russian courts, as presented in the cases of *Filatenko v. Russia*, no. 73219/01, § 17, 6 December 2007; *Dyuldin and Kislov v. Russia*, no. 25968/02, § 19, 31 July 2007; *Zakharov v. Russia*, no. 14881/03, §§ 11 and 13, 5 October 2006; *Grinberg v. Russia*, no. 23472/03, § 12, 21 July 2005; and *Godlevskiy v. Russia* (dec.), no. 14888/03, 9 December 2004). The Court does not exclude that before the 2005 resolution the courts were reasonably inclined to interpret the notions of refutation or rectification as possibly including an apology. Thus, in the circumstances of the present case, the Court is ready to accept that the interpretation of the relevant legislation by the Russian courts was not such as to render the impugned interference unlawful in the Convention terms.

25. The Court will therefore proceed with its analysis in order to determine whether the interference in the present case was "necessary in a democratic society".

26. In that connection, the Court observes that the defamation claim was born out of the applicant's written complaint to a supervising military commander rather than out of publication in the media (see, by contrast, *Dyuldin and Kislov*, cited above, §§ 40 and 41, and *Kwiecień v. Poland*, no. 51744/99, §§ 50 and 51, ECHR 2007-... concerning publication of so-called "open letters"). The applicant, himself a former military officer, wrote to the supervising commander, complaining that the conduct of the unit commander had not been even-handed and had at times been unlawful. It appears that the applicant acted within the framework established by law for making complaints (see, in a similar context, *Zakharov*, cited above, § 22). Apparently, the applicant's concerns were shared by other persons living in the military compound.

27. It is further noted that while Article 10 applies to military personnel just as it does to other persons within the jurisdiction of the Contracting States, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings (see, among others, *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994,

Series A no. 302, § 36). Notwithstanding that, it is not open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution (see *Grigoriades v. Greece*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, § 45). However, it appears that the applicant, being a former officer, was no longer bound by the rules of subordination. Thus, the applicant should be considered as a private individual raising a complaint against a public servant. In that connection, the Court has observed in several cases that it may be necessary to protect public servants from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I). In the present case, the Court is prepared to accept that a military unit commander may be considered to belong to that category of official.

28. However, the Court reiterates that, as the applicant set out his grievances in correspondence submitted in his private capacity, the requirements of protection under Article 10 of the Convention have to be weighed not in relation to the interests of the freedom of the press or of open discussion of matters of public concern but rather against the applicant's right to report irregularities in the conduct of an official to a body competent to deal with such complaints (see *Zakharov*, cited above, § 23; cf. *Chernysheva v. Russia* (dec.), no. 77062/01, 10 June 2004). That citizens should be able to notify competent State officials about the conduct of civil servants which to them appears irregular or unlawful is one of the precepts of the rule of law (*Zakharov*, § 26).

29. The Court considers that, in the circumstances of the present case, the fact that the applicant addressed his complaint by way of correspondence to the State official competent to examine the matter, is of crucial importance to its assessment of the proportionality of the interference (compare *Janowski* [GC], cited above, § 34; and *Raichinov v. Bulgaria*, no. 47579/99, § 48, 20 April 2006). In this connection, the Court notes the express provision of the Russian Supreme Court's resolution that "communication of information to the person whom it concerned" was not considered its dissemination and was therefore not actionable as defamation (see paragraph 12 above). Furthermore, the Court does not consider that the applicant's complaint was vexatious or that the applicant otherwise acted in bad faith.

30. Finally, the Court has considered whether the punishment imposed on the applicant was appropriate in the circumstances of the case. The Court accepts in this respect that a fine of 500 Russian roubles may not appear to give rise to any issue under Article 10 of the Convention. However, the Court notes that the applicant was ordered to issue an apology. In its view, to make someone retract his or her own opinion by acknowledging his or

her own wrongness is a doubtful form of redress and does not appear to be “necessary”. This point of view has also subsequently been acknowledged by the Supreme Court of Russia which considered an apology, whatever its form, to be contrary to the law (see paragraph 13 above).

31. In view of the foregoing considerations and assessing the text of the letter as a whole and the context in which it was written, the Court finds that the defamation proceedings resulted in an excessive and disproportionate burden being placed on the applicant. There has therefore been a violation of Article 10 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

32. The applicant also complained about the allegedly unlawful composition of the first-instance court in his defamation case and that the appeal judgment had been insufficiently reasoned. He also alleged that he had been discriminated against, as compared to the plaintiff in that case. The Court has examined the remainder of the applicant’s complaints as submitted by him. However, having regard to all the material in its possession, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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.”

34. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the restriction of the applicant’s freedom of expression admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no call to make any award under Article 41 of the Convention.

Done in English, and notified in writing on 18 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President