



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

FIRST SECTION

CASE OF MENCHINSKAYA v. RUSSIA

(Application no. 42454/02)

JUDGMENT

STRASBOURG

15 January 2009

FINAL

15/04/2009

This judgment may be subject to editorial revision.

In the case of Menchinskaya 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,

Dean Spielmann,

Sverre Erik Jebens,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 11 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 42454/02) 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, Mrs Anna Stefanovna Menchinskaya (“the applicant”), on 14 May 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. The applicant alleged, in particular, that the principle of equality of arms in the proceedings on her civil claim had been infringed as the prosecutor had entered the proceedings on the side of the State agency.

4. On 23 June 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949 and lives in Norilsk in the Krasnoyarsk Region of the Russian Federation.

7. In August 1998 the applicant, formerly an engineer in a public company, was made redundant. On 3 September 1998 she was registered in the Norilsk Employment Centre.

8. As the unemployment allowances were paid to the applicant after a substantial delay and, as she believed, their calculation was not correct, in March 2000 she sued the Norilsk Employment Centre for the allowance arrears, adjusted for inflation, and interest thereon.

9. On 25 September 2000 the Norilsk Town Court of the Krasnoyarsk Region allowed the applicant's claims in part. It awarded her 677.35 Russian roubles (RUR) for arrears and RUR 4,568.53 for the indexation of the arrears to take account of inflation. Basing its award on Article 395 of the Civil Code of the Russian Federation the court also granted the applicant RUR 8,102.50 as interest on belated payments.

10. On 2 and 25 October 2000 the applicant lodged an appeal, arguing that the claims rejected by the first-instance court should have been granted.

11. On 9 October 2000 the Norilsk Employment Centre lodged an appeal. It claimed that labour legislation did not provide for an interest on unemployment allowances and therefore requested that the judgment in this part be quashed.

12. On 12 October 2000 the Norilsk Town Prosecutor filed an appeal (*protest*) against the judgment, exercising his power under Article 282 of the RSFSR Code of Civil Procedure. He submitted that the first-instance court had erroneously applied provisions of civil law to labour law relations and therefore unlawfully granted interest on belated payments in the applicant's favour. In his view, no interest was payable in respect of belated unemployment allowances, thus he requested the Court of Appeal to quash the judgment in this part. The Prosecutor also supported the part of the judgment which rejected the remainder of the applicant's claims.

13. A copy of the prosecutor's *protest* was served on the applicant on 18 October 2000, and she submitted her objections on 25 October 2000.

14. Having examined the appeals and the prosecutor's protest and having heard the judge-rapporteur and the prosecutor, on 29 November 2000 the Krasnoyarsk Regional Court upheld the arguments made by the Employment Centre and the prosecutor. Finding that the Civil Code was not applicable in the sphere of unemployment benefits, it quashed the first-instance court's judgment in the part granting the applicant RUR 8,102.50 as interest on belated payments.

15. The applicant's attempts to institute supervisory review proceedings proved to be unsuccessful.

II. RELEVANT DOMESTIC LAW

16. The Civil Code of the Russian Federation provides that for the use of monetary assets belonging to another person, as a result of their unlawful withholding, or the failure to pay them back ... [statutory] interest should be paid The amount of that interest is defined as the refinancing rate [of the Central Bank of Russia] ... applicable in the place of residence of the creditor ... on the day of the execution of the monetary obligation (Article 395).

17. The RSFSR Code of Civil Procedure (in force at the material time) reads as follows:

Article 41. Participation of a prosecutor in the proceedings

"A prosecutor may bring to a court a claim for the protection of rights and lawfully protected interests of other persons or enter the proceedings at any stage, if it is required for the protection of State or public interests or rights and lawfully protected interests of citizens...

The prosecutor who participates in the proceedings may study the case materials, bring challenges, produce evidence, take part in the examination of evidence, lodge applications, state his opinion on issues arising in the course of the proceedings and on the merits of the case as a whole, as well as perform other procedural actions provided for by law..."

Article 282. The right to lodge appeals to the court of cassation

"Judgments of all courts in the RSFSR may be appealed against to the court of cassation by the parties and other persons who took part in the litigation.

A prosecutor or his or her deputy lodges an appeal against an unlawful or unjustified judicial decision, irrespective of whether he or she took part in the case..."

18. The Prosecutor's Offices Act (*Федеральный закон "О прокуратуре Российской Федерации"*), no. 2202-1 of 17 January 1992, as in force at the material time, provides:

Section 1. Prosecutor's Office of the Russian Federation

"... 3. In accordance with the procedural legislation of the Russian Federation, prosecutors shall participate in the hearing of cases by courts of law and commercial courts (hereinafter referred to as the "courts") and shall challenge any court decisions, sentences and rulings which are contrary to the law..."

Section 35. Prosecutor's participation in court hearings

"1. The prosecutor shall take part in court hearings in the cases provided for by the procedural legislation of the Russian Federation and other federal laws...

3. The prosecutor, in accordance with the procedural legislation of the Russian Federation, shall be entitled to make an application to the court or to enter the case at any stage of the proceedings, if the protection of civil rights and lawful interests of society or the state so requires..."

Section 36. Appealing against court decisions

"1. Prosecutors or their deputies, within the scope of their powers, shall lodge cassation or private appeals or appeals in exercise of supervisory power with higher courts, and appeals or applications for reviews or appeals in exercise of supervisory power against an unlawful or unfounded court decision, sentence or ruling with commercial courts. Prosecutor's assistants and prosecutors of directorates or divisions may lodge appeals only in cases in the hearing of which they themselves have participated..."

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

19. The relevant part of the Parliamentary Assembly's Resolution 1604 (2003) On the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law reads as follows:

"it is essential:

a. that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights;

b. that an effective separation of state power between branches of government is respected in the allocation of additional functions to prosecutors, with complete independence of the public prosecution from intervention on the level of individual cases by any branch of government; and

c. that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions..."

20. The European Commission for Democracy through Law (the Venice Commission) at its 63rd plenary session (10-11 June 2005) adopted an Opinion on the [Prosecutor's Offices Act] of the Russian Federation. Its relevant provisions provide as follows:

"...57...It is, of course, clear that the Russian Office of the Prosecutor General is among those Offices which does not conform to the model which the Parliamentary Assembly considered to be essential. Moreover, in respect of the Prosecutor's predominant role in the Russian administration, which can hardly be described as

limited or exceptional, the Prosecutor's Office does not seem to conform to the tests...which are as follows:

1. In addition to the essential role played by prosecutors in the criminal justice system, some member states of the Council of Europe provide for the participation of the prosecutor in the civil and administrative sectors for historical, efficiency and economic reasons but their role should always be exceptional (principle of exceptionality).

2. The role of the prosecutor in civil and administrative procedures should not be predominant; the intervention of the prosecutor can only be accepted when the objective of this procedure cannot, or hardly be ensured otherwise (principle of subsidiarity).

3. The participation of the prosecutor in the civil and administrative sectors should be limited and must always have a well-founded, recognisable aim (principle of speciality).

4. States can entitle prosecutors to defend the interest of the state (principle of protection of state interest).

5. Prosecutors can be entitled to initiate procedures or to intervene in ongoing procedures or to use various legal remedies to ensure legality (principle of legality).

6. In case it is required for reasons of public interest and/or the legality of decisions (e.g. in cases of protection of the environment, insolvency etc.) the participation of the prosecutor can be justified (principle of public interest).

7. Protecting the rights and interests of disadvantaged groups of society unable to exercise their rights can be an exceptional reason for the intervention of the prosecutor (principle of protection of human rights)...

13. Prosecutors should have no decision-making powers outside the criminal field or be given more rights than other parties before courts (principle of equality of arms).

14. Prosecutors should not discriminate among persons when protecting their rights and should only intervene for well-grounded reasons (principle of non-discrimination)...

74. There have been undoubted reforms in the Russian system of Procuracy, notably the limitations on the prosecutor's powers of supervisory review of court decisions... and the fact that intervention in court cases on behalf of the citizens is limited to cases where they are unable to act for themselves or where this is justified because numerous citizens are affected by the wrongdoing concerned".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

21. The applicant complained that the principle of equality of arms in the proceedings on her civil claim had been infringed as the prosecutor had entered the proceedings on the side of the State agency. She relied on Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

1. *Arguments by the parties*

22. The Government asserted that Article 6 did not apply to the proceedings in question, as the social insurance schemes fell outside the scope of “civil rights and obligations”. In any event they considered this complaint manifestly ill-founded.

23. The applicant claimed that her “civil rights” within the meaning of Article 6 § 1 had been at stake.

2. *The Court’s assessment*

24. Regarding the applicability of Article 6 § 1 of the Convention, the Court reiterates that this provision is applicable in the field of social insurance, including welfare assistance (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 46, Series A no. 263, and *Salesi v. Italy*, 26 February 1993, § 19). The Court further observes that the unemployment allowances at issue were individual and pecuniary in nature and were aimed at compensating for loss of means of subsistence resulting from unemployment (see *T.M. v. Finland* (dec.), no. 22377/93, 21 October 1996). Furthermore, it cannot be disputed that this pecuniary “right” was the subject of a “dispute” before the domestic courts (see *Mennitto v. Italy* [GC], no. 33804/96, §§ 23 et seq., ECHR 2000-X). Accordingly, Article 6 § 1 is applicable in the instant case.

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

B. Merits

1. Arguments by the parties

26. The applicant maintained that no public interest could justify the joining of a prosecutor as parties defendant in claims lodged by unemployed people against State bodies. She argued that the “interest of law” in her case had to be protected by the courts without interference from the Prosecutor’s Office.

27. She also emphasised that in his appeal the prosecutor requested the appeal court to quash the judgment in part and the wording he had used could only be interpreted as a direct instruction, therefore it cannot be said that the court had not been bound by the prosecutor’s *protest*.

28. The Government claimed that participation of the prosecutor in the proceedings at issue had not violated the principle of equality of arms, nor in any other way had it impaired fairness of the trial, as the appeal court had not been bound by the prosecutor’s arguments. Moreover, the defendant itself lodged its appeal against the judgment of 25 September 2000, using the same arguments as were used in the prosecutor’s *protest*, and this appeal was examined together with the *protest* and the appeal submitted by the applicant.

29. They further stressed that the prosecutor had participated in the case in accordance with relevant provisions of the domestic law in force at the material time. He acted in the interest of law, and not in favour of any party to the proceedings, thus his participation had been justified by the public interest.

2. The Court’s assessment

30. The Court reiterates that the principle of equality of arms is one element of the broader concept of fair trial, within the meaning of Article 6 § 1 of the Convention. It requires “a fair balance between the parties”: each party must be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Yvon v. France*, no. 44962/98, § 31, ECHR 2003-V; *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, *Reports of Judgments and Decisions* 1997-I; and *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

31. Referring to its previous case-law on the role of public prosecutors outside the criminal field, the Court reiterates that in a number of cases it clarified that the mere presence of the prosecutor or comparable officer at the courts’ deliberations, be it “active” or “passive”, is deemed to be a violation of Article 6 § 1 of the Convention (see *Martinie v. France* [GC], no. 58675/00, § 53, ECHR 2006-...). In many cases the Court has also examined whether the submissions of the advocate-general or similar officer

have been communicated to the applicant/party and whether the parties have had the opportunity to reply to them (see *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports of Judgments and Decisions* 1996-I; *K.D.B. v. the Netherlands*, 27 March 1998, § 43, *Reports of Judgments and Decisions* 1998-II and *Göç v. Turkey* [GC], no. 36590/97, § 55, ECHR 2002-V).

32. The present case, however, raises different issues, since the prosecutor did not participate in the deliberations of the Krasnoyarsk Regional Court; moreover, his *protest* was communicated to the applicant and she used an opportunity to reply to the prosecutor's arguments. Nevertheless, the Court reiterates that since a prosecutor or comparable officer, in recommending that an appeal on points of law should be allowed or dismissed and thereby became the ally or opponent of the parties, his participation is likely to create a feeling of inequality to a party (see *Kress*, cited above, § 81; and *F.W. v. France*, no. 61517/00, § 27, 31 March 2005). In this context, the Court reiterates that while the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances (see *Borgers v. Belgium*, 30 October 1991, § 24, Series A no. 214-B).

33. The Court considers that whether regarded as a sharing out of representation of the State's interests or as a strengthening of the Employment Centre's position, the Prosecutor's Office intervention undoubtedly weakened the applicant's position (see, *mutatis mutandis*, *Yvon*, cited above, § 32). However, the fact that a similar point of view is defended before a court by several parties does not necessarily place the opposing party in a position of "substantial disadvantage" when presenting his case. It remains to be ascertained whether, in the instant case, in view of the prosecutor's participation in the proceedings, the "fair balance" that ought to prevail between the parties was respected (*ibid.*)

34. To address this issue the Court will use the opinion of the European Commission for Democracy through Law or "Venice Commission" (see paragraph 21) as it did in a number of judgments (see, among other authorities, *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, §§ 70-73, ECHR 2007-...; *Basque Nationalist Party – Iparralde Regional Organisation v. France*, no. 71251/01, §§ 45-52, 7 June 2007, ECHR 2007-...; and *Çiloğlu and Others v. Turkey*, no. 73333/01, § 17, 6 March 2007). The Court emphasises that it has often used for the purpose of interpreting the scope of the rights and freedoms guaranteed by the Convention intrinsically non-binding instruments of Council of Europe organs to support its reasoning by reference to norms emanating from these organs (see, *mutatis mutandis*, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 74-75, 12 November 2008). It therefore proposes to examine whether in the present case the acts

of the Prosecutor's Office were compatible with proposed European standards for the Public Prosecutor's office functioning in a State governed by the rule of law (see paragraph 20 above).

35. The parties to civil proceedings are plaintiff and defendant, who have equal rights, including the right to legal aid. Support by the Prosecutor's Office of one of the parties may undoubtedly be justified in certain circumstances, for example the protection of rights of vulnerable groups – children, disabled people and so on – who are assumed unable to protect their interests themselves, or where numerous citizens are affected by the wrongdoing concerned, or where State interests need to be protected.

36. The applicant's adversary in the proceedings in question was the State body which itself lodged an appeal against the first-instance court's judgment, complaining that domestic law had been wrongfully applied. As the Government underlined, the prosecutor in his *protest* raised the same issues of interpretation of domestic legislation as the Employment Centre did. In fact, no well-founded, recognisable aim or public interest has been specified by the Government for the prosecutor's interference.

37. The Court considers that while the Norilsk Town Prosecutor had legal grounds under the domestic legislation to join the proceedings, the instant case did not present any special circumstances justifying his intervention.

38. The Court sees no reason to speculate on what effect such intervention may have had on the course of the proceedings; however it finds that the mere repeating by the prosecutor of the Employment Centre's arguments on points of law, unless it aimed at influencing the court, appeared meaningless. In this respect the Court also refers to the Parliamentary Assembly's Resolution 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law (see paragraph 19 above), which provides that none of the roles of prosecutors should give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights.

39. Further noting that only the prosecutor, but not the parties, had submitted his arguments orally before the Krasnoyarsk Regional Court, the Court concludes that the prosecutor's intervention in the appeal proceedings on the applicant's claim undermined the appearances of a fair trial and the principle of equality of arms.

40. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. The applicant complained under Article 3 of the Convention that, owing to belated payment of unemployment emoluments, she had been left without the means of existence and her very survival had been in danger.

She further complained under Article 1 of Protocol No. 1 that the belated payment of unemployment allowances in an unlawfully reduced amount had impaired her property rights. The applicant also relied on Article 13 of the Convention in conjunction with the above complaints.

42. The Court has examined the remainder of the applicant's complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they 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 should be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 1,645 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage.

45. The Government noted that they did not see any appearance of a violation of the applicant's rights, and therefore no award had to be made. However, if the Court found a violation, they suggested that the most appropriate form of redress would be putting the applicant into the same position as she had before the alleged violation occurred, and giving the applicant a retrial.

46. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6 § 1 of the Convention. It cannot speculate, however, as to what the outcome of proceedings compatible with Article 6 § 1 might have been had the requirements of this provision not been violated. It therefore rejects the applicant's claims for pecuniary damage. On the other hand, it awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

47. The applicant also claimed EUR 530 for the costs and expenses incurred before the domestic courts and the Court. She submitted a payment receipt for RUR 6,000 for lawyer's fees and a postal receipt for 41.14 Ukrainian hryvnias.

48. The Government relied on the Court's case-law to the effect that costs and expenses should be awarded only in so far as they were actually incurred, were necessary and were reasonable as to their amount. They accepted that only the applicant's claims for EUR 176 had been supported by relevant documents.

49. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award EUR 250 under this head, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

50. 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 complaint concerning violation of the principle of equality of arms admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
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 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable on that amount; and

(ii) EUR 250 (two hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount;

(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 15 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President