



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

FIRST SECTION

CASE OF KALINICHENKO v. RUSSIA

(Application no. 19136/04)

JUDGMENT

STRASBOURG

12 March 2009

FINAL

12/06/2009

This judgment may be subject to editorial revision.

In the case of Kalinichenko 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,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 19136/04) 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 Vladimir Vasilyevich Kalinichenko (“the applicant”), on 22 March 2004.

2. The applicant was represented by Mr V. Gandzyuk, a lawyer practising in Ryazan. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. On 28 February 2008 the President of the First Section decided to communicate 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1979 and lives in Ryazan.

5. He is a former military serviceman. From 22 August 2000 to 15 October 2001 he served in the Russian peacekeeping contingent in Bosnia and Herzegovina, the former Republic of Yugoslavia.

6. Upon his return, the applicant brought proceedings against the head of his military unit to secure payment of his daily allowance for his service abroad.

7. On 25 July 2003 the Military Court of the Ryazan Garrison granted the applicant's claim and ordered the military unit to pay the applicant 400,164.75 Russian roubles (RUB) in remuneration and RUB 1,000 in expenses for legal advice.

8. The military unit did not lodge an ordinary appeal, and on 22 August 2003 the judgment became binding and enforceable.

9. However, following the respondent's request, on 19 November 2003 the Presidium of the Military Court of the Moscow Command quashed the judgment of 25 July 2003 by way of supervisory review and dismissed the applicant's claims in full. The reason given for the quashing of the judgment was the "wrongful application of substantive law by the first-instance court".

II. RELEVANT DOMESTIC LAW

10. The Code of Civil Procedure of the Russian Federation provides as follows:

Article 362. Grounds on which appeal courts may quash or alter judicial decisions

"1. The grounds on which appeal courts may quash or alter judicial decisions are:

...

(4) a violation or incorrect application of substantive or procedural law."

Article 387. Grounds on which judicial decisions may be quashed or altered 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 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 fresh examination, if the substantive law has been erroneously applied or interpreted."

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 IN THE APPLICANT'S FAVOUR

11. The applicant complained that the quashing of the judgment of 25 July 2003 by way of supervisory-review proceedings 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. Submissions by the parties

12. The Government, relying on the Court's judgments in the cases of *Pellegrin v. France* ([GC], no. 28541/95, ECHR 1999-VIII) and *Kanayev v. Russia* (no. 43726/02, 27 July 2006), argued that the applicant's complaint under Article 6 of the Convention was incompatible *ratione materiae* because the applicant had been a military officer at the material time and the judgment award had concerned allowances for his military service. They further argued that Article 1 of Protocol No. 1 was also inapplicable because the applicant had not had a “possession” within the meaning of that Convention provision as he had had no right to receive “payments in the amount claimed”. He had neither an “existing possession” nor a “legitimate expectation”. As to the merits of the complaint, the Government noted that the judgment of 25 July 2003 had been quashed because the Military Court of the Ryazan Garrison had incorrectly interpreted and applied substantive law.

13. The applicant averred that the quashing of the final judgment of 25 July 2003 had irremediably impaired the principle of legal certainty and deprived him of the right to receive money he was entitled to receive.

B. The Court's assessment

1. Article 6 § 1 of the Convention

(a) Admissibility

14. The Government contested the applicability of Article 6 to the dispute raised by the applicant. Relying on *Pellegrin* (cited above), they argued that Article 6 was not applicable since complaints raised by servants of the State such as military officers over their conditions of service were excluded from its ambit.

15. The Court accepts that in the *Pellegrin* judgment it attempted to establish an autonomous interpretation of the term “civil service”. To that end the Court introduced a functional criterion based on the nature of the employee’s duties and responsibilities.

16. However, in its judgment in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, 19 April 2007), the Court found that the functional criterion adopted in the *Pellegrin* judgment did not simplify the analysis of the applicability of Article 6 in proceedings to which a civil servant was a party, or bring about a greater degree of certainty in this area as intended (§ 55). For these reasons the Court decided to further develop the functional criterion set out in *Pellegrin* and adopted the following approach:

“To recapitulate, in order for the respondent State to be able to rely before the Court on the applicant’s status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State’s interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in the *Pellegrin* judgment, a ‘special bond of trust and loyalty’ between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified.” (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, § 62)

17. Turning to the facts of the present case, the Court notes that the applicant had access to a court under national law. He made use of his right and introduced an action against his employer. The Military Court of the

Ryazan Garrison examined the applicant's claims and accepted them, awarding the applicant a daily allowance for his service abroad and compensation for legal costs. After the final judgment of 25 July 2003 had been quashed by way of supervisory review, the applicant's claims were once again re-examined and dismissed. Neither the domestic courts nor the Government indicated that the domestic system barred the applicant's access to a court. Accordingly, Article 6 is applicable (see *Vilho Eskelinen*, cited above, § 63, and, for a similar context in a Russian case, *Dovguchits v. Russia*, no. 2999/03, § 33, 7 June 2007).

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

(b) Merits

19. The Government pointed out that the aim of the application of the supervisory review procedure in the present case was to correct judicial errors. The applicant's case clearly did not call for any payment of a daily allowance and the supervisory review court had to give a proper explanation and an appropriate legal interpretation of the matter in dispute for the purpose of delivering a fair and lawful judgment and for the purpose of securing the correct application of the relevant domestic law in future similar cases. There had therefore been no violation of the principle of legal certainty.

20. The Court observes 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*, 28 October 1999, § 61, *Reports of Judgments and Decisions* 1999-VII).

21. This principle states that no party is entitled to seek the re-opening of proceedings merely for the purpose of a rehearing and a fresh decision of the case. The power of the higher courts to quash or alter binding and enforceable judicial decisions should be exercised only for the correction of fundamental defects. The mere possibility of two views on the subject does not constitute grounds 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).

22. The Court observes 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 enforceable judicial decision to be quashed by a higher court merely on the ground of disagreement with the assessment made by lower courts, with a view to carrying out a fresh examination (see *Kot v. Russia*, no. 20887/03, §§ 27-30, 18 January 2007, and *Zvezdin v. Russia*, no. 25448/06, § 28, 14 June 2007).

23. In the present case the judgment of 25 July 2003 in the applicant's favour was set aside on 19 November 2003 by way of a supervisory review on the grounds that the Military Court of the Ryazan Garrison had incorrectly applied the substantive law. The Court has to assess whether the power to conduct a supervisory review was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the proper administration of justice (see, *mutatis mutandis*, *Nikitin v. Russia*, no. 50178/99, §§ 57 and 59, ECHR 2004-VIII).

24. The Court reiterates that a binding and enforceable judgment should be quashed only in exceptional circumstances rather than for the sole purpose of obtaining a different decision in the case. In the Russian legal system, the grounds for quashing or altering judgments through 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). The judgment of 25 July 2003 was quashed by way of supervisory review because of the incorrect application of the substantive law. That defect could have been rectified in appeal proceedings. Thus, a situation where a final judgment in the applicant's favour was called into question could have been avoided, had the military unit lodged an ordinary appeal within the statutory ten-day time-limit.

25. The Court notes that the military unit 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 25 July 2003. Instead, it applied for supervisory review after the judgment in the applicant's favour had become binding and enforceable and after the bailiffs had initiated enforcement proceedings. The Government did not point to any exceptional circumstances that would have prevented the military unit from making use of an ordinary appeal in good time (see, for a similar case, *Nelyubin v. Russia*, no. 14502/04, 2 November 2006). Equally important is the fact that the Government, while relying on the need to correct a judicial error, have not shown that the error was of such fundamental character as to justify the quashing of the final judgment.

26. Having regard to these considerations, the Court finds that, by granting the respondent's request to set aside the judgment of 25 July 2003, the Presidium of the Military Court of the Moscow Command 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. Article 1 of Protocol No. 1

(a) Admissibility

27. The Court observes that the Government contested the applicability of Article 1 of Protocol No. 1 on the grounds that the applicant did not have a “possession” within the meaning of that Convention provision. In this connection, the Court notes that it has already on a number of occasions found that the existence of a debt confirmed by a binding and enforceable judgment constitutes the judgment beneficiary’s “possession” within the meaning of Article 1 of Protocol No. 1 (see, for example, *Bulgakova v. Russia*, no. 69524/01, § 31, 18 January 2007, and *Pravednaya*, cited above, § 38). The Court sees no reason to depart from those findings in the present case and dismisses the Government’s objection that the applicant’s complaint is incompatible *ratione materiae* with Article 1 of Protocol No. 1.

28. The Court further observes that the complaint under Article 1 of Protocol No. 1 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

29. The Government claimed that there was no violation of the applicant’s property rights because he had not had any “possessions”. Nor could he have had any “legal expectations” to benefit from the judgment, since it had been delivered as a result of an evident judicial error.

30. The Court observes that the existence of a debt confirmed by a binding and enforceable judgment constitutes a beneficiary’s “possessions” within the meaning of Article 1 of Protocol No. 1. The quashing of such a judgment amounts to an interference with his or her right to the peaceful enjoyment of possessions (see, among other authorities, *Brumărescu*, cited above, § 74, and *Androsov v. Russia*, no. 63973/00, § 69, 6 October 2005).

31. The Court observes that the proceedings concerned compensation for a daily allowance in respect of the applicant’s military service abroad and compensation for legal costs. A substantial amount was found by a domestic court to be payable by the military unit. The quashing of that enforceable judgment frustrated the applicant’s reliance on a binding judicial decision and deprived him of an opportunity to receive the money he had the right to receive. In these circumstances, the Court considers that the quashing of the judgment of 25 July 2003 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. 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. Damages

33. The applicant claimed 401,164.75 Russian roubles (RUB) in respect of pecuniary damage, referring to the unpaid judgment debt, and RUB 321,117.14, relating to inflation losses accrued during the period of the non-enforcement of the judgment of 25 July 2003. The applicant further claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

34. The Government submitted firstly that no award should be made as the judgment of 25 July 2003 was lawfully quashed. They further noted that the applicant did not apply to a national court with a claim for recalculation of the sum due to inflation. They maintained that in his calculation the applicant did not refer to any official sources in respect of rates of inflation from 2003-2007. This part of his claim should thus be dismissed. As regards the claim in respect of non-pecuniary damages, the Government considered that the applicant's claim was wholly excessive and unreasonable.

35. The Court observes that in the present case it has found a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in that the award in the applicant's favour was not paid to him as a result of the quashing of the final judgment by way of supervisory review. 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 in had the requirements of Article 6 not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85, and, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003). The Court finds that this principle also applies in the present case, having regard to the violations found. The applicant was prevented from receiving money he had legitimately expected to receive under the judgment of 25 July 2003. The Court considers that the Government should pay the judgment award made under the judgment of 25 July 2003.

36. The Court further recalls that the adequacy of the compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as an extended delay in enforcement (see *Gizzatova v. Russia*, no. 5124/03, § 28, 13 January 2005, and *Metaxas v. Greece*, no. 8415/02, § 36, 27 May 2004). Having regard to the materials in its possession and the fact that the Government did not furnish any objection to the applicant's method of calculation of

compensation or submit any other official sources for inflation rates in the relevant period, the Court also awards the applicant EUR 7,750 in respect of pecuniary damage, plus any tax that may be chargeable.

37. The Court further considers that the applicant suffered distress and frustration resulting from the quashing of the final judgment of 25 July 2003. Making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

38. The applicant also claimed RUB 10,000 for costs and expenses incurred before the Court.

39. The Government did not accept that the applicant's claims under this head were reasonable and substantiated as no service contract between the applicant and his counsel had been submitted. They further claimed that it was not clear whether the applicant's lawyer had represented his interests before the domestic courts and the Court.

40. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were 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 240, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 of the Convention and Article 1 of Protocol No. 1 on account of the quashing of the judgment of 25 July 2003;
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, shall pay the award made in the applicant's favour under the judgment of 25 July 2003, that is, RUB 401,164 (four hundred and one thousand one hundred and sixty-four Russian roubles);

(b) 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 the settlement:

(i) EUR 7,750 (seven thousand seven hundred and fifty euros) in respect of pecuniary damage;

(ii) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(iii) EUR 240 (two hundred and forty euros) in respect of costs and expenses;

(iv) any tax that may be chargeable to the applicant on the above amounts;

(c) 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 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President