



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

FIRST SECTION

CASE OF KOROLEV v. RUSSIA (no. 2)

(Application no. 5447/03)

JUDGMENT

STRASBOURG

1 April 2010

FINAL

04/10/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Korolev v. Russia (no. 2),

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Andre Wampach, *Deputy Section Registrar*,

Having deliberated in private on 11 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 5447/03) 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 Vladimir Petrovich Korolev (“the applicant”), on 23 October 2002.

2. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, the then Representative of the Russian Federation at the European Court of Human Rights.

3. On 2 April 2007 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1954 and lives in the town of Orenburg.

5. The applicant was in active military service between 1972 and 1998. In February 1998 while he was on leave he was refused a free plane ticket on account of the debt accrued by the Federal Ministry of Defence to the air carriers. The applicant purchased a ticket for himself expecting to be reimbursed by the employer later.

6. After his retirement from active service, the applicant took paid leave in September 1998.

7. Apparently, in March 1999 the military authority informed the applicant that he would not be reimbursed for the ticket he had bought in February 1998 because he was entitled to only one period of paid leave per year.

8. It appears that in May 2001 the applicant brought civil proceedings in the Leninskiy District Court of Yekaterinburg claiming compensation in respect of pecuniary and non-pecuniary damage caused by the above refusal. Apparently, the District Court dismissed his claim.

9. In June 2001 the applicant brought proceedings in the Military Court of the Yekaterinburg Garrison against two military authorities: the Urals-Tyumen regional department of the Federal Air Service and the financial department of the Privolzhsko-Uralskiy military command. He claimed annulment of a 1996 contract between the Ministry of Defence and an air company, as well as a compensation in respect of pecuniary damage (426 Russian roubles, RUB) and non-pecuniary damage in the amount of RUB 300,000 in relation to the refusal of the ticket in February 1998.

10. By a judgment of 15 March 2002 the Military Court of the Yekaterinburg Garrison dismissed the applicant's claims for failure to comply with the statutory time-limit (see paragraph 13 below). The court heard the applicant, the first defendant's representative and the second defendant's lawyer.

11. The applicant lodged an appeal before the Military Court of the Urals Command. The court heard the applicant, a representative of the Privolzhsko-Uralskiy military commander. A prosecutor was also present. At the end of the hearing, he made a statement, exercising a right conferred on him by the Civil Procedure Code 1964, in force at the material time (see paragraph 14 below). The applicant was not afforded an opportunity to comment on the above statement. On 25 April 2002 the Military Court of the Urals Command upheld the judgment on appeal. It considered that, as confirmed by the applicant, he had first learnt about the violation of his right on 27 February 1998; that his references to the contracts concluded by the State authorities had been irrelevant for his claim.

II. RELEVANT DOMESTIC LAW

A. Statutory time-limits and limitation periods

12. Under Articles 195 and 196 of the Civil Code, the general limitation period for claiming protection of a violated right amounted to three years.

13. Under Article 239-5 § 1 of the RSFSR Code of Civil Procedure a complaint against unlawful actions by a public official should be lodged

with the competent court no later than three months from the date on which the person concerned became aware of the violation of his or her rights or freedoms. By a ruling of 14 February 2000 the Plenary Session of the Supreme Court of Russia held that if a military officer's complaint against unlawful actions of military authorities contained a claim for the redress in respect of the alleged violation of his or her right, the three-month time-limit should not apply (§ 12).

B. Participation of public prosecutors in cases outside the sphere of criminal law

14. Both in first-instance and appeal proceedings, a party could challenge the prosecutor participating in the proceedings on account of his or her previous participation in the case in a different capacity, his next-of-kin status in relation to a party or other persons involved in the case, or if the prosecutor had an interest in the outcome of the case or if other circumstances indicated his partiality (Articles 18, 20 and 297 of the RSFSR Code of Civil Procedure).

15. After the oral pleading by the parties but before the court's deliberations, the prosecutor was allowed to give his conclusions as to the lawfulness and reasonableness of the court decision (Articles 303 and 304). The parties could not comment on the above conclusions.

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

16. 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...”

17. 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 (see above). 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”.

18. Opinion no. 3 (2008) adopted by the Consultative Council of European Prosecutors, an advisory body set up by the Council of Europe Committee of Ministers by its decision of 13 July 2005, contains the following comparative analysis [internal footnotes omitted]:

“22. Court actions – irrespective of the procedural rules governing them (rules of civil proceedings or special administrative law rules) – are bound to court proceedings: prosecutors act as parties therein. Prosecution services did not report any special powers or authority when prosecutors take part in civil court proceedings as petitioners, they have the same powers as other parties. Their position is not exclusive, the proceedings may be started by other interested persons as well. In such cases prosecutors have definitely no decision-making powers regarding the merit of cases, their decisions concern only initiation of a case: submitting a petition to the civil law court.

23. Almost in all countries where prosecutors have competences in the non criminal field, prosecutors are empowered to launch new court-actions, to use ordinary and extraordinary remedies (appeals) as parties of proceedings. However some rules could be identified (prohibition of extraordinary appeal or proposal for reopening of proceedings; prohibition of settlement in the name of the party)...

25. The aims of non penal activities of prosecutors, irrespective of their substantive or procedural differences, are much more concordant: ensuring rule of law (integrity of democratic decisions, legality, observance of law, remedy against violation of law), protection of rights and liberties of persons (mostly of those incapable to protect their rights – minors, persons with unknown domicile, mentally incapables), protection of assets and interests of State, protection of public interest (or of public order), harmonisation of jurisdiction of courts (special remedies against final court decisions in the best interest of law, action as parties in such proceedings of the highest court levels)...

27. ...[T]he CCPE is aware of occasional improper practice of public prosecutors acting outside the field of criminal justice assessed by the Court or by certain Constitutional Courts or criticised by other bodies of the Council of Europe. The most disconcerting events were in connection with rejection without reason of requests to start civil law court actions; intervention in court proceedings without reasonable interest (of State, of public interest or based on protection of rights) violating the principle of equality of arms; quashing of final judgment of courts violating the principle of legal certainty (*res judicata*) ; participation of prosecutors in panels of supreme courts confusing the decision-making role of judges with prosecutors tasks; unlimited right to start litigation.

28. The contribution of prosecutors to the consolidation of the case-law of the courts is a fact in many member States. The role of prosecutors in this respect should not allow them to exercise undue influence on the final decision-taking process by judges.”

The Opinion referred to the following principles applicable in the relevant field:

“a. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;

b. the respect of impartiality and fairness should characterise the action of prosecutors acting outside the criminal law field as well;

c. these functions are carried out “on behalf of society and in the public interest”, to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;

d. such competencies of prosecutors should be regulated by law as precisely as possible;

e. there should be no undue intervention in the activities of prosecution services;

f. when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms);

g. the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court;

h. the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law;

i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured;

j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

19. The applicant complained that there had been a violation of Article 6 § 1 of the Convention on account of the procedural inequality in the appeal proceedings. He referred to the public prosecutor's participation in the appeal proceedings, as well as the absence of an opportunity to make comments to the prosecutor's final remarks at the closure of the appeal hearing. The relevant part of Article 6 reads as follows:

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

A. Admissibility

20. With reference to the Court's judgment in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, *in fine*, ECHR 2007-IV), the Government considered that the applicant's complaint was incompatible *ratione materiae*.

21. The applicant made no comment.

22. The Court reiterates that for Article 6 § 1 in its “civil” limb to be applicable, there must be a dispute over a “civil right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is also protected under the Convention. 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; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among others, *Itslayev v. Russia*, no. 34631/02, § 25, 9 October 2008). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are therefore of little consequence (see *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009-...).

23. The applicant's claims were not excluded as such from judicial protection. He thus made use of this opportunity and introduced an action against the State bodies. It is also noted that in addition to contesting a contract between the Ministry of Defence and an air company, the applicant lodged claims for compensation in respect of pecuniary and non-pecuniary damage in relation to the refusal of a free ticket in February 1998. Apparently, he based his claims on the national legislation concerning leave arrangements for the military personnel. The Court considers on the basis of the available information that the claims for compensation could be qualified as “civil” in the meaning of Article 6 § 1 of the Convention. The Court also considers that the dispute was “serious and genuine” (see, by contrast, *Serov v. Russia*, no. 75894/01, § 56, 26 June 2008). Indeed, the Government raised no objections on that account.

24. It is further noted that the military court refused to examine the case on account of the applicant's failure to comply with the statutory time-limit for lodging it (see paragraphs 10 - 13 above). Neither the domestic courts nor the Government indicated that the domestic system barred the applicant's access to a court for reasons other than the ordinary requirement of a time-limit. The time-limit issue, in particular as regards the existence and validity of any eventual excuse for a belated claim, was aired and discussed at a court hearing. The appeal proceedings, which are at the heart

of the Convention complaint in the present application, concerned the same matter.

25. In view of the above, and irrespective of the fact that the domestic proceedings did not result in any final “determination” of the civil rights and obligations, the Court considers that Article 6 is applicable (see *Atanasova v. Bulgaria*, no. 72001/01, §§ 48-52, 2 October 2008; see, however, *Neshev v. Bulgaria* (dec.), no. 40897/98, 13 March 2003).

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

B. Merits

1. The parties' submissions

27. The applicant maintained his complaint.

28. The Government submitted that the prosecutor's participation in the appeal hearing had been lawful under the RSFSR Code of Civil Procedure. While the prosecutor had not been a party to the proceedings, his conclusions were intended “to express the opinion of the federal authorities” and were not binding on the court. In any event, the prosecutor made no statements on the merits of the case and his participation was essentially passive and confined merely to upholding the lower court's decision in favour of the defendants. He did not take part in the court's deliberations. Lastly, in the Government's view, it was open to the applicant to challenge the prosecutor or the court (see paragraph 14 above).

2. The Court's assessment

(a) General principles

29. 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).

30. The Court considers that 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 or her case. It should be ascertained whether, in a given case, in view of the prosecutor's participation in the proceedings, the "fair balance" that ought to prevail between the parties was respected.

31. The Court reiterates that since a prosecutor or comparable officer, in undertaking the status of a party to proceedings, becomes in effect the ally or opponent of one of the parties, his participation is capable of creating a feeling of inequality in respect of one of those parties (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 may not be open to criticism, the public's increased sensitivity to the fair administration of justice justifies the growing importance attached to appearances (see *Borgers v. Belgium*, 30 October 1991, § 24, Series A no. 214-B).

32. Indeed, the Court has previously considered that appearances may be of a certain importance in court proceedings, for instance for assessing compliance with the requirement of objective impartiality, or for the sake of preserving the confidence which the courts in a democratic society must inspire in the public (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 42, ECHR 2007-VIII). The Court noted in that context that in making such an assessment the focus should be on the legitimacy of the reason to fear that a particular judge lacks impartiality and on whether this fear could be held to be objectively justified (*ibid.*). In the context of the principle of equality of arms, in the case of *Stoimenov v. "the former Yugoslav Republic of Macedonia"* (no. 17995/02, §§ 40-42, 5 April 2007) the Court also referred to "appearances" when concluding that an opinion submitted by the Forensic Science Bureau, a State agency, was akin to incriminating evidence used by the prosecution and that the refusal of an alternative expert examination and the applicant's inability to challenge the Bureau's report in the circumstances of that case had resulted in a violation of the equality of arms (see also *Shulepova v. Russia*, no. 34449/03, §§ 65-67, 11 December 2008).

33. The Court does not exclude the possibility that support by the prosecutor's office for one of the parties may be justified in certain circumstances, for instance for the protection of vulnerable persons who are assumed to be unable to protect their interests themselves, or where numerous citizens are affected by the wrongdoing concerned, or where identifiable State assets or interests need to be protected (compare *Menchinskaya v. Russia*, no. 42454/02, §§ 37-40, 15 January 2009, and *Batsanina v. Russia*, no. 3932/02, § 27, 26 May 2009).

34. Lastly, the Court points out at the outset that its task is not to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of Article 6 § 1 (see, among other authorities,

Padovani v. Italy, 26 February 1993, § 24, Series A no. 257-B, and *Hauschildt v. Denmark*, 24 May 1989, § 45, Series A no. 154).

(b) Application of those principles in the present case

35. Turning to the circumstances of the present case, the Court observes at the outset that the applicant does not complain before the Court about the domestic courts' refusal to examine his action. Instead, the thrust of his complaint is on the public prosecutor's intervention at the appellate stage of those proceedings.

36. The Court notes that the applicant's opponents in the proceedings in question were State agencies. Their interests before national courts were defended by their representatives, at least one of whom was a lawyer. The prosecutor chose to support their position in the appeal proceedings. It appears that in his final statement at the closure of the hearing he upheld the first instance court's conclusions concerning the application of the statutory time-limit in the case.

37. In the present case, the Court does not discern any particular reason which would justify the prosecutor's participation in the appeal hearing in an ordinary civil case. It does not transpire that the prosecutor intended, for instance, to protect any identifiable State assets or interests at stake (see, by contrast, *Batsanina*, cited above, § 27). While it is uncontested that the prosecutor confined his participation in the proceedings to a mere statement of approval of the first-instance decision concerning the application of the statutory time-limit, 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 respondents' arguments on points of law, unless it aimed at influencing the court, appeared meaningless (see *Menchinskaya*, cited above, § 38). The foregoing considerations have led the Court to conclude that the principle of the equality of arms, requiring a fair balance between the parties, was not respected in the present case.

38. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATION OF THE CONVENTION

39. Lastly, the applicant complained under Article 6 § 1 of the Convention about the allegedly excessive length of the proceedings. In the light of all the material in its possession, and in so far as the matter complained of is within its competence, the Court finds that it does 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 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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 and costs

41. The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage caused by the length of the proceedings in the military courts and EUR 10 in respect of costs and expenses incurred in the domestic proceedings and before the Court.

42. The Government contested the above claims.

43. The Court observes that the claim in respect of non-pecuniary damage only concerns the inadmissible complaint (see paragraph 39 above) and does not relate to Court's findings under Article 6 § 1 of the Convention on the prosecutor's participation in the appeal proceedings. Thus, the Court dismisses the claim. Regard being had to the information in its possession, the Court grants the claim for costs.

B. Default interest

44. 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 the alleged inequality of arms in the civil case 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, EUR 10 (ten euros) in respect of costs and expenses, 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andre Wampach
Deputy Registrar

Christos Rozakis
President