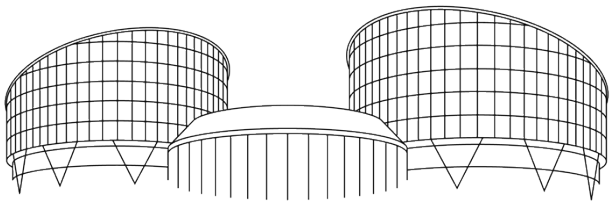

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications nos. 26716/09, 67576/09 and 7698/10
by Rustem Rifovich FAKHRETDINOV, Vladimir Viktorovich KUZOVLEV and Valeriy Leonidovich SERGEYEV
against Russia

The European Court of Human Rights (First Section), sitting on 23 September 2010 as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*

and André Wampach, *Deputy Registrar,*

Having regard to the above applications lodged on 12 February 2009, 23 November 2009 and 16 December 2009 respectively;

Having deliberated, decides as follows:

THE FACTS

1. The applicants are Russian nationals. The first applicant, Rustem Rifovich Fakhretdinov, was born in 1973 and lives in Oktyabrskiy in the Republic of Bashkortostan. The second applicant, Vladimir Viktorovich Kuzovlev, was born in 1950 and lives in Uzlovaya in the Tula Region. He is represented by L.S. Sladkikh, a lawyer practising in Shvartsevskiy, Tula

Region. The third applicant, Valeriy Leonidovich Sergeyev, was born in 1952 and lives in Pobednoye in the Orel Region.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. Application no. 26716/09 lodged on 12 February 2009

3. On 12 May 2005 the applicant was arrested on suspicion of a drug offence. On 29 December 2007 he was convicted by Salavat Town Court, Republic of Bashkortostan, of unlawful dealing in drugs and sentenced to five years' imprisonment. On 23 December 2008 the conviction was upheld on appeal by the Supreme Court of the Republic of Bashkortostan.

2. Application no. 67576/09 lodged on 23 November 2009

4. On 28 June 2001 the applicant lodged a claim for invalidation of certain gift agreements, which he later supplemented with other claims. His claims were dismissed in a judgment of 17 March 2008 by Uzlovaya Town Court, Tula Region. On 10 July 2008 Tula Regional Court upheld part of the judgment on appeal and remitted the rest for fresh consideration. On 19 May 2009 the trial court partially granted the applicant's claims invalidating certain transactions and third persons' property titles and acknowledging the applicant's title to a plot of land and a house. The judgment was upheld on appeal on 16 July 2009.

3. Application no. 7698/10 lodged on 16 December 2009

5. On 5 June 2002 the authorities instituted criminal proceedings against the applicant. On 24 September 2008 the justice of the peace of Verkhovskiy District, Orel Region, found the applicant guilty of infliction of bodily harm through negligence, did not impose any sanction due to the expiry of the time-limit for criminal prosecution and partly granted a civil suit against him. On 17 July 2009 Verkhovskiy District Court, Orel Region, upheld the judgment on appeal after some minor changes. The conviction was finally upheld at a third level of jurisdiction by Orel Regional Court on 13 October 2009.

4. The creation of a new domestic remedy

6. On 4 May 2010 the Government informed the Court that in response to the pilot judgment two federal laws had been enacted, introducing a new domestic remedy in respect of lengthy judicial proceedings and delayed enforcement of domestic judgments against the State. The laws entered into force on the same date (“the Compensation Act”, see part B below).

7. In May 2010 the Registry of the Court informed the applicants in the present cases and all other applicants in the same position of the new remedy, advising them to make use of it within the six-month time-limit set by the Compensation Act (see paragraph 16 below).

8. By a letter of 4 June 2010 Mr Fakhretdinov informed the Court in response that he had indeed brought a relevant claim before a domestic court in accordance with the new statute.

9. By a letter of 22 June 2010 Mr Sergeyev expressed an intention to lodge such a claim but cast strong doubts as to the effectiveness of the procedure, and added that it had not been available at the time of his application to the Court.

10. All the applicants explicitly maintained their complaints concerning undue length of the proceedings before the Court. Mr Fakhretdinov furthermore insisted on his other complaint (see paragraph 18 below).

B. Relevant domestic law

11. On 30 April 2010 the Russian Parliament adopted a Federal Law no. 68-*ФЗ* "On Compensation for Violation of the Right to a Trial within a Reasonable Time or the Right to Enforcement of a Judgment within a Reasonable Time" ("the Compensation Act"). On the same date the Parliament adopted a Federal Law, no. 69-*ФЗ*, introducing a number of corresponding changes to the relevant federal laws. Both laws entered into force on 4 May 2010.

12. The Compensation Act entitles a party concerned ("an applicant") to bring an action for compensation of the violation of his or her right to a trial within a reasonable time or of the right to enforcement within a reasonable time of a judgment establishing a debt to be recovered from State budgets (Section 1, § 1). Such compensation can only be awarded if the alleged violation took place independently of the applicant's own actions except those taken in the circumstances of *force majeure*. A breach of the statutory time-limits for examination of the case does not amount *per se* to a violation of the right to a trial within a reasonable time or right to enforcement of a judgment within a reasonable time (Section 1, § 2). A compensation award is not dependent on the competent authorities' fault (Section 1, § 3).

13. The compensation is awarded in monetary form (Section 2, § 1). The amount of the compensation should be determined by courts according to the applicant's claims, the circumstances of the case, and the length of the period during which the violation took place, the significance of its consequences for the applicant, the principles of reasonableness and fairness, and the practice of the European Court of Human Rights (Section 2, § 2).

14. Section 3 sets out the rules of jurisdiction and procedure. It states in particular that a claim for compensation for excessively lengthy civil and

criminal proceedings should be brought to a court of general jurisdiction, and a claim concerning commercial proceedings to a commercial court. Such a claim can also be introduced as part of an application for supervisory review of the decisions of commercial courts. This provision further sets down the conditions to be satisfied prior to lodging a claim for compensation. Thus, in the case of civil proceedings the claim should be lodged within six months of the last judicial decision, or prior to termination of the proceedings provided that their length has exceeded three years and the applicant has applied for their expedition in a procedure determined by statute. In the case of criminal proceedings the claim for compensation should be lodged within six months of the entry into force of a final judicial decision, or prior to termination of the proceedings if their length has exceeded four years and the applicant has applied for their expedition in a procedure determined by statute.

15. A court decision granting compensation is subject to immediate enforcement (Section 4, § 4). It may be appealed against in accordance with the procedural legislation in force (Section 4, § 5). The costs of payment of compensation awards are included in the federal budget, in the budgets of federal entities and in local budgets (Section 5, § 3).

16. All individuals who have complained to the European Court of Human Rights that their right to a trial within a reasonable time or to enforcement of a judgment within a reasonable time has been violated may claim compensation in domestic courts under the Compensation Act within six months of its entry into force, provided the European Court has not ruled on the admissibility of the complaint (Section 6 § 2).

COMPLAINTS

17. Referring to Article 6 of the Convention, the applicants complained that the length of the proceedings in their cases had been incompatible with the "reasonable time" requirement as established in the provision. The second applicant also relied on Article 13 to complain of lack of effective legal remedies in Russia in respect of excessive length of proceedings.

18. The first applicant also complained under Article 6 that the trial court had not adequately considered the testimonies of a certain defence witness.

THE LAW

A. Alleged violation of Article 6 § 1 of the Convention on account of the length of proceedings

19. The Court will first determine whether the applicants complied with the rule of exhaustion of domestic remedies set out in Article 35 of the Convention, which provides, in so far as relevant:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

1. General principles

20. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had the opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (see, among many other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

21. Nevertheless, the only remedies which Article 35 of the Convention requires to be used are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 36, Series A no. 40, A, and *Akdivar and Others*, cited above, § 67). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Van Oosterwijck*, cited above, § 37; *Akdivar*

and Others, cited above, § 71; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX).

22. An assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001, and *Brusco*, cited above).

23. Relying on the well-established principles set out above, the Grand Chamber vigorously reiterated in a recent decision the subsidiary role of the Convention system and the ensuing limits attached to the Court's function (see *Demopoulos and Others v. Turkey* (dec.), nos. 46113/99 *et al*., § 69, ECHR 2010-...):

> "69. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. (...) The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions."

2. Application to the present cases

24. The Court notes at the outset that the first applicant has already brought proceedings for compensation relying on the new Compensation Act. The third applicant indicated that he would lodge such a claim with the domestic court.

25. While disputing the effectiveness of the new remedy before the Court, the applicants showed no doubt that it was available to them. Nor does the Court see any reason to doubt that the applicants became entitled to bring their claims to domestic courts in accordance with the Compensation Act. First, the applicants' complaints to the Court concern excessive length of the proceedings (see section 1 § 1, paragraph 12 above). Second, even though their actions in domestic courts appear to be barred by the time-limits set in section 3 of the Compensation Act (see paragraph 14 above), the applicants were entitled until 4 November 2010 to benefit from the transitional provision of the law as their applications had been lodged with the Court before its entry into force and the Court had not ruled on their admissibility (see section 6 § 2, paragraph 16 above). The Registry informed the applicants of this opportunity (see paragraph 7 above).

26. As regards the effectiveness of the new remedy available to the applicants, it is evident from the Compensation Act that when deciding compensation claims domestic courts are required to apply the Convention criteria as established in the Court's case-law. In particular, compensation is

awarded in monetary form; its amount should be determined having regard to the applicant's claims, the circumstances of the case, the length of the period during which the violation took place, the significance of its consequences for the applicant, the principles of reasonableness and fairness, and the Court's case-law (section 2). Finally, compensation is awarded irrespective of the authorities' fault (section 1 § 3).

27. In view of these elements, the Court accepts that the Compensation Act was designed, in principle, to address the issue of excessive length of domestic proceedings in an effective and meaningful manner, taking account of the Convention requirements. It is true that domestic courts have not been able yet to establish any stable practice under this Act in the months since its entry into force (see *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII). However, the Court does not see at this stage any reason to believe that the new remedy would not afford the applicants the opportunity to obtain adequate and sufficient compensation for their grievances or that it would offer no reasonable prospect of success. The applicants' mere doubts about the capacity of the new remedy to provide adequate compensation cannot alter the Court's conclusion.

28. The Court further concludes, as it has repeatedly done in other similar cases, that the States can choose solely to introduce a compensatory remedy in respect of undue length of proceedings without that remedy being automatically regarded as ineffective (see *Kudla v. Poland* [GC], cited above, § 158, and *Žunič v. Slovenia* (dec.), no. 24342/04, 18 October 2007).

29. The Court is mindful that an issue may subsequently arise as to whether the new compensatory remedy would still be effective in a situation of persistent failure by the State to respect the right to a trial within a reasonable time notwithstanding a compensation award or even repeated awards made under the Compensation Act. However, it does not find it appropriate to anticipate such an event, nor to decide this issue *in abstracto* at the present stage.

30. Finally, the Court does not lose sight of the fact that the new remedy only became available after the introduction of the present applications and that only exceptional circumstances may compel the applicants to avail themselves of such a remedy (see paragraph 22 above). It observes that there have been several cases concerning the length of proceedings in various countries in which such exceptional circumstances were found to exist (see *Brusco v. Italy*, cited above; *Nogolica v. Croatia*, cited above; *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00 *et al.*, ECHR 2002-IX; *Michalak v. Poland* (dec.), no. 24549/03, §§ 41-43, 1 March 2005; and *Korenjak v. Slovenia*, no. 463/03, §§ 63-71, 15 May 2007). The Court stresses that the nature of the remedy and the context in which it was introduced weighs heavily in its assessment of such exceptions (see *Scordino (no. 1)*, cited above, § 144).

31. As in the cases mentioned above, the Court considers it appropriate and justified in the circumstances of the present cases to require applicants to use the new domestic remedy introduced by the Compensation Act. Firstly, as it observed in *Kudła v. Poland* (cited above, § 152), the right to a hearing within a reasonable time would be less effective if there was no opportunity to submit Convention claims to a national authority first. Once a domestic compensatory remedy has been introduced, it becomes particularly important for such complaints to be considered in the first place and without delay by the national authorities, which are better placed and equipped to establish the relevant facts and to calculate monetary compensation (see, *mutatis mutandis*, *Demopoulos and Others* (dec.), cited above, § 69). Secondly, the Court attaches particular importance to the fact that the applicants were entitled to bring their claims to the domestic courts under the transitional provision of the Compensation Act (see paragraph 16 above) which reflects the Russian authorities' intention to grant redress at the domestic level to those people who had already applied to the Court before the entry into force of the Act (compare *Brusco*, cited above). It reiterates that its task, as defined by Article 19 of the Convention, would not be best achieved by taking such cases to judgment in the place of domestic courts, let alone by considering them in parallel with the domestic proceedings (see, *mutatis mutandis*, *E.G. v. Poland* (dec.), no. 50425/99, § 27, 23 September 2008).

32. While the Court may exceptionally decide, for the sake of fairness and effectiveness, to conclude its proceedings by a judgment in certain cases of this kind which have remained on its list for a long time or have already reached an advanced stage of proceedings (see, *mutatis mutandis*, *Burdov (no. 2)*, cited above, § 144), it will require, as a matter of principle, that all new cases introduced after the pilot judgment and falling under the Compensation Act be submitted in the first place to the national courts.

33. However, the Court's position may be subject to review in the future depending, in particular, on the domestic courts' capacity to establish consistent case-law under the Compensation Act in line with the Convention requirements (see *Korenjak*, cited above, § 73). Furthermore, the burden of proof as to the effectiveness of the new remedy will lie in practice with the respondent Government (ibid.).

34. In view of the foregoing considerations, the Court finds that the applicants are required by Article 35 § 1 of the Convention to avail themselves of the new domestic remedy by pursuing domestic proceedings.

35. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Alleged wrongful assessment of evidence and lack of effective remedies in respect of excessive length of the proceedings

36. Regarding the first applicant's complaint of the court's inadequate consideration of a defence witness's statements, the Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28-29, ECHR 1999-I). Accordingly, it considers this complaint manifestly ill-founded and rejects it in accordance with Article 35 §§ 3 and 4 of the Convention

37. As to the second applicant's complaint of lack of effective remedies, the Court reiterates that this provision applies only to those with an arguable claim under the Convention (see *Silver and Others v. the United Kingdom*, 25 March 1983, § 113, Series A no. 61). Given that the applicant's complaint under Article 6 is rejected for non-exhaustion of domestic remedies, the complaint under Article 13 should be declared manifestly ill-founded and rejected under Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

André Wampach
Deputy Registrar

Christos Rozakis
President