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

FIFTH SECTION

DECISION

Application no. 17220/09
Veselin Angelov DINCHEV
against Bulgaria

The European Court of Human Rights (Fifth Section), sitting on 21 November 2017 as a Chamber composed of:

Angelika Nußberger, *President,*
Nona Tsotsoria,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 22 January 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Veselin Angelov Dinchev, is a Bulgarian national, who was born in 1952 and lives in Sofia. He was represented before the Court by Ms S. Margaritova-Vuchkova, a lawyer practising in Sofia.

2. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimitrova, of the Ministry of Justice.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant brought civil proceedings against his former employer, claiming that he had been dismissed unlawfully. He asked to be reinstated and sought damages of over 11,000 Bulgarian levs (BGN corresponding to about EUR 5,500). His claim was rejected at first instance by the Sofia District Court, but granted almost in its entirety on appeal by the Sofia City Court on 17 March 2005.

5. The other party, his former employer, a company, appealed in cassation in May 2005. The applicant submitted a written response to the cassation appeal. His response was dated 21 July 2005; it was received at the Sofia City Court on 25 July 2005. The file was then sent by the Sofia City Court to the Supreme Court of Cassation ("the SCC") for examination. The SCC gave the file a number in September 2005 and scheduled a hearing for 9 December 2008.

6. In the meantime, a new Code of Civil Procedure was adopted in July 2007, a major part of which was to enter into force on 1 March 2008. According to paragraph 2 (4) of the Code's Transitional and Concluding Provisions, all labour disputes pending before the SCC and in which a hearing had been scheduled for later than 30 June 2008 had to be transferred to "the appropriate court of appeal".

7. On 7 August 2007 the SCC terminated the proceedings before it and sent the case to the Sofia Court of Appeal ("SCA") for information and action. The applicant was not informed of the transfer of the case to the SCA and the applicant's written response to the cassation appeal of his former employer was not transmitted to the SCA.

8. On 6 and 19 February 2008 the SCA sent two letters to the other party, the applicant's former employer, informing the company that the proceedings in the case it had brought would be terminated if it failed to pay the requisite court fee. The company replied on 5 March 2008 that it had paid the fee.

9. The SCA scheduled a hearing for 27 May 2008. It notified the parties of the hearing via publication in the State Gazette, in accordance with the applicable legal provision (see paragraph 13 below). The record of the hearing showed that the SCA had noted that the parties had been regularly notified and had not sent representatives, and also that the case was ready for decision.

10. The SCA examined the company's cassation appeal on the merits. It delivered a final judgment on 23 July 2008, quashing the decision of the Sofia City Court which had upheld the applicant's claim. The SCA noted in its judgment that the applicant had made no submissions in respect of the arguments and claims put forward in the cassation appeal. The court then observed that, taking into account the submissions of the company and the available information in the case file, the company's counterclaims against the applicant were justified. The SCA found in favour of the applicant's former employer.

11. The applicant only learned about this decision in November 2008 when he inquired at the SCC's registry about the date of the hearing in his case before the SCC, as he had repeatedly done on previous occasions in 2006 and 2007. Until then he believed the hearing was going to take place on 9 December 2008 as scheduled and as the SCC's website continued to indicate at the time.

B. Relevant domestic law and practice

1. Examination of labour law disputes on cassation

12. A new Code of Civil Procedure ("the 2007 Code") was adopted in July 2007 and the larger part of it entered in force on 1 March 2008. According to paragraph 2 (5) of the Code's Transitional and Concluding Provisions, cassation appeals in labour disputes concerning unlawful dismissals, which were pending before the SCC and in which a hearing had been scheduled for a date subsequent to 30 June 2008, had to be transferred to "the competent court of appeal".

2. Notification of cassation hearings

13. Article 218d of the Code of Civil Procedure 1952 ("the 1952 Code"), in force until 1 March 2008, provided that before the end of each month the SCC should publish in the State Gazette the dates on which it would hold hearings and the cases to be heard during the following month. The second sentence in that provision stated that "when the circumstances so required, the parties received notice of the hearing". This was reproduced in Article 289 of the 2007 Code.

14. The general rules for summoning to court hearings can be found in Article 41 to Article 52 of the 1952 Code and in Article 37 to Article 55 of the 2007 Code. Those stipulate, *inter alia*, that a court notice or a summons has to be delivered in person or via an intermediary, by a court clerk or by registered mail, at the address given in the case.

3. Reopening of court proceedings

15. Article 303 of the 2007 Code provides that an interested party can request the reopening of civil proceedings which have ended with a decision which has acquired *res judicata*. Requests for reopening are examined by the SCC (Article 234, the 2007 Code). Reopening can be requested within three months as from the moment in which a party became aware of the facts that would serve as a ground for the reopening (Article 305, the 2007 Code). Reopening in such cases can be requested on the basis of specific grounds, which are exhaustively listed in the 2007 Code.

16. Article 303 § 1(5) of the 2007 Code (and before that Article 231 § 1e of the 1952 Code) stipulates in particular that a party to a case can seek reopening when in breach of the relevant rules the party has been deprived of the opportunity to take part in the proceedings and has not been adequately represented, or when the party could not appear in person or be represented before the court for reasons beyond that party's control.

17. In an interpretative decision, delivered by a plenary of the court and binding all courts, the SCC clarified in 2004 the type of circumstances necessitating a departure from the special procedure for summoning to a cassation hearing (тълк. реш. № 2 от 2.07.2004 г. по тълк. гр. д. № 2/2004). It held that failure in such cases to summon the parties in accordance with the general rules for summoning (see paragraph 14 above for those rules) could be a ground for allowing reopening of the proceedings. Such circumstances include the rescheduling of a hearing for a new date, despite the initial summoning to a different date having been fully in compliance with the legal requirements. In another interpretative decision of 2017 the SCC further clarified that the party seeking reopening of the proceedings is allowed to submit evidence before the SCC in support of his or her claim that the circumstances justified reopening (тълк. реш. № 7 от 31.07.2017 г. по т. д. № 7/2014, ОСГТК).

18. The SCC has allowed requests for reopening on the above-indicated grounds in a number of decisions (see, among many others, реш. № 10 от 9.02.2010 на ВКС по гр. д. № 973/2009 г., ГК; реш. № 689 от 30.12.2010 на ВКС по гр. д. № 1731/2009 г., ГК; реш. № 329 от 10.10.2012 на ВКС по гр. д. № 289/2012 г., ГК; реш. № 338 от 27.12.2013 на ВКС по гр. д. № 5550/2013 г., ГК), including in comparable circumstances to those of the applicant in the present case (реш. № 480 от 1.10.2009 на ВКС по гр. д. № 2194/2008 г.). In two other decisions in cases with similar circumstances to those of the applicant, different formations of the SCC found that there were no grounds for reopening in the specific circumstances of these cases and did not allow it (see реш. № 500 от 7.10.2009 по гр. д. № 4318/2008, II ГК; реш. № 798 от 28.10.2009 по гр. д. № 3714/2008, IV ГК).

COMPLAINT

19. The applicant complained that there had been a breach of Article 6 § 1 of the Convention because he had not been able to participate in person or otherwise present his position in the cassation hearing in which his case had been decided on the merits and which had put an end to the proceedings.

THE LAW

20. The Court notes the applicant's complaint in the preceding paragraph, made under Article 6 § 1 of the Convention, the relevant parts of which read as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

A. The parties' arguments

21. The Government asserted that making a request for reopening on the grounds provided in domestic law (see paragraph 16 above) was an effective remedy in the applicant's situation. They pointed to an interpretative decision of 2004 by the SCC where that court had clarified the circumstances which could constitute grounds for reopening. Those included the failure of the authorities to summon a party to a hearing under the general rules of summoning, as opposed to via a publication in the State Gazette applicable to cassation proceedings, in situations where, despite a proper initial summoning, circumstances had led to the hearing being rescheduled for a new date (see paragraph 17 above).

22. The Government likewise drew attention to a case with almost identical circumstances to those of the applicant in which the SCC had allowed reopening based on improper summoning. The court had found in particular that the appellant had not been informed about the termination of the proceedings and the transfer of the case to the relevant court of appeal (see paragraph 18 above).

23. The Government further stressed that mere doubts as to the effectiveness of a given remedy could not absolve aggrieved parties from attempting to use them. They emphasised that reopening of proceedings had to be resorted to in special circumstances where, for example, it had been established under domestic law that related requests constitute an effective remedy, or where the quashing of a judgment which has acquired legal force was the only means through which the respondent State could put matters right through its own legal system.

24. The applicant submitted that there had been no available effective domestic remedy which he should have exhausted before turning to the Court. As regards in particular a request for reopening of proceedings, he emphasised that this was an extraordinary remedy and that there was no established domestic practice in support of the Government's assertion that it was effective. He highlighted two decisions in which, in contrast to the decision cited by the Government, different formations of the SCC had rejected requests for reopening of civil proceedings concluding that the parties had been properly summoned (see paragraph 18 above). The

applicant underlined that protection of one's rights at the national level had to be effective and not illusory.

B. The Court's assessment

25. The Court reiterates that the purpose of the exhaustion rule, contained in Article 35 § 1 of the Convention, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them, before those allegations are submitted to the Court. 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 *Akdivar and Others v. Turkey*, 16 September 1996, § 65, Reports 1996-IV; and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

26. The only remedies which Article 35 of the Convention requires to be exhausted 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; it falls to the respondent State to establish that these various conditions are satisfied (see, among many authorities, *Mifsud v. France* (dec.) [GC], no. 57220/00, ECHR 2002-VIII).

27. Admittedly, with respect to final judgments delivered by national courts, the Court has repeatedly held that a request for reopening of proceedings on the basis of new evidence is not an effective remedy for the purposes of complying with the admissibility criteria under Article 35 § 1 of the Convention (see *Vainio v. Finland* (dec.), no. 62123/09, 3 May 2011; *Riedl-Riedenstein and Others v. Germany* (dec.), no. 48662/99, 22 January 2002; and *Babinsky v. Slovakia* (dec.), no. 35833/97, 11 January 2000). However, the Court has held so in circumstances where the new evidence concerned the findings on the merits of the dispute before the domestic courts. Thus, the decision to grant or refuse reopening in those cases was closely linked to the assessment of the relevant facts in the dispute, an issue on which this Court would as a rule defer to the national courts as it is for the national courts to assess the evidence before them (see the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 20, § 43, and the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 21, § 66; see also *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 48 confirming in its entirety the Chamber findings and in particular § 54 of the Chamber judgment,

27 October 2004; and, *Jorgic v. Germany*, no. 74613/01, § 82, ECHR 2007-III).

28. Notwithstanding the above, the Court has held that extraordinary remedies should be resorted to, for example, where the quashing of a judgment that has acquired legal force is the only means by which the respondent State can put matters right through its own legal system (see *Kiiskinen v. Finland* (dec.), no. 26323/95, 1 June 1999 where the complaint before the Court concerned the impartiality of a judge and it could not have been made before the end of the domestic proceedings). Similarly, under specific circumstances, the Court has held that a request for reopening of proceedings could be the only means whereby the specific complaint could be raised before the domestic courts and under such circumstances it would constitute an effective remedy (see *Sobczyk v. Poland* (dec.), no. 73446/10, §§ 40 and 48, 25 August 2015). In a case against Bulgaria where the applicant had been unable to take part in civil judicial proceedings in which he had been declared the father of a child, the Court found that, in the particular circumstances of the case, it was not unreasonable for the applicant to have attempted to have proceedings reopened before applying to the Court (see *Tsvetelin Petkov v. Bulgaria*, no. 2641/06, § 39, 15 July 2014). The reason was that this was the only avenue to allow the domestic courts to address his complaint that he had been excluded from the court proceedings. Thus, the Court accepted that the request for re-opening of the proceedings was an effective remedy for the purposes of Article 35 § 1 of the Convention and that it had to be taken into account for the calculation of the six-month period.

29. The Court notes that the applicant's complaint is about his exclusion from the court proceedings at the last level of appeal. The applicant's written submissions had not been transmitted to the national court which heard the cassation appeal (see paragraph 7 above) and as a result of a change of the competent court and the date of the hearing, of which he was not properly informed, he could not present his position, either orally or in writing, in person or through a representative, before the court which decided as a final instance on the merits of his case. The Court observes that in cases like this, where the issue is lack of fairness of the proceedings at the final judicial stage, the request for reopening is the only avenue to raise the matter before the domestic courts (see paragraph 28 above). The Court will have to address the issue whether, first, this remedy was available, namely sufficiently certain not only in theory but in practice, and, second, whether it was effective.

30. As to whether this remedy was sufficiently well established under domestic law, the Court observes that the 2007 Code expressly provided for such reopening (see paragraphs 15-17 above). Article 218d of the 1952 Code until March 2008 and Article 289 of the 2007 Code thereafter explicitly provided that, when the circumstances necessitated a departure

from the special procedure for summoning to a cassation hearing, the parties had to be summoned via notification (see paragraph 13 above). The SCC had held in an interpretative decision of 2004 that failure to summon the parties via the general rules for summoning, which included notification, could be a ground for allowing reopening of the proceedings. That interpretative decision also clarified that the circumstances which necessitated summoning via the general rules included the rescheduling of a hearing for a new date, despite the initial summoning to a different date having been fully compliant with the legal requirements (see paragraph 17 above), a situation with a clear parallel to that of the applicant in the present case. In another, more recent, interpretative decision the SCC further made clear that the party seeking reopening of the proceedings was allowed to submit evidence to demonstrate that the circumstances of the case justified reopening (*idem*.).

31. The Court acknowledges that in the three domestic decisions submitted to it by the parties (see paragraph 18 above) different formations of the SCC came to a different conclusion on reopening in situations similar to that of the present applicant. While in two of those judicial decisions reopening was refused, this cannot be considered an established judicial practice, particularly in light of the binding interpretative decision of the SCC. The Court reiterates in this connection that 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 *Akdivar and Others*, cited above, 71; *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX; and *Nagovitsyn and Nalgiyev v. Russia* (dec.), nos. 27451/09 and 60650/09, §§ 24 and 30, 23 September 2010). It follows that this remedy was sufficiently certain for the purposes of Article 35 § 1 of the Convention.

32. As to effectiveness of the reopening of judicial proceedings, the Court will have to examine the specific characteristics of the type of reopening available under the relevant Bulgarian law in the present case.

33. The Court notes in this connection the following: (1) the request for reopening was directly accessible to the applicant as a party to the completed proceedings and it did not depend on the discretion of any public authority to ask for it (contrary to the applicant's situation in the case of *Ryabykh v. Russia*, no. 52854/99, § 33 and § 56, ECHR 2003-IX, where the power to bring review proceedings in respect of final judgments lay solely with several public officials and not with the parties to the proceedings; see to this effect also *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, § 122); (2) that remedy was specifically provided for in law and the possibility to use it was circumscribed to a relatively short period in time (three months from learning about the reason, see paragraph 14 above, unlike the applicant's situation in the case of *Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII, where applications for review of final

judgments were not subject to any time-limit, so that judgments were liable to challenge indefinitely; see also, similarly, *Williams v. the United Kingdom* (dec.), no. 32567/06, 17 February 2009); (3) the grounds for reopening were exhaustively enumerated and those included the situation in which the present applicant found himself, namely where "in breach of the relevant rules the party has been deprived of the opportunity to take part in the proceedings and has not been adequately represented, or when the party could not appear in person or be represented before the court for reasons beyond that party's control" (see paragraph 16 above); (4) it was the only legal avenue through which the State could have put matters right in its own legal system and thus reinforced in practice the subsidiary role of the Court (see, *mutatis mutandis*, *Sobczyk* (dec.), cited above, § 56); and (5) there is no reason to believe that it would not afford the applicant the opportunity to obtain redress for his grievance or that it would have no reasonable prospect of success (see *Brusco*, cited above).

34. Had the proceedings in the applicant's case been reopened, it would have been possible for the deficiencies related to the applicant's inability to state his case to be redressed (see *Sobczyk* (dec.), cited above, § 48; and, *mutatis mutandis*, *Gurdulić and Others v. Croatia*, no. 5076/09, §§ 67-68, 8 April 2014). Reopening would have made it possible for him to participate in the hearing in person and he could also have made clear his position, which had been incorporated in his written submissions that had not reached the SCA in 2008. There is nothing to suggest that the applicant had been unable to seek reopening or that such a request was bound to fail or would not have been effective in his particular case if used.

35. By failing to seek reopening of the proceedings domestically, the applicant did not give the national authorities the opportunity to put the alleged violation right, in line with the spirit and aim of subsidiary protection under the Convention system (see, among other authorities, *Guzzardi v. Italy*, 6 November 1980, § 72, Series A no. 39, and *Cardot v. France*, 19 March 1991, § 36, Series A no. 200). In this connection the Court points out that States are exempted from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system (see the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 22, § 48; see also *Kiiskinen and Kovalainen v. Finland* (dec.), cited above).

36. In view of the above, the Court considers that the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 December 2017.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President