CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71933/01
by Vakha GARTUKAYEV
against Russia

The European Court of Human Rights (Second Section), sitting on 30 March 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr A. KOVLER,
Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 5 July 2001,

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

The applicant, Mr Vakha Gartukayev, is a Russian national, who was born in 1941 and lives in the town of Nalchik, in the Kabardino-Balkaria Republic. He is represented before the Court by Mr I. Timishev, a lawyer practising in Nalchik. The respondent Government are represented by their Agent, Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

The applicant is an ethnic Chechen; he was born and lived in the Chechen Republic. In 1994 his property in the Chechen Republic was destroyed as a result of a military operation. Since 1996 the applicant has been living in Nalchik; on 30 December 1996 a migrant's card was issued to him. At the material time the applicant was the deputy chairman of the board of the Union of Consumers' Associations of the Chechen Republic.

On 27 January 2000 the applicant returned by car from a mission in the Chechen Republic to Nalchik. He was accompanied by Mr Ba., driver, Mr M., a member of the Parliament of the Chechen Republic, and Mr Bi., a representative of the Chechen elders.

At about 5 p.m. the applicant's car was stopped at check-point "Kurp-2" on the administrative border between Ingushetia and Kabardino-Balkaria. After three hours of checking the documents and identities of the applicant and his travel companions, officers of the State Inspectorate for Road Safety of Kabardino-Balkaria (*ГИБДД МВД КБР*) refused them entry into Kabardino-Balkaria on the ground of their Chechen ethnic origin.

The night of 27 January 2000 the applicant and his companions took a long detour and reached Nalchik through a different check-point.

On 24 February 2000 the applicant lodged a complaint with the Nalchik Town Court against the Ministry of the Interior of Kabardino-Balkaria (*МВД КБР*). The applicant sought a declaration that the actions of the police officers had been unlawful, and claimed compensation for non-pecuniary damage caused by the alleged violation of his constitutional right to liberty of movement.

The Nalchik Town Court accepted the complaint, but no proceedings took place for more than a year. Following the applicant's complaint to the Supreme Court of the Kabardino-Balkaria Republic, the Nalchik Town Court held a hearing.

On 13 April 2001 the Nalchik Town Court gave its judgment. The court found that on 28 September 1999 the Ministry of the Interior of Kabardino-Balkaria had issued Regulation no. 1/220 (*Указание МВД КБР № 1/220*) on the procedure for crossing the administrative border of Kabardino-Balkaria by residents of the Chechen Republic. The regulation provided for stricter checks of vehicles and passengers of Chechen origin, as well as for special registration of Chechens on the basis of migrants' cards. The court questioned the police officers who had been on duty on 27 January 2000. The officers maintained that neither the applicant nor his companions had produced their migrants' cards; the officers had informed their superior on duty of this situation and, pursuant to his oral order, they refused admission to the applicant and his companions. The court held that the applicant had failed to prove that he had indeed shown his migrant's card to the police

officers and, therefore, there was no ground to declare their actions unlawful. The court noted that on the same night the applicant had gained admission into Kabardino-Balkaria through a different check-point. The court also inspected the registration log of 27 January 2000 and noted that on the same day other Chechen passengers carrying migrants' cards had been admitted into Kabardino-Balkaria.

The applicant appealed against the judgment of 13 April 2001. He submitted, in particular, that the regulation of 28 September 1999 had not been valid and enforceable because it had never been officially published.

On 22 May 2001 the Supreme Court of the Kabardino-Balkaria Republic upheld the judgment of 13 April 2001. The court pointed out that the burden of proof was on the applicant who had failed to show that he had been denied entry because of his ethnic (Chechen) origin.

B. Relevant domestic law

Article 19 of the Constitution of the Russian Federation provides for the equality of all before the law and courts of law, and equality of rights and liberties. Article 27 provides that everyone lawfully within the territory of the Russian Federation shall have the right to move freely and choose his or her place of stay or residence.

COMPLAINTS

1. The applicant complains under Article 2 § 1 of Protocol No. 4 to the Convention that the refusal to admit him into Kabardino-Balkaria on 27 January 2000 has violated his right to liberty of movement.

2. The applicant complains under Article 6 § 1 of the Convention that the proceedings before the Nalchik Town Court violated the "reasonable time" requirement and that they also were unfair because the Town Court refused his motion to obtain the attendance of witnesses who could have confirmed that he had had his migrant's card on him on 27 January 2000.

THE LAW

A. Objection of the Government as to the exhaustion of domestic remedies

The Government indicate that on 1 February 2003 the new Code of Civil Procedure of the Russian Federation became effective. Pursuant to the

Code, if a party to civil proceedings believes that the court judgments violated his (her) rights or lawful interests, such party may lodge a request for supervisory review of the judgments. The supervisory review proceedings may only be set in motion at the request of a party to the original proceedings. As the applicant never lodged such a request, the Government consider that he did not exhaust the domestic remedies available to him.

The applicant disagrees. He contends that the new procedure is not substantially different from the old one because the decision to open supervisory-review proceedings is made by a single judge of a higher court. The applicant believes that this remedy could not be considered "effective" for the purposes of the Convention.

The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). 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 (*ibid*.). 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, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65; *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-VI, p. 2275, § 51).

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

The Court observes that in the instant case the Government did not indicate any such circumstances that might warrant a departure from the general rule. Accordingly, the basic principle that the exhaustion requirement must be assessed with reference to the time at which the application was lodged applies.

The Government do not claim that at the date the application was introduced there were any domestic remedies that the applicant had failed to exhaust (cf. *Baumann v. France*, cited above, § 47). It is to be observed that the request for supervisory review, as it existed at that time, was not considered an "effective" remedy for the purpose of Article 35 § 1 (see *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001). In the present case the Court is not required to decide whether the procedure for supervisory review provided for in the new Code of Civil Procedure is an effective remedy because it only became available on 1 February 2003, i.e.

after the present application was lodged. The Court therefore considers that the domestic remedies have been exhausted.

The Government's preliminary objection is dismissed.

B. Admissibility of the complaints

1. The applicant complains under Article 2 § 1 of Protocol No. 4 that the decision of police officers to refuse him admission to Kabardino-Balkaria was an unacceptable restriction on his right to liberty of movement. Article 2 of Protocol No. 4 provides, in the relevant part, as follows:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> ...
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

The Government accept that the restriction on the applicant's right to liberty of movement was unlawful because it had been imposed by a directive of the Ministry of the Interior of Kabardino-Balkaria, whereas the Law on Russian nationals' right to liberty of movement, choice of place of stay or residence in the territory of the Russian Federation (no. 5242-I of 25 June 1993) required that any such restriction be set out in a law.

The applicant takes note of the Government's admission.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complains under Article 6 of the Convention about a violation of his right to a fair hearing within a reasonable time and the courts' refusal to examine witnesses on his behalf. Article 6 provides, in the relevant part, as follows:

> "1. In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time...
>
> ...

> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

To the extent that the applicant alleges a violation of his right to a hearing "within a reasonable time", the Court notes that the proceedings at two levels of jurisdiction lasted from 24 February 2000 (when the claim was lodged) until 22 May 2001 (the final judgment), i.e. for a total of one year, two months and 27 days. The Court finds that that period was compatible with the "reasonable time" criterion of Article 6 § 1. As regards the applicant's complaint about the first-instance court's failure to obtain the attendance and examination of witnesses on his behalf, the Court notes that this specific guarantee contained in Article 6 § 3 (c) of the Convention only applies to the determination of a criminal charge, whereas in the present case the proceedings were civil. Examining these complaints from the general fairness requirement under Article 6 § 1, the Court finds that they do not disclose any appearance of violation of this provision.

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.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint concerning a restriction on his right to liberty of movement;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President