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

THIRD SECTION

DECISION

Application no 33087/15
Rudolf Simon LOUW
against Sweden

The European Court of Human Rights (Third Section), sitting on 13 December 2016 as a Chamber composed of:

Luis López Guerra, *President,*
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 3 July 2015,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Rudolf Simon Louw, is a Dutch national who was born in 1951 and lives in Zierikizee. He was represented before the Court by Mr T. Barkhuysen, a lawyer practising in Amsterdam.

A. The circumstances of the case

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

3. The applicant worked as an engineer for a Swedish company that produces aircraft for the military. He started in 1996 in the civilian section and transferred to the military side of the business in 1998, where he had access to some classified information related to defence. However, he never had a security clearance. In 2003 the company changed its practices so that

only security-cleared personnel could access classified information. A security protection agreement was signed between the company and the Swedish Defence Material Administration (*Försvarets materielverk*, hereinafter – "the Administration"). Thereafter the applicant did not have access to classified information on defence matters.

4. However, as the applicant needed access to classified information in order to carry out his work, the company requested that the Administration grant him security clearance at level 2 (out of a possible three levels). On 10 June 2008 the Administration refused the company's request, stating that a foreign citizen could not be given access to defence secrets at that level.

5. The company subsequently renewed its request to the Administration to grant the applicant security clearance at level 2. On 7 October 2008 the Administration refused the request, stating that a foreign citizen could not be allowed to handle licensed information in the form of weapons data or information from strength of material analyses.

6. The Administration's decisions could not be appealed against.

7. The applicant, meanwhile, continued to work for the company on tasks that did not require security clearance.

8. During 2008 and 2009 the company suffered major shortages in demand which led to a reorganisation and staff reductions. The applicant received an offer to transfer to another department to continue to work as an engineer. He refused the offer. As there were no other suitable positions available, he was made redundant on 27 November 2009.

9. The applicant took the company to court, asking the Linköping District Court (*tingsrätt*) to declare the dismissal invalid and award him damages.

10. On 20 June 2012 his application was dismissed by the court. It found that the company had made the applicant a reasonable offer of an internal transfer and that the company had had an actual shortage of work. The dismissal had therefore been valid.

11. The applicant appealed against the judgment to the Labour Court (*Arbetsdomstolen*) and also requested that the court refer the case to the Court of Justice of the European Union (hereinafter "the CJEU") for a preliminary ruling.

12. On 19 December 2012 the Labour Court refused the request for a referral for a preliminary ruling and decided not to grant leave to appeal. The decision was final.

13. Thereafter the applicant lodged an application with the Court (application no. 46964/13). He complained that the Administration's refusal to grant him security clearance and his subsequent dismissal had constituted a violation of Article 1 of Protocol No. 1 to the Convention, separately and in conjunction with Article 14. Under Article 6, alone and in conjunction with Article 14, he further complained that the domestic courts had failed to request a preliminary ruling from the CJEU, that the domestic courts had

not been impartial or independent, and that he had not had access to a court with full jurisdiction. The application was declared inadmissible by the Court, sitting as a Single Judge, on 3 April 2014. The Court found that the complaints under Article 1 of Protocol No. 1 and Article 14 were premature since the applicant could bring a claim with the Chancellor of Justice (*Justitiekanslern*). The remaining complaints were declared inadmissible.

14. As a consequence, the applicant turned to the Chancellor of Justice, requesting damages from the State for the alleged violations of Article 6, Article 14 and Article 1 of Protocol No. 1. He submitted the same grounds as he had before the Court.

15. On 1 June 2015 the Chancellor of Justice rejected the claim. The Chancellor noted that the Administration's decisions had not concerned the applicant, but the company. The decisions had rather to be seen as replies by the State to the company within the framework of their security protection agreement and not as an exercise of public authority. Article 6 had thus not been applicable. Even so, the applicant had been able to challenge the dismissal he claimed was the consequence of his failure to obtain security clearance before the courts. Moreover, the Chancellor of Justice found that the proceedings before the domestic courts had been Article 6-compliant. Regarding Article 1 of Protocol No. 1, the Labour Court had found that the dismissal had been lawful. Lastly, concerning Article 14, the distinction made between Swedes and foreign citizens in terms of defence secrets had an objective and reasonable basis. In any event, the applicant had contributed to the situation by refusing the company's offer to be transferred to another department.

B. Relevant domestic law and practice

16. Pursuant to section 7 of the Security Protection Act (*säkerhetsskyddslag*, 1996:627), a private company has to protect, *inter alia*, classified information concerning national security in order to prevent such information being disclosed, changed or destroyed without authorisation and ensure that people who are not reliable from a security perspective do not participate in activities of importance to national security.

17. When the state procures services externally, a security protection agreement must be signed with the other party if it involves information that is classified on national security grounds (section 8 of the Act).

18. A security clearance must be granted before a person, through his or her employment at a company, participates in activities of importance to national security. The security clearance must ensure that the person is loyal to the protected interests and otherwise reliable in terms of security (section 11).

19. There is no prohibition on granting security clearance to foreign citizens working in private companies. Such a prohibition applies, however,

in the public sector. The Government may in individual cases grant an exception for public sector employees (section 29 of the Act).

20. In accordance with section 17 of the Act, there are three different levels of security clearance, depending on the extent of access the employee has and the nature of the information. Level 1: the employee has access to a great extent to classified information of the utmost importance to national security. Level 2: the employee has access to classified information of the utmost importance to national security to an extent that is not insignificant. Level 3: the employee otherwise has access to classified information of importance to national security and where disclosure can be expected to cause a not insignificant level of harm to national security.

21. The Administration is responsible for granting security clearances. Pursuant to section 50 of the Security Protection Ordinance (*säkerhetsskyddsförordning*, 1996:633), no appeal lay against the Administration's decisions.

22. According to a letter from the Government Offices (*Regeringskansliet*), dated 28 January 2013 (Fö2013/62RS) to the European Commission, the Administration handled about 3,000 cases of security clearance during 2012. Thirteen of those cases concerned foreign citizens, including eleven EU citizens. The Administration granted all the requests for security clearance.

COMPLAINT

23. The applicant complained under Article 1 of Protocol No. 1 to the Convention, alone and taken in conjunction with Article 14, that the decisions to refuse him security clearance and dismiss him on the sole ground that he was a Dutch national had violated his right to property and had been discriminatory against him.

THE LAW

24. The applicant argued that the refusal of a security clearance and his subsequent dismissal had violated his right to property and had been discriminatory against him. He relied on Article 14 of the Convention and Article 1 of Protocol No. 1, which read as follows.

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

25. The Court notes from the outset that in order for Article 1 of Protocol No. 1 to apply the complaint has to relate to an applicant's "possessions", meaning either existing possessions or a legitimate expectation of obtaining effective enjoyment of a property right (see, for example, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82 and 83, ECHR 2001-VIII, and *Vilho Eskelinen and Others v Finland* [GC], no. 63235/00, § 94, ECHR 2007-II).

26. Moreover, the Convention and its Protocols do not provide for a right to employment (see *Nenkova-Lalova v. Bulgaria*, no. 35745/05, § 50, 11 December 2012) and the Court reiterates that future income cannot be considered as constituting "possessions" unless it has already been earned or is definitely payable. There is no right under the Convention to continue to be paid a salary of a particular amount (see *Baka v. Hungary*, no. 20261/12, § 105, 27 May 2014, with further references).

27. In the present case, the Court notes that the applicant complains that because of his dismissal he lost potential future income, namely his salary. It is true that the dismissal precluded the applicant from receiving a future salary in the post he had held prior to the dismissal. However, that future income had neither been earned nor was it definitely payable.

28. The Court would also add that the applicant was able to challenge his dismissal before the domestic courts. As held by the District Court, the applicant was dismissed on legitimate grounds owing to a shortage of work after being offered another position within the company, which he refused.

29. Furthermore, the applicant made use of the opportunity to claim damages from the State by turning to the Chancellor of Justice, where his claims under Article 14 and Article 1 to Protocol No. 1 were examined in substance before being rejected. He thus had at his disposal, and made use of, effective domestic remedies to have the legitimacy of his dismissal examined.

30. It follows that the complaint under Article 1 of Protocol No. 1 is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3 (a) and should be rejected in accordance with Article 35 § 4 of the Convention.

31. With regard to the complaint under Article 1 of Protocol No. 1, taken in conjunction with Article 14, the Court has consistently held that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Hans-Adam II of Liechtenstein*, cited above, § 91).

32. The Court has already found that the facts at issue do not fall within the ambit of Article 1 of Protocol No. 1. It follows that the applicant's complaint under Article 1 of Protocol No. 1, taken in conjunction with Article 14, is also incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto, within the meaning of Article 35 § 3 (a) of the Convention, and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court by a majority

Declares the application inadmissible.

Done in English and notified in writing on 19 January 2017.

Stephen Phillips
Registrar

Luis López Guerra
President