CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40897/98
by Todor Nenchev NESHEV
against Bulgaria

The European Court of Human Rights (Third Section), sitting on 13 March 2003 as a Chamber composed of

Mr I. CABRAL BARRETO, *President*,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs S. BOTOUCHAROVA,
Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 3 December 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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 is a Bulgarian national who was born in 1953 and lives in Plovdiv. He was represented before the Court by Mr M. Ekimdjiev, a lawyer practising in Plovdiv.

The respondent Government were represented by Mrs V. Djidjeva, co-agent, of the Ministry of Justice.

A. The circumstances of the case

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

The applicant used to work as a shunter at the Bulgarian State Railways. On 15 August 1995 he was dismissed from his work for having breached disciplinary regulations.

On 5 February 1996 the applicant filed with the Plovdiv District Court an action for wrongful dismissal against his former employer.

On 12 March 1996 the District Court heard the applicant and his lawyer and rejected the case, ruling that the applicant's dismissal was not amenable to judicial review. It based its decision on section 9(3) of the Decree No. 9 of 6 January 1981 and the Supreme Court's practice, according to which employees of the State Railways dismissed for breach of disciplinary regulations could only appeal to a higher administrative body.

On 18 March 1996 the applicant appealed to the Plovdiv Regional Court against the District Court's decision. He argued that Decree No. 9 was contrary to Article 6 of the Convention. He also relied on an amendment to the Labour Code of 1993, stating that it vested with the courts power to examine all appeals for wrongful dismissal, despite the provisions of Decree No. 9.

By decision bearing the date 8 April 1996 the Regional Court, sitting in private, dismissed the applicant's appeal, holding that in accordance with Decree No. 9 a judicial appeal against the applicant's dismissal was not possible.

The Regional Court's decision was not pronounced publicly and was not served.

On 4 June 1996 the case file was transmitted by the judge-rapporteur to the Regional Court's clerical staff which made an entry in the court's register.

On 5 June 1996 the case file was transmitted to the District Court and an entry was made in its register.

On 13 June 1996 the applicant submitted a petition for review (преглед по реда на надзора) to the Supreme Administrative Court.

The parties were summoned for a hearing but none of them appeared.

On 18 July 1997, sitting in private, the Supreme Administrative Court rejected the petition for review as time barred. It held that the Regional Court's decision had entered into force on 8 April 1996 and that the two months' time-limit for submission of a petition for review had expired on 8 June 1996 whereas the petition had been submitted on 13 June 1996.

The present application was introduced by letter dated and postmarked 3 December 1997, signed by the applicant's lawyer. The lawyer's authorisation form was submitted together with the application form and was dated 23 March 1998.

B. Relevant domestic law and practice

1. Legal regime of State Railways' employees and appeals against dismissal

At the relevant time, in accordance with Decree No. 9 of 6 January 1981, employees of the State Railways were subject to a special legal regime. They had ranks and were subject to strict hierarchy and discipline, under the control of the Ministry of Transport.

Section 9 of the Decree, as in force at the relevant time and until February 1997, provided, *inter alia*, that disputes about wrongful dismissal of employees of the State Railways were amenable to review by the higher administrative authority only. As a result, until August 1996 the courts' practice was to reject actions for wrongful dismissal of railways' employees. On 19 August 1996 the Supreme Administrative Court held that the prohibition of judicial review under Decree No. 9 was to be considered abandoned since 1 March 1993, the date on which an amendment to the Labour Code had entered into force (опр. no. 641 от 19.8.1996 г., Бюлетин на ВС, кн. 10-1996 г., стр. 17).

The relevant part of section 9 of Decree No. 9 was eventually repealed by the Constitutional Court by decision of 18 February 1997 as unconstitutional and contrary to Article 6 of the Convention. The Constitutional Court held that dismissal from work could not be excluded from the jurisdiction of the courts, regard being had to the fact that the right to work is one of the fundamental constitutional rights (реш. no. 5 от 18.2.1997 по конст. дело no. 25/96 г. на КС на РБ, Държавен вестник, бр. 20/97).

In November 2000 the remainder of Decree No. 9 was repealed and the special legal regime of State Railways employees abandoned.

2. Service of judgments and decisions at the relevant time

Under the Code of Civil Procedure as in force at the relevant time, service was required only in respect of judgments and certain types of procedural decisions issued by a first level of jurisdiction.

Judgments or decisions delivered by a court acting as a second level jurisdiction were not served despite the fact that most of them were amenable to review (преглед по реда на надзора), within particular time limits, before the Supreme Court (which was later reconstituted into the Supreme Administrative Court and the Supreme Court of Cassation).

As a result, whenever second instance cases were decided in private (which was the rule in appeals against procedural decisions), the parties could only learn whether or not their case had been decided by visiting the respective court and checking its register periodically.

Article 226 of the Code of Civil Procedure, as in force at the relevant time, provided that a petition for review could be submitted within two months from the impugned decision's entry into force. At that time judgments and decisions issued by a second level of jurisdiction entered into force on the date on which they were made (opr. 3022-95-III).

According to the applicant, the courts nevertheless would normally count the two-months' time-limit from the date on which the second instance judgment or decision was entered in the respective register. No relevant case-law has been cited by the parties.

COMPLAINTS

The applicant raised a number of complaints under Article 6 § 1 alleging violations of that provision's requirements of fairness, reasonable length and public character of the proceedings in his case. He submitted that the Plovdiv Regional Court's and the Supreme Administrative Court's decisions had not been pronounced in public and had not been served and that the Supreme Administrative Court had taken its decision in private and had arbitrarily rejected his petition for review. He also stated that the proceedings lasted unreasonably long.

The applicant also complained under Article 6 § 1 of the Convention that he was denied access to court in respect of his dismissal from work.

THE LAW

1. *Alleged unfairness, lack of public hearing and public pronouncement of judgments and excessive length of the proceedings*

The applicant relied on Article 6 § 1 of the Convention which provides, in so far as relevant:

> "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."

The Government considered that these complaints were manifestly ill-founded which was disputed by the applicant in his reply.

The Court recalls that proceedings on the question whether or not a claim or an appeal is admissible on procedural grounds are not proceedings determining a dispute on civil rights and obligations (see, *Viikman v. Estonia*, no. 35086/97, Commission decision of 1 July 1998, unreported, and *Société Or-Est and société Mariale v. France*, no. 36856/97, Commission decision of 16 April 1998, unreported).

The above complaints concern the proceedings before the Regional Court and the Supreme Administrative Court in the applicant's case. Their subject matter was confined to issues of admissibility of the applicant's action for wrongful dismissal and his ensuing appeals. Those proceedings did not involve the determination of the applicant's civil rights and obligations and Article 6 did not apply.

It follows that this part of the application must be rejected as incompatible *ratione materiae* with the provisions of the Convention, within the meaning of its Article 35 § 3.

2. *Alleged lack of access to a court*

(a) The Government's objections

The Government stated that the applicant had not exhausted all domestic remedies as he had not appealed to the higher administrative authority against his dismissal and had not attempted a civil action for damages against the State.

The Government also stated that the applicant had not complied with the relevant two months' time limit for the submission of a petition for review and endorsed the reasoning of the Supreme Administrative Court. They stressed that had he submitted a valid petition for review, he would have obtained a favourable outcome, as in the meantime the relevant part of Decree No. 9 had been repealed. As a result, the application was abusive.

The Government also considered that the application had not been validly submitted as the applicant had signed an authorisation for his lawyer

several months after the submission of the lawyer's introductory letter and after the expiry of the six months' time limit.

The applicant replied that an appeal to the higher administrative authority would not provide access to a court and that under domestic law in circumstances as those obtaining in his case he did not have a cause of action for damages against the State.

He also stated that the Supreme Administrative Court's approach in determining the starting point of the relevant two months' time-limit for the submission of his petition for review and its rejection had been arbitrary. In particular, the starting point of the two months' time limit should have been the date on which the Regional Court's decision dated 8 April 1996 had been noted in the court's register. The applicant submitted that it was not uncommon for judges to back-date decisions taken in private in order to report the case as decided in time. Furthermore, the Supreme Administrative Court did not allow the applicant any possibility to adduce evidence about the date on which the second instance court's decision had become available.

Finally, as regards the date of the authorisation form, the applicant declared that he endorsed all legal acts performed by his lawyer in connection with the present case and referred to the rules of contract law according to which acts performed by an unauthorised agent become valid, retrospectively, when later confirmed.

The Court observes that the Government did not contend that an administrative appeal to a higher authority - in this case, apparently, to the Ministry of Transport - could have provided access to a court and did not refer to jurisprudence demonstrating that the applicant could claim damages for the fact that judicial review of his dismissal was excluded by statute. The Government have not referred to any other remedy.

As regards the rejection of the applicant's petition for review to the Supreme Administrative Court as time-barred, since domestic remedies cannot be considered exhausted where an appeal is not admitted owing to a procedural mistake by the applicant (see *Ulrik Steglich-Petersen v. Denmark*, no. 41250/98, Commission decision of 21 October 1998, DR 94 p. 163), the Court must examine under Article 35 § 1 of the Convention whether the applicant was responsible for such an error.

The Court observes that the Regional Court's decision of 8 April 1996 was taken in private and was not served. The applicant could not possibly learn about it before 4 June 1996, the date on which the decision was entered on the Regional Court's register. Moreover, as the applicant was never made aware of any timetable for processing of his case by the Regional Court, he could only learn of the entry made in the register by taking the initiative to visit the court and consult the register periodically. Obviously, he could not be reasonably expected to do that every day.

Despite the above undisputed facts, and without verifying the date on which the Regional Court's decision had been registered and the date on which the applicant had consulted the register, the Supreme Administrative Court rejected the petition for review as having been submitted more than two months after 8 April 1996, the date of the Regional Court's decision taken in private.

The Court finds that the above approach, which consisted in accepting that a time-limit for the submission of an appeal against a judicial decision ran during a period when the party concerned had no reasonable possibility to learn that such a decision existed, was contrary to the principle of legal certainty. The Court reiterates that although time-limits are in principle legitimate procedural limitations on access to a court, their interpretation in disregard of relevant practical circumstances may result in violations of the Convention (see, *mutatis mutandis*, *Shishkov v. Bulgaria*, no. 38822/97, § 84, 9 January 2003, unreported, and *Miragall Escolano and Others v. Spain*, no. 38366/97, §§ 33-39, ECHR 2000-I).

The applicant's petition for review was submitted on 13 June 1996, a few days after 4 June 1996, the date on which it became possible for him to learn about the decision in his case by consulting the court's register.

It follows that the applicant's attempt to employ the remedy available at the relevant time, a petition for review to the Supreme Administrative Court, was valid for the purposes of Article 35 § 1 of the Convention.

The Court also finds that the allegation of abuse is groundless.

Finally, the Court reiterates that the mere fact that the applicant's instruction to his legal representative was put in writing after the introduction of the application cannot deprive the introductory letter of its legal effect (see *Credit Bank and Others v. Bulgaria* (dec.), no. 40064/98, 30 April 2002, unreported). Therefore, the application was validly submitted within the six months time limit as required under Article 35 § 1 of the Convention.

It follows that the Government's above objections must be dismissed.

(b) As regards the substance of the complaint

The Government stated that the law at the time did not provide for judicial review of disputes concerning employment in the State Railways and that the Constitutional Court's judgment of 18 February 1997 did not have retroactive effect. Therefore, the courts in the applicant's case applied the relevant domestic law correctly.

The applicant replied that the courts should have suspended the proceedings in his case and should have referred to the Constitutional Court the issue of constitutionality of Decree No. 9. He also made extensive submissions arguing that Article 6 was applicable despite the particular legal regime of employment in the State Railways at the relevant time.

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 should depend on 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.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint that he had no access to a court in the determination of his employment rights;

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President