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. 63343/00
by Nikolay Dmitriyevich ROSHKA
against Russia

The European Court of Human Rights (Third Section), sitting on 6 November 2003 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE,
Mr A. KOVLER,
Mrs A. GYULUMYAN, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 7 July 2000,

Having deliberated, decides as follows:

THE FACTS

The applicant, Nikolay Dmitriyevich Roshka, is a Russian national, who was born in 1950 and lives in Vladivostok.

A. The circumstances of the case

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

The applicant is a notary. At the beginning of 1999 the State passed the State Funds (Contributions) Laws which obliged notaries and some other categories of taxpayers to pay contributions to the State Pension Fund at a rate considerably higher than that applicable to the others. Those thus affected by the laws, including the applicant amongst 2057 notaries, alleged that the rate was discriminatory. They applied to the Constitutional Court to impugn the laws as incompatible with the Constitution. The applicant's complaint was lodged on 17 May 1999. Since all the applications concerned the same subject the court joined them.

On 23 December 1999 the Constitutional Court held a public oral hearing. The President of the Moscow City Notarial Chamber was present at the hearing. The court declared the relevant provisions of the laws unconstitutional but maintained them in force until a new law was adopted. Payments made in the meantime were to be offset against future contributions. On 19 January 2000 the decision of the court was officially published.

The court allegedly failed to inform the applicant about the date of the hearing.

No proceedings in an ordinary court involving the application of the challenged laws were brought by the applicant.

The new law was adopted on 5 August 2000 and came into force on 1 January 2001.

B. Relevant domestic law and practice

Individual applications to the Constitutional Court

Article 96 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation of 21 July 1994 (“the Law”) provides that citizens whose constitutional rights and freedoms are violated by a law applied or to be applied in a specific case are entitled to submit their complaint to the Constitutional Court of the Russian Federation.

By Article 97 of the Law an application is only admissible if (i) the law in question affects the constitutional rights and freedoms of citizens; (ii) the law has been applied or is to be applied in specific proceedings, finished or pending, before courts of general jurisdiction or any other authority applying the law.

Under Article 100 of the Law the Constitutional Court may: (i) confirm that the law or certain of its provisions comply with the Constitution; or (ii) establish that the law or certain of its provisions do not comply with the Constitution. In the latter case, pursuant to procedural codes in force at the material time, an application may be made to a court which applied the unconstitutional law or to a court which is hierarchically superior. The respective court may then re-open the proceedings and order a fresh

examination of the case on the basis of the findings of the Constitutional Court. Where the unconstitutional law was applied by an authority other than a court, the authority re-considers the case on the basis of the findings of the Constitutional Court.

Under Articles 79 of the Law in force at the material time in case the Constitutional Court declares a law incompatible with the Constitution such a law becomes invalid.

Examination of applications by the Constitutional Court

Under Article 49 of the Law a judge rapporteur and a president of a session determine the persons to be summoned to the session and order their notification of the place and time of the session.

Under Articles 51 - 53 of the Law applicants and their representatives are notified about a hearing not later than ten days before it. Each party may have up to three representatives. Notices of hearings before the Constitutional Court are published and also placed in the building of the court in places accessible to the public.

Under Article 62 of the Law a party makes oral pleadings at a hearing.

Application of the Constitution

According to Article 15 of the Constitution of the Russian Federation the Constitution has a superior legal power and direct application on the whole territory of the Russian Federation. Laws and other legal acts shall comply with the Constitution.

Article 10 of the Code of Civil Procedure of the Russian Federation in force at the material time provides that a court shall determine civil cases on the basis of the Constitution of the Russian Federation, federal constitutional laws, federal laws and other acts. Under Article 101 of the Law the court, having established non-compliance with the Constitution of a law applied or to be applied in a specific case refers a matter of constitutionality of the law to the Constitutional Court and suspends the proceedings.

COMPLAINTS

1. The applicant complained under Article 6 § 1 of the Convention that the Constitutional Court had heard the case in his absence.

2. The applicant further complained under Article 1 of Protocol No. 1 to the Convention and Article 14 of the Convention that he had been required to pay contributions under the State Funds (contributions) Law of 1999 although the Constitutional Court had annulled the relevant provisions of this Law as being discriminatory and unconstitutional.

3. The applicant also complained under Article 4 § 2 of the Convention that the Constitutional Court's judgment had prevented him from leaving work because, had he left, he would never receive back the contributions made earlier under the old law. He believed that this situation could be regarded as "forced labour".

THE LAW

1. The applicant complained under Article 6 § 1 of the Convention that the Constitutional Court had not informed him of the date of the hearing, and heard the case in his absence. Article 6 § 1, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The Court first recalls that Constitutional Court proceedings do not, in principle, fall outside the scope of Article 6 § 1 (see *Süßmann v. Germany* [GC], no. 20024/92, § 39, *Reports of Judgments and Decisions* 1996-IV). In each case, the Court must determine whether the outcome of the proceedings is decisive for the determination of the applicant's "civil rights and obligations" (see *Süßmann* cited above, § 39).

Where proceedings before a Constitutional Court are embedded in ordinary proceedings, for example where the domestic courts refer a question of the constitutionality of a relevant provision to the Constitutional Court, the proceedings before the Constitutional Court may be relevant, to a greater or lesser extent, in an assessment of the compliance of the underlying proceedings with Article 6 of the Convention (see *Bock v. Germany*, judgment of 29 March 1989, Series A no. 150, § 37; *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, Series A no. 262, §§ 55-68). That is not the case in the application before the Court, which concerns an individual application lodged directly with the Constitutional Court and aimed at quashing of a law on the ground of its unconstitutionality.

The Court, however, is not required to decide in the present case whether Article 6 of the Convention applies to the proceedings in question. Even assuming that Article 6 was applicable, the complaint of the applicant is inadmissible for the following reasons.

The Court recalls that as regards criminal proceedings, the right of an accused person to be present at the hearing of a criminal charge is fundamental to the fairness of the proceedings (see *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, § 25). The presence of the parties to civil litigation does not, however, have the same significance. The Convention case law provides that the right to be present in person in civil proceedings is not as such guaranteed, providing that the parties to such

proceedings were represented by counsel, but the right to a fair trial may imply, in certain classes of cases or in certain sets of circumstances the right to be present in person, in particular in those cases where the personal character and manner of life of the party concerned is directly relevant to the formation of the court's opinion (see *X v. Sweden*, no. 434/58, Commission decision of 30 June 1959, Yearbook 2, p. 370).

In the instant case, the Constitutional Court held a public oral hearing.

The subject of the court's examination was the constitutionality of the State Funds (Contributions) Laws. The court determined that issue solely by reference to the Constitution and the challenged laws, thus making an abstract review of the legislation. The applicant, as well as the other individuals who had brought the action, were required to be affected by the laws in question, but that condition went to the standing of the applicants, and was of no relevance to the proceedings before the Constitutional Court, which did not deal with the facts of the applicants' particular situations. Thus, the court's jurisdiction in the case at hand was limited to matters of law and did not extend to factual issues.

The applicant was one of 2057 notaries of the country who challenged the laws in question in the Constitutional Court and whose applications joined by the court were considered at the same hearing. One of the notaries, namely the President of the Moscow City Notarial Chamber, did in fact participate in the hearing. It can be assumed that he represented the interests of all of the notaries who had brought the action.

It does not transpire from the applicant's submissions that he had applied to the Constitutional Court to be given the right to participate in the hearing. Moreover, he was not hindered from presenting arguments or evidence in writing. The Court is not convinced that the personal presence of the applicant was necessary to the formation of the Constitutional Court's opinion.

The Court notes that the applicant could have learned about the hearing from notices which the Constitutional Court places in the building of the court and publishes in mass media.

Having regard to the nature of the proceedings in question, the number of individuals pursuing the same interest whose applications were joined by the court and considered at the same hearing, their representation at the hearing, the lack of need for the personal presence of the applicant and the notification of the public about the hearing, the Court cannot find that the Constitutional Court's failure to notify the applicant in person of the hearing, thus depriving him of the possibility to be personally present, has violated the guarantees of Article 6 § 1 of the Convention.

It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant further complained under Article 1 of Protocol No. 1 to the Convention that he had to continue to pay contributions under the 1999 State Funds (contributions) Law, even though it had been declared unconstitutional as being discriminatory, but was left in force. He also complains under Article 14 of the Convention that he should not have been requested to pay contributions under the discriminatory law.

Article 1 of Protocol No. 1 provides as follows:

> "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."

Article 14 provides as follows:

> "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."

The Court notes at the outset that Article 1 of Protocol No. 1 guarantees in substance the right of property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. "Contributions" within the meaning of this provision has been held to include compulsory contributions to state benefit schemes (see *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, §§ 34-35).

However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, § 55).

The Court considers that the interference complained of in this case should be examined under the head of "securing the payment of taxes or other contributions", which comes under the rule in the second paragraph of

Article 1 of Protocol No. 1. That paragraph explicitly reserves the right of Contracting States to pass whatever fiscal laws they considered desirable to secure the payment of taxes or other contributions, provided that "measures in this field did not amount to arbitrary confiscation" (see *Gasus* cited above, § 59).

The Court notes that the Constitutional Court declared certain provisions of the 1999 State Funds (contributions) Law unconstitutional and provided that until a new law was adopted payments were to be made pursuant to the 1999 Law and after the adoption of the new law they were to be offset against future contributions.

The Court recalls that the principle of legal certainty, which is necessarily inherent in the law of the Convention, may dispense States from re-opening legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention. The same considerations apply where a Constitutional Court annuls domestic legislation as being unconstitutional (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 58). These considerations have led to the conclusion that there is no violation of the guarantees of Article 1 of Protocol No. 1 where a domestic court which declares tax legislation unconstitutional does not set it aside but provides that it shall remain in force for a limited period until the new regulation is enacted (see *Walden v. Liechtenstein* (dec.), no. 33916/96, 16 March 2000; *J. R. v. Germany*, no. 22651/93, Commission decision of 18 October 1995, Decisions and Reports 83, p. 14), or where the court provides that its judgment declaring tax legislation unconstitutional shall have limited or purely prospective force (see *Mika v. Austria*, no. 26560/95, Commission decision of 26 June 1996), or where the legislator provides that tax legislation overruling a prior court decision shall only apply prospectively (see *NAP Holdings UK Ltd v. the United Kingdom*, no. 27721/95, Commission decision of 12 April 1996).

Hence, when the Constitutional Court preserved in force for a limited, purely transitional, period of time the unconstitutional law, it was, it would seem, driven by the fear of creating a substantial legal lacuna in the tax sphere. This interest appears to be legitimate from the standpoint of legal certainty and cannot therefore be regarded as "arbitrary confiscation". In these particular circumstances, the Court finds that the present case does not disclose a violation of the applicant's right of property.

The applicant further complained, invoking Article 14 of the Convention, that he had been requested to pay contributions under the 1999 Law after it had been declared unconstitutional as being discriminatory. Having regard to its above findings under Article 1 of Protocol No. 1, which focus on the continuing application of the law which was declared unconstitutional, the Court considers that it is not necessary to examine the facts also under Article 14.

It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Finally, the applicant alleges under Article 4 § 2 that the decision of the Constitutional Court compelled him to stay at work against his wishes. Article 4 § 2, insofar as relevant, reads as follows:

> "No one shall be required to perform forced or compulsory labour."

The Court notes, however, that the applicant was free to resign. It follows that this complaint 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 the application inadmissible.

Mark Villiger Deputy Registrar	Georg RESS President