



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

FIRST SECTION

Application no. 25025/10
Aleksandr Nikolayevich ILCHENKO
against Russia
lodged on 23 April 2010

STATEMENT OF FACTS

The applicant, Mr Aleksandr Nikolayevich Ilchenko, is a Russian national, who was born in 1968 and lives in Moscow.

A. The circumstances of the case

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

Since 1 August 1985 the applicant has been a military serviceman employed in the Chief Operative Department of the General Headquarters of the Russian Military Forces.

1. Discharge proceedings

In January 2009, the Ministry of Defence decided to terminate the applicant's employment on account of redundancy. On 6 March 2009 the applicant accepted the discharge on the condition that the employer would provide his family with a flat in Moscow. By order of the Minister of Defence dated 30 April 2009, the applicant was laid off and placed at the disposal of the head of the Chief Operative Department of the General Headquarters until such time as the discharge procedure would be completed.

After the maximum six-month period for his placement "at the disposal" expired on 1 November 2009 and since the flat was not provided, the applicant sued the head of the Chief Operative Department and the housing commission of the General Headquarters in a military court.

By judgment of 16 November 2009, the Military Court of the Moscow Garrison found that the head of the Chief Operative Department had acted unlawfully in that he had not provided the applicant's family with a flat and had not completed his discharge procedure. However, on 28 January 2010 the Military Court of the Moscow Circuit quashed the judgment and dismissed the applicant's claim in its entirety. It noted, in particular, that the applicant had been offered a possibility of final discharge which he had declined, making his discharge conditional on provision of a flat. He was furthermore placed on the waiting list for provision of a flat under number 20.

2. Application for a travel passport

The first travel document allowing the applicant to go abroad was issued to him in August 1989 when he was required to serve in Czechoslovakia. That document expired in February 1991.

On 29 December 2004 the applicant signed a contract concerning his access to State secrets which provided in particular for a legal possibility to restrict his right to leave Russia for a period not exceeding five years.

In October 2006, the Main Directorate for International Co-operation of the Ministry of Defence issued a new travel passport for the applicant which he has never used. The applicant was not prevented from going abroad on an official mission; however, his right to travel for private purposes was curtailed.

On 13 September 2010 the applicant made an application for a travel document to the Federal Migration Service in Moscow. He submitted that he needed to go abroad for rest and recreation and pointed out that he had surrendered all the classified material already on 13 February 2009.

By letter of 22 December 2010, the Federal Migration Service notified him that his application was rejected on the following grounds:

“During the period of your service in the Chief Operative Department of the General Headquarters of the Russian Military Forces from November 2004 up to the present date, you have been aware of State secrets; accordingly, your right to go abroad was temporarily restricted until 13 February 2014 [on the basis] of a decision of the Chief Operative Department of the General Headquarters no. 312/3/196 of 8 October 2010.”

The applicant challenged the refusal before a court.

On 3 March 2011 the Presnenskiy District Court of Moscow rejected his claim. The court examined in particular the above-mentioned decision of 8 October 2010, according to which “the plaintiff's right to travel abroad for private purposes would be possible after 13 February 2014, but there were no objections to his leaving abroad on official missions arranged by organisations or companies affiliated with the Ministry of Defence”. The court found that the decision refusing the application had been made by the competent authority.

On 10 October 2011 the Moscow City Court upheld the District Court's judgment, endorsing its reasoning in a summary fashion.

B. Relevant domestic law and practice

1. Entry and Leave Procedures Act (no. 114-FZ of 15 August 1996)

Section 2 provides that the right of a Russian citizen to leave the Russian Federation may only be restricted on the grounds of, and in accordance with, the procedure set out in the Act. Section 15(1) provides that the right of a Russian national to leave the Russian Federation may be temporarily restricted if he or she has had access to especially important or top-secret information classified as a State secret and has signed an employment contract providing for a temporary restriction on his or her right to leave the Russian Federation. In such cases the restriction is valid until the date set out in the contract, but for no longer than five years from the date the person last had access to especially important or top-secret information. The Interagency Commission for the Protection of State Secrets can extend this period up to a maximum of ten years.

2. The State Secrets Act (no. 5485-1 of 21 July 1993)

The granting of access to State secrets presupposes the consent of the person concerned to partial and temporary restrictions on his or her rights in accordance with section 24 of the Act (section 21).

The rights of persons who have been granted access to State secrets may be restricted. The restrictions may affect their right to travel abroad during the period stipulated in the work contract, their right to disseminate information about State secrets and their right to respect for their private life (section 24).

C. Relevant Council of Europe documents

The relevant part of Opinion no. 193 (1996) on Russia's request for membership of the Council of Europe, adopted by the Parliamentary Assembly on 25 January 1996 (7th Sitting), reads as follows:

“10. The Parliamentary Assembly notes that the Russian Federation shares fully its understanding and interpretation of commitments entered into ... and intends:

...

xv. to cease to restrict – with immediate effect – international travel of persons aware of state secrets, with the exception of those restrictions which are generally accepted in Council of Europe member States ...”

D. Situation in the Council of Europe Member States

The laws of the founding members of the Council of Europe have not restricted the right of their nationals to go abroad for private purposes since the inception of the organisation. The Schengen Agreement, which was originally signed on 14 June 1985 by five States and has, to date, been implemented by twenty-five States, has removed border posts and checks in much of the Western part of Europe and abolished any outstanding restrictions on European travel.

Many other Contracting States, including, in particular, the former Socialist countries, repealed restrictions on international travel by persons having knowledge of “State secrets”, a common legacy of the Socialist regime, during the process of democratic transition (for example, Estonia, Georgia, Hungary, Latvia, Lithuania and Poland). Among the Council of Europe States, with the exception of Russia, Azerbaijan was the last to abolish such a restriction in December 2005. Nevertheless, three member States (Armenia, Azerbaijan and Ukraine) provide for temporary restrictions on permanent emigration – but not on international travel for private purposes – for persons who have had access to State secrets.

E. Relevant United Nations documents

Article 12 of the International Covenant on Civil and Political Rights (“ICCPR”), to which the Russian Federation is a party, defines the right to freedom of movement in the following terms:

“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.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

General Comment No. 27: Freedom of movement (Article 12), adopted by the Human Rights Committee under Article 40 § 4 of the ICCPR on 2 November 1999 (CCPR/C/21/Rev.1/Add.9), reads as follows:

“1. Liberty of movement is an indispensable condition for the free development of a person ...

2. The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

...

8. Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration ...

...

9. ... Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere ...

...

11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted ...

...

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

...

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of State secrets ...”

COMPLAINTS

Application form of 5 June 2010

The applicant complains under Article 4 of the Convention that he has been forced to continue his military service against his will because he has remained “at the disposal” the head of the Chief Operative Department.

The applicant complains under Articles 6 § 1 and 13 of the Convention that the appeal court misinterpreted the law in the housing proceedings and that he did not have any other effective remedy.

Application form of 15 February 2012

The applicant complains under 2 § 2 of Protocol No. 4 that he was refused a travel document which would have permitted him to go abroad for private purposes. He refers to the Court’s established case-law in cases *Bartik v. Russia* (no. 55565/00, ECHR 2006-XV) and *Soltysyak v. Russia* (no. 4663/05, 10 February 2011).

The applicant also alleges that the Presnenskiy District Court did not have jurisdiction to examine his claim which amounted to a breach of Article 6 of the Convention.

QUESTIONS TO THE PARTIES

1. Having regard to the principles established in the Court's judgment concerning the right of Russian nationals to leave their own country (see *Bartik v. Russia*, no. 55565/00, ECHR 2006-XV, and *Soltysyak v. Russia*, no. 4663/05, 10 February 2011), was there a violation of the applicant's right guaranteed under Article 2 § 2 of Protocol No. 4?

2. Do the cases concerning the restriction on the right of Russian nationals to go abroad for private purposes on account of their previous awareness of State secrets reveal the persistence of the structural problem which was highlighted in the previous Court's judgments and which Russia had undertaken to eliminate in its accession commitments adopted in 1996? Does this situation amount to "a practice incompatible with the Convention" (see *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V)?