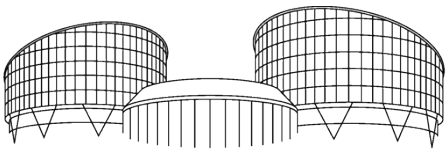

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GORFUNKEL v. RUSSIA

(Application no. 42974/07)

JUDGMENT

STRASBOURG

19 September 2013

FINAL

19/12/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Gorfunkel v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 27 August 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 42974/07) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Israeli national, Mr Boris Abramovich Gorfunkel ("the applicant"), on 22 August 2007.

2. The applicant was represented by Mr N. Glazychev, a lawyer practising in the Pskov Region. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained of the quashing in supervisory-review proceedings of a binding and enforceable judgment delivered in his favour.

4. On 2 December 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Judgment in the applicant's favour and its quashing on supervisory review

5. The applicant was born in 1928 and lives in Bene Ayish, Israel.

6. In 1990 the applicant emigrated from the USSR to Israel and thereby lost the USSR nationality. Prior to emigrating, he had been receiving an old-age pension from the Soviet authorities. Once the applicant left the USSR, the payments were discontinued in accordance with USSR pensions law as applied at the material time.

7. In 2006 the applicant brought civil proceedings against the Pension Fund of the Russian Federation ("the Pension Fund") seeking the restoration of the payment of his old-age pension.

8. On 26 May 2006 the Velikiye Luki Town Court found in the applicant's favour and ordered the Pension Fund to restore pension payments to him as from 15 June 1998. The court found, *inter alia*, that although the pension had initially been awarded in accordance with USSR legislation, that legislation remained applicable in the Russian Federation. The court interpreted the relevant legal provisions in the light of the Constitutional Court's judgment of 15 June 1998. On 1 August 2006, the Pskov Regional Court upheld this judgment on appeal and it became final.

9. However, on 16 March 2007, following a request lodged by the Pension Fund, the Presidium of the Pskov Regional Court quashed the final judgment by way of supervisory review and rejected the applicant's claim. The Presidium relied on the following facts: the applicant was not a Russian citizen, he did not reside in Russia, and no pension had been awarded to him in the Russian Federation in accordance with its legislation. The Presidium concluded that there was no basis under domestic law for pension payments to be awarded to the applicant.

B. Judgment of the Court in respect of the applicant's wife

10. The applicant's spouse, Mrs Lyubov Gorfunkel, faced a legal problem identical to that raised by the applicant in the present case: a judgment of the Velikiye Luki Town Court of 26 May 2006, which ordered the Pension Fund to restore her pension payments, was upheld by a final decision of the Pskov Regional Court on 1 August 2006. Both decisions were quashed on supervisory review by a decision of the Presidium of the Pskov Regional Court of 13 April 2007. Mrs Gorfunkel filed a complaint with the Court, which joined her application with nineteen similar applications in the case of *Tarnopolskaya and Others v. Russia* (nos. 11093/07 et al., 7 July 2009, final on 28 June 2010). The Court found a violation of Article 6 of the Convention and of Article 1 of Protocol No. 1 to the Convention in respect of all twenty applicants on account of the quashing of the judgments in their favour by way of supervisory review. Mrs Gorfunkel did not claim any award in respect of pecuniary damage. The Court awarded each applicant 3,000 euros (EUR) in respect of non-pecuniary damage.

11. The Court's judgment in the case of *Tarnopolskaya and Others v. Russia* served as a legal basis for the quashing of the decision of the Presidium of the Pskov Regional Court of 13 April 2007 and the reinstatement of the judgment of the Velikiye Luki Town Court of 26 May 2006.

C. Ruling of the Velikiye Luki Town Court of 26 January 2011 in respect of the applicant's wife

12. On an unspecified date the Federal Bailiff Service asked the Velikiye Luki Town Court to explain whether Mrs Gorfunkel's pension had to be recalculated in accordance with amendments to pensions legislation.

13. By a ruling of 26 January 2011 the Velikiye Luki Town Court explained that Mrs Gorfunkel's pension was to be calculated according to a method that would take into account all recalculations and adjustments that had taken place after 15 June 1998 in accordance with Russian law. In particular, the court found as follows:

> "... during the period of time from 20 May 1990 until now the amount of pension due to Mrs Gorfunkel, as well as to other pensioners, has been repeatedly changed for various reasons, one of them having been amendments to pensions legislation ...
>
> ... Restoration of pension payments for Mrs Gorfunkel in the amount set in 1990 cannot meet the generally recognised legal principles of equality and justice, and, with regard to the position of the European Court of Human Rights based on the provisions of Article 1 of Protocol No. 1 ..., would violate Mrs Gorfunkel's right to respect for her property.
>
> Taking the above-mentioned [factors] into consideration, the court deems it proper to explain that ... the writ of execution [which orders the Pension Fund to restore pension payments to Mrs Gorfunkel as from 15 June 1998], with due regard to the generally recognised legal principles of justice and equality, provides for the necessity of paying Mrs Gorfunkel a pension in the amount that would have been due to her on 15 June 1998, taking into account the recalculations, indexation and corrections that have been carried out since ... the pension was awarded to her on 20 May 1990 ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. For the relevant provisions on the payment of pensions to those who left the USSR and the Russian Federation, see *Tarnopolskaya and Others,* cited above, §§ 18-26.

THE LAW

I. THE GOVERNMENT'S REQUEST TO STRIKE OUT THE APPLICATION UNDER ARTICLE 37 OF THE CONVENTION

15. On 26 March 2012 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They therefore requested that the Court strike out the application in accordance with Article 37 of the Convention.

16. In that declaration the Government acknowledged the violation of the applicant's rights on account of the quashing of the judgment of the Velikiye Luki Town Court of 26 May 2006 by way of supervisory review. The Government undertook to pay the applicant EUR 3,000 in respect of non-pecuniary damage and 21,368.30 Russian roubles (RUB) as compensation for pecuniary damage, plus any tax that may be chargeable on those amounts.

17. According to the Government, the calculation of pecuniary damage was carried out on the basis of the arrears resulting from the non-enforcement of the judgment of the Velikiye Luki Town Court of 26 May 2006 prior to its quashing on 16 March 2007. This amount had constituted RUB 13,866.53 and had been calculated on the basis of the monthly pension payment of RUB 132 which was payable as of 15 June 1998. This sum had been index-linked in line with inflation. Consequently, the total amount of compensation for pecuniary damage offered by the Government constituted RUB 21,368.30.

18. The rest of the declaration read as follows:

> "The sum referred to above, which is to cover any pecuniary and non-pecuniary damage as well as costs and expenses, will be free of any taxes that may be applicable. It will be payable within three months from the date of notification of the decision taken by the Court pursuant to Article 37 § 1 of the European Convention on Human Rights. In the event of failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it from expiry of that period until settlement, at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points."

19. By letter of 26 April 2012 the applicant agreed with the declaration with respect to non-pecuniary damage. As to pecuniary damage, the applicant expressed the view that the sum proposed in the Government's declaration was unacceptably low and did not take into account pension recalculations, indexations and adjustments which had taken place since 15 June 1998. According to the applicant's calculations, the sum due for pecuniary damage was RUB 159,763.21. The applicant argued that this method of calculation was compatible with the Court's case-law. In

particular, he relied upon the just satisfaction for pecuniary damage awarded in *Tarnopolskaya and Others,* cited above.

20. The Court considers that, under certain circumstances, it may be appropriate to strike out an application under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration by the respondent Government, even if the applicant wishes the examination of the case to be continued. It will, however, depend on whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*; see also *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, § 75, ECHR 2003-VI; *Seleckis v. Latvia* (dec.), no. 41486/04, § 21, 2 March 2010; and the case-law cited therein).

21. Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the course of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at hand. Whether the facts are in dispute between the parties may also be important, and, if they are, to what extent, and what prima facie evidentiary value is to be attributed to the parties' submissions on the facts. In that connection, whether the Court has already taken evidence in the case for the purposes of establishing the facts will be of significance. Other relevant factors may include the question of whether in their unilateral declaration the respondent Government have made any admission(s) in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which they intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation (as, for example, in certain categories of property cases) and where the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application – the Court, as always, retaining its power to restore the application to its list as provided in Article 37 § 2 of the Convention and Rule 44 § 5 of the Rules of Court (see *Tahsin Acar*, cited above, §76).

22. The foregoing list is not intended to be exhaustive. Depending on the particular circumstances of each case, it is conceivable that further considerations may come into play in the assessment of a unilateral declaration for the purposes of Article 37 § 1 (c) of the Convention (see *Melnic v. Moldova*, no. 6923/03, §§ 24 and 25, 14 November 2006).

23. The Court also observes, as it has previously stated (see *Tahsin Acar*, cited above, §§ 74-77), that a distinction must be drawn between, on the one hand, declarations made in the course of strictly confidential friendly-settlement proceedings and, on the other, unilateral declarations – such as the present declaration – made by a respondent Government in

public and adversarial proceedings before the Court, as in the present case. The Court will therefore proceed to examination of the Government's unilateral declaration in the light of the applicable Convention principles set out above (see paragraphs 20-22).

24. The Court observes, on the one hand, that the Government explicitly acknowledged a violation of the Convention on account of the quashing of the binding and enforceable judgment in the applicant's favour. In consequence, they offered a sum of compensation for non-pecuniary damage which is in line with Court's awards in the similar case of *Tarnopolskaya and Others,* cited above, § 57.

25. On the other hand, as the applicant pointed out, the amount of compensation for pecuniary damage proposed by the Government is not compatible with the amounts of compensation for pecuniary damage awarded to the applicants by the Court in similar comparable cases (see *Tarnopolskaya and Others*, cited above, § 54, and *Eydelman and other "Emigrant pensioners" v. Russia*, nos. 7319/05 et al., § 46, 4 November 2010). The applicant disagreed with the Government's calculation of compensation for pecuniary damage on the basis of his monthly pension as of 15 June 1998, which was RUB 132. He contended that the total amount should have been calculated taking into account all recalculations and adjustments that had taken place between 15 June 1998 and 16 March 2006 in accordance with Russian law.

26. The Court notes that whereas in *Tarnopolskaya and Others* the Government did not object to the method of calculation of the amounts of compensation for pecuniary damage suggested by the applicants (see §§ 48 and 54), it came up with a radically different method of calculation in the present case. In these circumstances, and given in particular that the applicant's method of calculation has already been upheld by the Court's final judgments cited above, it is difficult for the Court to accept a radical difference in treatment between the applicant in the present case and those in other similar cases.

27. The Court's doubts about the adequacy of the compensation offered by the Government in respect of pecuniary damage are further supported by the ruling of the Velikiye Luki Town Court delivered on 26 January 2011 in the applicant's wife's case (see paragraph 13 above). In that case, the domestic court upheld her method for the calculation of pecuniary damage arising from the pension arrears. The position taken by the domestic court in the case of Mrs Gorfunkel, which is very similar to the present case, weighs heavily in the Court's assessment.

28. In view of the above elements the Court is not satisfied that the compensation offered by the Government in respect of pecuniary damage constitutes adequate and sufficient redress for the violations of the applicant's rights under the Convention. It follows that the Government's declaration, while acknowledging the violations of the Convention, fails to

ensure respect for human rights as defined in the Convention and thus compels the Court to continue its examination of the application.

29. This being so, the Court rejects the Government's request to strike the application out under Article 37 of the Convention and will examine the admissibility and merits of the case.

II. ALLEGED VIOLATION OF ARTICLE 6 AND ARTICLE 1 OF PROTOCOL No. 1 ON ACCOUNT OF THE QUASHING OF THE JUDGMENT IN THE APPLICANT'S FAVOUR

30. The applicant complained that the quashing by way of supervisory review of the binding and enforceable judgment in his favour had violated the principle of legal certainty and, therefore, his "right to a court" guaranteed by Article 6. He also complained in substance that Article 1 of Protocol No. 1 had also been violated. The relevant provisions read as follows:

Article 6 § 1

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

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 ..."

A. Admissibility

31. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

32. The Court reiterates that legal certainty, which is one of the fundamental aspects of the rule of law, presupposes respect for the principle of *res judicata*, that is, the principle of the finality of judgments. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Ryabykh*

v. Russia, no. 52854/99, §§ 51-52, ECHR 2003-IX), such as the need to correct a fundamental error (see *Protsenko v. Russia*, no. 13151/04, §§ 31-33, 31 July 2008).

33. The Court has to assess whether the quashing of the final judgment by way of supervisory review was indeed justified by such circumstances (*Kuzmina v. Russia,* no. 15242/04, § 23, 2 April 2009).

34. In the present case the final judgment was quashed on the grounds that the lower court had erred in law. According to the Court's settled case-law, the fact that the Presidium disagreed with the interpretation of substantive law made in the lower court's final judgment was not, in itself, an exceptional circumstance warranting the quashing of the binding and enforceable judgment and a reopening of the proceedings on the applicant's claim (see *Kot v. Russia*, no. 20887/03, § 29, 18 January 2007). No other reasons for the quashing of the final judgment were relied upon by the higher court (see paragraph 9 above).

35. The foregoing considerations are sufficient to enable the Court to conclude that in the present case there were no circumstances justifying a departure from the principle of legal certainty.

36. The Court further reiterates that the binding and enforceable judgment, though it did not indicate the sums to be paid, unconditionally ordered the Pension Fund to restore the pension payments which had previously been made. The judgment was thus specific enough to create an asset within the meaning of Article 1 of Protocol No. 1 (see *Vasilopoulou v. Greece*, no. 47541/99, § 22, 21 March 2002, and *Malinovskiy v. Russia*, no. 41302/02, § 43, ECHR 2005-VII (extracts)). The quashing of this judgment in breach of the principle of legal certainty frustrated the applicant's reliance on a binding judicial decision and deprived him of an opportunity to receive a judicial award he had legitimately expected to receive (see *Dovguchits v. Russia*, no. 2999/03, § 35, 7 June 2007). There has accordingly also been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 2 §§ 2 AND 3 OF PROTOCOL No. 4 TO THE CONVENTION

37. The applicant also complained under Article 2 §§ 2 and 3 of Protocol No. 4 to the Convention that the authorities had restricted his right to leave his own country by holding that his right to receive a pension depended on his place of residence. Article 2 §§ 2 and 3 of Protocol No. 4 provide as follows:

> "2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of [this right] 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 ..."

38. The Court observes that the measure complained of was not a restriction "placed on the exercise of" the applicant's right to leave his country. The applicant left Russia voluntarily in 1990, and there is nothing in the case file suggesting that he encountered any practical or legal difficulties in emigrating. Rather, the measure in issue represented a consequence of the exercise of the right to leave one's own country. Therefore, in the light of all the material in its possession, and in so far as the matter complained of is within its competence, the Court finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

39. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

41. The applicant claimed 159,763.21 Russian roubles (RUB) in respect of pecuniary damage. According to his calculation, this was the sum of arrears of pension payments that should have been paid for the period from 15 June 1998 to 16 March 2007 in accordance with the domestic judgment of the Velikiye Luki Town Court dated 26 May 2006, which had been quashed in violation of the Convention. The method of calculation used by the applicant took into consideration all amendments to pensions legislation that had taken place after 15 June 1998.

42. The amount of compensation offered by the Government for pecuniary damage in its unilateral declaration was substantially lower than that claimed by the applicant. They offered the applicant RUB 21,368.30, plus any tax that might be chargeable on that amount. This sum was calculated on the basis of the pensions legislation in force as of 15 June 1998, and was index-linked in line with inflation without taking account of the amendments to pensions legislation enacted after 15 June 1998.

43. The Court reiterates that in general the most appropriate form of redress in respect of violations found is to put applicants as far as possible

in the position they would have been in if the Convention requirements had not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85; and, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; and also *Dovguchits*, cited above, § 48).

44. In the instant case, the Court has found a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 arising from the fact that the judgment in the applicant's favour was quashed by way of supervisory review. Insofar as the applicant did not receive the money he had legitimately expected to receive under this final judgment in the period until it was quashed, there is a causal link between the violations found and the applicant's claim in respect of pecuniary damage. The parties agree on the fact that the violations of the Convention took place, and the pecuniary damage sustained should be compensated. However, they dispute the amount of compensation to be paid and the method to be used for its calculation.

45. The Court observes that the applicant's method of calculation of the pension arrears is in line with the Court's judgments in similar cases (see paragraph 25 above). This method, which takes into account all amendments to Russian pensions legislation, was used by the applicants in those similar cases and gave rise to no objections from the Government (see *Tarnopolskaya and Others*, cited above, §§ 48 and 54). In the present case, the Government changed their position and suggested a radically different method of calculation without any convincing explanation as to why it should be considered preferable. The Court is not prepared to accept the Government's position and therefore accepts the applicant's submissions on this point for the reasons outlined above (see paragraphs 25-28 above).

46. Therefore, the Court awards the applicant the equivalent of RUB 159,763.21 claimed by the applicant, namely 3,717 euros (EUR) in respect of pecuniary damage.

47. As far as non-pecuniary damage is concerned, the applicant claimed EUR 3,000 in this respect. The Court notes that the same amount was offered by the Government to compensate non-pecuniary damage in its unilateral declaration. The Court accepts that the applicant must have suffered non-pecuniary damage as a result of the violations found which cannot be compensated by the mere finding of a violation. Having regard to the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant the sum of EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

48. The applicant did not claim any award in respect of costs and expenses.

C. Default interest

49. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,UNANIMOUSLY,

1. *Rejects* the Government's request to strike the application out of its list of cases;

2. *Declares* the complaint regarding the quashing of the judgment of the Velikiye Luki Town Court of 26 May 2006 admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 of the Convention and of Article 1 of Protocol No. 1;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
      (i) EUR 3,717 (three thousand seven hundred and seventeen euros) in respect of pecuniary damage, and
      (ii) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 19 September 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President