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

FIFTH SECTION

CASE OF NEDELCHO POPOV v. BULGARIA

(Application no. 61360/00)

JUDGMENT

STRASBOURG

22 November 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nedelcho Popov v. Bulgaria,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 61360/00) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the Bulgarian national Mr Nedelcho Miloshev Popov, who was born in 1943 and lives in Sofia ("the applicant"), on 10 April 2000.

2. The applicant was represented before the Court by Ms E. Tancheva, a lawyer practising in Sofia.

3. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

4. The applicant alleged that he was denied access to a tribunal competent to examine all issues relevant to whether he had been unfairly dismissed.

5. On 20 May 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

6. On 20 June 2007 the Court decided that the parties should be invited to submit further written observations on the admissibility and merits of the application in the light of the recent judgment in the case of *Vilho Eskelinen and Others v. Finland* [GC] (no. 63235/00, 19 April 2007).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's employment

7. The applicant entered the employment of the Council of Ministers on 1 March 1991 as an "Adviser" in its "Local administration and regional policy" department. Subsequently, he was promoted to the post of "Chief Adviser" in the same department. The applicant's employment obligations included, *inter alia*, (a) providing expert advice relating to the preparation of draft legislation and (b) preparing opinions on such texts. He was also involved in providing technical assistance for organising national and municipal elections.

8. The applicant's employment contract was initially for an indefinite term. With an amendment of 22 February 1997 it was changed into a fixed term contract set to expire on 31 March 1997. The term of the said agreement was extended twice, the final term having been until 30 June 1997. The applicant's remuneration under the last agreement was 302,500 old Bulgarian levs (approximately 349 German marks at the relevant time).

9. Following the expiration of the applicant's employment agreement on 30 June 1997 he continued going to work and fulfilling his employment obligations without any objections from his employer. The applicant considered therefore that his contract had been transformed into an employment agreement for an indefinite term (see paragraph 17 below).

B. The applicant's dismissal

10. On 29 July 1997 the applicant was served with an order, dated 28 July 1997, for terminating his employment agreement as of 30 July 1997. The order was signed on behalf of the Minister of State Administration, instead of the Chief Secretary of the Council of Ministers, which was the competent officer, according to the applicant, in employment matters. The basis for terminating the employment agreement was the expiration of its term.

C. The applicant's appeals against his dismissal

11. On 21 September 1997 the applicant addressed a request to the Prime Minister petitioning him to reconsider the dismissal and to reappoint him. He received no response to his request.

1. Administrative proceedings

12. On 26 March 1998 the applicant initiated an action under the Administrative Procedure Act. He petitioned the court to declare the order for his dismissal null and void and to award him compensation for loss of income.

13. The administrative proceedings went through two levels of jurisdiction. With a final decision of 30 October 1998 the extended panel of the Supreme Administrative Court rejected the applicant's action. The courts found that the order for his dismissal was not an administrative act of the type that could be challenged under the Administrative Procedure Act and that he should have initiated a civil action instead.

2. Civil proceedings

14. In the meantime, on 14 July 1998 the applicant initiated civil proceedings. He petitioned the courts to recognise the continued existence of an employment agreement, to declare the order for his dismissal null and void, to order that he be granted access to his workplace and to award him compensation for loss of income during the time he had been denied such access.

15. With a final decision of 19 October 1999 the Supreme Court of Cassation rejected all but one of the applicant's claims – for loss of income during the period he was denied access to his workplace. In respect of the other claims, the courts found that the applicant should instead have initiated an action for unfair dismissal under Article 344 of the Labour Code (the "Code") and should have done so prior to the expiration of the six-month statutory deadline on 30 January 1998. The courts recognised that prior to the judgment of the Constitutional Court of 30 April 1998 the applicant had been barred under Article 360 § 2 (2) of the Code from initiating such an action for unfair dismissal. However, they reasoned that if he had nevertheless initiated such an action, the courts before which the case would have been pending on 30 April 1998 might have taken into account the judgment of the Constitutional Court and might have examined the case on the merits.

16. The remainder of the applicant's civil action, in respect of his claim for loss of income during the period he was denied access to his workplace, was examined by three levels of jurisdiction. With a final judgment of 25 September 2003 the Supreme Court of Cassation dismissed the applicant's claim. The courts found that in so far as the dismissal of the

applicant had never been proven to be unfair in any other set of proceedings, there was no obligation on the part of his previous employer to grant him access to his former workplace after 30 July 1997 and, therefore, that it was not liable to pay him compensation for loss of income for having failed to do so. The Supreme Court of Cassation recognised that the applicant had not been afforded the right to challenge his dismissal prior to the judgment of Constitutional Court but reasoned that he had been aware of that restriction at the time he entered Government employment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Labour Code

17. Article 69 § 2 of the Code provides that an employment contract concluded for a fixed term shall be transformed into a contract for an indefinite term if (a) the employee continues working for five or more working days after the expiration of the term under the fixed term contract, (b) without the employer making a written objection and (c) provided the position is vacant.

18. Article 358 § 1 (2) of the Code provides that actions for unfair dismissal have to be initiated within six months of the date of termination of the employment agreement.

19. Article 360 § 2 (2)(a) of the Code provided, at the relevant time, that the domestic courts did not have jurisdiction to review disputes regarding dismissals from certain posts in the Council of Ministers, including, *inter alia*, the posts of "Chief Adviser, ... Principal Adviser, Adviser".

20. In a judgment of 30 April 1998 (State Gazette no. 52/98) the Constitutional Court declared unconstitutional the restriction of Article 360 § 2 (2)(a) of the Code in respect of, *inter alia*, the posts of "Chief Adviser, ... Principal Adviser, Adviser". The court found the said restriction to be contrary not only to the Bulgarian Constitution but to a number of international conventions and charters to which the State was party, including specifically Article 6 § 1 of the Convention in respect of the right to a fair trial. The finding of the Constitutional Court did not have a retroactive effect, but was allegedly applied in practice to unfair dismissal proceedings pending before the domestic courts.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

21. The applicant complained that he was denied access to a tribunal competent to examine all issues relevant to whether he had been unfairly dismissed as guaranteed by Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. The parties' submissions

1. Government

22. In their initial observations the Government, relying on the Court's judgment in the case of *Pellegrin v. France* ([GC], no. 28541/95, ECHR 1999-VIII), argued that the applicant's complaint was incompatible *ratione materiae* with the provisions of the Convention as it considered him to have been a civil servant "whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities" (ibid., § 66).

23. In their supplementary observations the Government maintained their argument that the applicant's complaint was incompatible *ratione materiae* with the provisions of the Convention in view of the post he had held. They claimed that as Chief Adviser in the "Local administration and regional policy" department he had been directly involved in the preparation and adoption of normative acts by the Council of Ministers and had been influential in the formulation and implementation of the State's regional policy. Accordingly, the Government considered that the dispute did not involve the determination of his civil rights within the meaning of Article 6 of the Convention. Additionally, they argued that the applicant's special bond of trust and loyalty with the authorities had been severed after the election in 1997 of a government different from the one that had appointed him in 1991.

24. In their initial observations the Government also raised an objection of non-exhaustion. Based on the findings of the domestic courts they argued that, in spite of the existing restriction at the relevant time, the applicant should have initiated an action for unfair dismissal prior to the judgment of the Constitutional Court which might have been examined on the merits had it been pending before the lower courts. In support of their argument, they claimed that the applicant should have anticipated the possible finding in his favour of the Constitutional Court as he should have been aware that part of the relevant provision of the Code had been declared unconstitutional in a previous case and that a second case was pending before the said court when he had been dismissed. Alternatively, the Government considered that the applicant should have attempted to expand the scope of the other proceedings he later initiated by, for example, petitioning the courts to examine an action for unfair dismissal within those sets of proceedings.

25. On the merits, the Government agreed that prior to 30 April 1998 the order for the applicant's dismissal could not be challenged before the domestic courts. However, they considered this to have been in conformity with the Convention and the case-law developed by the Court. In addition, the Government noted that the applicant must have been aware of the aforesaid restriction when he started his employment and that he had therefore consented to it. In spite of this, he initiated a number of unsuccessful actions which the domestic courts examined fairly and exhaustively.

2. Applicant

26. In his initial observations the applicant objected to the Government's reliance on the *Pellegrin* criterion. He noted that they failed to present a job description for the post he had held and argued that his functions did not "wield a portion of the State's sovereign power". Thus, he considered Article 6 of the Convention applicable.

27. In his supplementary observations the applicant, relying on the judgment in the case of *Vilho Eskelinen and Others* (cited above), considered Article 6 of the Convention applicable. He argued that only one of the conditions specified in paragraph 62 of the said judgment had been met at the time he had been dismissed from service – the State in its national law had expressly excluded access to a court for the post he had held because Article 360 § 2 (2) of the Code precluded challenging the dismissal of a "chief adviser". The applicant further argued that the second condition could not be considered to have been met – that the above restriction was justified on objective grounds in the State's interest. He noted in this respect the judgment of 30 April 1998 of the Constitutional Court which declared unconstitutional the said restriction when it found it to be contrary not only to the Bulgarian Constitution but to a number of international conventions

and charters to which the State was party, including specifically Article 6 § 1 of the Convention in respect of the right to a fair trial.

28. In his initial observations the applicant challenged the Government's objection of non-exhaustion and asserted that at the time of his dismissal he was barred from initiating an action for unfair dismissal by virtue of Article 360 § 2 (2)(a) of the Code. Accordingly, he did not initiate such an action not because he did not want to or failed to do so, but because he was restricted from doing so under domestic legislation as it stood prior to 30 April 1998. Subsequent to that date, such an action was time-barred so he could not have petitioned the domestic courts to examine it in any of the other sets of proceedings either.

29. On the merits, the applicant noted that the Government had consented that at the time of his dismissal there was a statutory restriction in place which denied him the opportunity to challenge it before the domestic courts. As to its justification, he referred to the findings of the Constitutional Court that the said restriction was contrary not only to the Bulgarian Constitution but to a number of international conventions and charters to which the State was party, including specifically Article 6 § 1 of the Convention in respect of the right to a fair trial.

B. Admissibility

1. The Government's objections

30. The Government, essentially relying on *Pellegrin*, argued that the complaint brought by the applicant was outside the scope of Article 6 of the Convention as it related to his dismissal from service as a civil servant of the State. They also raised an objection of non-exhaustion.

31. The Court observes that in the *Pellegrin* judgment it attempted to establish an autonomous interpretation of the term "civil service" and introduced a functional criterion based on the nature of the employee's duties and responsibilities. However, in its recent judgment in the case of *Vilho Eskelinen and Others* (cited above), the Court found that the functional criterion, adopted in the *Pellegrin* judgment, did not simplify the analysis of the applicability of Article 6 of the Convention in proceedings to which a civil servant was a party or brought about a greater degree of certainty in this area as intended (ibid., § 55). For these reasons the Court decided to further develop the functional criterion set out in *Pellegrin* and adopted the following approach:

> "... in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.

> The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in the *Pellegrin* judgment, a "special bond of trust and loyalty" between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified." (ibid., § 62)

32. Turning to the present case, the Court notes that the criterion introduced in the *Vilho Eskelinen and Others* judgment in respect of its competence *ratione materiae* – whether a civil-servant applicant has a right of access to a court under national law and, if so, whether any exclusion of this right is justified – relates to and is indistinguishable from the merits of the applicant's complaint that he was denied access to a tribunal competent to examine all issues relevant to whether he had been unfairly dismissed from his post as a civil servant.

33. The same consideration applies to the question of whether the applicant had available a domestic remedy to exhaust.

34. Therefore, to avoid prejudging the merits, these questions should be examined together.

35. Accordingly, the Court holds that the issue of whether the Court is competent *ratione materiae* to examine the applicant's complaint under Article 6 of the Convention and the question of exhaustion of domestic remedies should be joined to the merits.

2. Conclusion

36. The Court finds that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

37. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). However, the right of access to the courts is

not absolute but may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (*Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, § 57).

38. In the present case, it is not disputed by the Government (see paragraph 25 above) that at the time of the applicant's dismissal on 30 July 1997 he did not have a right of access to a court under national law to bring an action for unfair dismissal by virtue of the restriction imposed by Article 360 § 2 (2)(a) of the Code. The said restriction persisted for the six-month term during which the applicant could have initiated such an action and the latter was time-barred by the time it was declared unconstitutional.

39. As to whether the exclusion of the right of access to court was justified in respect of the applicant, the Court refers to the finding of the Constitutional Court in its judgment of 30 April 1998 that the restriction of Article 360 § 2 (2)(a) of the Code in respect of, *inter alia*, the posts of "Chief Adviser, ... Principal Adviser, Adviser", was both unconstitutional and in violation of a number of international conventions and charters to which the State was party, including Article 6 § 1 of the Convention in respect of the right to a fair trial (see paragraph 20 above). Thus, in view of the principle of subsidiarity inherent in the machinery of the Convention, the Court finds that there was no justification for the restriction of the applicant's right of access to a court.

40. In these circumstances and in applying the *Vilho Eskelinen and Others* criterion the Court finds that it is competent *ratione materiae* to examine the present complaint and, furthermore, finds that there has been a violation of the applicant's right of access to a tribunal competent to examine all issues relevant to whether he had been unfairly dismissed, as guaranteed by Article 6 § 1 of the Convention.

It follows that the Government's preliminary objection of failure to exhaust the domestic remedies must be dismissed.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 75,609.12 Bulgaria levs (BGN) or 38,658 euros (EUR) as compensation for the pecuniary damage suffered as a result of his inability to challenge before the domestic court his dismissal and to prove that it had been unfair. The claimed amount represented the difference between the emoluments he would have received for the period up to 31 December 2005, had he been reinstated to his previous post, and the remuneration he actually received holding various other posts over the given period, plus interest. The applicant presented a financial expert's report attesting to the aforesaid amount.

43. The applicant also claimed non-pecuniary damage but asked the Court to determine a fair compensation in this respect.

44. The Government stated that the applicant's claim for pecuniary damage was excessive. They also argued that there was no direct causal link between the alleged violation of his right of access to a court and the compensation claimed.

45. The Court found that the applicant was barred from bringing an action for unfair dismissal by virtue of a statutory restriction for civil-servants to do so at the relevant time, which represented a violation of his right of access to a court under Article 6 §1 of the Convention (see paragraph 40 above). However, it would be speculation to accept that had the applicant had such a right of action and had utilised it that he would undoubtedly have been successful. Thus, the Court cannot find a direct causal link between the violation found and the pecuniary damage sought by the applicant.

46. In respect of non-pecuniary damage, the Court finds that the applicant must undoubtedly have suffered certain anguish and despair from having been unable to challenge his dismissal before a court. It notes, in this respect, his repeated unsuccessful attempts to obtain redress for his Convention complaints by utilising other rights of action available to him under domestic employment legislation. Thus, having regard to the circumstances of the present case and deciding on an equitable basis the Court awards EUR 2,500 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

47. The applicant also claimed BGN 3,000 (approximately EUR 1,540) for 30 hours of legal work by his lawyer in the proceedings before the Court at an hourly rate of EUR 50. In addition, he claimed BGN 1,395.73 (approximately EUR 712.54) for translation, certification and notarisation of documents and for postal expenses. He submitted a legal fees agreement

between him and his lawyer, as well as invoices and receipts for the translations, certifications, notarisations and postal expenses.

48. The Government stated that the applicant's claim for costs and expenses was excessive. Firstly, they noted that the applicant had appointed his lawyer only after the application had been communicated and that he had failed to present a timesheet for the work she had performed. Secondly, they considered that the cost for translation, certification and notarisation of documents for presentation to the Court was not a necessary expense as he could have presented them only in Bulgarian. Thus, they argued that any award in this respect should be reduced accordingly.

49. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession of the expenses incurred and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

50. The Court considers it appropriate that the default interest 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. *Decides* to join to the merits the issue of whether it is competent *ratione materiae* to examine the complaint under Article 6 of the Convention and the question of the exhaustion of domestic remedies;

2. *Declares* the application admissible;

3. *Holds* that it is competent *ratione materiae* to examine the complaint under Article 6 of the Convention and that there has been a violation of the said article as a result of the applicant being denied access to a tribunal competent to examine all issues relevant to whether he had been unfairly dismissed, and accordingly *dismisses* the Government's preliminary objection based on non-exhaustion of domestic remedies;

4. *Holds*
   (a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final according to

Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable on the date of settlement:

(i) EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage;

(iii) EUR 2,000 (two thousand euros) in respect of costs and expenses;

(iv) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President