FIRST SECTION

Application no. 28727/11
Olga Borisovna KUDESHKINA
against Russia

STATEMENT OF FACTS

THE FACTS

The applicant, Ms Olga Borisovna Kudeshkina, is a Russian national who was born in 1951 and lives in Moscow. She was represented before the Court by Ms K. Moskalenko, Ms A. Panicheva and Ms M. Voskobitova, lawyers practising in Strasbourg and Moscow.

A. The circumstances of the case

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

From 6 November 2000 the applicant held judicial office at the Moscow City Court.

In December 2003 the applicant, in series of media interviews, accused higher judicial officials of putting pressure on her in connection with a high-profile criminal case.

On 19 May 2004 the Judicial Qualifications Board of Moscow decided that the applicant's statements had been insulting to the judiciary and had been defamatory as regards the individuals mentioned therein. It found that the applicant had thus committed a disciplinary offence and terminated her office as a judge.

On 8 October 2004 the Moscow City Court upheld the decision of the Judicial Qualifications Board of Moscow. It found that the applicant's statements in the media had been false, unsubstantiated and damaging to the reputation of the judiciary and to the authority of all courts of law. It also established that the applicant had publicly expressed an opinion prejudicial to the outcome of a pending criminal case.

On 19 January 2005 the Supreme Court of the Russian Federation, ruling at final instance, upheld the judgment of 8 October 2004, having confirmed the earlier findings of the lower courts.

On 26 February 2009 the Court adopted a judgment in the case of *Kudeshkina v. Russia*, no. 29492/05, in which it found the applicant's dismissal from the judiciary to have violated her right to the freedom of expression guaranteed by Article 10 of the Convention.

In its judgment, the Court examined the proceedings before the Judicial Qualifications Board of Moscow and the ensuing judicial review. It considered that nothing in the impugned interviews would have justified the authorities' claims of disclosure of confidential information about the pending criminal case. Having noted that the applicant had publicly criticised the conduct of various officials, and had alleged that pressure on judges was common, the Court found that she had undoubtedly raised a very important matter of public interest which had to be open to free debate in a democratic society. It further found that her allegations had not been convincingly dispelled in the domestic proceedings. Even if the applicant had allowed herself a certain degree of exaggeration and generalisation, the Court found that her statements had to be regarded as fair comment on a matter of great public importance.

The Court also found that the disciplinary procedure which imposed a sanction on the applicant had not complied with important procedural guarantees, in particular as regards the impartiality of the Moscow City Court, which had considered her appeal despite the fact that that court's President was implicated in the statements. The Court finally observed that the manner in which the penalty had been imposed was capable of having a "chilling effect" on judges wishing to participate in public debate concerning the effectiveness of judicial institutions and held that it had been disproportionately severe.

The Court concluded that the domestic authorities had failed to strike a fair balance between the need to protect the authority of the judiciary and the protection of the reputation or rights of others, on the one hand, and the need to protect the applicant's right to freedom of expression on the other.

The applicant was awarded EUR 10,000 in respect of non-pecuniary damage.

On 14 September 2009, the Government's request for the case to be referred to the Grand Chamber having been rejected, the judgment became final.

On 11 December 2009 the applicant seized the Moscow City Court with an application to quash the decision of 8 October 2004. Relying on the Court's judgment of 26 February 2009, she sought to have the proceedings concerning her dismissal reopened on the grounds of new or newly discovered circumstances and to have the case transferred to the Supreme Court for fresh examination. She argued that the Code of

Civil Procedure, read in the light of the Code of Commercial Procedure, required a case to be reopened if the Strasbourg Court had found a violation of the Convention on account of domestic judicial decisions taken in a case. She claimed that the finding of a violation of Article 10 as a result of her dismissal from the judiciary constituted a newly discovered circumstance within the meaning of Russian procedural law and that it bound the authorities to reconsider the merits of her case.

On 18 December 2009 the Moscow City Court dismissed the applicant's request. In so far as relevant, it found as follows:

"... in accordance with [Russian] procedural law, not [all] judgments [of the Court] finding a violation of the Convention provide grounds for the review of a judicial decision, but only a judgment finding a violation of the Convention in the course of the adjudication of a particular case.

The Presidium of the Supreme Court ... clarified that a judgment of the [Court] finding a violation of the [Convention] that affects the legal standing of a citizen is considered as an independent basis for the review of the national court's judgment on the matter in relation to which the violation of the Convention was found on the grounds of newly discovered circumstances.

In Recommendation No. R (2000) 2 of the Committee of Ministers ... it is also pointed out that the Contracting Parties are encouraged to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention.

It follows that ... the function of the court deciding on whether to reopen a case on the grounds of newly discovered circumstances is not limited to automatic quashing of the judgment with reference to the [Court's] judgment, but involves the precise identification of the matter examined by the [Court] and its relation to the circumstances taking place in the course of the [domestic] adjudication of the case.

The reason for this is that, in accordance with the general principles set out in the Convention, the exercise of supranational control by the [Court] over [domestic] courts is not absolute, but is limited by the internationally recognised principle of respect for the autonomy of the national courts' judicial decisions.

Accordingly, the [Court's] finding of a violation of the Convention in relation to a particular applicant does not by itself constitute a basis for the review of a judgment taken by the national courts ...

If the [Court] finds a violation of [those] provisions of the Convention that guarantee the general principles of lawfulness in the course of adjudication by national courts, this may provide grounds for the review of domestic judicial decisions in accordance with the procedure provided by law, unless an obstacle of an objective sort prevents it.

If, on the other hand, the [Court] finds a violation of the Convention unrelated to the fundamental guarantees of fair trial ... it may not give grounds for review ... under any rules of procedure because the [Court's finding of a violation] has been [sufficiently] compensated by the mere fact of [its] acknowledgment or by the payment by the State of the just satisfaction award ...

The right to a fair hearing is guaranteed by Article 6 of the Convention.

However, there is no ... indication that the [Court] had declared the [applicant's] complaint admissible under Article 6 of the Convention.

It follows from the [Court's] judgment of 26 February 2009 that the question of [whether] the judicial decisions taken in [her] civil case complied with Article 6 was not originally a subject of the Court's examination.

... [S]he complained ... under Article 10 ... and it was a violation of Article 10, not Article 6, that the [Court] found.

The violation [found by the Court] ... was unconnected with the fundamental guarantees of fair hearing in civil proceedings.

... [T]he conclusions made by the [Court] in paragraph 97 of the judgment ... are general statements concerning [the applicant's] freedom of expression and not her right to a fair hearing.

It follows that the [Court's decision] in the above judgment cannot constitute by itself a ground for the reopening of civil proceedings ...

In [her] request, [the applicant] also claims that under Article 46 of the Convention the High Contracting Parties undertake to abide by final judgments of the Court in any case to which they are parties.

However, such reference to Article 46 of the Convention is incorrect because the review of national courts' decisions on the grounds of newly discovered circumstances does not fall [within the mandatory conditions of enforceability] of the [Court's] judgments.

The operative part of the judgment of 26 February 2009 ... contains no express or implicit indication that the [domestic decision] is subject to review.

However, it is the operative part [of the Court's judgments] that binds the High Contracting Parties under Article 46 of the Convention.

Accordingly [the applicant] is not *a priori* entitled to seek the review of the above judicial decision on the grounds of newly discovered circumstances within the framework of the execution of the judgment of 26 February 2009.

...

... [The just satisfaction award of] 10,000 euros constitutes, under the [Court's] case-law, exhaustive and sufficient just satisfaction ... for the violation found under Article 10 of the Convention because the applicant does not, and cannot, currently suffer any negative effects resulting from the domestic judicial decision on her freedom of expression as defined in Article 10 of the Convention, and her right of freedom of expression is ... not limited at the moment.

...

The judgment of 26 February 2009 does not disclose the existence of any facts of legal significance which [the applicant] had not been aware of during the proceedings in this civil case.

The [Court's] statements in the judgment as to whether the disciplinary penalty imposed on [the applicant] had been an appropriate measure are generalisations of a hypothetical and subjective, discretionary nature; personal opinion; and a debating point. They therefore cannot, in view of the requirement of legal certainty, constitute by themselves grounds for the review of a judicial decision.

...

The [applicant's] request to have the case transferred to the Supreme Court for examination ... must be refused because ... civil procedural law does not permit the first-instance court to decline jurisdiction in favour of another court in respect of a case where a [final] judgment remains in force.

...

The reopening of the proceedings [in order] to review the judgment of the Moscow City Court of 8 October 2004 on the grounds of newly discovered circumstances and the transfer of the civil case to the Supreme Court of the Russian Federation for examination must be refused.

This decision is subject to appeal to the Supreme Court of the Russian Federation, to be filed within 10 days."

The applicant filed an appeal to the Supreme Court, which it dismissed on 10 March 2010, finding, in particular, that the Moscow City Court's decision had taken account of all the material considerations, including the reasons for the courts' earlier findings in her case. It held as follows:

"Account had of all the particular circumstances of the case, [the Supreme Court] cannot not agree with the arguments put forward in Ms Kudeshkina's appeal against this decision of the Moscow City Court and considers that the decision must remain unchanged."

B. Relevant domestic law

The Code of Civil Procedure (in force as of 1 February 2003) contains the following provisions regulating the reopening of civil proceedings after a final judgment on the grounds of newly discovered circumstances:

Article 392. Grounds for reconsideration

"1. [Judgments] which have come into force may be reconsidered on the basis of newly discovered circumstances.

2. The grounds for reconsideration ... shall be:

(1) significant circumstances that were unknown and could not have been known to the applicant;

(4) the annulment of ... a decision of the State authority ... that was the basis for the judgment or decision of the court ..."

Article 394. Lodging of an application

"... [An application for the reconsideration of a [judgment] owing to the discovery of new circumstances] may be lodged by the parties, the prosecutor, or by other persons who participated in the proceedings within three months of the discovery of the new circumstances."

Article 397. Decision on the reconsideration of the case

"1. Following the examination of an application for the reconsideration of a [judgment] owing to the discovery of new circumstances, the court may either grant the application and quash the [judgment], or dismiss the application.

2. A court decision by which an application for the reconsideration of a [judgment] owing to the discovery of new circumstances is granted shall not be subject to appeal.

3. Provided that a [judgment] is quashed, the case shall be examined in accordance with the rules of this Code."

By a ruling of 26 February 2010 the Constitutional Court of Russia indicated that Article 392 of the Code of Civil Procedure should be interpreted as, in principle, allowing the launching of a procedure to have a final judgment re-examined on account of newly-discovered circumstances, such as the finding of a violation of the European Convention in a given case by the European Court of Human Rights.

The Code of Commercial Procedure provides for the reopening of commercial proceedings on the basis of newly discovered circumstances. One of the grounds allowing such reopening is a finding by the European Court of Human Rights that there has been violation of the Convention in the examination of a particular case by a commercial court (Article 311 § 7).

C. Relevant Council of Europe instruments

Recommendation No. R (2000) 2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000, encouraged the Contracting Parties "to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

COMPLAINTS

The applicant complained under Article 10 in conjunction with Article 46 of the Convention that the domestic courts had refused to reopen the proceedings concerning her dismissal from the judiciary, in respect of which the Court had previously found a violation of Article 10, thus committing a new violation of her right to freedom of expression.

She also claimed that the same refusal had constituted a violation of Articles 8 and 13 of the Convention and of Article 1 of Protocol No. 1 to the Convention, in that it had prevented her from reinstatement in her professional activities and from receiving a judicial salary and other benefits.

Finally, she complained under Article 34 of Convention of the Russian authorities' failure to comply with the Court's judgment in her favour.

QUESTIONS TO THE PARTIES

1. Does the Russian law and judicial practice provide for a possibility to have one's case reopened after the Court's finding of a violation of the Convention? Does that apply to the substantive Convention rights, such as those guaranteed by Article 10?

2. Does the present application fall within the Cout's competence *ratione materiae*, in the light of the principles established in the Court's case law (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)* [GC], no. 32772/02, ECHR 2009-...; *Mehemi v. France (no. 2)*, no. 53470/99, ECHR 2003-IV; *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX; *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, 11 May 2010; *Schelling v. Austria* (dec.), no. 46128/07, 16 September 2010; and *Kafkaris v. Cyprus (no. 2)* (dec.), no. 9644/09, 21 June 2011)?

In the affirmative,

3. Has there been a violation of Article 10 of the Convention alone or in conjunction with Article 46 of the Convention, with reference to the Moscow City Court's refusal to reopen the proceedings in the applicant's case?

STATEMENT OF FACTS AND QUESTIONS – KUDESHKINA v. RUSSIA (No. 2)