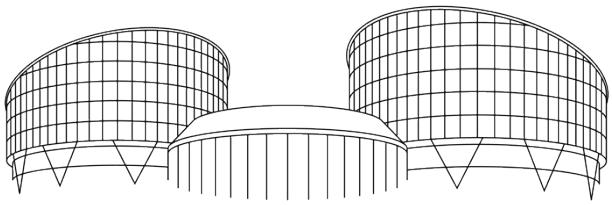

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

CASE OF DANILENKOV AND OTHERS v. RUSSIA

(Application no. 67336/01)

JUDGMENT

This version was rectified on 23 April 2010
under Rule 81 of the Rules of the Court

STRASBOURG

30 July 2009

FINAL

10/12/2009

This judgment may be subject to editorial revision.

In the case of Danilenkov and Others v. Russia,

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

Rait Maruste, *President,*
Renate Jaeger,
Karel Jungwiert,
Anatoly Kovler,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 14 April and 7 July 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 67336/01) 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 thirty-two Russian nationals, listed below ("the applicants"), on 9 February 2001. All the applicants are members of the Kaliningrad branch of the Dockers' Union of Russia ("the DUR").

2. The applicants, who had been granted legal aid, were represented by Mr M. Chesalin, Chairman of the DUR in Kaliningrad seaport. The Russian Government ("the Government") were represented successively by Mr P. Laptev and Mrs V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, that their right to freedom of association and freedom from discrimination had been breached and that they had not had effective domestic remedies in respect of their discrimination complaint.

4. On 19 October 2004 the application was declared admissible.

5. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Court decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are:
(1) Mr Sergey Nikolayevich Danilenkov, born in 1965;
(2) Mr Vladimir Mikhaylovich Sinyakov, born in 1948;
(3) Mr Boris Pavlovich Soshnikov, born in 1951;
(4) Mr Anatoliy Nikolayevich Kasyanov, born in 1958;
(5) Mr Viktor Mikhaylovich Morozov, born in 1947;
(6) Mr Anatoliy Yegorovich Troynikov, born in 1947;
(7) Mr Dmitriy Yurievich Korchazhkin[1], born in 1969;
(8) Mr Yuriy Ivanovich Zharkikh, born in 1970;
(9) Mr Anatoliy Ivanovich Kiselev, born in 1949;
(10) Mr Yuriy Anatolyevich Bychkov, born in 1969;
(11) Mr Aleksandr Igorevich Pushkarev, born in 1961;
(12) Mr Gennadiy Ivanovich Silvanovich, born in 1960;
(13) Mr Ivan Vasilyevich Oksenchuk, born in 1946;
(14) Mr Gennadiy Adamovich Kalchevskiy, born in 1957;
(15) Mr Aleksandr Ivanovich Dolgalev, born in 1957;
(16) Mr Vladimir Fedorovich Grabchuk, born in 1956;
(17) Mr Aleksandr Fedorovich Tsarev, born in 1954;
(18) Mr Aleksandr Yevgenyevich Milinets, born in 1967;
(19) Mr Lukshis Aldevinas Vintso, born in 1955;
(20) Mr Aleksandr Fedorovich Verkhoturtsev, born in 1955;
(21) Mr Igor Nikolayevich Vdovchenko, born in 1966;
(22) Mr Igor Yuryevich Zverev, born in 1969;
(23) Mr Nikolay Grigoryevich Yegorov, born in 1958;
(24) Mr Aleksandr Konstantinovich Lemashov, born in 1955;
(25) Mr Nikolay Nikolayevich Grushevoy, born in 1957;
(26) Mr Petr Ivanovich Mironchuk, born in 1959;
(27) Mr Nikolay Yegorovich Yakovenko, born in 1949;
(28) Mr Yuriy Yevgenyevich Malinovskiy, born in 1971;
(29) Mr Oleg Anatolyevich Tolkachev, born in 1964;
(30) Mr Aleksandr Viktorovich Solovyev, born in 1956;
(31) Mr Aleksandr Mikhaylovich Lenichkin, born in 1936;
(32) Mr Vladimir Petrovich Kolyadin, born in 1954.

7. The applicants are Russian nationals who live in Kaliningrad. The twentieth and thirty-first applicants died on unspecified dates.

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[1] The seventh applicant's name was rectified on 23 April 2010. The former version read "Dmitriy Yurievich Korzhachkin".

A. Background to the application

8. A branch of the Dockers' Union of Russia was established in 1995 in Kaliningrad seaport as an alternative to the traditional Maritime Transport Workers' Union. The branch was officially registered with the Kaliningrad Justice Department on 3 October 1995.

9. The applicants' employer, the private company Kaliningrad Commercial Seaport Co. Ltd. (*ЗАО «Морской торговый порт Калининград»* – "the seaport company"), was established on 30 June 1998 as a result of the reorganisation of the limited company Commercial Seaport of Kaliningrad and was the legal successor to the latter. On 20 July 1998 the Administrative Authority of the Baltiyskiy District of Kaliningrad officially registered the new legal entity. On 25 April 2002 the private company was converted into a public company under the same name (*ОАО «МПТК»*).

10. The applicants indicated that on 4 March 1997 the Governor of the Kaliningrad Region had issued Resolution no. 183 establishing the Kaliningrad Regional Development Fund ("the Fund") and appointing five officials of the Kaliningrad Regional Administrative Authority to its board of management. The Governor himself became the chairman of the board and Mr Karetniy, the first deputy Governor, was appointed Fund manager.

11. According to the applicants, between 1998 and 2000 Mr Karetniy was a member of the board of directors of the seaport company. During that time Mr Karetniy also managed, through a company called Regionk which was controlled by him, a further 35% of the seaport company shares. Thus, the applicants inferred that their employer had at the material time been under the effective control of the State: both directly (20% of shares owned by the Fund) and indirectly (35% of the shares managed by an official of the regional administrative authority).

12. According to the documents submitted by the Government, Kaliningrad seaport had been in private ownership and the Fund had acquired only 19.93% of its shares (0.09% in May 1997 and 19.84% in May 1998); therefore it could not be said that the State had effective control over its activity. Moreover, the seaport company's shares held by the Fund had been transferred on 28 November 2000 to the joint-stock company Zemland Eskima (*ЗАО «Земланд Эскима»*). With regard to Mr Karetniy, the Government submitted that he had been a member of the board of directors of the seaport company; however at that time he had not been a civil servant. The applicants' allegation that he controlled Regionk was not supported by any evidence. They further alleged that the extent of effective State control had been limited to monitoring the company's compliance with the applicable laws.

B. Alleged discrimination by the seaport management

13. In May 1996 the DUR took part in collective bargaining. A new collective labour agreement was signed, which provided for longer annual leave and better pay conditions. As a result, over a period of two years DUR membership grew from eleven to 275 (on 14 October 1997). The applicants stated that Kaliningrad seaport employed over 500 dockers at the material time.

14. On 14 October 1997 the DUR began a two-week strike over pay, better working conditions and health and life insurance. The strike failed to achieve its goals and was discontinued on 28 October 1997.

15. The applicants submitted that since 28 October 1997 the management of Kaliningrad seaport had been harassing DUR members to penalise them for the strike and incite them to relinquish their union membership.

1. Reassignment of DUR members to special work teams

16. On 28 October 1997 the managing director of Kaliningrad seaport issued an order whereby two special work teams (nos. 109 and 110), referred to as "dockers' reserve teams", with a staff capacity of up to forty workers each, were formed. These teams had originally been created for older or health-impaired dockers who could not perform at full capacity. They had had insufficient numbers of workers (six persons compared with fourteen to sixteen persons in other work teams) to handle cargo and, after their merger into one team (no. 109), they had been assigned to work in day shifts lasting eight hours, while other teams worked alternating day and night shifts of eleven hours. Under the terms of the order of 28 October 1997, older and health-impaired dockers were transferred to a newly formed team, no. 117, and the majority of dockers who had taken part in the strike were assigned to the re-formed "reserve teams", nos. 109 and 110.

17. According to the applicants, their earning time was substantially reduced as a result of their transfer to "reserve teams" assigned to work day shifts only. In late November 1997 the managing director attempted to encourage their co-workers to relinquish their DUR membership by immediately transferring those who left the union into non-DUR teams which had access to actual cargo-handling work.

18. On 1 December 1997 the new composition of the teams was made official and the managing director ordered the teams to be re-numbered. The applicants were transferred to four teams which comprised only DUR members who had taken part in the strike (teams nos. 9, 10, 12 and 13). Teams nos. 12 and 13 had a work schedule similar to other teams, while teams nos. 9 and 10 (formerly nos. 109 and 110) were assigned to work eleven-hour day shifts on two consecutive days followed by two days off.

2. Decrease in the earning potential of DUR-member teams

19. According to the applicants, until December 1997 it had been established practice for the leaders of the teams on duty to take turns to choose the work for their team. After 1 December 1997 the managing director unofficially excluded the leaders of the DUR teams from the traditional arrangement, effectively confining their options to the least lucrative work. The applicants' income fell by half to three quarters because they did not receive any cargo-handling work paid at piece rates, but performed only auxiliary work paid by the hour at half the normal rate.

20. On 21 January 1998 the State Labour Inspector ordered the human resources director of the applicants' employer to compensate dockers in the reorganised teams for lost earnings. On 2 February 1998 the human resources director replied that the reorganisation of teams was an internal matter for the seaport and that, given that all dockers received equal pay for equal work, there was no legal basis for granting compensation.

21. The applicants further alleged that their employer had deliberately kept the DUR teams understaffed (in August 1998 there had been three persons in teams nos. 9 and 10 and six persons in teams nos. 12 and 13) so as to have an excuse not to give them access to cargo-handling work.

22. The first and second applicants complained to the State Labour Inspectorate about the reassignment of DUR members to the special teams. On 25 August 1998 the head of the State Labour Inspectorate for the Kaliningrad Region issued an instruction (*предписание*) to the acting managing director of the seaport company. The Inspectorate found, in particular, that dockers were being assigned to teams on the basis of their trade union membership. Such an arrangement was in breach of section 9(1) of the Trade Union Act and prevented several teams from performing at full capacity as they were understaffed. The Inspectorate ordered that all the changes to the composition of work teams be reversed, in order to restore their staff numbers to normal levels.

23. On 4 November 1998 the managing director ordered the reassignment of dockers from the four DUR teams, each of which had fewer than five workers at the time, to other teams. On 1 December 1998 the remaining workers in the four DUR teams were brought together to form a new team (no. 14) and the first applicant was appointed as team leader.

3. Holding of the safety regulations test

24. Between 15 April and 14 May 1998 the annual test of dockers' knowledge of the work safety regulations was held. The DUR representative was not allowed to be a member of the test committee or even to be present during the test.

25. The applicants submitted that the test conditions had not been fair and had been prejudicial to DUR members: 79 out of the 89 dockers who

failed the test had been DUR members, whereas on 1 June 1998 the seaport had employed 438 dockers, of whom only 212 were DUR members. According to the Government, only 44 dockers who failed the test had had DUR membership. Dockers who failed the test were suspended from cargo-handling work for one week.

26. At the second attempt on 3-5 June, twenty workers again failed the test, seventeen of them DUR members. The applicants submitted that a week after the test two non-DUR members had been permitted to work, while the DUR members had been laid off and not given an opportunity to retake the test. The applicants submitted that the seaport management had rewarded those who agreed to relinquish their union membership with a pass mark in the test and permission to return to work. One applicant had had to hand in his dismissal and find employment outside the seaport.

27. On 25 August 1998 the State Work Safety Inspector ordered the annulment of the results of the safety regulations test on the ground that the composition of the test committee had not been agreed with the DUR. The Inspector ordered that the test be organised again within one month with the participation of the DUR and that the dockers be provided with reference materials on the safety regulations.

28. On 29 October 1998 the test was held for the third time in the presence of a DUR representative and an official of the State Work Safety Inspectorate. Out of five DUR members who sat the test, four received the highest mark and the fifth person received the second-highest mark.

4. Dockers' redundancies in 1998-99

29. On 26 March 1998 the seaport management issued a notice to the effect that 112 dockers would be made redundant.

30. On 10 August 1998 thirty-three dockers, formerly staff members, were transferred to "as-needed" contracts. The applicants pointed out that twenty-seven of the transferred dockers (81.8%) had been DUR members, while at the material time the average rate of DUR membership in the seaport was 33%. The applicants alleged that the transferred dockers were on average better qualified than their co-workers who had been retained.

31. On 11 November 1998 the managing director ordered that forty-seven dockers be made redundant. On 20 November 1998 the human resources director served notice on thirty-five dockers, of whom twenty-eight were DUR members (according to the applicants). The applicants submitted that the actual dismissal did not take place because it required the consent of their trade union, which would never have been granted and had not been sought. Instead, on 18 December 1998, fifteen dockers from the DUR team were informed that as of 18 February 1999 their working time would be reduced from 132 hours to 44 hours a month. Having examined a complaint lodged by the applicants, the Baltiyskiy transport prosecutor found that the arbitrary establishment of a part-time

schedule for an extremely small number of workers (15 out of 116 dockers with the same qualifications and 365 port dockers in total) without their consent was in breach of the constitutional principle of equality and contrary to Article 25 of the Labour Code. On 10 February 1999 the prosecutor ordered that the seaport company's managing director remedy the violations.

32. The first to sixth, ninth, tenth, eleventh and eighteenth applicants also brought court proceedings. They requested that the court declare their transfer unlawful, find that they had been discriminated against on the ground of their trade union membership and award them compensation for lost earnings and non-pecuniary damage.

33. On 25 January 2000 the Baltiyskiy District Court of Kaliningrad allowed the applicants' claims in part. The court found that the transfer of a small number of dockers to a part-time schedule had had no valid reason and was therefore unlawful. The court ordered the seaport company to compensate the claimants for lost earnings and non-pecuniary damage. However, the court declined to find that the claimants had been discriminated against on the ground of their DUR membership, as they had not proved discriminatory intent on the part of the seaport company management.

5. Complaint to the ITF and new collective agreement

34. On 26 January 1999 the DUR complained to the International Transport Workers' Federation, the ITF. The ITF called on the seaport company management to stop discriminating against the DUR and threatened an international boycott of cargo originating in Kaliningrad seaport.

35. Following international trade union pressure orchestrated by the ITF, the seaport company management and the DUR signed an agreement on 22 March 1999. The DUR-only teams were disbanded, DUR members were transferred to other teams with full access to cargo-handling work, and a uniform system of bonuses was put in place.

36. The applicants submitted that the conditions of the agreement had been complied with until 19 August 1999, when the most active members of the DUR were transferred again to a DUR-only team.

C. Proceedings before the domestic authorities

1. Attempted criminal proceedings against the seaport company's managing director

37. In 1998 the DUR requested the Baltiyskiy transport prosecutor's office to open a criminal investigation into the activities of

Mr Kalinichenko, the managing director of the seaport company, and to charge him under Article 136 of the Criminal Code with infringement of equality of rights in respect of the applicants.

38. On 24 September 1998 the Baltiyskiy transport prosecutor's office declined to open a criminal investigation concerning Mr Kalinichenko, as a preliminary inquiry had failed to establish direct intent on his part to discriminate against the applicants.

39. A further request by the applicants to have criminal proceedings instituted against the seaport company management for alleged discrimination, lodged on 29 November 2004, was rejected on 9 December 2004 for lack of *corpus delicti*, as the Baltiyskiy transport prosecutor's office had not established direct intent to discriminate against the applicants. According to the Government, the applicants did not appeal against this decision.

2. Proceedings seeking a finding of discrimination and compensation

40. On 12 December 1997 the DUR filed an action on behalf of its members, including six applicants (Mr Sinyakov, Mr Kasyanov, Mr Korchazhkin, Mr Zharkikh, Mr Kalchevskiy and Mr Dolgalev), with the Baltiyskiy District Court of Kaliningrad. The DUR requested the court to find that the seaport management's policies had been discriminatory and to order compensation for lost earnings and non-pecuniary damage sustained by the claimants.

41. On 18 August 1998 the DUR joined further claimants to the action (twelve applicants – Mr Danilenkov, Mr Soshnikov, Mr Morozov, Mr Troynikov, Mr Kiselev, Mr Bychkov, Mr Pushkarev, Mr Silvanovich, Mr Oksenchuk, Mr Grabchuk, Mr Tsarev and Mr Milinets) and also submitted new facts corroborating their discrimination complaint.

42. On 21 April 1999 the DUR lodged the action on behalf of its members in its final form.

43. On 28 May 1999 the Baltiyskiy District Court of Kaliningrad dismissed the DUR's action. The court found the complaints unsubstantiated and held that the seaport management could not be held responsible for the uneven distribution of well-paid cargo-handling work. The claimants appealed against the judgment.

44. On 6 October 1999 the Kaliningrad Regional Court quashed the judgment of 28 May 1999 on appeal and remitted the case for fresh examination. The court pointed out that the first-instance court had failed to assess whether the transfer of dockers between teams could have been motivated by retaliation against the claimants for their participation in the strike and membership of the DUR. The court also found that the first-instance court had ignored the claimants' complaint about a decrease in their wages after the transfer compared with their co-workers' earnings. The court reprimanded the first-instance court for the failure to obtain

documents on dockers' wages from the defendant and for refusing the claimants' request to this effect. The court concluded that the first-instance court's finding as to the absence of discrimination had not been lawful or justified because the above-mentioned shortcomings had prevented it from assessing the claimants' arguments in the light of all the relevant information.

45. On 22 March 2000 the Baltiyskiy District Court of Kaliningrad delivered a new judgment. The court held that the discrimination complaint was unsubstantiated because the applicants had failed to prove the management's intent to discriminate against them. The court based its conclusion on statements from port managers and stevedores. The managers explained that DUR-only teams had been formed to mitigate tension in the workforce created by the animosity of strikers towards their co-workers who had not taken part in the strike. The stevedores denied that they had received any instructions from the management concerning the distribution of cargo-handling work. The court also referred to the decision of the prosecutor's office of 24 September 1998 and ruled that the seaport company could not be held liable for the alleged acts of discrimination, since no intent to discriminate had been established on the part of its management. The court pointed to the insignificant number of claimants (29) compared with the total number of strikers (213), and held as follows:

> "...the very request for a finding of discrimination on the general ground of membership of a certain public association made by only a small group of its members is an indication of the absence of the alleged discrimination, while the situation of the claimants is the result of their individual actions and characteristics and of objective factors."

46. The court attributed the decrease in the claimants' wages to their individual omissions (such as the failure to pass the work safety test) and the overall reduction in cargo-handling work in the seaport. However, on a proposal from the defendant the court awarded the claimants nominal compensation in the form of the difference in wages for two months following their transfer to new teams. The applicants appealed against the judgment.

47. On 14 August 2000 the Kaliningrad Regional Court ordered the discontinuance of the civil proceedings in the part concerning the discrimination complaint. The court decided that the existence of discrimination could only be established in the framework of criminal proceedings concerning a specific official or another person. Legal entities such as the seaport company could not be held criminally liable. Therefore, the court concluded that it lacked jurisdiction to examine the discrimination complaint against the seaport company. In the remainder, the court upheld the judgment of 22 March 2000.

48. On 9 July 2001 all the applicants brought a fresh action against the seaport company. They sought a declaration that they had been

discriminated against on the ground of their DUR membership and that their rights to equal pay for equal work and access to work had been violated; they also requested that the violations be made good by the seaport company and that they be awarded compensation for non-pecuniary damage.

49. On 18 October 2001 the Justice of the Peace of the First Court Circuit of the Baltiyskiy District of Kaliningrad, in an interim decision (*определение*), dismissed the application for a declaration. The court followed the reasoning of the judgment of 14 August 2000. It held that it lacked jurisdiction to establish whether there had been discrimination because such a fact could only be established in criminal proceedings; however, a legal entity could not be held criminally liable.

50. The applicants appealed against the decision to the Baltiyskiy District Court of Kaliningrad, which on 6 December 2001 upheld the decision of 18 October 2001.

3. Decision of the Kaliningrad Regional Duma

51. The DUR complained to the Kaliningrad Regional Duma, alleging a violation by the employer of the rights of its members. On 15 November 2001 the Duma's Standing Committee on Social Policy and Health Care issued a resolution expressing concern at the situation described by the complainants. In particular, it stated as follows:

> "...3. In the Kaliningrad seaport company different labour conditions apply to workers depending on their trade union membership. As a result members of the DUR are placed at a disadvantage by their employer compared with those who do not belong to the above-mentioned trade union.
>
> 4. The DUR reasonably raised an issue of discrimination at the Kaliningrad seaport company in connection with trade union membership..."

52. On 29 November 2001 the Duma Committee addressed a letter to the Kaliningrad prosecutor with a request to take immediate measures to defend the rights of DUR members and to consider the possibility of instituting criminal proceedings against the management of the seaport company.

4. Other domestic proceedings concerning various complaints

(a) Deprivation of bonuses and loss of earnings

53. From 8 to 15 November 1998 the second, third, fourth, ninth and eighteenth applicants and four of their co-workers took part in a trade union conference in Denmark. They had applied in advance to the seaport company management for permission to attend the conference, but received no reply. By orders of 18 December 1998 and 30 March 1999 the

conference participants had their annual bonuses withdrawn because they had allegedly taken absence without leave. The dockers appealed to a court.

54. On 1 November 1999 the Baltiyskiy District Court of Kaliningrad found that the seaport company management had been required to grant the claimants leave to attend a trade union conference, as their right to such leave was unconditionally guaranteed by section 25(6) of the Trade Union Act. The court declared the orders depriving the claimants of their annual bonuses to be unlawful and ordered the seaport company to pay compensation. The judgment was not appealed against.

(b) Lifting of a disciplinary sanction against the eighteenth applicant

55. On 10 January 1999 the eighteenth applicant was issued with a disciplinary reprimand for his failure to appear for work on 14 December 1998, which was a public holiday. The eighteenth applicant appealed against the sanction; he stated that he was an elected leader of a trade union and that therefore the trade union's consent was required in order to impose the sanction.

56. On 11 January 2000 the Baltiyskiy District Court of Kaliningrad allowed the eighteenth applicant's complaint. The court annulled the disciplinary sanction on the ground that the seaport company management had failed to seek the trade union's consent before imposing it, as required by Article 235 of the Labour Code.

(c) Lifting of a disciplinary sanction for refusal to perform unskilled work

57. On 15 January 1999 dockers of DUR-only team no. 14 were ordered to clear the port of snow. The dockers refused because the collective bargaining agreement provided that they could be required to perform unskilled work only if such work was auxiliary to their cargo-handling work, which was not the case. They remained on standby in the port until the end of the shift. On 21 January 1999 the seaport company management ordered that the day in question be counted as absence without leave, imposed a disciplinary reprimand and withheld their January bonus.

58. The DUR lodged a court action on behalf of the second to sixth applicants and the ninth applicant. It claimed that the disciplinary sanction should be lifted and the wages and bonuses withheld should be paid.

59. On 10 October 2000 the Baltiyskiy District Court of Kaliningrad found in favour of the claimants. The court found that the unjustified redeployment of qualified dockers to unskilled work violated their labour rights and that they could not be penalised for an unauthorised absence as they had stood by waiting for cargo-handling work within the port confines. In addition, the court pointed out that the claimants were elected leaders of a trade union and that the union's consent was required in order to impose a sanction; no such consent had been obtained. The seaport company was

ordered to lift the sanction and to pay the claimants compensation for lost earnings and bonuses, as well as to bear the court fees.

(d) Unlawful dismissal of the sixteenth applicant

60. On 14 May 1999 the sixteenth applicant was dismissed on the ground that he had allegedly appeared for work in an inebriated state. The sixteenth applicant appealed to a court against the decision to dismiss him.

61. On 25 August 1999 the Kaliningrad Regional Court, ruling at final instance, upheld the applicant's complaint and ordered the seaport company to reinstate him and pay compensation for lost earnings. The court found, in particular, that there was no evidence showing that the sixteenth applicant had been drunk.

(e) Unlawful disciplinary sanction

62. By an order of 10 December 1999 the nineteenth, twentieth, twenty-sixth and thirty-second applicants were severely reprimanded in the course of disciplinary proceedings against them for allegedly leaving their workplace early without authorisation. The DUR, acting on behalf of the applicants concerned, appealed against the disciplinary sanction to a court.

63. On 29 November 2001 the Baltiyskiy District Court of Kaliningrad allowed the DUR's action. The court found it established that the defendant (the seaport company) had failed to prove unauthorised absence. The court quashed the contested order and awarded the applicants concerned compensation for non-pecuniary damage.

(f) Unlawful finding of responsibility for accident

64. On 20 June 2000 the eighteenth applicant was injured in the workplace. A special commission found that he had been responsible for the accident himself as he had allegedly failed to observe the safety regulations. A DUR representative (the twenty-fourth applicant) disagreed with the commission's conclusion. Nevertheless, the eighteenth applicant was reprimanded in disciplinary proceedings and he and his team leader (the third applicant) lost their June bonus. On behalf of the eighteenth and third applicants, the DUR appealed against these decisions to a court.

65. On 13 April 2001 the Justice of the Peace of the First Court Circuit of the Baltiyskiy District of Kaliningrad found that the conclusions of the special commission were not sustainable in the light of the testimony given by eyewitnesses. The court quashed the disciplinary sanction imposed on the eighteenth applicant and ordered the seaport company to pay the June bonus to him and to his team leader.

(g) Unlawful demotion of the third applicant

66. By an order of 19 July 2000 the third applicant was demoted from the position of team leader to that of a simple docker, on the ground that he had allegedly failed in his leadership duties. The DUR challenged the order, lodging a court action on behalf of the third applicant.

67. On 7 May 2001 the Justice of the Peace of the First Court Circuit of the Baltiyskiy District of Kaliningrad allowed the action in part. The court found that the demotion had not been agreed to by the DUR, of which the third applicant was an elected leader. The court quashed the demotion order and ordered the seaport company to pay compensation for lost earnings and non-pecuniary damage, and the court fees.

(h) Restriction of access for trade union leaders to the port

68. On 15 May 2001 the seaport company's human resources director ordered that DUR representatives be admitted to the port only in order to visit DUR members at their workplaces and during their working hours. Under the order, the second applicant was not allowed into the port.

69. On 20 June 2001 the Baltiyskiy transport prosecutor found that the order violated the guarantees of free access for trade union leaders to the workplaces of union members, contained in Article 231 of the Labour Code and section 11(5) of the Trade Union Act, and ordered the managing director of the seaport company to remedy the violation.

70. On 16 July 2001 the seaport company's managing director issued a new order, no. 252, regulating access for DUR leaders to the port. It provided, *inter alia*, that access was only possible between 8 a.m. and 8 p.m. on the basis of "one-off" permits obtained in advance and specifying the itinerary and purpose of the visit.

71. On 26 November 2001 the Baltiyskiy transport prosecutor requested the seaport company's managing director to annul order no. 252 on the ground that it was unlawful. The request was refused by the seaport company management.

72. On 23 January 2002 the Baltiyskiy transport prosecutor lodged a civil action on behalf of the second applicant against the seaport company, requesting that order no. 252 be declared invalid.

73. On 9 July 2002 the Justice of the Peace of the First Court Circuit of the Baltiyskiy District of Kaliningrad allowed the action and declared that the order restricting trade union leaders' access to the port was unlawful and that, in so far as it required advance permission to be obtained, it was also in breach of Article 231 of the Labour Code. The judgment was not appealed against.

D. Transfer of non-DUR-members to a new company

1. Establishment of a new company and transfer of personnel

74. In August-September 1999 the seaport company management founded a subsidiary stevedoring company, TPK (*ООО «Транспортно-погрузочная компания»*), which hired thirty new dockers. Between September 1999 and November 2000 TPK's dockers worked together with the seaport company dockers in mixed teams.

75. On 27 November 2000 a new collective labour agreement was signed between the Kaliningrad seaport company management and the Maritime Transport Workers' Union. The agreement provided, *inter alia*, that all cargo-handling work would be assigned to TPK and that the employees of this company would receive a pay rise, complementary medical insurance and a special allowance for sport activities.

76. In December 2000 and January 2001 the seaport company management offered most dockers lucrative transfers to TPK, but all the DUR members were allegedly excluded from the transfer. In January 2001 the remaining DUR members were put into two work teams. The seaport company's managing director announced to the applicants that all stevedoring work would be assigned to TPK, as the seaport company's licence for stevedoring expired on 1 October 2001.

77. In April 2001 DUR members found their potential earning time cut in half after they were forbidden to work night shifts. Their income fell to around USD 55 per month, as against an average for non-DUR workers of USD 300 per month.

78. In June 2001 DUR members' wages fell again to USD 40 per month.

79. As a result of the conflict, DUR membership shrank from 290 (in 1999) to only twenty-four on 6 December 2001.

80. In February 2002 the remaining DUR members (twenty-two dockers) were made redundant and dismissed. The second applicant was retained: he was a deputy chairman of the DUR steering committee and the DUR's consent was required for his dismissal. The applicants submitted that he had been kept in his position for the sake of appearances only as he did not have any earning opportunities.

2. Civil action concerning the transfer of personnel

81. On 18 March 2002 the DUR, on behalf of the first to fifth, ninth to eleventh, sixteenth and eighteenth to thirty-second applicants, brought a civil action against the seaport company and TPK, seeking reinstatement of the DUR members and compensation for lost earnings and non-pecuniary damage. It also asked the court to find a violation of the applicants' right to freedom of association and to declare that the employer's actions had

discriminated against the claimants on the ground of their DUR membership.

82. On 24 May 2002 the Baltiyskiy District Court of Kaliningrad delivered its judgment. The court found that in November 2000 the board of directors of the Kaliningrad seaport company had decided to reassign the cargo-handling work to TPK. Between 30 November 2000 and April 2001, 249 dockers had been transferred to TPK and in December 2000 the cargo-handling terminals and equipment had been either sold or leased to the new company. The court inferred from this that the employer's real intention had been to change the structural subordination of the stevedoring unit and that there had been no lawful grounds for making the unit's employees redundant. It found the applicants' dismissal to be unlawful and ordered their reinstatement with TPK and payment of lost earnings and compensation for non-pecuniary damage.

83. The court also examined the applicants' allegations of discrimination against them. Relying on statements by several leaders of dockers' teams, it established that in November 2000 all the dockers had been invited to a meeting where their transfer to TPK had been discussed. The applicants had not been prevented from attending and they had been offered the opportunity to apply for transfer. However, they had refused to do anything without the steering committee chairman's advice. When asked by the court why they had not applied for transfer individually, the applicants stated that they had been certain they would receive a negative response from their employer.

84. The team leaders also testified that the second applicant (the deputy chairman of the steering committee) had been present at the meeting and had argued against the transfer to TPK. The court further inspected leaflets distributed by the DUR and the twenty-fourth applicant's complaint to a prosecutor's office. It appeared from the leaflets that the DUR had consistently campaigned against the transfer to TPK and advocated staying with the seaport company, and that the complaint had exposed alleged compulsion to apply for a transfer to TPK. The court found that the evidence gathered contradicted the applicants' allegations that the DUR had not been informed of the transfer or had been excluded from it. It dismissed as unsubstantiated the applicants' complaints of discrimination against them and of a violation of their right to freedom of association.

85. Finally, the court ordered immediate enforcement of the judgment in the part concerning the applicants' reinstatement.

86. On 7 August 2002 the Kaliningrad Regional Court upheld the judgment of 24 May 2002 on an appeal by the seaport company.

3. Enforcement of the judgment of 24 May 2002

87. On 27 May 2002 the managing director of the seaport company annulled the orders for the applicants' dismissal of 20 February 2002 and reinstated them. However, they were not transferred to TPK.

88. On 24 June 2002 the TPK limited company was reorganised to form the public company Maritime Commercial Port (*ОАО «Морской торговый порт»* – "MTP"). On 11 September 2002 the Kaliningrad Regional Court clarified that the applicants were to be reinstated into MTP, which was the legal successor to TPK.

89. On 7 August 2002 all the applicants were again dismissed from the seaport company for absence without valid reasons. However, they pointed out that as far back as 10 June the seaport company's managing director had confirmed to them in writing that there were no earning opportunities for them in the old company because the stevedoring licence had expired in 2001. The applicants appealed against their dismissal to a court.

90. On 7 October 2002 the Baltiyskiy District Court of Kaliningrad granted the applicants' claim. The court found that the defendant had failed to enforce the judgment of 24 May in the part concerning the dockers' transfer to TPK and that their dismissal for unauthorised absence had therefore been unlawful. It ordered payment of lost earnings and compensation for non-pecuniary damage. On 22 January 2003 the Kaliningrad Regional Court upheld the judgment on appeal.

91. On 30 October 2002 the applicants' employment with the seaport company was terminated "in connection with their transfer to another company". On the following day the managing director of MTP ordered the hiring of the applicants as second-category stevedores. The applicants submitted that the positions offered were below their professional qualification as dockers.

92. On 30 December 2002, at the applicants' request, a judge of the Baltiyskiy District Court of Kaliningrad clarified the judgment of 24 May 2002 to the effect that the applicants were to be hired by MTP as dockers. On 26 February 2003 this clarification was confirmed by the Kaliningrad Regional Court.

II. RELEVANT DOMESTIC LAW

A. Constitution of the Russian Federation

93. Article 19 of the Russian Constitution provides that the State shall guarantee equality of rights and freedoms to all citizens, regardless of sex, race, nationality, language, origin, property and official status, place of

residence, religion, beliefs, membership of public associations and other circumstances.

94. Article 30 § 1 guarantees the right of association, including the right to create trade unions for the protection of one's interests.

B. Code of Labour Laws of the RSFSR (of 25 September 1992)

95. Article 2 of the Code (in force at the material time) guaranteed, in particular, the right to equal pay for equal work without any discrimination and the right to apply to a court for the protection of one's labour rights.

C. Criminal Code of the Russian Federation (of 13 June 1996)

96. Article 136 prohibits infringements of equality as regards human rights and freedoms, committed on grounds of, *inter alia*, affiliation to a public association, which harm the rights or lawful interests of citizens.

D. Trade Union Act (Law no. 10-FZ of 12 January 1996)

97. Section 9 prohibits any restriction of citizens' social, labour, political or other rights or freedoms on the ground of their membership or non-membership of a trade union. It is prohibited to make the recruitment, promotion or dismissal of an employee conditional on his or her membership or non-membership of a particular trade union.

98. Section 29 guarantees judicial protection of the rights of trade unions. A court must examine cases concerning alleged violations of the rights of trade unions, brought on an application from a prosecutor, as a civil action or as a complaint by a trade union.

99. Section 30 provides that State and municipal officials, employers and officers of employers' associations shall be subject to disciplinary, administrative or criminal liability for breaches of the laws on trade unions.

E. Civil Code of the Russian Federation (of 30 November 1994)

100. Article 11 provides that courts must examine claims for the protection of civil rights which have been breached or contested.

101. Article 12 specifies that the protection of a civil right may take the form of, *inter alia*, confirmation of a right, restoration of the *status quo*, an injunction in respect of actions that violate or threaten to violate a right, and compensation for loss and non-pecuniary damage.

III. RELEVANT INTERNATIONAL DOCUMENTS

A. Council of Europe

102. Article 5 of the European Social Charter (revised), not ratified by the Russian Federation, provides as follows:

Article 5 - The right to organise

"With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."

103. The European Committee of Social Rights of the Council of Europe (formerly the Committee of Independent Experts), which is the supervisory body of the European Social Charter, has held that domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies where this right is not respected. Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities. Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim (see, for example, Conclusions 2004, Bulgaria, p. 32).

104. It has further held that in order to make the prohibition of discrimination effective, domestic law must provide for appropriate and effective remedies in the event of an allegation of discrimination; remedies available to victims of discrimination must be adequate, proportionate and dissuasive (see, for example, Conclusions 2006, Albania, p. 29). Domestic law should provide for an alleviation of the burden of proof in favour of the plaintiff in discrimination cases (see Conclusions 2002, France, p. 24).

B. The International Labour Organisation ("ILO")

105. Article 11 of Convention No. 87 of the International Labour Organisation (ILO) on Freedom of Association and Protection of the Right to Organise (ratified by the Russian Federation) provides as follows:

"Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

106. Article 1 of ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (ratified by the Russian Federation) reads as follows:

"1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to -

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."

107. The Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) includes the following principles:

"...

769. Anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions.

...

818. The basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed.

...

820. Respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial.

...

835. Where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention.

..."

108. On 18 April 2002 the ILO Committee on Freedom of Association forwarded to the Committee of Experts case No. 2199, concerning the

Complaint against the Government of the Russian Federation presented by the Russian Labour Confederation (KTR) (Report No. 331). The KTR alleged that members of the DUR, the affiliated organisation of the KTR at Kaliningrad seaport, were subject to anti-union discrimination. The Committee found, *inter alia*, as follows:

"...

702. While noting that the Baltic District Court judgement found that the allegations of anti-union discrimination had not been proven, the Committee notes that, since the court's decision to reinstate the [DUR] members at the re-subordinated production section of the TPK due to the nevertheless illegal grounds for their dismissal, the [Kaliningrad seaport] administration has persistently refused to fully implement this decision, despite repeated clarifications and confirmation from this and higher courts. In the light of these circumstances, the Committee feels bound to query the motivation behind the employer's acts, in particular its persistent refusal to reinstate dockers, all of whom happen to be members of the [DUR], despite repeated judicial orders in this respect. Further noting the Duma resolution expressing extreme concern about this situation and adding that the question of anti-union discrimination has been reasonably posed, the Committee therefore requests the Government to establish an independent investigation into the allegations of acts of anti-union discrimination and if it is proven that acts of anti-union discrimination were taken against [DUR] members, in particular as concerns the non-transferral to the subordinated production sectors at TPK in accordance with the court's decision to take all necessary steps to remedy this situation, to ensure reinstatement at the TPK, as requested by the courts, as well as payment of lost wages. Furthermore, noting that the dockers were once again dismissed and a new case was filed, the Committee requests the Government to keep it informed of the outcome of this case.

703. As concerns the means of redress against alleged acts of anti-union discrimination, the Committee recalls that the existence of basic legislative provisions prohibiting acts of anti-union discrimination is not sufficient if these provisions are not accompanied by effective procedures ensuring their application in practice (see Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 742). Noting that in the present case, the complainant has been addressing the different judicial bodies since 2001 with allegations of anti-union discrimination, which were, until May 2002 rejected on procedural grounds, the Committee considers that the legislation providing for protection against acts of anti-union discrimination is not sufficiently clear. It therefore requests the Government to take the necessary measures, including the amendment of the legislation, in order to ensure that complaints of anti-union discrimination are examined in the framework of national procedures which are clear and prompt..."

THE LAW

I. PRELIMINARY ISSUES

A. The complaints of the twentieth and thirty-first applicants

109. The Court notes that in their letter of 10 September 2007 the applicants informed it that the twentieth and thirty-first applicants (Mr Aleksandr Fedorovich Verkhoturtsev and Mr Aleksandr Mikhaylovich Lenichkin) had died. However, no information was provided concerning their heirs or whether the latter wished to pursue the application.

110. Article 37 § 1 of the Convention, in its relevant part, reads:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ...
>
> (c) ... it is no longer justified to continue the examination of the application."

The Court finds no special circumstances relating to respect for human rights as defined in the Convention and its Protocols which require it to continue the examination of the application in respect of the twentieth and thirty-first applicants. Accordingly, the application should be struck out of the Court's list of cases in so far as it relates to these two applicants.

111. The Court reiterates that it has been its practice to strike applications out of the list of cases in the absence of any heir or close relative who has expressed a wish to pursue the application (see *Scherer v. Switzerland*, 25 March 1994, § 31, Series A no. 287; *Karner v. Austria*, no. 40016/98, § 23, ECHR 2003-IX; and *Thevenon v. France* (dec.), no. 2476/02, ECHR 2006-...).

B. The Government's preliminary objection

112. In their submissions following the Court's decision on the admissibility of the application, the Government stated that the applicants had failed to challenge the prosecutor's office's decisions not to institute criminal proceedings for alleged discrimination, and thus had not exhausted the available domestic remedies.

113. The Court reiterates that, under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). However, in their observations on the admissibility of the application the Government did not raise this point.

114. Consequently, the Government are estopped at this stage of the proceedings from raising the preliminary objection of failure to make use of a domestic remedy (see, *mutatis mutandis*, *Bracci v. Italy*, no. 36822/02, §§ 35-37, 13 October 2005). It follows that the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 11

115. The remaining applicants complained under Articles 11 and 14 of the Convention of a violation of their right to freedom of association in that the State authorities had tolerated the discriminatory policies of their employer and refused to examine their discrimination complaint owing to the absence of an effective legal mechanism in domestic law.

Article 11 provides as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 14 reads 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."

A. Scope of the State's obligations under Article 14 of the Convention taken together with Article 11 of the Convention

1. Submissions by the parties

(a) The applicants

116. The applicants maintained that their rights guaranteed by Article 11 of the Convention had been breached since their employer had acted with the intention of deterring and penalising trade union membership. They submitted that the State had been directly involved in a number of unfavourable acts against them as members of the DUR trade union, as it

controlled the Kaliningrad seaport company. They alleged that twenty percent of the shares had been held by the Kaliningrad Regional Development Fund and a further thirty-five percent had been controlled by Mr Karetniy, who had held simultaneously the positions of first deputy Governor, manager of the Fund and member of the board of the seaport company.

117. The applicants claimed that their membership of the DUR had had harmful consequences for their employment and remuneration, and that their employer had exerted various forms of pressure in order to create a distinction between them and their colleagues who did not belong to that trade union. They mentioned the reassignment of DUR members to special teams, as acknowledged by the key managers of the Kaliningrad seaport company in their oral and written submissions to the Baltiyskiy District Court, reflected in the judgment of 22 March 2000 (see paragraph 45 above). The applicants emphasised that the same judgment had confirmed a decrease in their wages, which had already been substantially lower than those in other teams. They also referred to the allegedly biased way in which the safety regulations test had been conducted and the allegedly prejudicial decisions concerning dismissal on grounds of redundancy.

(b) The Government

118. The Government contested these allegations. They submitted that the Kaliningrad Regional Development Fund, the State agency concerned, had owned less than twenty per cent of the Kaliningrad seaport company and for only a short period of time, namely between May and November 1998. As to Mr Karetniy, he had never combined the positions of civil servant and member of the seaport company's board. Therefore, in their view, the State could not be held liable for the anti-union actions complained of.

119. The Government further submitted that the complaint concerning the alleged sharp decrease in the applicants' wages had been examined by the Kaliningrad State Labour Inspectorate, which had found the DUR teams to be earning approximately the same amount as non-DUR teams. No violation of the labour rights of port workers had been established, nor was there any indication of discrimination against DUR members in the administration of the safety regulations test or in the dismissal of employees.

2. The Court's assessment

120. The Court notes that the parties disagree as to whether the circumstances of the present case involved direct intervention by the State, given the status of the Kaliningrad seaport company. It considers that it is not necessary to rule on this issue, since the responsibility of the Russian Federation would, in any case, be engaged if the matters complained of

resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V).

121. The Court reiterates that Article 11 § 1 presents trade union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police v. Belgium,* 27 October 1975, § 38, Series A no. 19, and *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 39, Series A no. 20). The words "for the protection of his interests" in Article 11 § 1 are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (see *Wilson*, cited above, § 42).

122. The Court observes that the applicants obtained State protection in respect of one-off measures by their employer which they believed violated their rights. Thus, a domestic court ordered compensation in the form of two months' wages for their reassignment to DUR-only work teams, which had allegedly resulted in a decrease in their earnings (see paragraph 46 above); the allegedly prejudicial safety regulations test was organised again as ordered by the State Work Safety Inspectorate (see paragraphs 27-28 above); a regional prosecutor found that there had been an arbitrary decrease in working hours, giving rise to an award of lost earnings and compensation for non-pecuniary damage by a court of law (see paragraphs 31 and 33 above); compensation in respect of lost earnings and non-pecuniary damage was also granted for non-enforcement of the judgment of 24 May 2002 (see paragraph 90 above); and in most instances the courts also granted compensation to individual trade union members affected by their employer's actions (see paragraphs 53-73 above). Furthermore, the domestic courts carefully examined the applicants' grievances in connection with the lucrative transfer to a new stevedoring company offered to their co-workers but not to them and granted their claims for lost earnings, reinstatement and non-pecuniary damage (see paragraph 82 above). The applicants did not complain that the judgments of the domestic courts in this connection had been ill-founded or arbitrary.

123. Nevertheless, as to the substance of the right of association enshrined in Article 11, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade union freedom, subject to its margin of appreciation (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 144, 12 November 2008). An employee or worker should be free to join or not join a trade union without being sanctioned or subject to disincentives (see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 39, ECHR 2007-...). The wording of Article 11 explicitly refers to the right of "everybody", and this provision obviously includes a right not to be

discriminated against for choosing to avail oneself of the right to be protected by a trade union, given also that Article 14 forms an integral part of each of the Articles laying down rights and freedoms whatever their nature (see *National Union of Belgian Police,* cited above, § 44). Thus, the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership which, according to the Freedom of Association Committee, constitutes one of the most serious violations of freedom of association, capable of jeopardising the very existence of a trade union (see paragraph 107 above).

124. The Court finds crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages and other relief. Therefore, States are required under Articles 11 and 14 of the Convention to set up a judicial system that ensures real and effective protection against anti-union discrimination.

125. The Court thus has to consider whether sufficient measures were taken by the authorities to protect the applicants from the alleged discriminatory treatment based on their choice to join the trade union.

B. Sufficiency of protection against discrimination on the ground of the applicants' trade union membership

1. Submissions by the parties

(a) The applicants

126. The applicants pointed out that all the domestic courts to which they had applied – the Baltiyskiy District Court of Kaliningrad, the Kaliningrad Regional Court and the Justice of the Peace of the Baltiyskiy District – had uniformly refused to examine the merits of their complaint concerning a violation of their right to freedom of association and discrimination, on the grounds that it could be determined only in criminal proceedings (see paragraphs 45, 47 and 49 above). The applicants indicated that civil proceedings differed fundamentally from a criminal prosecution, in that the latter protected the public interests of society as a whole, while the former were called upon to afford redress for encroachments on individuals' private interests. Since, in the present case, it was precisely the private rights of the applicants which were at stake, the refusal of the domestic courts to examine their discrimination complaint in civil proceedings had deprived them of an effective remedy. In any event, the prosecutor's office had also refused the applicants' request to start a criminal investigation in connection with an alleged infringement of the equality

principle and had not taken any steps to establish whether the applicants' complaints were well-founded.

127. The applicants contended that the generic anti-discrimination provisions in the Russian legislation to which the Government referred were ineffectual in the absence of a working mechanism for their implementation and application. As to the Government's reliance on the provisions of criminal law, they had failed to show that anyone had ever been charged, tried or convicted under Article 136 of the Criminal Code.

(b) The Government

128. The Government denied these allegations. They submitted that the DUR had been registered as a trade union in 1995 and re-registered in 1999; therefore, the domestic authorities had not hindered the establishment or functioning of the DUR. The Trade Union Act prohibited any interference by State bodies with the functioning of trade unions (section 5(2)) and provided that social and labour rights could not be made conditional on trade union membership (section 9). The Code of Labour Laws in force at the material time contained a number of guarantees: the approval of the trade union was required before a trade union member could be dismissed on grounds of redundancy, insufficient professional qualifications, frail health or similar. More stringent guarantees were provided for elected leaders of trade unions: without the prior consent of their trade union they could not be transferred to another position, dismissed or subjected to disciplinary sanctions. Lastly, the Government indicated that the Code prohibited discrimination on the ground of membership of a public association (Article 16 § 2) and provided for judicial protection of violated rights (Article 2).

129. The Government asserted that the applicants had enjoyed the same protection of their rights and freedoms as all other Russian citizens. In particular, they had made use of their right to strike and had applied to the State Labour Inspectorate and to various prosecutors' offices. As to the court action seeking a finding of discrimination, the Government referred to the decision of the Kaliningrad Regional Court to the effect that the applicants' complaint concerned, in substance, an alleged violation of equality between individuals and as such was to be determined in criminal proceedings under Article 136 of the Criminal Code. They further submitted that since 1997 six persons had been convicted under this provision. The Government pointed out that the applicants had failed to challenge the decisions of the prosecutor's office not to institute criminal proceedings for alleged discrimination, and thus had not exhausted the available domestic remedies.

2. The Court's assessment

130. The Court notes that various techniques were used by the Kaliningrad seaport company in order to encourage employees to relinquish

their trade union membership, including their reassignment to special work teams with limited opportunities, dismissals subsequently found to be unlawful by the courts, reductions in earnings, disciplinary sanctions and refusals to reinstate employees following court judgments. As a result, DUR membership shrank dramatically from 290 in 1999 to twenty-four in 2001. The Court also refers to the findings of the Kaliningrad Regional Duma (see paragraph 51 above) and the ILO Committee on Freedom of Association (see paragraph 108 above) to the effect that the question of anti-union discrimination was reasonably raised by the applicants. It therefore agrees that the clear negative effects of DUR membership on the applicants were sufficient to constitute a *prima facie* case of discrimination in the enjoyment of the rights guaranteed by Article 11 of the Convention.

131. The Court further notes that the applicants in the present case requested the authorities to prevent abuse on the part of their employers aimed at compelling them to leave the union. They drew the courts' attention to repeated discriminatory actions against them over a long period of time. In their view, allowing their discrimination complaint would have been the most effective means of protecting their right to join a trade union without being sanctioned or subject to disincentives.

132. The Court observes that Russian law at the material time contained a blanket prohibition on all discrimination on the ground of trade union membership or non-membership (section 9 of the Trade Union Act). Under domestic law the applicants were entitled to have their discrimination complaint examined by a court, by virtue of the general rules of the Russian Civil Code (Articles 11-12) and the *lex specialis* contained in section 29 of the Trade Union Act.

133. These provisions, however, remained ineffective in the instant case. The Court notes that the domestic judicial authorities, in two sets of proceedings, refused to entertain the applicants' discrimination complaints, holding that the existence of discrimination could be established only in criminal proceedings and that the applicants' claims could not therefore be determined via a civil action (see paragraphs 47 and 49 above). This position, also confirmed in the Government's observations, was nevertheless overruled on one occasion, when the Baltiyskiy District Court examined on the merits yet another discrimination complaint, lodged barely a year later (see paragraphs 83-84 above).

134. The principal deficiency of the criminal remedy is that, being based on the principle of personal liability, it requires proof “beyond reasonable doubt” of direct intent on the part of one of the company's key managers to discriminate against the trade union members. Failure to establish such intent led to decisions not to institute criminal proceedings (see paragraphs 38-39, 45, 47 and 49 above). Furthermore, the victims of discrimination have only a minor role in the institution and conduct of criminal proceedings. The Court is thus not persuaded that a criminal

prosecution, which depended on the ability of the prosecuting authorities to unmask and prove direct intent to discriminate against the trade union members, could have provided adequate and practicable redress in respect of the alleged anti-union discrimination. On the other hand, civil proceedings would have made it possible to perform the far more delicate task of examining all elements of the relationship between the applicants and their employer, including the combined effects of the various techniques used by the latter to induce dockers to relinquish DUR membership, and to afford appropriate redress.

135. The Court will not speculate as to whether the effective protection of the applicants' right not to be discriminated against could have prevented future unfavourable actions against them on the part of their employer, as the applicants suggested. Nonetheless, it considers that given the objective effects of the employer's conduct, the lack of such protection could engender fears of potential discrimination and discourage other persons from joining the trade union. This in turn could lead to its disappearance, with adverse effects on the enjoyment of the right to freedom of association.

136. In sum, the Court considers that the State failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership. It follows that there has been a violation of Article 14 of the Convention taken together with Article 11.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

137. The applicants complained they had not had any effective remedy for their discrimination complaints. They relied on Article 13 of the Convention.

138. The Court notes that this complaint is directly connected with those examined under Articles 11 and 14 of the Convention. Having regard to the grounds on which it has found a violation of Article 14 of the Convention taken together with Article 11 (see paragraphs 130-136 above), the Court considers that no separate issue arises under this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. 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

140. The applicants claimed compensation for the loss of earnings they had sustained as a result of being discriminated against as members of the trade union. The claims under this head varied from approximately 17,387 Russian roubles (RUR) to approximately RUR 1,207,643. They further claimed 100,000 euros (EUR) each in respect of non-pecuniary damage.

141. The Government considered these claims groundless and excessive.

142. The Court reiterates that the principle underlying the provision of just satisfaction is that the applicant should, as far as possible, be put in the position he would have enjoyed had the violation of the Convention not occurred. The Court will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible (see *Wilson*, cited above, § 54).

143. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the authorities refused to examine the applicants' complaints of discrimination against them. The Court cannot speculate as to whether the applicants would indeed have been able to keep their earnings if these complaints had been effectively examined. It therefore rejects the applicants' claims in respect of pecuniary damage. However, the unsuccessful attempts to protect their right not to be discriminated against on the ground of their trade union membership must have caused the applicants justifiable anger, frustration and emotional distress (see *Wilson*, cited above, § 61). The Court considers that, on an equitable basis, each applicant should be awarded EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

144. The applicants made no claim for costs and expenses. Noting that the applicants were paid EUR 701 in legal aid by the Council of Europe, the Court makes no award under this head.

C. Default interest

145. 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 strike out the application in so far as it concerns the complaints of the twentieth and thirty-first applicants (Mr Aleksandr Fedorovich Verkhoturtsev and Mr Aleksandr Mikhaylovich Lenichkin);

2. *Holds* that there has been a violation of Article 14 of the Convention taken together with Article 11 in respect of the remaining applicants;

3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable at the date of settlement.
   (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 30 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Rait Maruste
Deputy Registrar	President