



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

THIRD SECTION

CASE OF KUNGUROV v. RUSSIA

(Application no. 70468/17)

JUDGMENT

Art 8 • Respect for family life • Arbitrary refusal of family visits in remand prison • Domestic law conferring unrestricted discretion to authorities to grant or refuse prison visits
Art 13 (+ Art 8) • Effective remedy • Applications for prison visits rejected by means of unreasoned non-procedural letters not amenable to review

STRASBOURG

18 February 2020

FINAL

18/06/2020

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

In the case of Kungurov v. Russia,

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

Paul Lemmens, *President*,

Paulo Pinto de Albuquerque,

Dmitry Dedov,

Alena Poláčková,

María Elósegui,

Gilberto Felici,

Lorraine Schembri Orland, *judges*,

and Stephen Phillips, *Section Registrar*,

Having regard to:

the application 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 a Russian national, Mr Timofey Vladimirovich Kungurov (“the applicant”), on 14 September 2017;

the decision to give notice of the application to the Russian Government (“the Government”);

the unilateral declaration submitted by the Government and the applicant’s comments on the declaration;

Having deliberated in private on 28 January 2020,

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

INTRODUCTION

The case concerns a ban on family visits following the applicant’s conviction at first instance and the impossibility to obtain a judicial review of the ban.

THE FACTS

1. The applicant was born in 1978 and lives in St Petersburg. He was represented before the Court by Mr E. Mezak, a human-rights defender from Syktyvkar, who was granted leave to represent the applicant in accordance with Rule 36 of the Rules of Court.

2. The Government were represented by Mr M. Galperin, the Representative of the Russian Federation to the European Court of Human Rights.

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

4. On 30 November 2016 the Oktyabrskiy District Court in St Petersburg convicted the applicant for conspiracy to commit fraud and

sentenced him to one and a half years' imprisonment. On the same day the applicant was taken into custody and placed in the SIZO-1 remand prison.

5. On 19 December 2016 the applicant asked the trial judge K. to authorise short-term visits from his wife and children and phone communications with them. He pointed out that his nine-year-old daughter suffered greatly from the separation from her father and convinced herself that he had died.

6. Judge K. refused the applicant's request by a letter of 28 December 2016 which was delivered to the remand prison on 10 January 2017 and handed over to the applicant on 14 March 2017. The letter quoted the text of section 18 of the Defendants' Detention Act and continued as follows:

"Since [the applicant's wife] is a witness in criminal case no. [XXX] and [since] the judgment of 30 November 2016 has not yet become final, whereas the Defendants' Detention Act makes no provision for prison visits by minors, there are no grounds for authorising visits by [the applicant's wife and children]."

7. The letter was not a procedural act, and the applicant could not file an appeal against it.

8. On 26 June 2017 the applicant's conviction became final. On 11 September 2017 he was transferred to a prison hospital.

RELEVANT LEGAL FRAMEWORK

9. Section 18 of the Defendants' Detention Act (Federal Law no. 103-FZ of 15 July 1995) provides as follows:

"Subject to written authorisation from the official or authority in charge of the criminal case, suspects and defendants may have no more than two visits per month from their family members and other persons ..."

10. The Constitutional Court held that the refusal of an application for a prison visit should take the form of a reasoned decision (*мотивированное постановление*). It could be challenged before a supervising prosecutor or a court of general jurisdiction which would be called upon to verify, in the light of factual circumstances of the case, whether or not the refusal was justified (see decisions no. 176-O of 13 June 2002, no. 351-O of 16 October 2003, and no. 807-O-O of 17 June 2010).

THE LAW

I. THE GOVERNMENT'S REQUEST TO STRIKE THE CASE OUT ON THE BASIS OF A UNILATERAL DECLARATION

11. On 5 July 2019 the Government submitted a unilateral declaration in which they acknowledged a violation of Articles 8 and 13 of the Convention, offered to pay a sum of money to the applicant and invited the

Court to strike the case out of the list of cases in accordance with Article 37 § 1 (c) of the Convention. The applicant did not accept the Government's offer.

12. The criteria for assessment of unilateral declarations are well-established in the Court's case-law (see *Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, §§ 75-76, ECHR 2003-VI; *Gerasimov and Others v. Russia*, nos. 29920/05 and 10 others, § 130, 1 July 2014; and *Jeronovičs v. Latvia* [GC], no. 44898/10, §§ 64-71, 5 July 2016). The existence of a structural deficiency which – in the absence of effective domestic remedies – forces large groups of people to seek redress in the Court for repetitive violations of their Convention rights, is a relevant consideration for deciding whether the Court should continue examination of the case (see *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, §§ 98-100, 9 April 2019).

13. The instant case concerns a ban on prison visits and a lack of avenues to complain about it. The Government's declaration acknowledged violations of Articles 8 and 13 of the Convention but did not contain any undertaking to address the underlying deficiencies of the domestic law which the Court had identified more than ten years ago (see *Vlasov v. Russia*, no. 78146/01, §§ 125-26 and 152, 12 June 2008, and *Moiseyev v. Russia*, no. 62936/00, §§ 249-50, 9 October 2008) and which had given rise, and continue to give rise, to repetitive applications to the Court. Accordingly, the Court considers that the terms of the Government's declaration do not provide a sufficient basis for concluding that respect for human rights does not require it to continue its examination of the case. Their request to strike the case out of the list is rejected.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

14. The applicant complained of a violation of Article 8 of the Convention on account of a refusal of his petition for a visit from his wife and children. Article 8 reads as follows:

“1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.”

A. Admissibility

15. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

16. As is well established in the Court's case-law, on imprisonment a person forfeits the right to liberty but continues to enjoy all other fundamental rights and freedoms, including the right to respect for family life, so that any restriction on those rights must be justified in each individual case. Detention entails inherent limitations on his family life, and some measure of control of the detainee's contacts with the outside world is called for and is not of itself incompatible with the Convention. However, it is an essential part of a prisoner's right to respect for family life that the authorities enable him or, if need be, assist him to maintain contact with his close family (see *Trosin v. Ukraine*, no. 39758/05, § 39, 23 February 2012; *Khoroshenko v. Russia* [GC], no. 41418/04, §§ 116-17, ECHR 2015; and *Andrey Smirnov v. Russia*, no. 43149/10, §§ 35-36, 13 February 2018).

17. The applicant was taken into custody following his conviction at first instance and his application to see his wife and children was rejected. The Court has established that denial of family visits amounts to interference with the right to respect for family life (see *Moiseyev*, § 247, and *Andrey Smirnov*, § 38, both cited above). It remains to be seen whether the interference was "in accordance with the law", pursued one or more of the legitimate aims listed in paragraph 2 and was also "necessary in a democratic society".

18. The letter refusing the applicant's request for a family visit referred to section 18 of the Defendants' Detention Act (see paragraph 6 above). It has been the Court's settled position in similar cases against Russia that section 18 falls short of the "quality of law" requirement in so far as it confers on the authority in charge of the criminal case unrestricted discretion to grant or refuse prison visits. It does nothing to limit the scope of the discretion and the manner of its exercise, and deprives the detainee of the minimum degree of protection against arbitrariness or abuse to which citizens are entitled under the rule of law in a democratic society (see *Vlasov*, cited above, §§ 125-26; *Moiseyev*, cited above, §§ 249-50; *Andrey Smirnov*, cited above, §§ 40-42; and, most recently, *Resin v. Russia*, no. 9348/14, §§ 36-38, 18 December 2018, and *Chaldayev v. Russia*, no. 33172/16, §§ 60-61, 28 May 2019).

19. The above-cited cases illustrated the manner in which that unlimited discretion could be, and had been, abused by investigators at the pre-trial stage of proceedings. In the instant case, following the applicant's conviction at first instance, the trial judge K. remained "the official in charge of the criminal case" within the meaning of section 18 of the Defendants' Detention Act. On the issue of family visits, Article 8 requires the States to take into account the interests of the prisoner and his or her family members and to evaluate them not in terms of broad generalities but in application to the specific situation (see *Andrey Smirnov*, cited above,

§ 48). In the present case, however, Judge K. made no attempt to justify the decision to refuse a visit by the applicant's wife and children beyond a generic reference to the fact that his wife was a witness in the case and that the Defendants' Detention Act made no express provision for visits by children. The letter did not give any weight to the applicant's and his family members' right to respect for their family life or explain why the procedural status of the witness prevented the applicant's wife from seeing him even after the taking of evidence had been completed and the conviction pronounced. Moreover, the Defendants' Detention Act does not restrict the right to prison visits to adult family members, and the refusal of a visit by the applicant's children on the ground that children were not expressly mentioned in the Act was arbitrary.

20. In so far as section 18 of the Defendants' Detention Act offers no protection against arbitrary refusals, such as those in the present case, the Court reiterates that it does not meet the "quality of law" criterion. Accordingly, the interference was not "in accordance with the law".

21. There has therefore been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

22. The applicant complained that he had not had a possibility to obtain a review of the decision rejecting his applications for a family visit. He relied on Article 13 of the Convention in conjunction with Article 8, which reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

23. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

24. In accordance with the Court's established case-law, the effective remedy required by Article 13 of the Convention is one which allows the domestic authority examining the case to consider the substance of the Convention complaint. In cases involving Article 8 of the Convention, this means that the authority has to carry out a balancing exercise and examine whether the interference with the applicant's rights answered a pressing social need and was proportionate to the legitimate aims pursued, that is,

whether it amounted to a justifiable limitation of his rights (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 62, 24 April 2008, and *Voynov v. Russia*, no. 39747/10, § 42, 3 July 2018).

25. As regards the theoretical possibility of obtaining a Convention-compliant review of the impugned decisions, the Court notes the position of the Russian Constitutional Court. It expressed the view that a reasoned decision refusing an application for a prison visit should be amenable to a judicial review. A court carrying out such a review should decide whether or not the refusal was justified in the light of factual elements of the case. Even though the Constitutional Court formulated that position as early as 1998 and affirmed it in subsequent decisions (see paragraph 17 above, and also *Vlasov*, cited above, §§ 75 and 152), the requirement to issue a reasoned decision and to provide for its judicial review has not been incorporated in the Code of Criminal Procedure or the Defendants' Detention Act. In the absence of a specific requirement, the courts of general jurisdiction did not consider themselves bound by the case-law of the Constitutional Court and rejected applications for prison visits by means of non-procedural letters without giving relevant and sufficient reasons (compare *Chaldayev*, cited above, §§ 11 and 15). This is what happened in the instant case. The applicant's request was rejected in generic terms by means of a non-procedural letter which was not amenable to a judicial review. In these circumstances, the Court finds that the applicant did not have an effective remedy for his complaint about the restriction on family visits.

26. There has therefore been a violation of Article 13 of the Convention, taken in conjunction with Article 8.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. 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."

28. In the light of the documents submitted and its well-established case-law in this type of cases, the Court, ruling on an equitable basis, as required by Article 41 of the Convention, awards the applicant 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 250 in respect of costs and expenses, plus any tax that may be chargeable on him.

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Rejects* the Government's unilateral declaration;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention, taken in conjunction with Article 8;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 250 (two hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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.

Done in English, and notified in writing on 18 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Paul Lemmens
President