



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

THIRD SECTION

**CASE OF Y.B. v. RUSSIA**

*(Application no. 71155/17)*

JUDGMENT

Art 2 P7 • Review of conviction • Applicant deprived of possibility to have a hearing, even in his absence, on a request for reinstating the time-limit for appeal against his *in absentia* conviction, as provided by domestic law  
Art 35 § 1 • Exhaustion of domestic remedies • Applicant not required to appeal against non-procedural letter from domestic court president devoid of the applicable procedure for challenging it

STRASBOURG

20 July 2021

**FINAL**

**20/10/2021**

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



**In the case of Y.B. v. Russia,**

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

Paul Lemmens, *President*,

Georgios A. Serghides,

Dmitry Dedov,

Georges Ravarani,

Darian Pavli,

Anja Seibert-Fohr,

Peeter Roosma, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 71155/17) 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 French national, Mr Y.B. (“the applicant”), on 27 September 2017;

the decision to give notice to the Russian Government (“the Government”) of the complaints concerning the alleged lack of an opportunity to appeal against conviction *in absentia* and to declare the remainder of the application inadmissible;

the decision to grant the applicant anonymity under Rule 47 § 4 of the Rules of Court;

the parties’ observations;

the decision of the French Government, who had been notified of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of the Court), not to exercise their right in the present case;

Having deliberated in private on 22 June 2021,

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

**PROCEDURE**

1. The case originated in an application (no. 71155/17) 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 French national, Mr Y.B. (“the applicant”), on 27 September 2017.

2. On 21 November 2017 notice of the complaint under Article 2 of Protocol No. 7 to the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

## INTRODUCTION

3. The case concerns, under Article 2 of Protocol No. 7 to the Convention, the domestic courts' refusal to accept and examine the applicant's statement of appeal.

## THE FACTS

4. The applicant was born in 1978 and lives in France. He was represented by Mr O. Arnod, a lawyer practising in Bobigny, France.

5. The Government were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr A. Fedorov.

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

### I. INVESTIGATION

7. On 16 December 2014 a number of photographs and a video were published on a Russian-language website for young parents. The photographs featured (1) the applicant and his wife engaged in sexual intercourse and (2) the applicant and his daughter, born in 2009, naked.

8. On an unspecified date a certain Ms V. complained to the Russian police about the above-mentioned material published on the website.

9. On 28 January 2015 the regional investigative committee opened a criminal investigation into the offences of production and distribution of child pornography. The investigators established that the photographs and the video had been uploaded from an IP address that could be traced to the applicant's wife.

10. On 11 February 2015 the applicant, who at the time lived in Russia, was arrested as a suspect and the Kuybyshevskiy District Court of Irkutsk authorised his detention pending investigation.

11. On the same date the investigators searched the applicant's flat and seized electronic equipment belonging to him, including his laptops and cameras. In the files stored on the laptops, they discovered, *inter alia*, forty-nine photographs of a naked girl (the applicant's daughter).

12. On 26 March 2015 the District Court extended the applicant's detention until 28 April 2015.

13. On 21 April 2015 the Irkutsk Regional Court quashed the decision of 26 March 2015 and imposed house arrest on the applicant in lieu of detention pending investigation. On several occasions the District Court extended the applicant's house arrest.

14. On 7 April 2016 the investigation was completed and the applicant's case file was transferred to the Kirovskiy District Court of Irkutsk. The

applicant was accused of production and distribution of pornography and child pornography and of child molestation.

## II. TRIAL

15. On 14 June 2016 the District Court opened the trial in the applicant's case.

16. On 11 September 2016 the applicant absconded. The District Court continued the trial in his absence.

17. On 26 December 2016 the District Court found the applicant guilty as charged and sentenced him to fifteen years' imprisonment. The court relied on the statements of numerous witnesses (including members of the applicant's family, his colleagues, computer experts and psychologists) and on physical evidence and forensic reports. The applicant's counsel attended the hearing and was issued with a copy of the judgment. According to the text of the judgment, it was amenable to appeal during 10 days following its pronouncement.

18. Neither the applicant nor his counsel appealed against the judgment of 26 December 2016 and on 10 January 2017 it became enforceable.

## III. APPEAL

19. On 8 March 2017 the applicant appealed against his conviction, asking for the restoration of the time-limit for appealing. In the statement of appeal, he alleged that the trial court had delivered the judgment in his case in violation of substantive and procedural criminal laws. In particular, he had been unable to confront the witnesses; the trial court's findings had not been supported by the evidence submitted and its interpretation of the applicable laws had been erroneous. He forwarded the statement of appeal by post and it was received by the District Court on 15 March 2017.

20. According to the Government, the national courts did not hold a hearing in order to consider the applicant's request for restoration of the time-limit for his appeal or to examine the applicant's appeal on the merits.

21. On 28 March 2017 the President of the District Court dispatched a non-procedural letter to the applicant via the French consulate in Moscow. In particular, the President indicated as follows:

"The statement of appeal lodged by [the applicant] cannot be examined on the merits given that the judgment in his case was delivered *in absentia* and can be reviewed only by way of cassation.

Furthermore, ... an appeal can be lodged against a judgment which is not yet final. The judgment of the Kirovskiy District Court of Irkutsk of 26 December 2016 ... became enforceable on 10 January 2017.

Please be advised that pursuant to [the applicable rules of criminal procedure], the court must hold a hearing in the defendant's presence, subject to the exception

provided for by law. Under Article 247 § 5 of the Code of Criminal Procedure of the Russian Federation, in exceptional circumstances, the court may examine a case concerning serious or very serious crimes in the absence of a defendant who is outside the Russian Federation or who absconds ...

The criminal case against [the applicant] was examined in his absence, given that [the applicant] breached the conditions of the house arrest, absconded and, according to the information provided to the court, is outside the Russian Federation. ...

Pursuant to Article 247 § 7 of the Code of Criminal Procedure of the Russian Federation, if the circumstances indicated in Article 247 § 5 cease to exist, the judgment delivered *in absentia* is to be quashed, if so requested by the defendant or his counsel, by way of a cassation review and a retrial is to be conducted.

It follows, in accordance with the applicable laws, that [the applicant] or his counsel may apply to the Irkutsk Regional Court for a cassation review of the judgment delivered by the [District Court] on 26 December 2016 provided the [applicant's] whereabouts are known and the court's ruling on [remand in custody pending trial] is enforced. Under such circumstances, the judgment [in the applicant's case] is to be quashed and the retrial is to be conducted in the defendant's presence."

#### IV. APPLICATION FOR A CASSATION REVIEW

22. According to the Government, on 23 June 2017 K., a lawyer, applied to the Regional Court for a cassation review of the applicant's conviction.

23. On 27 July 2017 the Regional Court refused to grant the application for a cassation review of the applicant's conviction.

24. According to the applicant, he did not retain K. to represent him in the cassation review proceedings or to lodge an application for a cassation review of his conviction.

#### RELEVANT LEGAL FRAMEWORK AND PRACTICE

25. The Code of Criminal Procedure of the Russian Federation provides for the defendant's unconditional right to appeal against his or her conviction where the conviction is not yet final (Articles 389.1 and 389.2 of the Code). The statement of appeal should be lodged with the court which delivered the judgment in the case (Article 389.3) within ten days after the date on which the judgment is delivered by a court at the first level of jurisdiction (Article 389.4). The appellant may apply for restoration of the time-limit for appealing. A court will hold a hearing to examine the request for restoration of the time-limit and deliver an appropriate (procedural) decision. If the court acknowledges that there was a compelling reason for failing to comply with the time-limit, it restores it. A refusal by the court to restore the time-limit is amenable to appeal to a superior court (Article 389.5 of the Code).

26. Under the Code of Criminal Procedure, judgments can be delivered *in absentia* in exceptional circumstances, in particular in respect of a defendant who has absconded (Article 247 § 5 of the Code). In such a case,

the defendant has a right to a retrial. Upon a request by the defendant, the judgment delivered *in absentia* is to be quashed once the circumstances preventing the defendant from attending are no longer in place (if the defendant is no longer absconding – Article 247 § 7 of the Code). The defendant may lodge such request by way of cassation appeal (Article 401.15 of the Code).

27. Parties to the proceedings, including a defendant, may challenge the judgment which has come into force by way of cassation appeal (Article 401.2 of the Code). The purpose of the cassation appeal is to verify the lawfulness of the judgment delivered in the criminal case (Article 401.1 of the Code). Should the cassation appeal court establish that there was a serious violation of criminal substantive or procedural laws, it will quash or revise the judgment of a lower court (Article 401.15 § 1 of the Code).

28. The Presidium of the Supreme Court of the Russian Federation may verify the lawfulness of the judgments delivered by superior courts by way of supervisory review (Article 412.1 of the Code). A ground for revision or quashing of such judgments is a serious violation of criminal substantive or procedural laws (Article 412.9 of the Code). The Presidium may review any judicial act delivered on the matter (Article 412.11 of the Code).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 7 TO THE CONVENTION

29. The applicant complained that he had been unable to appeal against his conviction, in violation of Article 2 of Protocol No. 7 to the Convention, which reads as follows:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

#### A. Admissibility

##### *1. The parties' submissions*

30. The Government submitted that the applicant had failed to exhaust all effective domestic remedies in respect of his complaint. He should have complained to a superior court about the refusal, set out in the non-procedural letter issued by the District Court's President on 28 March 2017, to accept his statement of appeal for consideration. The fact that the

President had failed to deliver a procedural decision in response to the applicant's request for restoration of the time-limit for lodging an appeal should not have been construed as preventing the applicant from appealing against the President's letter. The Government relied on the decisions given by the Constitutional Court of the Russian Federation as regards the constitutionality of the relevant rules of civil procedure and the Amnesty Act and the decisions of the Supreme Court of the Russian Federation concerning the issuance of letters instead of decisions by national courts in the course of civil proceedings.

31. The applicant argued that the President's non-procedural letter had not been amenable to appeal, having been issued in breach of the applicable rules of criminal procedure.

## *2. The Court's assessment*

32. The Court reiterates that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted. The question which first arises is therefore whether the Government's objection that domestic remedies have not been exhausted is well-founded in the instant case. In that connection the Court points out that any applicant must have provided the domestic courts with the opportunity which is in principle intended to be afforded to Contracting States, namely the opportunity of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII, with further references therein).

33. Having examined the parties' submissions, the Court accepts the applicant's argument that it was not incumbent on him to appeal against the President's letter of 28 March 2017, as alleged by the Government, in order to comply with the requirements set forth in Article 35 § 1 of the Convention. There is nothing in the materials submitted by the Government to allow the Court to consider this letter to be a judicial decision against which an appeal was possible. It was not issued by a tribunal competent to decide on the matter nor did it lay down the rules on how to appeal against it. The letter cannot but be viewed as informal information lacking any legally binding force.

34. In this connection, the Court notes that in response to the applicant's appeal and his request for restoration of the time-limit for lodging it, it was incumbent on the trial court, pursuant to the Russian law, to hold a hearing and to deliver a formal decision on the matter (see paragraph 25 above). For reasons unknown, the District Court's President ignored the requirements set forth in the relevant rules of criminal procedure and issued a non-procedural letter advising the applicant that his appeal would not be entertained.

35. The Court further notes that the text of that letter made no reference to the possibility of appealing against it. The President also advised the applicant that his conviction was not amenable to appeal (see paragraph 21 above).

36. Regard being had to the omission on the part of the President of the District Court to indicate in his letter the applicable procedure for challenging it, the Court finds that, in the circumstances of the case, it cannot be said that the applicant received clear and comprehensible instructions as to the proper avenue for exhausting domestic remedies. Accordingly, for the purposes of Article 35 § 1 of the Convention, the applicant was not required to lodge an appeal against the letter of 28 March 2017. The Government's objection as to the alleged failure by the applicant to exhaust all effective domestic remedies should therefore be dismissed.

37. 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**

### *1. The parties' submissions*

38. The applicant submitted that the Russian authorities had provided two mutually exclusive positions as regards his right to appeal against his conviction. The domestic judicial authorities had refused to examine his appeal under the pretext that the judgment delivered *in absentia* had not been amenable to appeal and that a retrial had been possible only if the applicant had appeared in person before the court. They had further reasoned that his conviction *in absentia* could have been re-examined by way of a cassation review. On the contrary, in the Government's view, the applicant had had an opportunity to appeal against his conviction as provided for by the applicable rules of criminal procedure. As to the application for a cassation review lodged by the lawyer K., the applicant submitted that at the relevant time he had not retained K.'s services or asked him to apply for a cassation review.

39. The Government submitted that it had been open to the applicant to appeal against his conviction within the appropriate time-limit. However, he had chosen not to do so. Even after his application for restoration of the

time-limit for appealing had been dismissed without consideration, he could have reapplied had he considered that the dismissal had been unlawful. The fact that the applicant's lawyer had applied for a cassation review of the applicant's conviction confirmed that the applicant had waived his right to appeal, having opted for another type of review.

## 2. *The Court's assessment*

40. The Court reiterates that the Contracting States in principle enjoy a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law, or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II; and, *mutatis mutandis*, *Nait-Liman v. Switzerland* [GC], no. 51357/07, §§ 114-15, 15 March 2018; and *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 195, 25 June 2019).

41. The Court further reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of the interpretation are compatible with the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018, and *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018). However, the authorities should respect and apply domestic legislation in a foreseeable and consistent manner (see *Jovanović v. Serbia*, no. 32299/08, § 50, 2 October 2012). In cases concerning access to court, it may fall to the Court to determine, in particular, whether the applicant was able to count on a coherent system that struck a fair balance between the authorities' interests and his own interests (see *De Geouffre de la Pradelle v. France*, 16 December 1992, § 34, Series A no. 253-B, and *Maširević v. Serbia*, no. 30671/08, § 48, 11 February 2014).

42. As regards Russian national law (see paragraphs 25-28 above), the Court notes that it provides a defendant convicted *in absentia* with three avenues, as regards a possibility to challenge a conviction. As a general rule, it is possible to lodge an appeal against a conviction within ten days of the delivery of the judgment by the court at first level of jurisdiction. Furthermore, once the ten-day limit has passed and the judgment has become final, the defendant may either present him- or herself physically

before the competent court asking for his conviction to be quashed, by way of cassation appeal, and a retrial, or ask for reinstatement of the time-limit for appeal should he or she consider such reinstatement justified. In this last case the law does not require that the defendant present him- or herself in person to lodge such application. The competent court is to hold a hearing on the issue and to deliver a reasoned decision which itself is amenable to appeal.

43. Turning to the circumstances in the present case, the Court observes that the applicant opted for the third avenue. He chose to apply for the reinstatement of the time-limit for appeal without presenting himself physically before the court. In response, the District Court's President refused to entertain the applicant's request noting, in a non-procedural letter, that conviction *in absentia* was not amenable to appeal. There was no hearing held. Nor did the President issue a reasoned decision on the matter, as required by law.

44. The Court reiterates, in this connection, that it is of capital importance that a defendant should appear in person in the criminal proceedings and that the legislature must accordingly be able to discourage unjustified absences (see *Poitrimol v. France*, 23 November 1993, § 35, Series A no. 277-A). Nevertheless, it does not lose sight that the domestic legislation clearly provides for the right to apply for reinstatement of the time-limit for appeal against conviction in absentia and does not require the applicant's physical presence for the examination of such request, irrespective of the obligation of the defendant to be eventually physically present at the trial on the merits of the charges brought against him or her once the time-limit for appeal has been reinstated.

45. As the applicant has been deprived of the possibility to have a hearing – even in his absence – on his request to have the time-limit for appeal reinstated, it appears that the dismissal of his relevant request deprived him of a possibility to exercise this right effectively. There has been accordingly a violation of Article 2 of Protocol No. 7 to the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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**

47. The applicant claimed 500,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government submitted that the award, if any, should be made by the Court in accordance with its established case-law.

49. The Court refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005 IV, and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). The Court notes, in this connection, that Article 413 of the Russian Code of Criminal Procedure provides the basis for the reopening of the domestic proceedings if the Court finds a violation of the Convention. It therefore considers that its finding of a violation constitutes sufficient just satisfaction and makes no award under this head.

### **B. Costs and expenses**

50. The applicant also claimed EUR 14,400 for the costs and expenses incurred before the Court and in respect of the work conducted by his representative on his case in France.

51. The Government submitted that the reimbursement should be made in accordance with the Court's established case-law.

52. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court is unable to allow the totality of the sums claimed and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

### **C. Default interest**

53. 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,

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 2 of Protocol No. 7 to the Convention;
3. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
4. *Holds*, by six votes to one,
  - (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, EUR 2,000 (two thousand 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško  
Registrar

Paul Lemmens  
President