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

SECOND SECTION

CASE OF POSOKHOV v. RUSSIA

(Application no. 63486/00)

JUDGMENT

STRASBOURG

4 March 2003

FINAL

04/06/2003

In the case of Posokhov v. Russia,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE,
Mr A. KOVLER, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 11 February 2003,

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

PROCEDURE

1. The case originated in an application (no. 63486/00) 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 Sergey Vitalyevich Posokhov ("the applicant"), on 2 October 2000.

2. The applicant was represented by Mr A. Kiriyanov, a lawyer practising in Taganrog. The Russian Government ("the Government") were represented by their Agent, Mr P. Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that he had been convicted by a court composed in breach of the relevant domestic law.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 9 July 2002, the Chamber declared the application partly admissible.

7. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations and provided further information about the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1966 and lives in Taganrog.

A. Initial criminal proceedings

9. The applicant worked for the Taganrog Customs Board, supervising the clearance of imported goods at a seaport customs post. In 1996 criminal proceedings were instituted against him and certain others for the alleged smuggling of considerable amounts of vodka.

10. On 22 May 2000 the Neklinovskiy District Court of the Rostov Region, composed of Judge Kink and two lay judges (народные заседатели), Ms Streblyanskaya and Ms Khovyakova, found the applicant guilty of being an accessory in the avoidance of customs duties and of abuse of office.

11. Immediately upon his conviction, the applicant was dispensed from serving the sentence partly because of the expiry of a statutory limitation period and partly because of a 1997 amnesty law.

12. On 26 and 29 May and 16 June 2000 the applicant and his counsel filed appeals against the judgment.

13. On 17 August 2000 the applicant requested from the President of the Neklinovskiy District Court a list of lay judges currently serving in the court and a copy of the President's decision selecting those lay judges who were to sit in cases under the presidency of Judge Kink between January and May 2000.

14. On 29 August 2000 the applicant supplemented his appeal with new points. He challenged the bench that had delivered the judgment of 22 May, alleging a breach of the rules on the appointment of lay judges. In particular, the applicant submitted that, whereas the Federal Law on the Lay Judges of the Federal Courts of General Jurisdiction ("the Lay Judges Act") allowed lay judges to be called once a year for a maximum period of fourteen days, or for as long as a specific case lasted, the lay judges Ms Streblyanskaya and Ms Khovyakova had been engaged earlier in the course of 2000 in several other trials. In addition, it was claimed that Ms Streblyanskaya's statutory term of office had expired before the day of the applicant's trial.

15. On 29 August 2000 the Criminal Division of the Rostov Regional Court dismissed the applicant's appeals. The court also refused an application by the applicant and his counsel for access to copies of earlier judgments delivered by the Neklinovskiy District Court under the presidency of Judge Kink. The court held that the applicant had been informed of his right to challenge the bench at the outset of his trial, but he

had failed to do so. No breach of the rules for the appointment of lay judges had been established.

16. On 16 November 2000 the President of the Rostov Regional Court refused an application for supervisory review (принесение протеста в порядке надзора) of the applicant's case. In his application to the President, the applicant had raised a new argument in support of his allegation that the judges had not been appointed according to the applicable rules: it was claimed that there was nothing to indicate that the judges had been drawn at random by lot as required by the Lay Judges Act. The President rejected the applicant's earlier argument as to the expiry of the judges' term, referring to the Presidential Decree of 25 January 2000, whereby the terms of lay judges already in office had been extended pending the appointment of new ones. The President noted that the list of lay judges for the Rostov Region had been drawn up on 18 October 2000, after the applicant's conviction. No answer was given to the applicant's allegation that the judges had not been drawn by lot.

17. On 20 February 2001 the President of the Rostov Regional Court refused another application by the applicant for a supervisory review.

18. In August and October 2001 the applicant requested the President of the Legislature of the Neklinovskiy District to provide information concerning the lay judges who had been authorised to sit in cases during the period between 10 and 22 May 2000.

19. On 2 October 2001 the Neklinovskiy District Authority informed the applicant that the pertinent list of lay judges for the Neklinovskiy District had been compiled on 4 February 2000 and confirmed by the Legislature of the Rostov Region on 15 June 2000.

B. Re-examination of the case

20. On an unspecified date following communication of the present application to the Government, the President of the Rostov Regional Court lodged an application for a supervisory review of the case on the ground that the judgment of 22 May 2000 had not described in sufficient detail the offence committed by the applicant and his accomplices.

21. On 3 May 2001 the Presidium of the Rostov Regional Court granted the application, partly quashed the judgment of 22 May 2000 and the appeal judgment of 29 August 2000, and ordered a fresh examination of the case.

22. On 2 July 2001 the Neklinovskiy District Court found the applicant guilty of the same offences but dispensed him from serving the sentence because the case was time-barred.

23. An appeal by the applicant was dismissed by the Rostov Regional Court on 2 October 2001 and the judgment became final.

24. Following another application for supervisory review lodged by the President of the Rostov Regional Court on an unspecified date, the

Presidium of the Rostov Regional Court on 31 January 2002 quashed the decisions given on 2 July and 2 October 2001. It found that the courts were not in a position to decide on the applicant's guilt because the whole case was time-barred.

C. Further developments

25. Following the request of the applicant's lawyer, on 28 August 2002 the Neklinovskiy District Authority informed the applicant that the list of lay judges serving in the district had been adopted by a decision of the District Legislature on 4 February 2000 and confirmed by a decision of the Rostov Regional Legislature on 15 June 2000.

26. On 4 October 2002, the Neklinovskiy District Authority informed the applicant that there was no record of any adoption of lay judges' lists before 4 February 2000 [The original letter indicated the date as "4 February 2002", apparently a typographical error].

II. RELEVANT DOMESTIC LAW

A. Composition of courts in criminal proceedings

27. Article 15 of the Code of Criminal Procedure provides that hearings in first-instance courts dealing with criminal cases should, subject to certain exceptions, be conducted by a single professional judge or by one professional and two lay judges. In their judicial capacity, lay judges enjoy the same rights as the professional judge.

B. Lay judges

28. On 10 January 2000, the Federal Law on the Lay Judges of the Federal Courts of General Jurisdiction in the Russian Federation ("the Lay Judges Act" or "the Act") came into force. By section 1(2) of the Act, lay judges are persons authorised to sit in civil and criminal cases as non-professional judges.

Section 2 of the Act provides that lists of lay judges should be compiled for every district court by local self-governing representative authorities, such lists being subject to confirmation by the legislature of the respective Federation entity. Section 5 of the Act, which determines the procedure for the selection of lay judges, provides that the president of a district court should draw lots at random from a list of names of a certain number of lay judges to be assigned to the competent district court. The number of lay judges assigned to every professional judge should be at least three times

greater than that needed for a hearing. Since most criminal cases in Russia are examined by a court composed of one professional judge and two lay persons, it appears that every judge must have at least six lay judges attached to him or her. Out of these six, a judge picks two at random to sit in a particular case.

By section 9, lay judges should be called to serve in a district court for a period of fourteen days, or as long as the proceedings in a particular case last. Lay judges may not be called more than once a year.

Under the Decree of the Acting President of Russia issued on 25 January 2000, lay judges serving in the courts of general jurisdiction were authorised to remain in office until the courts received new lists of lay judges, as confirmed by the legislatures of the Federation's entities.

THE LAW

29. The applicant complained under Article 6 § 1 of the Convention that the court that had convicted him on 22 May 2000 could not be considered to have been a "tribunal established by law" because it had been composed in breach of the relevant national rules.

30. The applicant specifically claimed that neither the president of the court nor the presiding judge had drawn lots for the lay judges as required by the Lay Judges Act. The applicant also maintained that the lay judges Ms Streblyanskaya and Ms Khovyakova had been acting in this capacity before the applicant's trial for at least eighty-eight days, instead of the maximum fourteen days permitted by law, and, lastly, that there had been no evidence that any judicial authority had been conferred on them before the trial.

I. THE APPLICANT'S VICTIM STATUS

31. The Government contended that the applicant could no longer claim to be a victim of the violation alleged. They submitted that the original judgment, i.e. the judgment of 22 May 2000 in which the lay judges Ms Streblyanskaya and Ms Khovyakova had been involved, had been set aside after notice of the application had been given by the Court to the Russian authorities, and that a fresh examination of the case had been carried out by properly appointed judges. Moreover, since the decision of the Presidium of the Rostov Regional Court of 31 January 2002 had terminated the entire criminal proceedings because they were time-barred, the applicant's criminal record had been erased. The Government concluded that these decisions had removed all the legal effects of the applicant's

conviction, and the composition of the court which had passed judgment on 22 May 2000 was no longer of any importance.

32. The applicant agreed that both the adverse judgments of the Neklinovskiy District Court, those of 22 May 2000 and 2 July 2001, had indeed been quashed. However, the decision of the Presidium of the Rostov Regional Court of 31 January 2002 had not amounted to an acquittal because it had not overturned the finding of guilt, closing the case on purely technical grounds. The applicant averred that the decision of 31 January 2002 had not restored his good name. Lastly, the applicant claimed that the decision of the Presidium had not acknowledged the fact that the composition of the Neklinovskiy District Court on 22 May 2000 had been illegal, and that he had therefore not been deprived of the status of victim.

33. By Article 34 of the Convention, "the Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto ...".

34. The Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether or not the applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *E. v. Austria*, no. 10668/83, Commission decision of 13 May 1987, Decisions and Reports 52, p. 177).

35. The Court further reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

36. Turning to the facts of the present case, it may be true that the applicant's criminal record has now been erased following the decision of 31 January 2002. However, no decision of the domestic courts since the Rostov Regional Court appeal judgment of 29 August 2000 has touched upon the issue of the lay judges or contained any acknowledgment of the violations alleged.

37. In these circumstances, the Court considers that the applicant may still claim to be the victim of a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

38. Article 6 § 1 of the Convention, in its relevant part, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

39. The Court reiterates that the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case (see *Buscarini v. San Marino* (dec.), no. 31657/96, 4 May 2000).

The Court is therefore requested to examine allegations such as those made in the present case concerning a flagrant breach of the internal rules for the appointment of judicial officers. The fact that the allegation in the present case concerns lay judges, does not make it any less important as, pursuant to Article 15 of the Code of Criminal Procedure, in their judicial capacity lay judges enjoy the same rights as the professional judge.

40. The parties' dispute focuses on the extent to which the participation of the lay judges Ms Streblyanskaya and Ms Khovyakova in the hearing of 22 May 2000 complied with the domestic legislation, notably the Lay Judges Act.

41. The applicant's initial claim was that the two women had, contrary to section 9 of the Act, been acting as lay judges before the applicant's trial for at least eighty-eight days, instead of the maximum fourteen days per year. Moreover, their names had not been drawn by lot, in breach of section 5 of the Act.

The applicant subsequently supplemented that complaint. On the basis of the Neklinovskiy District Authority's reply of 4 October 2002 that there was no record of any adoption of lay judges' lists before 4 February 2000, the applicant concluded that there was no proof that Ms Streblyanskaya and Ms Khovyakova had ever been appointed as lay judges, even before the enactment of the Lay Judges Act.

42. In their defence, the Government referred to the Presidential Decree of 25 January 2000 which extended the statutory term of office of the current lay judges until new lists had been established under the Lay Judges Act. The Government did not contest the fact that Ms Streblyanskaya and Ms Khovyakova had served for more than fourteen days before the applicant's trial. But the Government could not accept the notion that a lengthier period of service would automatically entail a violation of the Act, since the lay judges' statutory term was for five years and they preserved their judicial authority during the whole of that period.

43. However, apart from the apparent failure to observe the requirements of the Lay Judges Act regarding the drawing of random lots and two weeks' service per year, the Court is particularly struck by the fact that the Neklinovskiy District Authority – the body responsible for the appointment of lay judges – has confirmed that it had no list of lay judges appointed before 4 February 2000. The authority thus failed to present any legal grounds for the participation of Ms Streblyanskaya and Ms Khovyakova in the administration of justice on the day of the applicant's trial, bearing in mind that the list adopted on 4 February 2000 only took effect on 15 June 2000 after its approval by the Rostov Regional Legislature.

These circumstances, cumulatively, do not permit the Court to conclude that the Neklinovskiy District Court which heard the applicant's case on 22 May 2000 could be regarded as a "tribunal established by law".

44. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed the sum of 10,000 euros (EUR) for the violation of his right to be tried by a tribunal established by law. He said that he had suffered emotional distress on account of his conviction by a court with no authority and the risk of his being dismissed from his job as a result.

47. The Government refrained from making comments on the applicant's claims because they believed that the quashing of the judgment of 22 May 2000 had erased any adverse effects which it might have produced.

48. The Court accepts that the applicant suffered damage of a non-pecuniary nature as a result of his conviction by an unlawfully constituted court. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 500.

B. Costs and expenses

49. The applicant also requested, without specifying the precise amount, the reimbursement of the legal fees he had incurred in the domestic proceedings.

50. The Government made no comment on this claim.

51. However, in the absence of any details or breakdown of the claim, no award can be made under this head.

C. Default interest

52. 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. *Holds* that the applicant may claim to be a "victim" for the purposes of Article 34 of the Convention;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 500 (five hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at a rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
(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;

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

Done in English, and notified in writing on 4 March 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President