



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

FIRST SECTION

CASE OF SERGEY ZOLOTUKHIN v. RUSSIA

(Application no. 14939/03)

JUDGMENT

STRASBOURG

7 June 2007

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
10/02/2009**

This judgment may be subject to editorial revision.

In the case of Sergey Zolotukhin v. Russia,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 15 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 14939/03) 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 Aleksandrovich Zolotukhin ("the applicant"), on 22 April 2003.

2. The applicant was represented before the Court by Mr K. Koroteyev, Ms D. Vedernikova, Mr W. Bowring and Mr P. Leach, lawyers with the European Human Rights Advocacy Centre (EHRAC). The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been tried again for an offence of which he had previously been convicted.

4. By a decision of 8 September 2005 the Court declared the application partly admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1966 and lives in Voronezh.

A. Administrative proceedings against the applicant

7. On 4 January 2002 the applicant was arrested for having brought his girlfriend into the military compound without authorisation. At 9.45 a.m. he was taken to police station no. 9 of the Department of the Interior of the Leninskiy District of Voronezh-45 (the “police station”).

8. According to reports by Captain S. and Lieutenant-Colonel N., the applicant was drunk, behaved insolently and verbally abused police officers using obscene language. He ignored the rebukes and warnings issued to him. After he attempted to escape, the officers handcuffed him.

9. Major K., the officer in charge of the police station, drew up an administrative offences report, noting that the applicant had committed offences under Articles 158 (“Minor disorderly acts”) and 165 (“Persistent refusal to comply with lawful police orders”) of the RSFSR Code of Administrative Offences. The report was then submitted to the court.

10. On the same day the Gribanovskiy District Court found the applicant guilty of an offence under Article 158 of the Code of Administrative Offences and sentenced him to three days’ administrative detention. The judgment was not amenable to appeal and took immediate effect.

B. Criminal proceedings against the applicant

11. On 23 January 2002 criminal case no. 81 was opened against the applicant on suspicion of his having committed disorderly acts, an offence under Article 213 § 2 (b) of the Criminal Code, on 4 January 2002 at the police station. The investigation was assigned to Major V.

12. On 24 January 2002 Major K. ordered the applicant’s detention on remand for “disorderly acts, including resisting a public official dealing with a breach of public order”.

13. On 1 February 2002 two further cases (nos. 82 and 83) were opened against the applicant. In case no. 82 he was suspected of a violent sexual assault against minors. In case no. 83 the applicant was charged with the theft of a tape recorder.

14. On 6 February 2002 all three cases were joined under the number 81 and assigned to Major V.

15. On 26 February 2002 the joined case file was transferred to an investigator with the Voronezh town prosecutor’s office.

16. On 5 April 2002 the applicant was formally indicted on all the above charges. His actions on 4 January 2002 were additionally characterised as threatening violence against a public official (Article 318 § 1 of the Criminal Code) and insulting a public official (Article 319).

17. On 2 December 2002 the Gribanovskiy District Court delivered its judgment. It found the applicant guilty of aggravated rape of minors, relying on statements by two victims, the victims’ mother (the victims were sisters),

the applicant's wife and the applicant's girlfriend, and on the results of a forensic examination of the victims.

18. The District Court acquitted the applicant of the offence under Article 213 § 2 for the following reasons:

“On the morning of 4 January 2002 in ... police station no. 9 [the applicant], in an inebriated state, swore at ... Ms Y. and Mr S., threatening to kill the latter. He refused to comply with a lawful request by Captain S. ..., behaved aggressively, pushed S. away and attempted to leave. Having examined the evidence produced at the trial, the court considers that [the applicant's] guilt has not been established. On 4 January 2002 [the applicant] was subjected to three days' administrative detention for the same actions [characterised] under Articles 158 and 165 of the Code of Administrative Offences. No appeal was lodged against the judicial decision, nor was it quashed. The court considers that there is no indication of a criminal offence under Article 213 § 2 (c) in the defendant's actions and acquits him of this charge.”

19. The District Court further found the applicant guilty of insulting a State official under Article 319 of the Criminal Code. It established that the applicant had sworn at Major K. and threatened him while the latter had been drafting the report on the administrative offence under Articles 158 and 165 in his office at the police station. Major K.'s statements to that effect were corroborated by depositions from Captain S., Lieutenant-Colonel N. and Ms Y., who had also been present in K.'s office.

20. Finally, the District Court pronounced the applicant guilty of threatening violence against a public official under Article 318 § 1 of the Criminal Code. On the basis of the statements by Major K., Lieutenant-Colonel N. and the applicant's girlfriend it found that, after the administrative offence report had been finalised, the applicant and his girlfriend had been taken by car to the Gribovskiy district police station. In the car the applicant had continued to swear at Major K. He had also spat at him and said that, once released, he would kill him and abscond. Major K. had perceived the threat as a real one because the applicant had a history of abusive and violent behaviour.

21. The applicant was sentenced to five years and six months' imprisonment in a correctional colony and to mandatory treatment for alcohol addiction.

22. On 15 April 2003 the Voronezh Regional Court upheld the judgment in its entirety on the applicant's appeal.

II. RELEVANT DOMESTIC LAW

23. The relevant provisions of the RSFSR Code of Administrative Offences of 20 June 1984 (in force at the material time) read as follows:

Article 158 Minor disorderly acts

“Minor disorderly acts, that is, utterance of obscenities in public places, offensive behaviour towards others and other similar acts that breach the public order and peace, shall be punishable by a fine of between ten and fifteen months’ minimum wages or by one to two months’ correctional work combined with the withholding of twenty percent of the offender’s wages, or – if, in the circumstances of the case and having regard to the offender’s character, these measures are not deemed to be adequate – by up to fifteen days’ administrative detention.”

Article 165 Persistent refusal to comply with a lawful order or a request by a police officer...

“Persistent refusal to comply with a lawful order or a request by a police officer ... shall be punishable by a fine of between ten and fifteen months’ minimum wages ... or by one to two months’ correctional work combined with the withholding of twenty percent of the offender’s wages, or – if, in the circumstances of the case and having regard to the offender’s character, these measures are not deemed to be adequate – by up to fifteen days’ administrative detention.”

24. The relevant provisions of the Criminal Code of the Russian Federation (version in force at the material time) read as follows:

Article 213 Disorderly acts

“1. Disorderly acts, that is, serious breaches of the public order or flagrant displays of disrespect to the community, combined with the use of violence towards individuals or a threat to use violence or to destroy or damage the property of others, shall be punishable ... by up to two years’ deprivation of liberty.

2. The same acts, if committed:

...

(b) [“6” in the original] while resisting a public official or another person fulfilling his or her duty to maintain the public order or dealing with a breach of the public order;

(c) [“B” in the original] by a person with a previous conviction for disorderly acts,

– shall be punishable by between 180 and 240 hours’ mandatory work or by one to two years’ correctional work or up to five years’ deprivation of liberty.”

Article 318 Use of violence against a public official

“1. The use of violence not endangering life or health, or a threat to use such violence, against a public official or his relatives in connection with the performance of his or her duties shall be punishable by a fine of between 200 to 500 months’ minimum wages ... or by three to six months’ detention or up to five years’ deprivation of liberty...”

Article 319 Insulting a public official

“Publicly insulting a public official in the performance of his or her duties or in connection with the performance thereof shall be punishable by a fine of between 50 and 100 months’ minimum wages, ... 120 to 180 hours’ mandatory work or six months to a year’s correctional work.”

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7**

25. The applicant complained under Article 4 of Protocol No. 7 that, after he had already served three days’ detention for disorderly acts committed on 4 January 2002, he had been re-detained and tried again for the same offence. The relevant part of Article 4 of Protocol No. 7 provides as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State...”

26. The applicant acknowledged that he had not been convicted or punished twice, but maintained that he had been tried twice before the District Court in respect of the same offences. His first conviction had been “criminal” in nature, having regard to the nature and severity of the penalty (deprivation of liberty). The second set of proceedings had been based on the same facts, as the offences of “disorderly acts” (Article 158 and Article 213) and “refusal to comply with or resistance to a lawful order” (Article 165 and Articles 318 and 319) had the same essential elements. The applicant pointed out that the authorities had opened and carried on a new set of proceedings against him in full knowledge of his previous conviction.

27. The Government submitted that the District Court had acquitted the applicant of the charge of disorderly acts under Article 213 § 2 of the Criminal Code and thereby remedied an earlier violation of the applicant’s rights committed by the investigation. The applicant’s conviction under Articles 318 and 319 of the Criminal Code related to the events that occurred after the report on an administrative offence had been drawn up. Thus, the applicant had not been previously tried for either insulting a public official or threatening to use violence.

28. The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see *Franz Fischer v. Austria*, no. 37950/97, § 22, 29 May 2001, and *Gradinger v. Austria*, judgment of 23 October 1995, Series A

no. 328-C, § 53). In the present case the applicant was first found guilty of disorderly acts in administrative proceedings and served three days' detention; a charge of disorderly acts was subsequently levelled against him in criminal proceedings. Although the applicability of Article 4 of Protocol No. 7 was not in dispute between the parties, the Court has to ascertain whether the applicant's initial administrative detention followed on from a conviction "in accordance with the law and penal procedure".

29. The Court notes that the words "in criminal proceedings" and "penal procedure" used in the text of Article 4 of Protocol No. 7 – rendered in the French text as "pénalement" and "procédure pénale" – must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" ("infraction pénale") and "penalty" respectively in Articles 6 and 7 of the Convention. Hence, the Court will have regard to such factors as the legal classification of the *offence* under national law; the nature of the offence; the national legal characterisation of the *measure*; its purpose, nature and degree of severity; whether the measure was imposed following conviction for a criminal offence, and the procedures involved in the making and implementation of the measure (see *Storbråten v. Norway* (dec.), no. 12277/04, ECHR 2007-... (extracts), and *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-..., with further references).

30. As to the domestic legal classification, the Court has previously found that the sphere defined in the Russian and some other legal systems as "administrative" embraces some offences that are criminal in nature but too trivial to be governed by criminal law and procedure (see *Menesheva v. Russia*, no. 59261/00, § 96, ECHR 2006-...). Loss of liberty imposed as punishment for an offence belongs in general to the criminal sphere, unless by its nature, duration or manner of execution it is not appreciably detrimental (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 69-130, ECHR 2003-X). The offence of minor disorderly acts under Article 158 of the Code of Administrative Offences was punishable by up to fifteen days' deprivation of liberty. The administrative proceedings against the applicant resulted in a three-day period of detention which he served in the detention unit of the police station. These factors enable the Court to conclude that the offence of disorderly acts of which the applicant was found guilty on 4 January 2002 amounted to a "criminal" conviction for the purposes of Article 4 of Protocol No. 7.

31. The Court further recalls that Article 4 of Protocol No. 7 prohibits, among other things, repeated convictions based on the same conduct of the accused. However, this provision cannot be interpreted so as to exclude repeated convictions based on conduct shown on a number of distinct occasions, even if in essence the conduct was substantially similar to that previously shown (see *Smolickis v. Latvia* (dec.), no. 73453/01, 27 January

2005, and *Raninen v. Finland*, no. 20972/92, Commission decision of 7 March 1996, Decisions and Reports 84, p. 17).

32. The Government maintained that the applicant's conviction for insulting and threatening violence against public officials had been based on a set of facts different from that on which his conviction for disorderly acts had been founded. The Court accepts the Government's submission. It observes that the disorderly acts imputed to the applicant had been committed on the morning of 4 January 2002, *before* the administrative offence report was drafted. It further transpires from the District Court's judgment that the applicant had insulted and threatened police officers with violence *during the time* when the administrative report concerning his disorderly acts was being prepared. He had been verbally abusive *after* his arrival at the police station and in the car on the way to it. It follows that the offences at issue were separate and subsequent in time (cf. *Asci v. Austria* (dec.), no. 4483/02, 19 October 2006). Accordingly, there was no repetition of criminal proceedings as regards the applicant's conviction under Articles 318 and 319 of the Criminal Code.

33. Nonetheless, the Government did not dispute that the applicant's punishment in the administrative proceedings and his subsequent prosecution under Article 213 of the Criminal Code had been connected with the same facts, that is, his disorderly conduct before his arrival at the police station on the morning of 4 January 2002. The Court observes that the offence of "minor disorderly acts" as defined in Article 158 of the Code of Administrative Offence and that of "disorderly acts" under Article 213 of the Criminal Code had the same essential elements, namely disturbance of the public order (see, by contrast, *Ponsetti and Chesnel v. France* (dec.), nos. 36855/97 and 41731/98, 14 September 1999, ECHR-1999-VI, *Oliveira v. Switzerland*, judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, § 27, *Isaksen v. Norway* (dec.), no. 13596/02, 2 October 2003, and *Franz Fischer*, cited above, § 22). It follows that, as regards the proceedings instituted on the charge of disorderly acts under Article 213 of the Criminal Code, the applicant was prosecuted for the same offences of which he had previously been convicted under Article 158 of the Code of Administrative Offences.

34. The Court is not persuaded by the Government's contention that there had been no violation of Article 4 of Protocol No. 7 because the applicant had been acquitted of the charge under Article 213 of the Criminal Code. It recalls that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice (see *Franz Fischer*, cited above, § 29, and *Zigarella v. Italy* (dec.), no. 48154/99, 3 December 2002). Were this not the case, it would not have been necessary to add the word "punished" to the word "tried" since this would be mere duplication. Article 4 of Protocol No. 7 finds application even where the individual has merely been prosecuted in

proceedings that have not resulted in a conviction (see *Zigarella*, cited above). The Court has emphasised that Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, or (ii) tried, or (iii) punished for the same offence (see *Nikitin v. Russia*, no. 50178/99, § 36, ECHR 2004-...).

35. Thus, the fact that the applicant was eventually acquitted of the charge of disorderly acts has no bearing on his claim that he had been prosecuted and tried on that charge for a second time. After the applicant had served three days' detention for the disorderly acts committed on the morning of 4 January 2002, he was charged with essentially the same offence on 23 January 2002 and remanded in custody. Until 1 February 2002 that charge remained the only charge against him. It was not subsequently dismissed; instead, the prosecution continued for a further ten months until the trial court delivered its judgment on 2 December 2002. The present case is therefore distinguishable from the *Nikitin* case (cited above) in which the Court found no violation of Article 4 of Protocol No. 7 because the criminal proceedings against the applicant had not been re-opened despite the prosecution's request to that effect.

36. The Court further reiterates that Article 4 of Protocol No. 7 does not necessarily extend to all proceedings instituted in respect of the same offence (see *Falkner v. Austria* (dec.), no. 6072/02, 30 September 2004). Its object and purpose imply that, in the absence of any damage proved by the applicant, only new proceedings brought in the knowledge that the defendant has already been tried in the previous proceedings would violate this provision (see *Zigarella*, cited above). For that reason in the *Zigarella* case the Court rejected the applicant's complaint under Article 4 of Protocol No. 7, because the domestic courts had terminated the proceedings as soon as they had been informed that there had been a breach of the *non bis in idem* principle.

37. The situation obtaining in the present case is different from that in the *Zigarella* case. The Court observes that the criminal proceedings against the applicant on the charge of disorderly acts were instituted and conducted by the same police department which had obtained the applicant's administrative conviction by the District Court on 4 January 2002. The same police officer, Mr K., took part in both sets of proceedings within a short period of time – only nineteen days elapsed between the first conviction and the institution of new criminal proceedings. The same District Court and the same judge tried both cases. In these circumstances, the Court finds that the domestic authorities permitted duplication of criminal proceedings in full knowledge of the applicant's previous conviction of the same offence.

38. Finally, the Court observes that the violation of the *non bis in idem* principle was not the reason for the applicant's acquittal. It clearly follows from the District Court's judgment that the acquittal was founded on a

substantive ground, namely the fact that the prosecution had not proved the applicant's guilt to the standard of proof required in criminal, rather than administrative, proceedings (see paragraph 18 above). The judgment contained no acknowledgement of the duplication of proceedings (see, by contrast, *Zigarella*, cited above).

39. The Court finds that the applicant was prosecuted and tried for a second time for an offence of which he had already been convicted and for which he had served a term of detention. There has accordingly been a violation of Article 4 of Protocol No. 7.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed compensation for the non-pecuniary damage sustained as a result of his having been tried a second time for the same offence. He left the determination of the amount to the Court's discretion.

42. The Government submitted that the finding of a violation would constitute sufficient just satisfaction in the present case.

43. The Court observes that the repeated criminal proceedings against the applicant were pending for some ten months and that for some time his prosecution for the same offence was the sole ground for his detention. In these circumstances, the finding of a violation cannot be said to constitute sufficient just satisfaction for the sense of injustice and frustration the applicant must have felt. Making its assessment on an equitable basis, the Court awards the applicant 1,500 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

44. The applicant claimed 12,700 Russian roubles for the work of two lawyers in the domestic proceedings, EUR 500 for ten hours' work by his representative Mr Koroteyev, 300 pounds sterling (GBP) for three hours' work by Mr Leach and GBP 138.10 for translation costs.

45. The Government submitted that the applicant had failed to produce invoices in support of his claims.

46. The Court observes that the applicant submitted documents in support of his claims. Having regard to the material in its possession, the Court awards the applicant EUR 1,000 in respect of costs and expenses, plus any tax that may be chargeable on that amount, and dismisses the remainder of his claim.

C. Default interest

47. 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 there has been a violation of Article 4 of Protocol No. 7;
2. *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 Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (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;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President