



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

FIRST SECTION

CASE OF PONOMAREV v. RUSSIA

(Application no. 7672/03)

JUDGMENT

STRASBOURG

15 May 2008

FINAL

15/08/2008

This judgment may be subject to editorial revision.

In the case of Ponomarev v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 24 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 7672/03) 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 Vladimir Vladimirovich Ponomarev (“the applicant”), on 22 May 2001.

2. The applicant was represented by Mr V.D. Yermeychuk, a lawyer practising in the Republic of Komi. The Russian Government (“the Government”) were represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights.

3. On 11 January 2006 the Court decided to communicate the complaint concerning the domestic courts’ failure to examine the applicant’s claim about his alleged infection with tuberculosis to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4. The Court dismissed an objection raised by the Government concerning the application of Article 29 § 3 of the Convention to the present case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975 and lives in Vorkuta, in the Republic of Komi.

A. Criminal proceedings against the applicant

6. On 30 October 1996 police apprehended the applicant on suspicion of having committed theft from a garage, together with Sh. Upon arrival at the police station the applicant and Sh. admitted the charges. The applicant told the police the location of the garage they had robbed. It appears from the records of the applicant's arrest and first questioning that his right to have legal assistance provided by the state or of his own choosing was explained to him. However, he declined the offer initially and said that he would appoint a counsel to defend him during the trial.

7. On 1 November 1996 the applicant was remanded in custody.

8. On 28 February 1997 the prosecution authorities referred the criminal case to the Vorkuta Town Court of the Republic of Komi ("the Town Court") for trial.

9. On 9 December 1997 the Town Court found that during the pre-trial investigation the applicant had been deprived of an opportunity to appoint legal counsel of his own choosing. In the Town Court's view, the applicant's defence rights had not been respected and the charges against him had been based to a large extent on his self-incriminating testimony. Furthermore, the Town Court established that the applicant had been in custody for a year and that he had contracted tuberculosis. In those circumstances it decided to release the applicant on the undertaking not to leave his place of residence, and returned the case to the prosecution authorities for further investigation. The Town Court ordered that all investigative measures, including questioning the applicant, should be conducted in the presence of the applicant's legal counsel.

10. In July 1998 the investigating authorities discontinued the criminal proceedings against the applicant in the absence of any *corpus delicti*. However, in November 1998 the Deputy Prosecutor of Vorkuta ordered them to be re-opened.

11. On 18 December 2000 the Town Court examined the applicant's case. The applicant was represented by K., a counsel appointed by him. The

applicant and Sh. denied all charges. They submitted that they had confessed to theft to protect Sh.'s brother. The applicant refused to give any further testimony, relying on his right not to incriminate himself.

12. The Town Court heard testimonies by a victim, several witnesses and the investigator in charge of the case, who stated that the applicant had been assisted by a lawyer throughout the proceedings, except at times when he had refused to call one. Each time his refusal had been noted in the records of questioning and endorsed by the applicant. The Town Court held that the applicant had admitted the charges and that other evidence examined in the trial proved his guilt. It dismissed as unsubstantiated the applicant's complaint that he had been questioned on occasion with no counsel present, finding that according to the records of questioning sessions signed by the applicant, he had declined to call a lawyer.

13. On the same date the Town Court convicted the applicant as charged and sentenced him to two years' imprisonment, but ordered the sentence to be lifted under the Amnesty Act of 26 May 2000. On 26 January 2001 the Supreme Court of the Republic of Komi ("the Supreme Court") upheld the conviction on appeal.

B. Civil proceedings for damages

14. On 22 December 1998 the applicant brought a court action against the Ministry of Finance of the Russian Federation, seeking to recover lost wages and obtain compensation for his allegedly unlawful detention. He also claimed damages for his alleged infection with tuberculosis while in detention. He relied on Articles 1070 and 1100 of the Civil Code of the Russian Federation and claimed 150,000 Russian roubles (RUB). In the course of the proceedings, on 5 July 2001, the applicant increased his claim to RUB 300,000.

15. In support of his claims concerning his alleged infection with tuberculosis, the applicant provided the Town Court with an extract of his medical record delivered by the hospital of the village of Severnyy on 23 October 1998, and medical certificates delivered by the tuberculosis dispensary of Vorkuta on 23 December 1997 and 5 August 1998. According to those documents the applicant had been diagnosed with tuberculosis in 1997, while in pre-trial detention, and had to follow regular in-patient and sanatorium therapy.

16. The Town Court delivered its judgment on 23 January 2003. It held that the applicant's pre-trial detention had been lawful and dismissed his claim in respect of compensation for detention. It did not address the applicant's complaint about his alleged infection with tuberculosis. On 17 March 2003 the Supreme Court upheld the judgment on appeal.

II. RELEVANT DOMESTIC LAW

17. Constitution of the Russian Federation of 12 December 1993

Article 53

“Everyone shall have the right to compensation by the state for harm caused by the unlawful action (or inaction) of State organs or their officials.”

18. Criminal Code of the Russian Federation of 13 June 1996

Article 84 Amnesty

“An amnesty may be declared by the State Duma of the Federal Assembly of the Russian Federation with regard to a broad range of persons.

Persons who have committed crimes may be relieved from criminal liability by an act of amnesty. Persons convicted of crimes may be released from punishment, or the punishment imposed on them may be reduced or replaced with a milder penalty, or such persons may be released from additional penalties. The criminal records of persons who have served punishment may be expunged by an act of amnesty.”

19. Part II of the Civil Code of the Russian Federation of 26 January 1996, as worded at the material time

Article 1069 Liability for harm caused by State agencies, local self-government agencies and their officials

“Harm caused to an individual or a legal person as a result of the unlawful action (or inaction) of state agencies, local self-government agencies or officials thereof, including as a result of the issuing by state and local self-government agencies of acts that do not conform with the law or with other legal acts, shall be subject to compensation. Such compensation shall be paid by the treasury of the Russian Federation, the treasury of the subject of the Russian Federation, or the treasury of a municipal authority, as the case may require.”

Article 1070 Liability for harm caused by the unlawful actions of agencies of inquiry, agencies of preliminary investigation, the prosecutor’s office and the courts

“1. Harm caused to an individual as a result of unlawful conviction, unlawful criminal prosecution, unlawful application as a measure of restraint of remand in custody or a written undertaking not to leave a specified place, unlawful imposition of administrative sanctions in the form of an arrest or correctional labour, shall be compensated in full at the expense of the treasury of the Russian Federation and, in those instances provided for by law, at the expense of the treasury of the subject of the Russian Federation or the municipal authority concerned, regardless of any fault on the part of officials of agencies of inquiry, preliminary investigation, the prosecutor’s office and the courts, in the procedure established by law.

2. Harm caused to an individual or a legal person as a result of the unlawful activity of agencies of inquiry, preliminary investigation, prosecutor's offices, which has not entailed the consequences specified in paragraph 1 of this Article, shall be compensated on the grounds and in accordance with the procedure set out in Article 1069 of this Code. Harm caused in the course of the administration of justice by the courts shall be compensated in cases where the fault of a judge has been established by a court judgment that has entered into legal force."

Article 1100 Grounds for compensation for non-pecuniary damage

"Non-pecuniary damage shall be compensated, regardless of the fault of the person responsible for inflicting the damage, in the following instances:

where the damage to the life and health of an individual was caused by a source of extreme danger;

where the damage was caused to an individual as a result of his unlawful conviction, unlawful criminal prosecution, unlawful application as a measure of restraint of remand in custody or a written undertaking not to leave a specified place, unlawful imposition of an administrative sanction in the form of an arrest or correctional labour;

where the harm was caused as a result of the dissemination of defamatory information discrediting honour, dignity and business reputation;

in other instances specified by law."

THE LAW

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

20. The applicant complained that the domestic courts had failed to examine his claim concerning his infection with tuberculosis while in pre-trial detention. The Court considers that this complaint falls to be examined under Article 6 § 1 of the Convention. The relevant parts of this provision read as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Admissibility

21. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

22. The Government acknowledged that the applicant's right of access to a court had been violated as a result of the domestic courts' failure to examine his claim concerning his alleged infection with tuberculosis while in pre-trial detention.

23. The applicant maintained his complaint.

24. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way that provision embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 36). However, the right of access to a court does not consist only of a right to institute proceedings, but also of a right to obtain a "determination" of the dispute, or, in other words, to have the claims examined, by a court (see, *mutatis mutandis*, *Multiplex v. Croatia*, no. 58112/00, § 45, 10 July 2003).

25. The Court observes that on 22 December 1998 the applicant brought a claim against the Ministry of Finance before the Vorkuta Town Court of the Republic of Komi, seeking compensation for his allegedly unlawful detention but also for having contracted tuberculosis in pre-trial detention. The applicant submitted several medical certificates in support of his claims relating to the alleged infection with tuberculosis. The Court notes that the applicant's claims for compensation were undoubtedly "civil" within the meaning of Article 6 § 1 of the Convention, and had a basis in national law.

26. It follows from the judgment of 23 January 2003, that the Vorkuta Town Court examined only the applicant's claims relating to compensation for detention and failed to examine his claim concerning his alleged infection with tuberculosis. The appellate instance, in its turn, endorsed the first-instance court's findings in summary fashion. It is therefore clear that the applicant's claims regarding compensation for his alleged infection with tuberculosis remained without examination. Against this background and taking into account that the Government acknowledged the domestic courts' failure to examine the applicant's claim, the Court considers that the applicant was denied access to a court.

27. Accordingly, there has been a violation of Article 6 § 1 of the Convention on that account.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

28. The applicant complained under Article 3 that he had been infected with tuberculosis while in pre-trial detention. The Court recalls that, in accordance with the general rules of international law, the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (see, for example, *Blečić v. Croatia* [GC], no. 59532/00, § 70, 8 March 2006). The Court observes that the applicant was detained from 30 October 1996 to 9 December 1997, whereas the Convention entered into force in respect of the Russian Federation on 5 May 1998. It follows that this complaint is incompatible *ratione temporis* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

29. The applicant further complained, under Article 5 § 5, that the domestic courts had dismissed his claim for damages for his allegedly unjustified detention. The Court notes that the right to compensation set forth in paragraph 5 presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court (see, for example, *Stoichkov v. Bulgaria*, no. 9808/02, § 72, 24 March 2005). In the present case the domestic courts have not established that the applicant's detention from 30 October 1996 to 9 December 1997 was unlawful. The Court itself is not competent to examine the lawfulness of the applicant's detention as it took place before 5 May 1998, the date of entry into force of the Convention in respect of the Russian Federation. Therefore, the applicant's complaint under Article 5 § 5 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

30. The applicant also complained, under Article 6 § 3, that in the criminal proceedings against him he had not been assisted by a lawyer during the first questioning by police and he had been forced to incriminate himself. The Court notes that on 9 December 1997 the Town Court returned the case for further investigation on the ground that the applicant's right to defence had not been respected, and a new investigation had been conducted, respecting the applicant's rights. Furthermore, the domestic courts established that the applicant had been assisted by a lawyer throughout the proceedings, except in those instances when he had explicitly declined to call him. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

31. The applicant complained that the domestic courts had violated his rights under Article 8 of the Convention when they applied the Amnesty Act without him asking them to do so. The Court considers that this complaint does not disclose any appearance of a violation of Article 8. Finally, the applicant complained under Article 13 that the authorities had infringed his right to an effective remedy. The Court considers that the applicant failed to substantiate that complaint. Moreover, in so far as he relied on the fact that the domestic courts had not properly examined his complaints (see paragraph 20 above), the Court considers that this is covered by its findings under Article 6 of the Convention. In these circumstances the Court finds that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 200,000 euros (EUR) in compensation for his alleged infection with tuberculosis. He further claimed 150,000 United States dollars in respect of just satisfaction for all the alleged violations of the Convention.

34. The Government considered that the amounts claimed were excessive and unsubstantiated. They submitted that if the Court were to find a violation in the present case, that in itself would constitute sufficient just satisfaction for any damage sustained by the applicant.

35. As regards the applicant's claim for compensation for his alleged infection with tuberculosis, the Court notes that this issue were not subject to examination on the merits in the present case, and therefore rejects this claim. Furthermore, the Court considers that an award for just satisfaction in the present case must be based on the fact that the applicant did not have the benefit of the right of access to a court. However, the Court cannot speculate as to what would have been the final outcome of the proceedings (see, for example, *Freitag v. Germany*, no. 71440/01, § 64, 19 July 2007). It accordingly rejects the applicant's claim in so far as it relates to pecuniary damage. On the other hand, the Court considers that the applicant has suffered distress and frustration as a result of the domestic courts' failure to

examine his claim about his alleged infection with tuberculosis, and that this cannot be sufficiently compensated for by the finding of a violation. Making its assessment on an equitable basis and having regard to its case-law on the subject, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage plus any tax that may be chargeable on that amount.

B. Costs and expenses

36. The applicant did not make any claims in respect of the costs and expenses incurred before the domestic courts and before the Court. Accordingly, the Court does not award anything under this head.

C. Default interest

37. 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. *Declares* the complaint concerning lack of access to a court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant's right of access to a court;
3. *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, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, 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 amount 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 15 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President