



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

FIRST SECTION

CASE OF SELIVERSTOV v. RUSSIA

(Application no. 19692/02)

JUDGMENT

STRASBOURG

25 September 2008

FINAL

25/12/2008

This judgment may be subject to editorial revision.

In the case of Seliverstov 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,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 19692/02) 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 Aleksandr Vladimirovich Seliverstov (“the applicant”), on 15 April 2002.

2. The applicant was represented by Mr S. Galikhanov, a lawyer practising in Izhevsk. 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. By a decision of 30 June 2005, the Court declared the application admissible.

4. The applicant, but not the Government, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and lives in the town of Sarapul in the Udmurtiya Republic.

6. On 23 April 2001 the Supreme Court of the Udmurtiya Republic delivered a judgment in a criminal case against the applicant and his co-defendants, Mr T. and Mr Z. The court established that in February-March 2000 the applicant, the then Head of the Sarapul Town Property

Management Committee, had detected certain irregularities in the privatisation of a local brewery which, in his assessment, might have rendered the privatisation void. The applicant had conspired with T. and Z. to approach the director of the brewery to extort 350,000 Russian roubles (RUB) from the head of the brewery in exchange for covering up those irregularities. The head had agreed to pay RUB 200,000. On the day of payment the applicant prepared an amended assessment report on the brewery's immovable property, signed it in his office and affixed the seal of the Property Management Committee. Z. and T. delivered the report to the brewery head and received the stipulated amount. On leaving the head's office they were apprehended by the police.

7. The trial court found the applicant guilty of having attempted to solicit, through an intermediary, a large sum of money for performing acts in the interests of the bribe-giver that were within the applicant's official competence. The court established that those acts were punishable under Article 290 § 4 (c) and (d) of the Criminal Code ("Bribery") in conjunction with Article 30 § 3 ("Preparation of a criminal offence and an attempted criminal offence"). The applicant was sentenced to three years and six months' imprisonment in a high-security colony.

8. The applicant, but not the prosecution, appealed against the first-instance judgment.

9. On 17 October 2001 the Supreme Court of the Russian Federation held an appeal hearing in the presence of the applicant's lawyer and a prosecutor. The applicant did not attend the hearing. In his oral submissions the prosecutor asked the court to recharacterise the applicant's acts as attempted large-scale fraud committed by an organised group (Article 159 § 3 (b) of the Criminal Code in conjunction with Article 30 § 3), without reducing the sentence. Pursuant to Article 338 of the 1960 Code of Criminal Procedure, the court then asked the applicant's lawyer to submit "additional explanations". The lawyer contended that the granting of the prosecutor's request would violate the applicant's right to prepare his defence because neither the applicant nor the lawyer himself had been informed in advance of the nature and grounds of the new charge and they had not had adequate time to prepare their position. The lawyer relied, in particular, on Article 6 § 3 (a) and (b) and Article 13 of the Convention.

10. The court then withdrew for deliberations and delivered its judgment by which it recharacterised the applicant's acts as attempted large-scale fraud within the meaning of Article 159 § 3 (b) of the Criminal Code in conjunction with Article 30 § 3 and upheld the applicant's imprisonment term. It reasoned as follows:

"Having correctly established the facts of the case, the [trial] court, however, groundlessly characterised [the applicant's] acts as an attempt to solicit a bribe in conspiracy with T. and Z. As the court acknowledged in the judgment, the brewery privatisation documents had contained 'defects' that had been too insignificant to

entail annulment of the privatisation, and [the applicant], as the court established, had been perfectly aware of it. By setting up a deception scheme designed to get hold of a large amount of money because of the defects in the documents, [the applicant], acting in collusion with T. and Z., attempted to steal another person's property on a large scale using his official position. These acts of [the applicant] are to be characterised under Articles 30 and 159 § 3 (b) of the Criminal Code...

Notwithstanding the change in the legal characterisation of the defendants' acts, it must be recognised that the sentence imposed by the [trial] court corresponds to [the gravity of] the offence and the information on their personalities."

II. RELEVANT DOMESTIC LAW

A. Criminal Code of the Russian Federation

Article 290. Bribe-taking

"1. Obtaining a bribe in form of money, securities, other property ... by an official - personally or through an intermediary – for acts (omissions) in the interests of the bribe-giver ... , provided such acts (omissions) are within the competence of the official or he can facilitate the performance of such acts (omissions) by virtue of his position...shall be punishable by a fine ...or up to five years' imprisonment ...

...

4. The acts enumerated in parts one, two and three of the present Article, if they are committed...

...

c) with a solicitation of a bribe;

d) on a large scale,

shall be punishable by seven to twelve years' imprisonment, accompanied by a confiscation of property or without such."

Article 159. Fraud

"1. Fraud, notably theft of other's property or acquisition of the right to other's property by way of deception or abuse of confidence, shall be punishable by a fine ... or up to three years' imprisonment...

...

3 Fraud committed:

a) by an organised group;

b) on a large scale...

...

shall be punishable by five to ten years' imprisonment, accompanied by a confiscation of property or without such."

Article 30. Preparation of a criminal offence and attempted criminal offence

"...

3. An attempted criminal offence is an intentional act (omission) of a person, directly aimed at committing an offence, if however the offence had not been completed due to circumstances beyond the will of that person."

B. The 1960 Code of Criminal Procedure (in force at the material time)

11. Article 254 of the 1960 Code of Criminal Procedure required the court to examine the case within the scope of the charge against the defendant(s). The charge could be amended by the court, provided that such an amendment did not aggravate the situation of the defendant or violate his right to defend himself. If the amendment entailed a violation of the defence rights, the court was to remit the case for an additional investigation. It was prohibited to prefer a more serious charge or a charge based on substantially different factual circumstances. The court could continue the trial if the amendment only concerned abandonment of certain counts or aggravating circumstances.

12. Articles 339 and 342 provided that the appeal court could decide to dismiss the appeal and uphold the judgment; to quash the judgment and remit the case for an additional investigation or a fresh examination by a trial court; to discontinue the criminal proceedings or to vary the judgment, in particular, if the trial court had incorrectly applied the law.

13. Article 338 described the procedure for the examination of cases before the appeal court. A judge rapporteur opened the hearing and gave a summary of the facts of the case and the grounds of appeal. The defendant first gave explanations, after which the prosecutor made oral submissions. The defendant then made additional observations and the court withdrew for deliberations and delivery of the judgment.

THE LAW

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

14. The applicant complained that the appeal court had recharacterised his acts, having failed to inform him in advance of the new charge, and had thereby deprived him of his right to prepare his defence. He also complained about inefficient assistance by his lawyer and incorrect assessment of evidence by the domestic courts. The applicant relied on Article 6 §§ 1 and 3 (a), (b) and (c) of the Convention, the relevant parts of which read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing...”

A. Recharacterisation of the offence by the appeal court

1. Submissions by the parties

15. The applicant argued that he could not have foreseen that the appeal court would amend the charges. The court of appeal did not refer to Article 254 or any other provision of the Code of Criminal Procedure governing recharacterisation of criminal offences. Nor had it given any reasons for acceding to the prosecution’s request and attributing to his acts a different legal characterisation which was, moreover, based on a substantially different factual basis.

The Government submitted that the legal recharacterisation of the applicant’s acts by the Supreme Court was compatible with Articles 254 and 342 of the Code of Criminal Procedure as the factual basis of the charge had not been substantially modified and a more lenient provision of the Criminal Code had been applied. They submitted that the applicant could have foreseen the changes in the characterisation of his acts because he had been represented by an experienced lawyer.

2. *The Court's assessment*

16. The Court reiterates that the provisions of paragraph 3 (a) of Article 6 reflect the need for special attention to be paid to the notification of the “accusation” to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II).

17. The scope of the above provision must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. In this respect it is to be observed that Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. The Court further recalls that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (see *Pélissier and Sassi v. France*, cited above, §§ 52-54, and *Lakatos v. Hungary* (dec.), no. 43659/98, 20 September 2001).

18. Turning to the circumstances of the present case, the Court finds no indication that during the preliminary investigation the authorities ever considered or mentioned the possibility of charging the applicant with attempted large-scale fraud under Article 159 of the Criminal Code. Equally, the arguments before the trial court were confined to the offence of attempted large-scale bribery under Article 290. The prosecution did not appeal against the trial judgment, a fact which leads the Court to surmise that they had no objections to the trial court's legal characterisation of the applicant's acts. Hence, the Court finds nothing to suggest that the applicant was made aware, at any time before the final pleadings before the court of appeal, that he risked conviction under Article 159 of the Criminal Code.

19. Furthermore, having regard to the definitions of the offences of bribe-taking and fraud, as contained in the Criminal Code (see Relevant Domestic Law above), the Court cannot but note significant differences in their objective and subjective elements. The offence of fraud presupposes that another person's property is obtained by specific means, namely

deception or abuse of confidence, the perpetrator being aware that the victim divests him- or herself of the asset on account of the deceitful conduct. The objective element of bribe-taking consists in accepting valuable assets in exchange for acts or omissions within the perpetrator's professional competence and its subjective element requires that the bribe-taker be aware that he obtains the asset precisely for the requested acts or omissions in the interest of the bribe-giver. Taking into account these differences, the Court does not consider that it was sufficiently foreseeable for the applicant that he could be convicted of attempted fraud instead of attempted bribe-taking (compare *Pélissier and Sassi*, cited above, §§ 57-59; and, *mutatis mutandis*, *Miroux v. France*, no. 73529/01, § 36, 26 September 2006). Nor is the Court convinced by the Government's argument that the applicant could have anticipated the amendment of the charges against him because he was represented by an experienced lawyer. It has already dismissed such arguments in a similar context, finding that a mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution on the issue of the qualification of an offence is not sufficient for a proper exercise of the right to defence (see *I.H. and Others v. Austria*, no. 42780/98, § 34, 20 April 2006). Furthermore, in so far as the Government argued that a more lenient provision had been applied, the Court considers that this fact is irrelevant to the case at hand since the thrust of the applicant's complaint is not the severity of the punishment but the alleged breach of his right to be informed of the charges against him and his ability to prepare his defence and, in any event, the appeal court upheld the applicant's imprisonment term.

20. It is not for the Court to assess the merits of the defence the applicant could have adopted, had he had an adequate opportunity to make submissions on the charges, as recharacterised by the court of appeal (see *I.H. and Others*, cited above, § 37). Nevertheless, given the obvious differences in the constitutive elements of the offences described above, the Court considers it plausible to argue that the applicant's defence to the charges of attempted fraud would have been different from that used to contest attempted bribe-taking (compare *Sadak and Others*, § 55, and *Pélissier and Sassi*, § 60, both cited above).

21. The Court further observes that in some of its previous cases, when examining similar complaints and assessing the fairness of the criminal proceedings as a whole, it accepted that a recharacterisation of an offence did not impair the defence rights where the accused had a sufficient opportunity to defend themselves in subsequent review proceedings, provided that they were entitled to contest the conviction in respect of all relevant legal and factual aspects before a court of appeal (see *Dallos v. Hungary*, no. 29082/95, §§ 49-52, ECHR 2001-II; *Sipavičius v. Lithuania*, no. 49093/99, § 31, February 2002; and *Feldman v. France* (dec.), no. 53426/99, 6 June 2002).

22. However, in the present case it was not until the final pleadings before the appeal court that the prosecution asked for the charges against the applicant to be amended. The applicant's counsel clearly referred to the need to restructure and adapt the defence position in view of this important change in the prosecution case. The Supreme Court then withdrew for deliberations and pronounced a judgment by which it recharacterised the applicant's acts from attempted bribe-taking to attempted fraud. Taking into account the fact that the judgment in the applicant's case became final and no ordinary appeal lay against it (see *Nikitin v. Russia*, no. 50178/99, § 39, ECHR 2004-VIII), it appears that there was no further instance where the applicant could have advanced his defence against the reformulated charge (see, by contrast, *Dallos*, cited above, § 50; *Lakatos v. Hungary* (dec.), no. 43659/98, 20 September; *Sipavičius*, cited above, § 32; and *Balette v. Belgium* (dec.), no. 48193/99, 24 June 2004). It also does not appear that the applicant's counsel had a possibility of submitting any additional arguments during the appeal hearing (see, by contrast, *Bäckström and Andersson v. Sweden* (dec.), no. 67930/01, 5 September 2006).

23. The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the court of appeal should have afforded the applicant an adequate possibility of exercising his defence rights on the issue of attempted fraud in a practical and effective manner and in good time (see *Pélissier and Sassi*, cited above, § 62). However, this was not the case.

24. In the light of the above, the Court concludes that the applicant's right to be informed in detail of the nature of the accusation against him and his right to have adequate time for the preparation of his defence were infringed. Consequently, there has been a violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention.

B. Other complaints under Article 6

25. The Court refers to its conclusions in paragraph 24 above and finds it unnecessary to examine the other complaints under Article 6 of the Convention relating to the fairness of the proceedings (see *Sadak*, cited above, § 69).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. 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

27. The applicant claimed RUB 1,040,186 in lost salary and 11,000,000 euros (EUR) in respect of non-pecuniary damage.

28. The Government considered that the alleged loss of earnings had resulted from the fact of the applicant's conviction, which fell outside the Court's review in the present case. They further submitted that the applicant's claims were excessive.

29. The Court does not discern any causal link between the violation found and the pecuniary damage alleged in respect of the loss of earnings. It therefore rejects this claim. On the other hand, it accepts that the applicant must have suffered distress and frustration resulting from the violation of his right to be informed in detail of the nature of the accusation against him and his right to have adequate time for the preparation of his defence. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

30. The applicant claimed RUB 104,000 in respect of costs and expenses incurred before the domestic courts and this Court, broken down as follows: RUB 2,000 in lawyers' fees at the preliminary investigation, RUB 22,000 for Mr Galikhanov's fees before the Supreme Court and RUB 80,000 for Mr Galikhanov's fees in the proceedings before this Court. He submitted receipts of payment for legal services for the amount claimed.

31. The Government submitted that the expenses incurred in the domestic proceedings should not be reimbursed because they had not been incurred with a view to prevent or redress the alleged violation of the applicant's rights under the Convention. The amount claimed in respect of Mr Galikhanov's representation of the applicant before the Court did not reflect the real costs and was excessive.

32. The Court notes that Mr Galikhanov represented the applicant before the court of appeal in the domestic proceedings and throughout the proceedings before this Court and that the applicant did not request legal aid. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. As regards the expenses incurred during the preliminary investigation, the Court does not consider that they were incurred in order to prevent the violation of the applicant's rights under Article 6. As regards Mr Galikhanov's services and in so far as the related expenses have been necessarily incurred and were supported by the relevant documents, the Court awards the applicant EUR 2,000 in respect of costs and expenses,

plus any tax that may be chargeable to the applicant, and dismisses the remainder of his claims under this head.

C. Default interest

33. 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 6 §§ 1 and 3 (a) and (b) of the Convention on account of the recharacterisation of the applicant's offence by the appeal court;
2. *Holds* that no examination of the applicant's further complaints under Article 6 is required;
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, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (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 25 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President