



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

FIRST SECTION

CASE OF ABRAMYAN v. RUSSIA

(Application no. 10709/02)

JUDGMENT

STRASBOURG

9 October 2008

FINAL

09/01/2009

This judgment may be subject to editorial revision.

In the case of Abramyan 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 André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 18 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 10709/02) 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 Edgar Nikolayevich Abramyan (“the applicant”), on 18 January 2001.

2. The Russian Government (“the Government”) were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his right to a fair trial had been violated by the reclassification of charges against him by his trial court and the examination of his case on appeal in his and his counsel’s absence.

4. By a decision of 31 August 2006 the Court declared the application partly admissible.

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

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

6. The applicant was born in 1974 and lives in Pyatigorsk, Stavropol region.

7. On 16 June 2000 criminal proceedings were brought against the applicant, a police investigator. The investigating authority charged him

with taking a bribe involving a large sum of money, aggravated by extortion, under Article 290 § 4 (c) and (d) of the Criminal Code, together with a number of other offences.

8. The applicant and his lawyer were present at the hearings before the Stavropol Regional Court.

9. On 2 October 2000 the Stavropol Regional Court delivered a judgment. In respect of the legal characterisation of the acts the applicant was found to have committed, it held as follows:

“... the court finds the classification of the acts of Abramyan E.N. by the preliminary investigation authorities to have been erroneous and classifies his acts under Articles 30 § 3 and 159 § 3 (b) of the UK RF [Criminal Code of the Russian Federation]. It was established that Abramyan, through the abuse of official authority and with a view to misappropriating another’s property, misled witness [L.], claiming that he would forward her case to a court. He then fraudulently obtained two thousand US dollars from [L.], via [D.], having kept from [D.] and [L.] the fact that the proceedings had already been terminated. Taking into account the amount that was stolen and the fact that Abramyan had no real opportunity to dispose of the money, having been arrested at the scene, the court regards his acts as attempted misappropriation, through the abuse of official authority, of another’s property, involving a large sum of money, since he committed all the acts necessary in order to misappropriate another’s property and failed to complete the crime due to circumstances beyond his control.”

10. The court convicted the applicant under Articles 30 § 3 and 159 § 3 (b) of the Criminal Code, acquitted him on the remaining charges and sentenced him to seven years’ imprisonment and imposed a confiscation order.

11. According to the record of the hearing, after pronouncing the judgment the presiding judge explained to the applicant the procedure and time-limit for appealing against the judgment. He explained that convicted persons could participate in the examination of their case by an appeal body.

12. The applicant appealed against the judgment. In particular, he complained that the court’s classification of his actions had been erroneous. In his appeal against the judgment the applicant did not request that he be summoned to the hearing before the appeal court or that he be informed of the date of the hearing. Nor did he or his lawyer lodge a separate request to that effect.

13. On 27 December 2000 the Supreme Court of the Russian Federation held an appeal hearing at which neither the applicant nor his counsel were present. The Supreme Court heard a prosecutor K. who argued that the judgment should be upheld. It examined the applicant’s points of appeal, reviewed the judgment and found that the trial court had correctly established the facts based on the evidence examined by it and had given the correct legal classification of the acts which the applicant had been found to have committed. The Supreme Court upheld the judgment.

14. On an unspecified date in 2003 the applicant was released on parole.

II. RELEVANT DOMESTIC LAW

A. The right to be present at an appeal hearing

15. Under Article 335 of the Code of Criminal Procedure of 1960 (“the CCP”), in force at the material time, the public prosecutor would state his or her opinion at an appeal hearing as to whether a judgment was lawful and well-founded. Defence counsel could participate in the hearing. A decision about the defendant’s participation at the hearing was taken by the appeal court. A defendant who appeared before the court was always entitled to give evidence.

16. In Decision no. 27-P of 10 December 1998, the Constitutional Court of the Russian Federation declared Article 335 § 2 of the CCP incompatible with the Constitution on the grounds that this provision enabled appeal courts to take a final decision where a defendant’s request to attend the appeal hearing had been rejected and where a defendant had not been given an opportunity to study the materials of the hearing and communicate in writing his or her opinion on the issues raised before the appeal court.

17. Article 336 of the CCP provided that persons who had submitted appeals were to be apprised of the appeal hearing if it was held before courts lower than the Supreme Court of Russia. If an appeal was to be examined by the Supreme Court, an appellant would be apprised of the appeal hearing if he or she had requested the court to do so in their appeal or observations on the appeal. Notification of the time of the hearing on appeal was to be displayed at the court not later than three days before the hearing.

18. In Decision no. 200-O of 17 October 2001, the Constitutional Court held that the provisions of Article 336 of the CCP could not serve as a basis for failing to inform persons entitled to appeal against judgments about the date of examination of their appeals by a court of any level.

19. Article 338 of the CCP required that, at the beginning of an appeal hearing, the presiding judge should verify who was present and the court should decide whether to proceed with the hearing.

B. The appeal court’s jurisdiction

20. The appeal courts considered, on the basis of the materials in the case file and newly submitted materials, whether a first-instance judgment was lawful and well-founded. They were not bound by the grounds of the appeal and exercised a full review of the case (Article 332 of the CCP).

21. Under Articles 339-341 of the CCP appeal courts could decide to dismiss the appeal and uphold the judgment, to quash the judgment and remit the case for a new investigation or for a fresh trial, to terminate the criminal proceedings or to vary the judgment. It could reduce the sentence

or amend the legal classification to the defendant's advantage. If it found the sentence or legal classification to be too lenient, it could quash the judgment only if an appeal on such grounds had been filed by the prosecutor or the victim. Acquittals could be quashed on appeal at the request of the prosecutor, the victim or the acquitted person.

22. Article 342 of the CCP

Grounds for quashing or varying judgments [on appeal]

"The grounds for quashing or varying a judgment on appeal shall be as follows:

- (i) prejudicial or incomplete inquest, investigation or court examination;
- (ii) inconsistency between the facts of the case and the conclusions reached by the court;
- (iii) a grave violation of procedural law;
- (iv) improper application of [substantive] law;
- (v) discrepancy between the sentence and the seriousness of the offence or the convicted person's personality."

C. Offence reclassification

23. Article 254 of the CCP required the court to examine the case on the basis of the charges brought against the defendant. The charge could be amended by the court provided that such 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 had to remit the case for additional investigation. It did not have powers to prefer a more serious charge or a charge based on substantially different factual circumstances. The court could continue the trial if the amendment related only to the deletion of certain counts or aggravating circumstances.

D. Bribe-taking and fraud

24. An official who – personally or through an intermediary – receives a bribe in the form of money, shares or other property or benefits for acts (or omissions) in the interest of the bribe-giver, provided that such acts are within the competence of the official or the official can facilitate the performance of such acts by virtue of his position, commits a criminal offence (Article 290 § 1). The same acts, if they are aggravated by extortion (Article 290 § 4 (c)) or involve a large sum of money (Article 290 § 4 (d)), are punishable by seven to twelve years' imprisonment, which may be accompanied by a confiscation order.

25. Article 159 § 1 provides that fraud, that is theft of others' property or acquisition of rights to others' property by way of deception or abuse of confidence, is a criminal offence. Article 159 § 3 (b) specifies that a fraud involving a large sum of money is punishable by five to ten years' imprisonment, which may be accompanied by a confiscation order.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicant complained under Article 6 of the Convention about the judicial authorities' failure to inform him of the date and place of the appeal hearing and the resultant violation of the principle of equality of arms. He also complained that the reclassification of the offence by the trial court from accepting a bribe to fraud had prevented him from exercising his defence rights properly. Article 6 in its relevant parts provides:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... 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; ...”

A. The parties' submissions

27. The Government submitted that under Article 336 of the CCP the Supreme Court of the Russian Federation had given notice of the date of an appeal hearing only to those participants in proceedings who had made a request to that effect when lodging their appeal. Since the applicant had made no such request, the Supreme Court, in examining the applicant's appeal in his absence and in the absence of his lawyer, had acted in full compliance with the legislation on criminal procedure. The Constitutional Court's decision of 17 October 2001 had been adopted after the applicant's appeal proceedings. Therefore, the applicant's right to a fair trial guaranteed by Article 6 § 1 had not been violated.

28. The Government further submitted that under Article 254 of the CCP a trial court could examine criminal cases only in respect of the charges on which a defendant had been brought to trial. Amendment of the charges by the trial court was allowed only if it had not been to the detriment of the

accused and had not violated his right to defend himself. The factual scope of the applicant's criminal acts had remained unchanged; only their legal qualification had been altered. Since Article 159 of the Criminal Code had concerned a less serious offence than Article 290, the trial court had improved the applicant's position without changing the essence of the charge in its factual aspect. No new circumstances had been established by the trial court going beyond the initial charge. The applicant had therefore been informed, throughout the trial, of the charge against him. He had had ample opportunity to prepare his defence. Furthermore, the Stavropol Regional Court had re-qualified the charge in the applicant's presence, which distinguished this case from the cases of Vanyan (see *Vanyan v. Russia*, no. 53203/99, 15 December 2005) and Aldoshkina (see *Aldoshkina v. Russia*, no. 66041/01, 12 October 2006). Hence, his rights under Article 6 § 3 (a) and (b) had not been violated.

29. The applicant noted that he had been deprived of the possibility to decide on his own or his lawyer's participation in the examination of his appeal. The appeal court had examined issues of both law and fact. His right to defend himself had been violated.

30. He further submitted that the *corpus delicti* of the offence under Article 159 of the Criminal Code differed from that of the offence under Article 290. The taking of a bribe represented malfeasance in office, whereas fraud was a crime against property. The trial court had convicted him of a crime with which he had never been charged. His rights to a defence had been violated because he had been unaware of the charge against him.

B. The Court's assessment

1. Appeal hearing in the absence of defence

31. The Court observes that the present case raises the same issue as the case of *Stadukhin* which concerned holding the appeal hearing before the Supreme Court in the absence of the defence (see *Stadukhin v. Russia*, no. 6857/02, 18 October 2007). The question whether or not the applicant had requested to be informed of the appeal hearing, which was a pre-requisite for the Supreme Court's notification at the material time, was disputed between the parties in that case. The Court recalls that it held that even assuming that the applicant had failed to request explicitly that he be apprised of the appeal hearing, it had been incumbent on the judicial authorities to do so in order for the proceedings to be fair. It found a violation of the rights of the defence and the principle of equality of arms having noted that the Supreme Court, which had to exercise a full review of the case, had heard a representative of the prosecution (§§ 31-37).

32. In the present case the Court equally considers that in order for the proceedings to be fair the judicial authorities had to ensure that the applicant be informed of the hearing before the Supreme Court for the examination of his case on appeal despite his failure to request them to do so. The Court does not consider it necessary to decide whether the absence of the applicant and his counsel, taken separately, would render the proceedings before the appeal court unfair. Neither of them was present before the Supreme Court, and it is against this background that the Court will determine the complaint in issue.

33. Having made the above observations, the Court sees nothing to distinguish the present case from the case of *Stadukhin*. Accordingly, it finds that there has been a violation of Article 6 § 1 on the grounds of the examination of the case by the Supreme Court in the absence of the applicant and his counsel.

2. Reclassification of the offence

34. The Court recalls that the provisions of paragraph 3 (a) of Article 6 point to 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 written 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). The Court recalls further that the scope of Article 6 § 3 (a) must in particular 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 (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II; *Mattocia v. Italy*, no. 23969/94, § 58, ECHR 2000-IX; and *I.H. and Others v. Austria*, no. 42780/98, § 34, 20 April 2006).

35. The fairness of proceedings must be assessed with regard to the proceedings as a whole (see *Dallos v. Hungary*, no. 29082/95, § 47, ECHR 2001-II). Furthermore, 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 guaranteed by sub-paragraph (b) of Article 6 § 3 (see *Pélissier and Sassi*, cited above, § 54, and *Dallos*, cited above, *ibid.*).

36. In the present case the applicant learned about the new legal classification of the charges against him when the trial court pronounced its judgment at the end of the hearing. There is no indication that at any time before the pronouncement of the judgment he was made aware that he risked conviction under Articles 30 § 3 and 159 § 3 (b) of the Criminal Code. However, the constituent elements of fraud and bribe-taking differed

significantly (see paragraphs 24 and 25 above). The offence of fraud presupposed that another person's property was obtained by way of deception or abuse of confidence, the perpetrator being aware that the victim was divesting himself of the asset as a result of the deceitful conduct. The objective element of bribe-taking consisted in accepting valuable assets in exchange for acts or omissions within the perpetrator's professional competence and its subjective element required that the bribe-taker be aware that he was obtaining the asset in return for the requested acts or omissions for the benefit of the bribe-giver. The applicant had no opportunity to react to that change in the proceedings before the trial court which, given the difference between the two offences, had certainly impaired his ability to defend himself.

37. The Court recalls further that it found no violation in the *Dallos* case, which concerned the reclassification by an appeal court of a charge upon which the applicant had been convicted, since the Supreme Court had entirely reviewed the case at an oral hearing having heard the prosecution and the applicant's defence counsel. The Court was satisfied that the applicant had had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge and that any defects in the proceedings before the Regional Court had been cured before the Supreme Court (see *Dallos*, cited above, §§ 48-53). The Court came to the same finding in the case of *Sipavičius*, in which the applicant had been unaware of a reformulated charge until the public pronouncement of his judgment as in the case at hand, and in which the Court of Appeal had heard the parties at an oral hearing and reviewed the applicant's complaints about the reclassification of the charge from both the procedural and substantive point of view and the applicant had had a further opportunity to advance his defence before the Supreme Court (see *Sipavičius v. Lithuania*, no. 49093/99, §§ 29-34, 21 February 2002).

38. In the present case the applicant indicated his disagreement with the legal classification of the charges against him by the trial court in his appeal against the judgment. The Supreme Court, which had the power to exercise a full review of the case, examined and dismissed the applicant's appeal at an oral hearing having heard the submissions by the prosecution (see paragraphs 13, 20, 21 and 22 above). However, the applicant and his counsel were not present at the hearing before it which deprived the applicant of the possibility to exercise his defence rights in respect of the reclassified charge in a practical and effective manner. In these circumstances the Court considers that the violation of the applicant's right to defend himself by the Stavropol Regional Court was not cured by the Supreme Court.

39. Therefore, the applicant's right to a fair trial and, in particular, the rights to be informed in detail of the nature and cause of the accusation

against him and to have adequate time and facilities for the preparation of his defence were infringed.

40. Accordingly, the Court finds that there has been a violation of Article 6 §§ 1 and 3 (a) and (b) on this ground.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 130,321.85 Russian roubles (RUB), which his family had allegedly spent in order to support him during his imprisonment, in respect of pecuniary damage. He also claimed 35,000 euros (EUR) in respect of non-pecuniary damage which he had allegedly suffered in view of the unfair proceedings in his case.

43. The Government submitted that the damage claimed was excessive and did not relate to the issues raised in the present application. Alternatively, a finding of a violation of the Convention would be adequate just satisfaction.

44. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore dismisses this claim. As regards non-pecuniary damage, it accepts that the applicant has suffered non-pecuniary damage which would not be adequately compensated by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

45. The applicant claimed RUB 10,000 for his legal representation in the proceedings before the trial court in his criminal case. He also claimed RUB 1,177.65 in respect of his postal expenses in the proceedings before the Court.

46. The Government submitted that the claim for legal costs was not supported by any documents.

47. The Court reiterates that to be entitled to an award of costs and expenses the injured party must have incurred them in order to seek, through the domestic legal order, prevention or redress of a violation, to

have the same established by the Court or to obtain reparation therefore. It notes that the legal costs claimed were not incurred for the purpose of prevention or redress of the violations of the Convention found in this case: they therefore should be dismissed. Furthermore, the Court has to be satisfied that the costs and expenses were actually incurred, were necessarily incurred and were also reasonable as to quantum. It considers that postal expenses relating to the applicant's correspondence with the Court meet the above criteria. The Court awards the applicant EUR 35 in respect of his postal expenses, plus any tax that may be chargeable on that amount.

C. Default interest

48. 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 of the Convention on account of the examination of the applicant's case on appeal in the absence of the applicant and his counsel;
2. *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 offence by the trial 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, 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), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 35 (thirty-five 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 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 9 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President