



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

FIFTH SECTION

**CASE OF KISELEV v. RUSSIA**

*(Application no. 75469/01)*

JUDGMENT

STRASBOURG

29 January 2009

**FINAL**

*06/07/2009*

*This judgment may be subject to editorial revision.*



**In the case of Kiselev v. Russia,**

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Anatoly Kovler,

Renate Jaeger,

Mark Villiger,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 January 2009,

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

## PROCEDURE

1. The case originated in an application (no. 75469/01) 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 Bogdan Aleksandrovich Kiselev (“the applicant”), on 17 April 2001.

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

3. The applicant alleged, in particular, that the supervisory review conducted in the present case had violated his rights under Article 6 of the Convention and Article 4 of Protocol No. 7 to the Convention.

4. By a decision of 5 February 2007, 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 1973 and lives in Vyatskiye Polyany, Kirov Region.

7. On 7 February 2000 the applicant was remanded in custody on suspicion of having committed gang rape. He remained in custody throughout the investigation.

8. On 3 May 2000 the Vyatsko-Polyanskiy District Court of the Kirov Region found the applicant guilty of aggravated rape and violent sexual assault and sentenced him to two years and two months' imprisonment. In deciding on the sentence the court applied Article 64 of the Criminal Code, which allowed the imposition of a penalty below the statutory minimum (which was four years' imprisonment) with regard to the voluntary compensation paid to the victim, her request to terminate the applicant's prosecution, the absence of a previous criminal record and the fact that the applicant had a child.

9. On 10 May 2000 the Vyatsko-Polyanskaya District Prosecutor's Office filed an appeal against the judgment on the ground that the sentence, resulting from an unjustified application of Article 64 of the Criminal Code, was too lenient. On an unknown date the applicant also filed an appeal, pleading not guilty and requesting the reduction of his sentence and release on parole.

10. On 26 May 2000 the Amnesty Act entered into force.

11. On 8 August 2000 the Kirov Regional Court dismissed the appeals of both parties and upheld the judgment of the District Court at final instance. It held, in particular, that the applicant's participation in the rape had been "secondary" and that this in combination with other circumstances referred to by the first-instance court had justified application of a penalty below the statutory minimum. The court also stated that no grounds for applying the Amnesty Act had been made out.

12. On 18 August 2000 the Vyatsko-Polyanskiy District Court of the Kirov Region, in a separate decision, found that this was the applicant's first conviction and that his prison sentence did not exceed three years. It absolved the applicant from serving the sentence by virtue of the Amnesty Act.

13. On 31 October 2000 the Kirov Regional Prosecutor lodged an application for supervisory review, seeking to have the judgment of 3 May 2000 and the appeal decision of 8 August 2000 quashed on the ground that the sentence imposed was too lenient and specifically challenging the application of Article 64 of the Criminal Code.

14. On 15 November 2000 the Presidium of the Kirov Regional Court granted the application and remitted the case for a new examination at first instance. The Presidium also quashed the decision of 18 August 2000.

15. On 27 December 2001 the Vyatsko-Polyanskiy District Court of the Kirov Region found the applicant guilty on the same counts and sentenced him to four years and six months' imprisonment. It found that there had been no "exceptional circumstances" justifying the application of Article 64

of the Criminal Code. Pursuant to this judgment, the applicant was taken into custody following the court hearing.

16. The applicant lodged an appeal against this judgment claiming, *inter alia*, that he had been tried and punished twice for the same offence.

17. On 3 April 2001 the Kirov Regional Court dismissed the applicant's appeal and upheld the judgment of the District Court in the final instance.

18. On 28 November 2002 the Kirovo-Chepetskiy District Court of the Kirov Region released the applicant on parole.

## II. RELEVANT DOMESTIC LAW

### A. Criminal liability

19. Article 131 § 2 (b) of the 1996 Criminal Code provides that a rape committed by a group of persons is punishable by a prison term of four to ten years. Article 132 § 2 (b) provides for the same penalty for a violent sexual assault committed by a group of persons.

20. Article 64 of the Code provides that the court may impose a penalty below the minimum punishment provided for in respect of a particular criminal offence if it finds exceptional circumstances mitigating the public danger of the crime committed. The following circumstances, or their combination, may be considered for the purposes of this provision: the aim or the cause of the crime; the extent of participation; the culprit's behaviour during or after the commission of the crime; and other circumstances.

21. Section 1 of the Amnesty Act of 26 May 2000 absolved all persons convicted for the first time and whose sentence did not exceed three years from serving their sentence.

### B. Supervisory review in criminal proceedings

22. The relevant domestic law governing supervisory review in criminal proceedings has been summarised in the case *Fadin v. Russia* (no. 58079/00, 27 July 2006).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

23. The applicant complained under Article 6 § 1 of the Convention and Article 4 of Protocol No. 7 to the Convention that the supervisory review conducted in his case had been unfair and had resulted in an unfairly harsh penalty. These Articles read, in so far as relevant, as follows:

#### **Article 6 of the Convention**

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

#### **Article 4 of Protocol No. 7**

“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.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”

#### **A. The parties’ submissions**

24. The applicant claimed that he had been tried and punished twice for the same criminal offence and invoked in particular the detrimental consequences entailed by his retrial following the supervisory review. He complained that the substantial increase in his prison term after his earlier release, when he had regarded it as executed, had deprived him of the benefit of the Amnesty Act and had been disproportionate and unfair. He pointed out that the grounds for quashing the final judgment by the supervisory instance, notably the excessively lenient sentence imposed in accordance with Article 64 of the Criminal Code, were the same as those that had been raised before, and examined by, the appellate court. The applicant therefore maintained that the proceedings as a whole had been unfair and had run counter to the principle of legal certainty.

25. The Government accepted the applicant’s version of events but denied that the criminal proceedings at issue had resulted in a violation of the domestic law or of the Convention principles. They relied on Article 4

§ 2 of Protocol No. 7, which expressly permitted the reopening of a criminal case if there had been a fundamental defect in the previous proceedings that could affect the outcome of the case. They claimed that the supervisory review in the present case fell within the scope of that provision. They contended, further, that the retrial, as well as the increase in the sentence, had been absolutely necessary in circumstances where a serious violent crime, such as the one of which the applicant had been found guilty, had gone virtually unpunished. They relied on the Code of Criminal Procedure then in force and stated that the prosecutor's request for supervisory review had been filed within the prescribed time-limit and the retrial by the courts of two instances had afforded all guarantees of a fair trial.

### **B. The Court's assessment**

26. The Court has previously examined cases raising similar complaints under the Convention in relation to the quashing of a final judicial decision (see *Nikitin v. Russia*, no. 50178/99, ECHR 2004-VIII; *Bratyakin v. Russia* (dec.), no. 72776/01, 9 March 2006; *Fadin*, cited above; and *Radchikov v. Russia*, no. 65582/01, 24 May 2007). It reiterates that the mere possibility of reopening a criminal case is *prima facie* compatible with the Convention, including the guarantees of Article 6. However, the actual manner in which it is used must not impair the very essence of a fair trial. In other words, the power to reopen criminal proceedings must be exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice (see *Nikitin*, cited above, §§ 54-61). In the specific context of supervisory review, the Convention requires that the authorities respect the binding nature of a final judicial decision and allow the resumption of criminal proceedings only if serious legitimate considerations outweigh the principle of legal certainty (see *Bratyakin*, cited above).

27. Turning to the circumstances of the present case, the Court observes that the Amnesty Act was passed before the end of the first set of proceedings and the court could have taken it into account. However, the court considered it inapplicable and imposed an exceptionally short term of imprisonment intending that it be actually served in full. When an amnesty was eventually applied for, the prosecutor requested a full reassessment of the case calling for a sentence within the statutory limits. As a result of the rehearing granted, the applicant's punishment was increased by two years and four months compared with his original sentence and he could no longer benefit from an amnesty.

28. The Court notes that the grounds for the prosecutor's request for supervisory review and the courts' reasoning was limited to the sole question as to whether there had been exceptional circumstances justifying

the penalty below the statutory minimum. The application of the Amnesty Act to the applicant was not called into question. Accordingly the Court has to assess whether the reopening of the case could be justified solely on grounds of the allegedly wrongful application of the clause permitting a penalty “below the statutory minimum”.

29. The Court observes that the supervisory review court had to examine exactly the same argument that had already been put before the court of appeal and dismissed. The Court has previously held that a review of a final and binding judgment should not be granted merely for the purpose of obtaining a rehearing and a fresh determination of the case, but rather to correct judicial errors and miscarriages of justice (see, *Radchikov*, cited above, §§ 49-52). In the instant case, the supervisory instance allowed a rehearing of precisely the same legal point, which in the light of the above case-law cannot be considered sufficient to outweigh the binding force of a final judgment.

30. It follows that the criminal proceedings against the applicant, taken as a whole, did not satisfy the requirements of a “fair hearing”.

31. Therefore, the Court finds a violation of Article 6 § 1 of the Convention. It finds that the applicant’s complaints raise no separate issue under Article 4 of Protocol No. 7 to the Convention (see *Nikitin*, cited above, § 46, and *Radchikov*, cited above, § 55).

## II. 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 requested the Court to award him 150,000 Russian roubles (RUB) for pecuniary damage and RUB 100,000 for non-pecuniary damage.

34. The Government contested the claim as unsubstantiated and considered that any finding by the Court of a violation would constitute sufficient just satisfaction in the present case.

35. The Court considers that the applicant must have suffered distress and frustration as a result of the reopening of his criminal case following the supervisory review. Making its assessment on an equitable basis, it awards the applicant 2,000 euros for non-pecuniary damage, plus any tax that may be chargeable on that amount. The court rejects the claim for pecuniary



damage because the applicant provided no supporting documents for his claims.

### **B. Costs and expenses**

36. The applicant submitted that he had spent RUB 45,000 in legal fees in the domestic proceedings and requested a reimbursement of this sum.

37. The Government contended this claim on the grounds that the applicant had not submitted any supporting documents for his claims.

38. 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. The Court notes that the applicant was granted leave to represent himself before this Court. As regards the expenses incurred during the domestic proceedings, the Court has no grounds to establish that they were incurred in the supervisory review proceedings in order to prevent the violation of the applicant's rights under Article 6. Having also noted that the claims contained no particulars and were not accompanied by any supporting documents, the Court dismisses them under this head.

### **C. Default interest**

39. 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**

1. *Holds* by six votes to one that there has been a violation of Article 6 of the Convention;
2. *Holds* by six votes to one that no separate issue arises under Article 4 of Protocol No. 7 to the Convention;
3. *Holds* unanimously
  - (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) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above 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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Peer Lorenzen  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Kalaydjieva is annexed to this judgment.

P.L.  
C.W.

## DISSENTING OPINION OF JUDGE KALAYDJIEVA

In the present case the majority found a violation of Article 6 § 1 of the Convention and agreed that the applicant's complaints under Article 4 of Protocol No. 7 raised no separate issue. I fail to subscribe to this opinion for the following reasons.

In my view the facts of the case clearly disclose a duplication of finalised criminal proceedings which resulted in a new punishment contrary to the *ne bis in idem* principle. There is no dispute that the accusations against the applicant were determined by a final and enforceable decision of the courts and that the subsequent review of that decision and the resulting new set of proceedings were not a part of the regular appeal procedure.

In such circumstances the Court should determine the compatibility of those proceedings with Article 4 of Protocol No. 7 before proceeding to consider their fairness or their compliance with the principle of legal certainty envisaged under Article 6 of the Convention. In my view this distinction is important because of the different effect of the two provisions on the situation of the person concerned. Where a retrial is prohibited *per se*, its outcome cannot be seen as compatible with the Convention.

In the instant case both the request and the decision to perform a new trial were based exclusively on the dissatisfaction of the prosecution authorities and the supervising court with the leniency of the final penalty. No new facts or fundamental defects of the regular proceedings were adduced. This situation is clearly distinguishable from the one considered in the earlier cases of *Nikitin*<sup>1</sup>, *Bratyakin*<sup>2</sup>, and others. Before considering the supervisory review proceedings in those cases under Article 6 § 1 of the Convention, the Court first looked at their compatibility with the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7 and distinguished whether they amounted to a retrial – prohibited by the first paragraph – or to a reopening, justified in exceptional circumstances under the second paragraph. Based on the specific facts in those cases, the Court was satisfied that the review proceedings either did not lead to any rehearing, or were justified under Article 4 § 2 of Protocol No. 7 as necessary to correct a fundamental defect of the regular proceedings, or as solicited by the applicants and leading to no deterioration in their situation.

I agree with the majority's conclusion that the supervisory review in the present case "allowed a rehearing of precisely the same legal point, which in the light of the above case-law cannot be considered sufficient to outweigh the binding force of a final judgment" (§ 29). This conclusion should exclude any further consideration of the proceedings under Article 6. A retrial may not be justified by the fact that the applicant was not required to

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1. Application no. 50178/99, judgment of 20 July 2004.

2. Application no. 72776/01, decision of 9 March 2006.

serve his penalty – an issue which was determined by the competent courts pursuant to a law on amnesty. A reopening on that ground would question the very aim of that law, which was to absolve certain categories of convicted persons from serving their penalties. I also fail to see anything extraordinary in the dissatisfaction of the accusatory party with the leniency of the penalty pronounced – a complaint which was raised and considered by the courts within the regular appeal proceedings. To see this dissatisfaction as justifying a rehearing would render the principle of legal certainty devoid of its substance.

In the absence of any justification, the reopening of the criminal proceedings constituted a retrial within the meaning of the first paragraph of Article 4 of Protocol No. 7, which cannot be considered in the light of Article 6 of the Convention. While both these provisions promote finality in criminal proceedings, Article 4 § 1 of the Protocol should be interpreted as a *lex specialis* to the principle of legal certainty envisaged by Article 6. More importantly, the effect of a finding of a violation of Article 6 § 1 does not equate to that of a finding of a breach of the *ne bis in idem* principle.<sup>1</sup> Turning to the straightforward fact of the retrial in the present case, I realise that a separate finding of a violation of Article 4 § 1 of Protocol No. 7 would perhaps be of questionable theoretical contribution to its interpretation. Yet, this provision also protects individuals from being punished twice. Following an amnesty, the effect of which is comparable to an acquittal, the applicant's retrial resulted in his effective imprisonment. In my view this detrimental outcome should be considered automatically contrary to the Convention. This conclusion involves different consequences and requires a different redress. The applicant's effective imprisonment cannot be seen as warranted by Article 5 § 1 (a) and this conclusion should automatically require his immediate release. The Court has declared this complaint inadmissible and has limited the scope of the case to the proceedings *per se*, thus leaving their result outside the focus of its scrutiny. The majority's finding that a prohibited retrial "did not satisfy the 'fair balance' required by Article 6" (§ 30) neither requires the applicant's immediate release, nor calls for any additional compensation for the resulting deprivation of liberty prohibited by the Convention. In these circumstances one may only hope that the individual measures taken to correct the absence of "fair balance" found by the Court do not involve yet another reopening of the proceedings.

The provision of Article 4 § 1 of Protocol No. 7 functions also to preserve the authority of the courts<sup>2</sup> by protecting their independence and impartiality from any pressure to change their final conclusions. Contrary to this legitimate aim, the very purpose of the retrial in the present case was to

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1. See Stefan Trechsel, "Human Rights in Criminal Proceedings".

2. Ibidem, p.383 – in regard of the French text of the provision.

require the lower courts to impose a harsher penalty than the initial “final” one. This was the legal ground for the requested supervisory review, and the single issue discussed in the resulting decision to order a rehearing of the case. It must not be overlooked that the reasoning given for this decision was binding and served as a mandatory instruction for the lower courts. In *Daktaras v. Lithuania*<sup>1</sup> (§§ 35 et seq.) the Court considered that “[the binding] opinion cannot be regarded as neutral from the parties’ point of view. By recommending that a particular decision be adopted or quashed, the President necessarily becomes the defendant’s ally or opponent (see, *mutatis mutandis*, *Borgers v. Belgium*, 30 October 1991, § 26, Series A no. 214-B).” In *Daktaras* the Court found that “the applicant’s doubts as to the impartiality of the Supreme Court may be said to have been objectively justified. Consequently, there has been a breach of Article 6 § 1 of the Convention.”

In the present case the similarly binding opinion had the effect of instructing the lower courts to come to certain conclusions and to a predefined result. Moreover, once the Presidium of the upper court agreed with the prosecutor’s view that the penalty was inappropriately lenient, the applicant’s case was destined to as many quashings, remittals and reviews as necessary to achieve the harsher penalty sought. Any different outcome was vulnerable to further supervisory review proceedings and there was nothing in the law to stop the subsequent quashing of decisions which failed to comply with the instructions given. Since the initiation of the supervisory review mechanism was a privilege of the prosecution with the consent of the upper courts, it allowed the perpetuation of the criminal proceedings until that party was satisfied with the result.

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1. Application no. 42095/98, judgment of 10 October 2000.