



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

FIRST SECTION

**CASE OF SABIROV v. RUSSIA**

*(Application no. 13465/04)*

JUDGMENT

STRASBOURG

11 February 2010

**FINAL**

*28/06/2010*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



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

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 21 January 2010,

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

## PROCEDURE

1. The case originated in an application (no. 13465/04) 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 Radmir Rinatovich Sabirov (“the applicant”), on 5 November 2003.

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 that his detention from 9 October to 5 December 2003 had been unlawful and that his defence by state-appointed legal counsel was ineffective before the cassation court.

4. On 2 May 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1982 and lives in Sharan, Bashkortostan Republic.

7. On an unspecified date the applicant was charged with disorderly conduct. On 25 April 2003 he signed an undertaking not to leave the town.

8. On 8 July 2003 the Justice of the Peace of the Sharanskiy District of the Bashkortostan Republic found the applicant guilty as charged and sentenced him to one year and nine months' imprisonment, conditionally suspended for two years. It ordered the applicant to remain in the town until the conviction became final. The applicant and the prosecutor appealed.

9. On 19 August 2003 the Sharanskiy District Court of the Bashkortostan Republic upheld the applicant's conviction on appeal. It revoked the suspension of the sentence, however. On the same day the applicant was taken into custody.

10. Further to a cassation appeal lodged by the applicant, on 9 October 2003 the Supreme Court of the Bashkortostan Republic quashed the District Court's judgment of 19 August 2003 and remitted the case to the District Court for fresh examination. The Supreme Court noted that the District Court had failed to observe the procedure pertaining to the presentation of the final submissions by the parties and to classify the conviction in full compliance with the applicable substantive law.

11. The applicant remained in custody. He allegedly complained to the director of the remand prison that his continued detention was not based on a judicial decision and asked to be released. The director responded by informing him that a certain "Judge K." had told him not to release the applicant until further notice. The applicant also complained to the Supreme Court of the Bashkortostan Republic but received no reply.

12. On 5 November 2003 the District Court fixed an appeal hearing for 13 November 2003. Neither the applicant nor his counsel attended the hearing. As regards the applicant's detention, the court noted as follows:

"The preventive measure, notably placement of [the applicant] in custody, should remain unchanged."

13. According to the applicant, he received a copy of the decision of 5 November 2003 on 25 November 2003. Therefore, he considered that he had missed the ten-day time-limit for challenging the decision in question and did not lodge an appeal against it.

14. On 5 December 2003 the District Court upheld the applicant's conviction on appeal and revoked the suspension of his conditional

sentence. The applicant was represented by Mr G., state-appointed counsel. Both the applicant and the prosecutor appealed.

15. The Supreme Court scheduled a hearing for 17 February 2004. On 29 January 2004 the court dispatched summonses to the parties, including the applicant and his counsel, notifying them of the date and time of the hearing.

16. On 17 February 2004 the Supreme Court held the cassation hearing. It heard the prosecutor and granted his request to reclassify the charges against the applicant. It found the applicant guilty of battery and sentenced him to one year, eight months and fifteen days' imprisonment. The applicant was neither present nor represented.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### **A. Detention pending determination of the criminal charge by the court**

17. A defendant can be remanded in custody or his detention can be extended only on the basis of a judicial decision (Russian Constitution, Article 22). The court should make the relevant decision upon a reasoned request by the prosecutor or the investigator supported by appropriate evidence (Code of Criminal Procedure, Article 108 § 3) or of its own motion (Code of Criminal Procedure, Article 108 § 10).

18. When considering a cassation appeal lodged by one of the parties to the criminal proceedings, the cassation court is required to decide whether or not a preventive measure, including placement in custody, should be applied pending a new hearing (Code of Criminal Procedure, Article 388 § 1).

19. The Supreme Court of Russia provided the following interpretation of the relevant parts of Article 388 § 1 (Resolution no. 28 “on application of the rules set forth in the Russian Code of Criminal Procedure governing appeal and cassation proceedings, adopted on 23 December 2008, as amended):

“23. When quashing the verdict or any other judicial act and remitting the matter for fresh consideration to the trial or appeal court or to the prosecutor, the cassation court should, if asked by the prosecutor or of its own motion, decide whether to apply a preventive measure in respect of the defendant who is held in custody, the aims [of this decision] being the protection of the rights and legal interests of the parties to the proceedings and the proper conduct of the court hearing within a reasonable time. The court may impose any of the preventive measures authorised by [law] provided it ensures that the said aims are achieved.

When deciding to extend the defendant's detention..., the cassation court should specify... the exact time-limit of the [detention]. If, on the date of the decision, the

earlier imposed detention period has not expired and this period is sufficient to secure the above-mentioned aims, [the court] should indicate... that the previously imposed detention will remain unchanged. In any event, [the court] should state the reasons for its decision.”

## **B. Presence in court**

20. The failure of a party, who has been duly notified of the date, time and place of the cassation hearing, to attend the hearing should not preclude the court from proceeding with the examination of the case (Code of Criminal Procedure, Article 376 § 4).

21. If a convicted person wishes to take part in the appeal hearing, he or she must indicate this request in his statement of appeal (Code of Criminal Procedure, Article 375 § 2).

22. If the court is unable to proceed owing to the absence of a party summoned to court, it must adjourn the hearing (Code of Criminal Procedure, Article 253 § 1).

## **THE LAW**

### **I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION**

23. The applicant complained that his detention from 9 October to 5 December 2003 was unlawful. He relied on Article 5 of the Convention, which reads, in so far as relevant, as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court[.]”

24. The Government contested that argument. They submitted that the appeal judgment had been quashed by the Supreme Court of the Bashkortostan Republic on procedural grounds which did not affect the lawfulness of the applicant's detention pending a new appeal hearing. Furthermore, the lawfulness of the applicant's detention had been subsequently confirmed by the decision of 5 November 2003 in which the court ordered that the applicant remain in custody pending the appeal hearing.

25. The applicant maintained his complaints. He argued that on 9 October 2003 the Supreme Court had quashed the appeal judgment in full. Accordingly, after that date there had been no court order authorising his

detention and he should have been released pending a new appeal hearing. As regards the court order of 5 November 2003 which indicated that the preventive measure imposed earlier should remain unchanged, the applicant considered it to be in contravention of the applicable rules of criminal procedure since no such measure had ever been imposed on him.

### **A. Admissibility**

26. 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**

#### *1. General principles*

27. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While, in the first place, it is normal for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed (see, among other authorities, *Douiye v. the Netherlands* [GC], no. 31464/96, §§ 44-45, 4 August 1999). Furthermore, the “lawfulness” of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see, among most recent authorities, *Bakmutskiy v. Russia*, no. 36932/02, § 109, 25 June 2009).

#### *2. The applicant's detention from 9 October to 5 November 2003*

28. The Court observes that on 19 August 2003 the applicant was taken into custody pursuant to the appeal judgment rendered by the Sharanskiy District Court which revoked his conditional sentence. However, on 9 October 2003 the Supreme Court of the Bashkortostan Republic quashed the appeal judgment of 19 August 2003 and remitted the matter to the Sharanskiy District Court for fresh consideration.

29. The Court notes that it is undisputed by the Government that on 9 October 2003 the appeal judgment of 19 August 2003 was quashed in full. Accordingly, it rejects their argument that such quashing had no consequences as far as the applicant's detention was concerned.

30. The Court further notes that the domestic rules of criminal procedure required that the Supreme Court decide whether the applicant should remain in custody pending the new appeal hearing (see paragraph 18 above). However, the Supreme Court failed to do so. As a result, from 9 October to 5 November 2003 the applicant was deprived of liberty for almost a month in the absence of a court order or any other legal ground.

31. It follows that the applicant's detention during the period in question was not "lawful" or "in accordance with a procedure prescribed by law". There has accordingly been a violation of Article 5 § 1 of the Convention on account of the applicant's detention from 9 October to 5 November 2003.

*3. The applicant's detention from 5 November to 5 December 2003*

32. The Court observes that on 5 November 2003 the Sharanskiy District Court, when fixing the date of the appeal hearing for 5 December 2003, noted that the preventive measure imposed on the applicant "should remain unchanged".

33. In this connection the Court reiterates that a court's decision to maintain a custodial measure would not breach Article 5 § 1 provided that the trial court "had acted within its jurisdiction ... [and] had the power to make an appropriate order". However, "the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (see *Khudoyorov v. Russia*, no. 6847/02, § 135 *in fine*, ECHR 2005-X (extracts)).

34. The Court accepts that on 5 November 2003 the District Court acted within its powers in deciding to maintain the applicant's detention pending the appeal hearing. The Court can even concede that the District Court indicated, albeit implicitly, that the applicant was to remain in custody until the day on which the appeal hearing was to be held, namely, until 5 December 2003. However, the Court cannot but notice that the District Court failed to indicate any reason for ordering the extension of the applicant's detention. As a result, the applicant remained unaware as to the grounds of his detention after 5 November 2003. The District Court's failure to give reasons for its decision was made all the more regrettable by the fact that the applicant had by then spent almost a month in custody without a valid judicial decision (see paragraph 31 above).

35. Having regard to the above, the Court considers that the District Court's decision of 5 November 2003 did not comply with the requirements of clarity, foreseeability and protection from arbitrariness, which together



constitute the essential elements of the “lawfulness” of the detention within the meaning of Article 5 § 1.

36. Accordingly, the Court considers that in the present case there has been a violation of Article 5 § 1 of the Convention on account of the applicant's detention from 5 November to 5 December 2003.

## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

37. The applicant complained that his state-appointed counsel had failed to appear before the cassation court. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

...

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

...

(c) to defend himself ... through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require[.]”

38. The Government opined that the State had not been responsible for the failure of the applicant's counsel to appear before the cassation court. On 29 January 2004 the Supreme Court of the Bashkortostan Republic had sent out summonses both to the applicant and his counsel informing them of the date and time of the cassation hearing. It had been open to the applicant to ask the court to ensure his and his counsel's presence in court. However, he had failed to do so. Accordingly, the judicial authorities had not been required to ensure their presence in court.

39. The applicant maintained his complaint.

### A. Admissibility

40. 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

41. As the requirements of paragraph 3 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1 of Article 6, the

Court will examine the applicant's complaints under both provisions taken together (see, among many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

42. The Court reiterates that, while it confers on everyone charged with a criminal offence the right to “defend himself ... through legal assistance ...”, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, 24 May 1991, § 30, Series A no. 205).

43. The Court has previously held that the appointment of defence counsel in itself does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c). The Convention is intended to guarantee not rights which are theoretical or illusory, but rights which are practical and effective. Thus, mere nomination does not ensure effective assistance since a lawyer appointed for legal aid purposes may be prevented from performing, or shirk his or her duties. If they are notified of the situation, the authorities must either replace the lawyer or oblige him or her to fulfil those duties (see, for example, *Kahraman v. Turkey*, no. 42104/02, § 35 *in fine*, 26 April 2007).

44. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or chosen by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal-aid scheme or be privately financed (see *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002). The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see *Kamasinski v. Austria*, 19 December 1989, Series A no. 168, § 65, and *Daud v. Portugal*, 21 April 1998, *Reports of Judgments and Decisions* 1998-II, § 38).

45. Turning to the circumstances of the present case, the Court observes that on 17 February 2004 the Supreme Court of the Bashkortostan Republic held the cassation hearing in the applicant's absence. In this connection the Court notes that the applicant did not dispute the Government's assertion that, having been notified of the cassation hearing, he had not asked the Supreme Court to ensure his presence in court. However, in the Court's opinion, the applicant's waiver of the right to be present at the hearing in person did not relieve the judicial authorities of the responsibility to take steps necessary to provide for the effectiveness of his defence.

46. The Court further observes that state-appointed counsel G., failed to appear before the Supreme Court on 17 February 2004. Nor did he ask the

court to adjourn the hearing or communicate to the court the reasons for his inability to attend. In the Court's opinion, counsel G. did not perform his duties properly with respect to the applicant's defence and his failure to do so was manifest to the Supreme Court. Accordingly, in such circumstances, it was incumbent on the court to intervene, especially in view of the prosecutor's presence and his request for reclassification of the charges against the applicant.

47. Lastly, the Court notes that, while the Government claimed that the applicant should have asked the court to ensure his counsel's presence in court, and in the absence of a such request, the cassation court bore no responsibility for the shortcomings on the part of state-appointed counsel G., they did not refer to any provision in the Russian rules of criminal procedure that would justify their assertion. Accordingly, the Court rejects the Government's argument that the Supreme Court was not required to act in response to counsel G.'s failure to appear.

48. Having regard to the above, the Court concludes that the Supreme Court of the Bashkortostan Republic failed to ensure that the applicant's defence by state-appointed counsel was effective. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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.”

50. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

### FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's detention from 9 October to 5 November 2003 and from 5 November to 5 December 2003;
3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of state-appointed counsel's failure to appear before the cassation court;

Done in English, and notified in writing on 11 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen  
Registrar

Christos Rozakis  
President