



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

FIRST SECTION

CASE OF KHAMETSHIN v. RUSSIA

(Application no. 18487/03)

JUDGMENT

STRASBOURG

4 March 2010

FINAL

04/06/2010

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

In the case of Khametshin 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 Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 9 February 2010,

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

PROCEDURE

1. The case originated in an application (no. 18487/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Rafail Nagimovich Khametshin (“the applicant”), on 5 May 2003.

2. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, the then Representative of the Russian Federation at the European Court of Human Rights.

3. On 11 April 2007 the President of the Third 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). The application was subsequently transferred to the First Section of the Court.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and lives in Yaroslavl.

6. On 23 June 2002 the applicant tried to smuggle alcohol to his friends, who were detained in prison. When police officers Mr S. and Mr A. tried to

arrest him he apparently resisted the arrest. Subsequently, the applicant was accused of assaulting officer S.

7. In October 2002 the applicant was charged with violence against a public official. The investigator in the Zavolzhskiy district prosecutor's office of Yaroslavl noted in his decision that the applicant had committed an administrative offence of smuggling prohibited goods to detainees; he had resisted lawful arrest during the commission of that offence; the latter act constituted a criminal offence punishable under Article 318 of the Criminal Code. The investigator's decision also contained a list of procedural rights under Article 47 of the Russian Code of Criminal Procedure (see paragraph 20 below). It appears that the applicant was given a copy of the above decision.

8. During the preliminary investigation, officer S. explained that on 23 June 2002 when together with officer A. he was patrolling in the vicinity of the prison they had noticed the applicant and two other persons throwing certain objects over the prison wall. When they had attempted to arrest them, the applicant and others had assaulted them and tried to escape. Officer A confirmed his fellow officer's statement.

9. The applicant disagreed with their version of the events and claimed in essence that the police officers had been drunk and had beaten him up and shot his friend.

10. At the trial, on 5 November 2002 the applicant made a written statement declining the services of his counsel. He declared that this waiver was not based on any "financial considerations" and that he would continue to ensure his own defence. The hearing was adjourned because certain witnesses, including officers S. and A., had not answered the court summons.

11. Thereafter, the trial court received a note of a telephone conversation between the court registry and A.'s grandmother. The latter explained that Mr A. had resettled to Moscow for permanent residence; that she had informed him on 5 November 2002 about the court summons and that he had asked her to inform the court that he maintained his earlier statement and could not attend the trial because his wife was about to be admitted to a maternity hospital.

12. On 11 November 2002 the trial judge received a note of a telephone conversation between the court registry and investigator M., who informed the judge that Mr A. had reportedly moved to the Moscow Region without giving his new address; Mr S. was still an officer and was living at the same address.

13. On 15 November 2002, noting the officers' absence, the trial judge enquired with the parties as to the admission in evidence of the officers' pre-trial statements. As can be seen from the trial verbatim record, both the prosecutor and the applicant consented to the reading out of the officers' pre-trial statements.

14. The court also referred to the statements from the prison guard Mr P., who had been on duty that day and had seen several persons throwing certain objects over the prison wall. The court also heard guard K., who had been patrolling at the territory of the prison and had seen the bottles being thrown over the prison wall. According to two medical reports, Mr S. and Mr A. were sober on 23 June 2002 and Mr S. had various injuries on his body. During a pre-trial identification, he had pointed to the applicant as his assailant.

15. The court rejected as unreliable the applicant's version of the events, which was supported by three witnesses on his behalf. The court also dismissed the fourth witness's allegation that one of the officers had been drunk on 23 June 2002.

16. By a judgment of 18 November 2002, the Zavolzhskiy District Court of Yaroslavl convicted the applicant as charged and sentenced him to three years and six months' imprisonment.

17. The applicant appealed contending that the court had not given a proper weight to the fact that despite the summons Mr S. and Mr A. had not appeared before the trial court and thus had not been examined at the trial.

18. On 14 January 2003 the Yaroslavl Regional Court upheld the judgment in the following terms:

“The court rightly founded the judgment on the testimonies by S. and A. because those testimonies are coherent, non-contradictory and correspond to the actual circumstances of the case. They were corroborated by other evidence presented in the judgment, such as the medical report indicating that S. had [injuries], P.'s statement..., K.'s statement...The reference to the failure of S. and A. to appear before the court on the summons is not a valid reason for annulment of the judgment because the court obtained the parties' opinion on the possibility of reading out their depositions in view of their absence from the trial; [the applicant] did not object to the reading out...”

19. In 2003 the Regional Court dismissed the applicant's request for supervisory review of the above judgments. In 2007 the Prosecutor of the Yaroslavl Region applied for supervisory review, considering that there was no *corpus delicti* and that there was no case to answer against the applicant. On 25 October 2007 the Acting President of the Regional Court dismissed the prosecutor's application and refused leave to supervisory review.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure (CCrP)

20. Under Article 47 § 3 of the CCrP, a defendant has a right to adequate time and facilities for the preparation of his defence. Article 47 § 4 contains a list of procedural rights, including a right to legal assistance and to free legal representation in certain circumstances, a right to participate in

hearings before first-instance and higher courts, to have access to the trial record and to lodge comments on it. During the first interview the defendant should be informed of the above procedural rights (Article 47 § 6).

21. All evidence should normally be presented at a court hearing during which the court should hear statements from the defendant, victim, witnesses and so on and examine physical evidence (Article 240). The reading of pre-trial depositions should only be allowable under Articles 276 or 281 of the Code (*ibid*).

22. Under Article 281 § 1 of the Code, in its version before 10 July 2003, the reading out of earlier statements made by the victim or witness was allowable if the parties gave their consent to it and if (i) there were substantial contradictions between the earlier and the later statements, or (ii) the victim or witness had not appeared before the trial court.

B. Supreme Court of Russia

23. Sitting as a court of appeal in a criminal case examined by the first-instance court in 2003, the Supreme Court interpreted Article 281 as requiring consent from both parties only when it was the intention of the trial court *ex officio* to read out a pre-trial statement rather than a request from one of the parties (Appeal decision no. 3-74/03 of 19 February 2004).

C. Constitutional Court of Russia

24. In its admissibility decision of 27 October 2000 (no. 233-O), the Constitutional Court held that the reading out of pre-trial depositions should be considered as an exception to the court's own assessment of evidence and should not upset the procedural balance between the interests of the prosecution and those of the defence. If a party insists on calling a witness whose testimony may be important to the case, the court should take all available measures to ensure this witness's presence in court. When that witness is available for questioning, the reading out of his or her deposition should be considered inadmissible evidence and should not be relied upon. However, when the witness is not available for questioning, the defence should still be provided with appropriate procedural safeguards such as challenge to the read-out deposition, a request for challenge by way of examining further evidence, as well as pre-trial face-to-face confrontation between that witness and the defendant when the latter was given an opportunity to put questions to the former (see also the admissibility decision of 7 December 2006 (no. 548-O)).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that he had not had a fair trial. In particular, he complained of the trial court's assessment of the available evidence and of the fact that he had not been afforded any opportunity to examine officers S. and A. in the criminal proceedings against him. Article 6 in the relevant parts reads as follows:

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

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

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;...”

26. The Government submitted that the criminal proceedings against the applicant had complied with the requirements of Article 6 of the Convention. The trial had been adjourned once, to ensure the presence of officers S. and A.; the authorities had made reasonable efforts in this respect but to no avail. The applicant had consented to the reading out of their pre-trial statements. Thus, he had unequivocally waived his right to examine them. This decision had been taken by him without legal advice since he had voluntarily declined the services of counsel at an earlier hearing.

27. The applicant maintained his complaints.

A. Admissibility

28. The Court considers that the application 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

29. With regard to judicial decisions, the Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the

observance of the obligations undertaken by the Parties to the Convention. In particular, the Court is not competent to deal with an application alleging that errors of law or fact have been committed by the domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (see, among other authorities, *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140).

30. As regards Article 6 of the Convention, the Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Doorson v. the Netherlands*, judgment of 26 March 1996, § 67, *Reports* 1996-II, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, § 50, *Reports* 1997-III).

31. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, § 49, Series A no. 238). The same paragraphs, taken together, require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him, such measures being part of the diligence the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII).

32. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected (see *Saïdi v. France*, judgment of 20 September 1993, § 43, Series A no. 261-C, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). If there has been no negligence on the part of the authorities, the impossibility of securing the appearance of a witness at the trial does not in itself make it necessary to halt the prosecution (see *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, § 21). The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or to a decisive extent, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either

during the investigation or at trial (see *Delta v. France*, judgment of 19 December 1990, § 37, Series A no. 191-A, and *Isgrò v. Italy*, judgment of 19 February 1991, § 35, Series A no. 194-A).

33. Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court and it is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see, among many other authorities, *Bricmont v. Belgium*, judgment of 7 July 1989, § 89, Series A no. 158).

2. Application of those principles in the present case

34. In the present case the Court reiterates that the applicant maintained that he had not had a fair trial and, under Article 6 §§ 1 and 3 (d) of the Convention, he referred in particular to the fact that he had been unable to examine officers S. and A.

35. Since the requirements of paragraph 3 (d) of Article 6 represent specific aspects of the right to a fair trial set forth in paragraph 1, the Court will examine the applicant's complaint under the two provisions taken together (see *Asch v. Austria*, judgment of 26 April 1991, § 25, Series A no. 203).

36. The Government argued that the national authorities had taken reasonable measures to enable the applicant to examine or have examined officers S. and A. Indeed, after their initial failure to attend the trial, the trial court ordered an adjournment to secure their presence at the next hearing. However, in the Government's submission, the officers were not available for questioning at the relevant time despite the efforts made by the authorities.

37. The Court will first determine whether the applicant validly waived his right under Article 6 § 3 (d) of the Convention. The Court reiterates in that connection that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, entitlement to the guarantees of this provision (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII). However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner, be attended by minimum safeguards commensurate with its importance, and should not run counter to any important public interest (*ibid*). Moreover, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Panovits v. Cyprus*, no. 4268/04, § 68, 11 December 2008).

38. Turning to the circumstances of the case, the Court observes that under the Russian Code of Criminal Procedure, the reading out of pre-trial statements made by a victim or witness was allowable if the victim or witness did not appear before the trial court, provided that the parties

consented to the reading out. The trial record clearly states that the applicant consented to the reading out of the officers' statements. There is no reason to doubt the authenticity of the record.

39. The Court also notes that there was no allegation that the applicant had been compelled to refuse legal assistance at the trial or that he had otherwise been prevented from taking informed decisions in the course of the trial. Nor did the Court detect any shortcomings in the legal representation by counsel. While not being directly concerned with the question of the applicant's waiver of the right to legal assistance, the Court considers on the basis of the available materials that the applicant voluntarily and unequivocally chose to defend himself at the trial. Moreover, it has not been argued, and the Court does not consider, that the applicant was not sufficiently aware of his procedural rights, including the right to examine witnesses against him (see, by contrast, *Panovits*, cited above, § 68, and *Strzałkowski v. Poland*, no. 31509/02, § 54, 9 June 2009). The applicant did exercise his right to call witnesses on his behalf at the trial. At the same time, it does not transpire from the materials in the case file that the applicant made any visible effort to obtain the officers' presence in court or for them to be questioned at some other stage of the proceedings (see, by contrast, *Makeyev v. Russia*, no. 13769/04, § 37, 5 February 2009).

40. Bearing in mind the above factors, in the Court's opinion, it was incumbent on the applicant, who chose self-representation at the trial, to make an informed decision as to the necessity of examining the officers in open court. There is no reason to believe that the applicant did not understand that his consent to the reading out of the statements implied the waiver of the right to examine them in the subsequent proceedings at the trial. The materials before the Court do not disclose any circumstance which would lead it to consider that the trial judge himself should have taken any particular measure in this respect (see, for instance, *Talat Tunç v. Turkey*, no. 32432/96, § 61, 27 March 2007, and *Timergaliyev v. Russia*, no. 40631/02, § 59, 14 October 2008).

41. Consequently, the Court concludes that the applicant made an explicit waiver of his right to examine the officers or have them examined. In the circumstances of the case, there is no reason to consider that the applicant was not sufficiently put on notice as to the consequences of his consenting to the admission of the officers' pre-trial statements (compare *Craxi v. Italy (no. 1)*, no. 34896/97, §§ 90-93, 5 December 2002, and *Bonev v. Bulgaria*, no. 60018/00, § 41, 8 June 2006).

42. Lastly, the Court does not consider that the case raised any questions of public interest preventing the aforementioned procedural guarantee from being waived (see *Hermi* [GC], cited above, § 79).

43. The foregoing considerations have led the Court to conclude that there has been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* by four votes to three that there has been no violation of Article 6 §§ 1 and 3(d) of the Convention.

Done in English, and notified in writing on 4 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following joint dissenting opinion of Judges Rozakis, Spielmann and Jebens is annexed to this judgment.

C.L.R.
S.N.

JOINT DISSENTING OPINION OF JUDGES ROZAKIS,
SPIELMANN AND JEBENS

1. We disagree with the majority view that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

2. The majority come to the conclusion that the applicant made an explicit waiver of his right to examine the officers or have them examined (see paragraph 41 of the judgment).

3. We disagree with this finding. A waiver is acceptable only if it meets the quality requirement of being “unequivocal”. We would like to emphasise that we are not satisfied that the alleged waiver of the applicant's right to have both witnesses heard was an “unequivocal” waiver, and hence a valid waiver, as required by the Court's case-law. According to the *Oxford Dictionary of English* (2nd edition revised), “unequivocal” means “unambiguous” or “leaving no doubt”. The Court in its case-law has used such strong language to underline the importance of the rights of the defence. In *Hermi v. Italy* ([GC], no. 18114/02, ECHR 2006-XII) the Court held as follows:

“73. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Poitrimol*, cited above, pp. 13-14, § 31). In addition, it must not run counter to any important public interest (see *Sejdovic*, cited above, § 86, and *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66).”

4. In *Panovits v. Cyprus* (no. 4268/04, 11 December 2008) the Court emphasised that

“68. ... before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.”

5. If a defendant is not assisted by counsel, the trial judge has a duty to apprise the applicant in detail of his right to examine prosecution witnesses and to explain the consequences of waiving this right and agreeing to the “reading out” of pre-trial statements.

6. According to the majority view, “*there is no reason to believe that the applicant did not understand that his consent to the reading out of the statements implied the waiver of the right to examine them in the subsequent proceedings at the trial*” (paragraph 40 of the judgment).

7. This is the wrong test. Instead of taking as a starting point that “*there is no reason to believe that the applicant did not understand...*”, the Court should be *satisfied* that the applicant *did* understand that his consent to the reading out of the statements implied the waiver of the relevant right. In

other words, it should transpire from the file that the waiver was “unequivocal”. Then, and only then, should the Court accept any waiver as “unequivocal”.

8. Admittedly, and turning to the particular circumstances of the case, the applicant did not dispute that he had consented to the reading out of the officers' pre-trial depositions (see *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007, and *Ozerov v. Russia* (dec.), no. 64962/01, 3 November 2005). At the same time, there is no indication that the applicant was clearly apprised of his right to examine prosecution witnesses. Moreover, it did not follow from the wording of Article 281 of the Code of Criminal Procedure that by giving his consent to the reading out of the pre-trial statements the applicant definitely waived his right to examine those witnesses. We would like to stress that the applicant was not represented during the trial or on appeal and that there is no indication that he was well versed in the law (see *Bonev v. Bulgaria*, no. 60018/00, § 41, 8 June 2006; *Isgrò v. Italy*, 19 February 1991, § 29, Series A no. 194-A; and also, by contrast, *Andandonskiy v. Russia*, no. 24015/02, § 54, 28 September 2006).

9. Moreover, being faced with the authorities' apparent unwillingness to make further reasonable efforts to ensure S.'s and A.'s presence at the trial, the applicant was left with no other significant option regarding the possibility of questioning officers S. and A. Thus, we are not satisfied that the applicant was sufficiently put on notice as to the consequences of his refusing legal assistance or his consenting to the admission of the officers' pre-trial statements. We reiterate in that connection that the ultimate guardian of the fairness of the proceedings was the trial judge (see *Timergaliyev v. Russia*, no. 40631/02, § 59, 14 October 2008). It is true that, on 15 November 2002, noting the officers' absence, the trial judge enquired of the parties whether the officers' pre-trial statements could be admitted in evidence (see paragraph 13 of the judgment). But at the same time, as already mentioned, there is no indication that the judge apprised the applicant of his right to examine prosecution witnesses (see paragraph 5 above) and of the consequences of a waiver of this right. Nor did the judge explain the consequences of agreeing to the “reading out” of pre-trial statements.

10. In view of the above, we consider that the applicant cannot be considered to have waived his right to examine or have examined officers S. and A. in the criminal proceedings against him.

11. We would further observe that no proof was adduced to show that the national authorities had made every reasonable effort to provide the applicant with an effective opportunity to examine or have examined officers S. and A., whose testimony laid the foundations for the prosecution's case against the applicant. After the officers had failed to appear before the court on one occasion, it still remained possible to ensure

their presence at the trial. Despite this, no effective measures were taken to bring them before the court.

12. Bearing in mind the importance of the officers' testimony and the authorities' failure to ensure their presence at the trial, we conclude that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.