



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

FIRST SECTION

CASE OF SABAYEV v. RUSSIA

(Application no. 11994/03)

JUDGMENT

STRASBOURG

8 April 2010

FINAL

08/07/2010

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

In the case of Sabayev v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 18 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 11994/03) 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 Maksim Anatolyevich Sabayev (“the applicant”), on 13 February 2003.

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

3. In his first application form of 13 February 2003 the applicant complained about the outcome of the proceedings in his case and also alleged that he had been denied an opportunity to attend the supervisory review hearing in his case. By letter of 1 February 2005 the applicant also complained about the allegedly unlawful composition of the trial court in his criminal case.

4. On 26 September 2006 the President of the First Section decided to communicate the complaint concerning the applicant's alleged inability to take part in the supervisory review hearing in his case 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 FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in the town of Kolomna in the Moscow Region.

6. By judgment of 16 September 1999 the Elektrostal District Court of the Moscow Region examined the criminal case against the applicant and three other co-accused. The court convicted the applicant of aggravated blackmail and kidnapping and sentenced him to sixteen years' imprisonment. That sentence was upheld on appeal by the Moscow Regional Court on 25 January 2000.

7. Thereafter the applicant sought to initiate supervisory review of his case.

8. The applicant's supervisory review request to the Presidium of the Moscow Regional Court was partly successful. On 18 January 2001 the Presidium of the Moscow Regional Court, sitting as a supervisory review body, re-examined his case and partly changed the judgment of 16 September 1999.

9. On 26 February 2002 the applicant requested one of the Deputy Presidents of the Supreme Court to initiate supervisory review proceedings in his case before the Supreme Court, arguing that the lower courts wrongly assessed the evidence in the case and failed to apply the domestic law correctly.

10. Apparently in response to that request, on 11 June 2002 the Deputy President of the Supreme Court decided to initiate supervisory review proceedings in respect of the decisions of the lower courts in the applicant's case. The main reason for that decision was that while the lower courts had made a correct assessment of the facts of the case, they had erred in the legal characterisation of the offence committed by the applicant.

11. According to the Government, on 5 November 2002 notifications that the supervisory review hearing would take place on 19 November 2002 were sent to the applicant and the lawyer who had represented him at the trial. They were also invited to respond to the arguments of the Deputy President of the Supreme Court.

12. According to the applicant, he received a notification in the form of a telegram about the hearing of 19 November on 6 November 2002. From the documents submitted by the applicant it follows that he received a copy of the request of 11 June 2002 only on 27 November 2002, that is already after the supervisory review hearing in his case.

13. The applicant explained that once the main set of criminal proceedings was over, the lawyer in question had ceased to represent him. He submitted a copy of the lawyer's letter dated 29 January 2006, in which

the lawyer had confirmed the absence of any agreement to act on the applicant's behalf in the supervisory review proceedings of 19 November 2002. The lawyer also confirmed the receipt of the notification of 5 November 2002, along with a copy of the request of 11 June 2002, but stated that he had been unable to react to these documents for lack of authority.

14. The parties agreed that the applicant asked to attend the supervisory review hearing in person.

15. The applicant submitted a copy of that request. The request was made on 10 November 2002 but was not received by the Supreme Court until 26 November 2002.

16. On 19 November 2002 the Supreme Court, in the presence of the prosecutor and one of the other co-defendants' lawyers, examined the arguments of the Deputy President's supervisory review appeal and amended the sentence by changing the charges of aggravated kidnapping to aggravated deprivation of liberty. The applicant's sentence was thus reduced from sixteen to thirteen years of imprisonment accordingly.

17. By letter of 4 December 2002 the Supreme Court notified the applicant of the outcome of the supervisory review proceedings.

II. RELEVANT DOMESTIC LAW

18. Section VI, Chapter 30 of the Code of Criminal Procedure of 1960 (*Уголовно-процессуальный кодекс РСФСР*), in force at the material time, allowed certain officials to challenge a judgment which had become effective and to have the case reviewed.

19. Pursuant to Article 356 of the Code of Criminal Procedure of 1960, a judgment became effective and enforceable as of the day when the appeal instance pronounced its decision or, if the judgment had not been appealed against, when the time-limit for appeal expired.

Article 379. Grounds for setting aside judgments which have become effective

“The grounds for quashing or changing a judgment [on supervisory review] are the same as [those for setting aside judgments which have not become effective on cassation appeals].”

Article 342. Grounds for quashing or changing judgments [on cassation appeal]

“The grounds for quashing or changing a judgment on appeal are 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) serious violation of procedural law;

(iv) misapplication of [substantive] law;

(v) inappropriate sentence considering the gravity of the offence and the convict's personality.”

20. Article 371 of the Code of Criminal Procedure of 1960 provided that the power to lodge a request for a supervisory review could be exercised by the Prosecutor General, the President of the Supreme Court of the Russian Federation and their respective Deputies in relation to any judgment other than those of the Presidium of the Supreme Court, and by the Presidents of the regional courts in respect of any judgment of a regional or subordinate court. A party to criminal or civil proceedings could solicit the intervention of such officials for a review.

21. According to Articles 374, 378 and 380 of the Code of Criminal Procedure of 1960, the request for supervisory review was to be considered by the judicial board (the Presidium) of the competent court. The court could examine the case on the merits, and was not bound by the scope and grounds of the extraordinary appeal. The Presidium could dismiss or uphold the request. If the request was dismissed, the earlier judgment remained in force. If it upheld the request, the Presidium could decide whether to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, or for fresh court examination at any instance, to uphold a first-instance judgment reversed on appeal, or to amend and uphold any of the earlier judgments.

22. Article 380 §§ 2 and 3 of the Code of Criminal Procedure of 1960 provided that the Presidium could in the same proceedings reduce a sentence or amend the legal classification of a conviction or sentence to the defendant's advantage. If it found a sentence or legal classification too lenient, it had to remit the case for fresh examination.

23. Under Article 377 § 3 of the Code of Criminal Procedure of 1960, a public prosecutor took part in a hearing before a supervisory review body. The convicted person and his or her counsel could be summoned if the supervisory review court found it necessary. If summoned, they were to be given an opportunity to examine the application for supervisory review and to make oral submissions at the hearing. On 14 February 2000 the Constitutional Court of the Russian Federation ruled that the convicted person's presence was not optional but mandatory if the grounds for initiating the supervisory review proceedings could worsen his personal situation.

24. Under Article 407 of the new Code of Criminal Procedure of 2001, which entered into force on 1 July 2002, the convicted person and his counsel are notified of the date, time and place of hearings before the supervisory review court. They may participate in the hearing provided that they have made a specific request to do so.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained under Article 6 of the Convention of the outcome of the criminal proceedings against him. Furthermore, he complained that the decision of the Supreme Court of 19 November 2002 had prevented him from exercising his defence rights properly and thus rendered the supervisory review proceedings unfair. The Court is of the view that this complaint falls to be examined under Article 6 § 1 of the Convention, which provides:

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

A. The parties' submissions

26. The Government disagreed. They submitted that no fresh charge had been brought against the applicant in the supervisory review procedure, in which the initial conviction for kidnapping had merely been re-characterised as the less serious offence of unlawful deprivation of liberty.

27. The Government further stated, with reference to Article 377 of the Code of Criminal Procedure as amended by Decision of the Constitutional Court of 14 February 2000, that the summoning of parties to a supervisory review hearing remained at the discretion of the relevant court provided the review procedure was not triggered by an application that would be to the applicant's detriment. The Government noted that the application for supervisory review, as well as the prosecutor's pleadings at the hearing, were not to the applicant's detriment. Given that the supervisory review procedure had benefited the applicant by sentencing him to a shorter term of imprisonment as a result of a new legal classification of his actions, the Government were of the view that the Supreme Court's failure to secure the attendance of the applicant and his counsel did not breach Article 6 of the Convention.

28. The applicant contended that he did not have a fair trial in the proceedings before the supervisory review court. In his view, he had faced a new charge. He was informed of the proceedings and the contents of the Deputy President's request too late. The applicant stated that he had been deprived of an opportunity to be present and to submit arguments on that particular issue. In view of the above and having regard to the fact that the prosecution had participated in the hearing, the applicant considered that there had been a breach of Article 6 of the Convention.

B. The Court's assessment

1. Admissibility

29. In so far as the applicant complained generally of the outcome of the criminal proceedings against him, the Court notes that it is not called upon to examine alleged errors of fact and law committed by the domestic judicial authorities, provided that there is no indication of unfairness in the proceedings concerned. In this respect, the Court notes that the Supreme Court examined the request for supervisory review lodged by the Deputy President of the Supreme Court of Russia, re-opened the proceedings in the case and amended the lower courts' decisions. It re-characterised the applicant's offence from aggravated kidnapping to aggravated deprivation of liberty, reducing his sentence from sixteen to thirteen years of imprisonment. For the remainder, it upheld the previous court decision in his case.

30. The Court is of the view that, in so far as the Supreme Court re-opened the proceedings in the applicant's case and amended the decisions of the lower courts, the supervisory review proceedings concerned the determination of a criminal charge against the applicant. Accordingly, it finds that Article 6 § 1 of the Convention under its criminal head applies to those proceedings (see, among other authorities, *Vanyan v. Russia*, no. 53203/99, §§ 56-58, 15 December 2005).

31. The Court observes that this part of 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.

2. Merits

(a) General principles

32. The Court reiterates that it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the first-instance hearing (see *Colozza v. Italy*, 12 February 1985, §§ 27 and 29, Series A no. 89).

33. The personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing, even where the appellate court has full jurisdiction to review the case on questions of both fact and law. Regard must be had in assessing this question to, among other things, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance

for the appellant (see *Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II).

34. It is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A).

35. The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The latter means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, §§ 66 and 67, Series A no. 211).

(b) Application of the above principles to the instant case

36. The Court observes that the supervisory review proceedings under the Code of Criminal Procedure of 1960 were different from “ordinary” appeal proceedings in that, among other things, the power to initiate them was vested with certain senior judicial and prosecution officers, and not with the parties.

37. The fact remains, however, that the supervisory review court was not bound by the scope of the request for supervisory review but had the power to carry out a full-scale judicial review of the decisions in the case by quashing or amending them, remitting the case to lower courts or an investigator, or terminating the criminal proceedings partly or altogether (see paragraph 21). The Supreme Court did exercise its power by amending the conviction and the applicant's sentence, thereby determining a criminal charge against him (see paragraph 16).

38. Having regard to the above, the Court considers that in order to satisfy the principle of fairness enshrined in Article 6 of the Convention the Supreme Court should have notified the applicant or his defence lawyer of the contents of the prosecution's supervisory review request and the date and place of the hearing. Since the prosecution was later present at the supervisory review hearing of 19 November 2002 and made submissions, the principle of adversarial proceedings also required that the defence be present at that hearing in order to be able to contest and comment on the arguments advanced by the prosecution. In such circumstances, the Court rejects as irrelevant the Government's reference to the fact that the absence of the applicant and his counsel from the hearing was not unlawful under domestic law.

39. On the facts, the Court notes that the applicant was denied a proper opportunity to familiarise himself with the contents of the Deputy President's supervisory review request (see paragraphs 11-15). This made prior notice of the date of the supervisory review hearing (see paragraph 12) meaningless in practical terms, as the applicant was unable to present his arguments to the Supreme Court not only in person or through his defence counsel (see paragraphs 14 and 15), but also in writing. The Court cannot agree with the Government's reference to the notification and service of the relevant supervisory review request on the applicant's former counsel. The documents submitted by the applicant (see paragraph 13) clearly demonstrated that at the relevant time he was not represented by the lawyer in question or indeed by any other lawyer, and in the absence of a clear indication to the contrary the Supreme Court should have clarified this issue with the applicant himself.

40. Overall, the Court finds the above considerations sufficient to conclude that the supervisory review proceedings before the Supreme Court did not comply with the requirements of fairness.

41. There has therefore been a breach of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. Lastly, as to the applicant's complaint about the trial court's allegedly unlawful composition, the Court notes that the grievance was brought out of time, as the last decision in the applicant's criminal case was taken on 19 November 2002, and the applicant complained about it in his letter of 1 February 2005.

43. It follows that this part of the application should be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant considered that the outcome of the criminal proceedings in his case was erroneous and unjust and asked for 100,000 United States dollars to compensate for the alleged damage.

46. The Government submitted that the claims were unsubstantiated and generally excessive.

47. The Court observes, as stated above, that the Supreme Court amended the applicant's conviction in his absence and failed to notify him of the hearing. The Court considers that the applicant indisputably sustained non-pecuniary damage, which cannot be compensated solely by a finding of a violation. Deciding on an equitable basis, it awards him 3,000 euros for non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

48. The applicant made no claim in respect of costs and expenses. The Court considers that there is no call to make an award under this head.

C. Default interest

49. 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. *Declares* the complaint concerning the fairness of the supervisory review proceedings before the Supreme Court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
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, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President