



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

FIRST SECTION

CASE OF SINICHKIN v. RUSSIA

(Application no. 20508/03)

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 Sinichkin 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. 20508/03) 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 Andrey Vladimirovich Sinichkin (“the applicant”), on 12 May 2003.

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

3. On 29 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).

4. The Government objected to the joint examination of the admissibility and merits 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

5. The applicant was born in 1970 and is serving a prison sentence in correctional colony YuK-25/8 in the Orenburg Region.

6. On 24 June 2002 the applicant was arrested on suspicion of aggravated concerted robbery and taken to the Leninskiy District police

station of the Orsk town police department. He refused legal assistance, signed a record confirming his refusal and denied the accusations made. He was released on the same day.

7. On 22 July 2002 the applicant was again remanded in custody. He was charged with aggravated robbery and questioned after he had refused legal assistance. Police officers allegedly threatened and humiliated him with a view to extracting a confession from him. The applicant did not confess. Two days later he was released on a written undertaking not to leave the town.

8. On 23 July 2002 the local bar association appointed counsel M. to represent the applicant in the criminal proceedings. It appears that M. was appointed to represent the applicant as legal-aid counsel.

9. On 31 October 2002 the Leninskiy District Court of Orsk started examining the applicant's criminal case. On the same day the applicant lodged a written request with the trial court, by which he declined the services of M. and sought leave to represent himself. He explained that it was a voluntary decision and had not been caused by financial difficulties. M. submitted to the court that he agreed with the applicant's request. Having discussed the issue, the court allowed the applicant's request and granted him leave to represent himself.

10. By a judgment of 10 November 2002, the District Court found the applicant guilty as charged and sentenced him to thirteen years' imprisonment. It established that the applicant, together with his two co-defendants, had attacked, robbed and severely beaten up the victim. The applicant's role, previously agreed upon by the co-defendants, consisted, among other things, in threatening the victim with a knife. The court based its findings on partial confessions by the applicant's co-defendants, statements by victims and witnesses and material evidence. It was finally stated in the judgment that it could be appealed against to the Orenburg Regional Court within ten days of its pronouncement or, for the detained defendants, within the same period after receipt of its copy. It was also stated that if the remanded convicts were submitting an appeal statement, they had a "right to request to participate in the examination of the criminal case by the appellate court".

11. On 21 November 2002 the applicant appealed against his conviction to the Orenburg Regional Court ("the Regional Court"). He did not dispute that he had taken the money from the victim but disagreed with the way the trial court had established the relevant facts, the distribution of roles between him and his co-defendants and the classification of his own acts. He submitted, in particular, that the trial court had disregarded his testimony and statements by witnesses which supported it, in particular, regarding the trial court's findings about the distribution of responsibility between him and his co-defendants and the classification of his acts as a premeditated robbery. In his appeal statement the applicant neither requested the Regional

Court to secure his presence at the appeal hearing nor sought legal representation. According to the Government, the applicant's co-defendants who also appealed against the conviction expressly requested the appellate court to secure their presence at the appeal hearing.

12. According to the Government, on 25 November 2002 a notification about the appeal hearing was sent to the remand centre where the applicant was being held.

13. On 19 December 2002 the Regional Court examined the appeals lodged by the applicant and his co-defendants and upheld the judgment. The applicant was absent from the appeal hearing and was not represented before it, while his co-defendants, as well as the prosecutor, attended the hearing and made submissions.

14. By a judgment of 19 December 2002, the Regional Court dismissed the applicant's appeal and upheld the conviction.

II. RELEVANT DOMESTIC LAW

A. The Code of Criminal Procedure

1. Scope of examination of the criminal case by the appeal court

15. Under Article 360 of the Code of Criminal Procedure, which entered into force on 1 July 2002 ("the CCP"), the appeal court verifies the legality, validity and fairness of the judgment of the trial court only to the extent to which it has been complained against and only in respect of those convicted who are concerned by the appeal. The appeal court is empowered to reduce the sentence imposed on the convicted person or to apply the law of a lesser offence. It has no power to impose a more severe penalty, apply a law on a more serious offence or quash an acquittal, unless it considers that the conviction was unfair or that the interests of the parties to the proceedings were violated.

16. A conviction is deemed unfair if the sentence imposed is inconsistent with the seriousness of the offence, the personality of the convicted person, or if that sentence, although within the limits of the relevant Article of the Criminal Code, is unfair in its chosen type or extent, being either disproportionately lenient or disproportionately severe. A conviction may be reversed when it is necessary to impose a more severe penalty where the penalty imposed by the trial court is deemed unfair as being disproportionately lenient - only when it is requested by the public prosecutor, the victim or the private prosecution (Article 383).

17. Under Article 377 §§ 4 and 5 of the CCP, the appeal instance may directly examine evidence, including additional material submitted by parties.

2. Defendant's presence at the appeal hearing

18. Under Article 375 § 2, if a convicted person wishes to participate in an appeal hearing he or she should indicate that wish in the statement of appeal.

19. Article 376 of the Code provides that upon receipt of the criminal case and the statements of appeal, the judge fixes the date, time and place for a hearing. The parties shall be notified of the date, time and place of the hearing no later than fourteen days before the scheduled hearing. The court determines whether the remanded convict should be summoned to the hearing. If the remanded convict has expressed the wish to be present at the examination of his appeal, he has the right to participate in person or to state his case via video link. The manner of his participation in the hearing is to be determined by the court. A defendant who has appeared before the court shall always be entitled to take part in the hearing. The failure of persons timely notified about the date, time and venue of the hearing to appear does not preclude the court from taking on the examination of the case.

20. Under Article 377, the presiding judge opens the hearing by announcing which criminal case is to be examined and on whose appeal. He then announces the composition of the court, the names of persons who are parties to the proceedings and are present at the hearing and hears the statements of those who had lodged the appeals and of the opposing parties. The appeal court is entitled, at the party's request, to directly examine evidence and additional materials provided by the parties to support or disprove the arguments cited in the statement of appeal or in the statements of the opposing party.

3. Legal representation

21. The CCP provides as follows:

Article 51

“1. Participation of legal counsel in the criminal proceedings is mandatory if:

1) the suspect or the accused has not waived legal representation in accordance with Article 52 of this Code;

2) the suspect or the accused is a minor;

3) the suspect or the accused cannot exercise his right of defence by himself owing to a physical or mental handicap;

3.1) the court proceedings are to be conducted [in the absence of the accused] in accordance with Article 247 § 5 of this Code;

4) the suspect or the accused does not speak the language in which the proceedings are conducted;

5) the suspect or the accused faces serious charges carrying a term of imprisonment exceeding fifteen years, life imprisonment or the death penalty;

6) the criminal case falls to be examined by a jury trial;

7) the accused has filed a request for the proceedings to be conducted [without a hearing] under Chapter 40 of this Code;

2. ...

3. In the circumstances provided for by paragraph 1 above, unless counsel is retained by the suspect or the accused, or his lawful representative, or other persons on request, or with consent, of the suspect or the accused, it is incumbent on the investigator, prosecutor or the court to ensure participation of legal counsel in the proceedings.”

Article 52

“1. The suspect or the accused may refuse legal assistance at any stage of criminal proceedings. Such a waiver may only be accepted if made on the own initiative of the suspect or the accused. The waiver must be filed in writing and must be recorded in the official minutes of the relevant procedural act.

...”

B. Case-law of the Constitutional Court of the Russian Federation

22. Examining the compatibility of Article 51 of the Code of Criminal Procedure with the Constitution, the Constitutional Court ruled as follows (decision no. 497-O of 18 December 2003):

“Article 51 § 1 of the Code of Criminal Procedure, which describes the circumstances in which the participation of defence counsel is mandatory, does not contain any indication that its requirements are not applicable in appeal proceedings or that the convict's right to legal assistance in such proceedings may be restricted.”

23. That position was subsequently confirmed and developed in seven decisions delivered by the Constitutional Court on 8 February 2007. It found that free legal assistance for the purpose of appellate proceedings should be provided on the same conditions as during the earlier stages in the proceedings and is mandatory in situations listed in Article 51. It further underlined the obligation of courts to secure participation of defence counsel in appeal proceedings.

C. Case-law of the Supreme Court of the Russian Federation

24. In a number of cases (decisions of 13 October 2004 and 26 January, 6 April, 15 June and 21 December 2005) the Presidium of the Supreme Court of the Russian Federation quashed judgments of appeal courts and remitted cases for fresh consideration on the ground that the courts had failed to secure the presence of defence counsel in the appeal proceedings, although it was obligatory for the accused to be legally represented.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained under Article 6 of the Convention that the appellate court had examined his appeal in his absence. The Court also raised, of its own motion, under Article 6 of the Convention the issue of lack of free legal representation for the applicant at the appeal hearing. Article 6, in its relevant parts, 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...

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

... (c) to defend himself in person or through legal assistance of his own choosing...”

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. Submissions by the parties

27. The Government submitted that pursuant to Article 375 of the Code of Criminal Procedure, if a convicted person wished to participate in the appeal hearing, he or she was to request it expressly in the appeal statement. They further claimed that on 10 November 2002, after the pronouncement of the conviction, the first-instance court had explained to all defendants

that they had a right to request the appellate court to secure their presence at the appeal hearing. A copy of the judgment of 10 November 2002 obtained by the applicant in the remand centre also contained that indication. However, in his appeal statement the applicant had not sought leave to attend the hearing. Accordingly, on 25 November 2002 a simple notification about the date of the appeal hearing had been sent to his remand centre. The applicant had not submitted any other requests, either to attend the appeal hearing or for a lawyer to be appointed to represent him there. At the same time, his co-defendants had expressly requested the appellate court to secure their attendance and had been able to attend.

28. As regards the issue of representation, the applicant had not been represented before the trial court, hence a lawyer could not have been notified about the appeal hearing. The applicant had refused legal assistance during the trial, as he had had the right to do under Article 52 of the CCP. The applicant's refusal had not prevented him from requesting legal assistance at later stages of the proceedings. Pursuant to Article 51, the authorities could have insisted on appointing a lawyer for the applicant if, among other things, he had been charged with offences punishable with more than fifteen years' imprisonment, or he had no knowledge of Russian or was mentally disabled. However, he had been charged with an offence carrying a sentence of up to fifteen years' imprisonment and thus the authorities could not override his wish to refuse legal representation. Had the applicant requested a representative, the authorities would have been obliged to appoint counsel for him pursuant to Articles 47, 50 and 52 of the CCP. Furthermore, had the applicant requested his lawyer's presence at the appeal hearing and had the appellate court disregarded it, those circumstances would have constituted an unconditional ground for quashing the appellate court's judgment. Lastly, they noted that the applicant had several previous convictions and thus had a good knowledge of the peculiarities of the pre-trial investigation and the proceedings before the courts.

29. The applicant maintained his position.

2. The Court's assessment

(a) General principles

(i) The rights to participate in the hearing and to be legally represented

30. The Court reiterates that in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A, and *Poitrimol v. France*, 23 November 1993, § 35, Series A no. 277-A), and that the duty to guarantee the right of a criminal defendant to be present in

the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005).

31. The personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing (see *Hermi v. Italy* [GC], no. 18114/02, § 60, ECHR 2006-XII). In particular, proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, even though the appellant has not been given the opportunity to be heard in person by the appeal or cassation court, provided that he has been heard by a first-instance court (see *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 30, Series A no. 115, and *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74). Furthermore, in appeal proceedings reviewing the case both as to facts and as to law Article 6 has been interpreted by the Court in several cases as not always requiring a right to appear in person (see, for example, *Fejde v. Sweden*, 29 October 1991, § 33, Series A no. 212-C).

32. At the same time the Court held on several occasions that where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine that issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004; *Constantinescu v. Romania*, no. 28871/95, § 55, ECHR 2000-VIII; and *Igual Coll v. Spain*, no. 37496/04, § 27, 10 March 2009).

33. In sum, in assessing this question regard must be had to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appeal court, particularly in the light of the issues to be decided by it and of their importance for the appellant (see *Hermi*, cited above, § 62, with further references; *Metelitsa v. Russia*, no. 33132/02, § 27, 22 June 2006; and *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 *Metelitsa* and *Lala*, both cited above, §§ 28, and 33, respectively). As regards, in particular, the need for an applicant to be provided with legal-aid counsel on appeal, the Court has already held that the situation in a case involving a heavy penalty where an appellant was left to present his own defence unassisted before the highest instance of appeal, which has wide powers in the assessment of the case, was not in conformity with the requirements of Article 6 (see *Shulepov v. Russia*, no. 15435/03, § 32, 26 June 2008; *Granger v. the United Kingdom*, 28 March 1990, §§ 47-48, Series A no. 174; *Maxwell v. the United Kingdom*, 28 October 1994,

§§ 38-41, Series A no. 300-C; and *Boner v. the United Kingdom*, 28 October 1994, §§ 38-44, Series A no. 300-B).

(ii) *Waiver*

35. Lastly, the Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II, and *Hermi*, cited above, § 73). Moreover, before an accused can be said to have by implication, 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 *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

(b) *Application of the above principles to the present case*

36. The Court notes at the outset that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the applicant's complaints under Article 6 §§ 1 and 3 should be examined together (see *Vacher v. France*, 17 December 1996, § 22, *Reports of Judgments and Decisions* 1996-VI).

37. The Court would further observe that it does not consider it necessary to decide whether the absence of the applicant and his counsel, taken separately, would render the proceedings before the appellate court unfair. Neither of them was present before the Orenburg Regional Court, and it is against this background that the Court will determine the complaint in issue (see *Metelitsa*, cited above, § 30).

38. Having regard to paragraphs 15-17 above, the Court notes that the jurisdiction of appeal courts in the Russian legal system extends to both issues of facts and law (see also *Sidorova (Adukevich) v. Russia*, no. 4537/04, § 25, 14 February 2008, and *Shulepov*, cited above, § 34) and that the Orenburg Regional Court had the power to fully review the case and consider additional arguments which had not been examined at the trial. In his appeal statement the applicant contested his conviction on both factual and legal grounds, his account of events differing from those of his co-accused in important aspects (see paragraph 11 above and compare *Metelitsa*, cited above, § 31). The appeal court was thus called upon to make a full assessment of the applicant's guilt or innocence regarding the charges against him. In the Court's view, the issues raised by the applicant in his appeal statement can reasonably be considered to have presented a certain factual and legal complexity. It also cannot disregard that the prosecutor and the applicants' co-defendants were present at the appeal hearing and made submissions to the appeal court. Taking further into account what was at

stake for the applicant, who had been sentenced to thirteen years' imprisonment, the Court does not consider that the Orenburg Regional Court could properly determine the issues before it without a direct assessment of the evidence given by the applicant either in person or through some form of legal representation.

39. In so far as the Government may be understood to argue that, by failing to indicate in his appeal statement his wish to participate in the appeal hearing and to obtain legal representation, the applicant waived those rights, the Court considers it necessary to note the following.

40. As regards the right to take part in the appeal hearing, the Court is satisfied that the applicant's failure to request to attend did not constitute an explicit and unequivocal waiver of that right. If analysed in terms of an implicit waiver, the Court has certain doubts that the necessary safeguards were in place to make it satisfy the Convention requirements (see, among other authorities, *Talat Tunç*, cited above, § 60). Nonetheless, the Court need not resolve that issue, because it considers that the proceedings before the Regional Court in any event fell short of the requirements of fairness for the following reasons.

41. It follows from the parties' submissions and the documents at the Court's disposal that at trial the applicant explicitly declined services of M., who appeared to be legal-aid counsel, and that the trial court accepted that decision and allowed his request for self-representation. However, there is no indication that the applicant waived, explicitly or implicitly and in accordance with the above-mentioned requirements (see paragraph 35 above), his right to be represented by legal-aid counsel on appeal (compare *Grigoryevskikh v. Russia*, no. 22/03, § 89, 9 April 2009).

42. For the reasons stated in paragraph 38 the Court cannot accept as decisive the Government's argument that the applicant's representation on appeal was not mandatory under the domestic law. In this respect the Court stresses that it is not its role to decide in the abstract whether the applicable domestic law is compatible with the Convention or whether it has been respected by the national authorities, but to assess whether the requirements of Article 6 have been complied with (see *Ringeisen v. Austria*, 16 July 1971, § 97, Series A no. 13).

43. In so far as the Government further argued that it had been for the applicant to request appointment of counsel on appeal, the Court notes that it has already dismissed similar arguments, pointing out that, according to the applicable norms of the CCP, as interpreted by the Russian Constitutional Court, the onus to appoint a legal-aid lawyer rested upon the relevant authority at each stage of proceedings (see *Shulepov*, cited above, § 37). In the *Grigoryevskikh* judgment (cited above, § 90) it was specifically emphasised that the effectiveness of the guarantee of legal representation by default contained in Article 51 of the CCP would be undermined without a corresponding obligation on the part of the court to verify in each individual

case whether it is lawful to proceed with the hearing in the absence of legal counsel for the accused. In that case the Court concluded that it had been incumbent on the appeal court to verify whether there had been a valid waiver of legal assistance by the applicant and, if there was none, to appoint a lawyer as required by Article 51 §§ 1(1) and 3 of the Code (*ibid*).

44. In view of the above findings, the Government's submission concerning the applicant's presumably extensive experience of the applicable procedures because of his previous convictions is without relevance for the Court's analysis, particularly having regard to the fact that the applicant's trial took place shortly after the entry into force of the new CCP.

45. Having regard to its findings in paragraphs 38-44 above, the Court concludes that the proceedings before the Orenburg Regional Court fell short of the requirements of fairness. There has therefore been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. Lastly, the applicant complained under Articles 1 and 3 of the Convention that the two days of his detention in July 2002 had amounted to inhuman and degrading treatment, because police officers had humiliated him, and under Article 6 that the domestic courts had incorrectly assessed the evidence in his case and had refused to summon certain witnesses on his behalf.

47. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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.”

49. 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 complaints concerning the applicant's absence from the appeal hearing on 19 December 2002 and the authorities' failure to provide him with a legal aid counsel admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

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