CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 26260/02
by Vladimir Vitalyevich GOLUBEV
against Russia

The European Court of Human Rights (Third Section), sitting on 9 November 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mr E. MYJER, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 1 June 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Vladimir Vitalyevich Golubev, is a Russian national who was born in 1972 and lives in Krasnoye-Na-Volge.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In 2000 the applicant, a police officer at that time, was charged with bribe taking. He was suspected in providing "protection" to a group of black market dealers in return for regular payments. On 7 July 2000 he was arrested and, since he was a former policeman, placed in a special detention facility for former law enforcement officials.

On 20 May 2000 he was transferred for several days to a "common" cell where ordinary criminal suspects were detained. In his words, the investigator placed him in that cell in order to put pressure on him.

On 12 September 2000 the applicant complained about this fact to the prosecution authorities. On 23 October 2000 the local prosecutor informed the applicant that the person responsible for placing him in that cell was reprimanded. There is no information on any further development regarding this complaint.

On 12 October 2001 the applicant was convicted of bribe taking by the Kostroma Regional Court. He was sentenced to five years' imprisonment in a colony of the strict regime.

The applicant indicates that he was unable to study the record of the trial hearings. He indicates that he signed a waiver where he renounced his right to examine the record. He claims, however, that he did so under the pressure of the judge.

The applicant and his lawyers appealed. They challenged the findings of the first instance court as to the facts of the case and complained of misinterpretation of the domestic law and various irregularities in the proceedings during the investigation and before the first instance court. The defence indicated inter alia that in the course of the pre-trial detention the applicant had been placed in a common cell, in breach of the relevant provisions of the domestic law. However, the brief of appeal did not mention that the applicant had been unable to study the trial record. The applicant did not request his personal presence at the hearing before the court of appeal.

On 18 March 2002 the applicant's conviction was upheld by the Supreme Court of Russia. The applicant was not present at the court of appeal's hearing and remained in the detention centre. However, his two lawyers were in the courtroom and during the hearing the applicant was able to communicate with the judges through a video communication system, which allowed him to see and hear what happened in the court room, and put questions to the participants of the hearing. The Supreme Court, basing on the materials of the case-file and the parties' pleadings, upheld the finding of the lower court in full. It did not detect any serious irregularity in the proceedings before the trial court which would require the review of the case.

After conviction the applicant was sent to serve his sentence in a correctional colony in Mordovia.

In 2004, due to the changes in the Criminal Code, the applicant's sentence was reduced to four years and eleven months, and he was transferred to a colony with a milder regime.

B. Relevant domestic law and practice

Article 375 of the Code of Criminal Proceedings of 1960, as in force at the relevant time, provided that the criminal defendant should indicate in his points of appeal whether or not he wanted to participate personally in the hearing before the court of appeal. Article 335 of that Code provided that the court of appeal might choose whether or not the applicant should participate in the hearings. However, by Ruling of 10 December 1998 no. 27-П the Constitutional Court of Russia invalidated that provision as anticonstitutional. The Constitutional Court found that the criminal defendant should always have the possibility to participate in the proceedings before the court of appeal. However, the Constitutional Court did not specify whether personal participation was needed, or participation through a video communication system was sufficient.

The new Code of Criminal Proceedings, as in force from 1 July 2002, provides that the criminal defendant may choose whether or not he wants to participate in the proceedings (Article 376 § 3). However, the choice between personal presence and participation via the video communication system belongs to the court.

COMPLAINTS

1. Under Article 3 of the Convention the applicant complains that in May 2000, despite his special status as a former policeman, he was placed in a "common" detention cell, where he could have been beaten by criminals detained there.

2. Under the same Convention provision the applicant further complains about the conditions of detention in the detention facilities and the correctional colony. Thus, the cells in the remand centre where he was detained during the pre-trial investigation and trial were overcrowded. The cells in the correctional colony were also overcrowded, badly heated and full of insects; the toilets were filthy, situated outside the living premises and had no doors. In his words, it was extremely difficult to have a shower, because of the insufficiency of shower cabins and shortage of hot and cold water. He also complained about the lack of proper medical assistance and bad quality of food. Finally, the applicant indicates that the prison rules prohibit the detainees having certain objects in their personal possession,

and that the detainees' right to receive parcels from their relatives is very limited.

3. Under Article 6 § 1 of the Convention the applicant complains about the lack of independence of the Russian courts from the prosecution. He further complains that he was unable to get access to the verbatim record of the trial court hearings. He finally complains about the outcome of the proceedings in his criminal case.

4. Under the same Convention provision the applicant complains that he was absent at the court of appeal and, therefore, could not communicate with his lawyers in private during the hearing.

THE LAW

1. The applicant complains that during the pre-trial investigation he was placed in a "common" cell where he could have been ill-treated by his cell-mates. Article 3 of the Convention, referred to by the applicant, reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum is relative and depends on all the circumstances of the case. Furthermore, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

In the present case the Court notes that the applicant did not claim that he had been subjected to any actual ill-treatment in the "common" cell. As to the mere fear of reprisals from the cell-mates, it is not, by itself, sufficient to bring the situation within the scope of Article 3.

Even assuming the contrary, the Court notes the following. The applicant raised the complaint about his placement in the "common" cell twice: before the prosecution and before the court of appeal. The complaint before the court of appeal cannot be regarded as an adequate remedy within the meaning of Article 35 of the Convention: the task of the court of appeal was to review the legality and well-foundeness of the judgment, but not to examine the modalities of the pre-trial detention (see, *mutatis mutandis*, *Toteva v. Bulgaria*, (dec.), no. 42027/98, 3 April 2003). As regards other legal avenues, namely the complaint to the prosecution authorities, the Court notes the last (and the only) domestic decision in respect of this

complaint dated 23 October 2000. It is unclear whether this decision can be considered as a "final" one for the purposes of Article 35 § 1. If so, then the complaint was lodged outside the six months' time-limit. If, on the contrary, that decision could have been challenged to a higher prosecutor or to a court, the Court notes that it has not been done by the applicant.

It follows that this complaint should be rejected under Article 35 §§ 1 and 4 of the Convention as having been introduced out of time or, alternatively, for non-exhaustion of the domestic remedies.

2. The applicant further complains, under the same Convention provision, about the conditions of detention in the pre-trial detention centres and the correctional colony, namely overcrowding, and limitations imposed on detainees in that colony.

The Court recalls that complaints regarding conditions of detention often raise questions of facts. In such cases the burden of proof may, under certain circumstances, be shifted to the authorities (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; see also *Mathew v. the Netherlands*, no. 24919/03, § 156, ECHR 2005-...). However, it is permissible only if the applicant produces at least some *prima facie* evidence of ill-treatment. In the present case the Court has nothing but the applicant's own words in support of his allegations concerning the conditions of detention. The complaint about the limitations imposed on the detainees by the prison rules is not sufficiently developed, and, in any event, it is unclear to what extent the applicant was personally affected by those limitations. The Court concludes that the applicant failed to produce even minimal evidence in support of his allegations of ill-treatment.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. The applicant complains about the alleged lack of independence of the Russian courts. He also complains about his alleged inability to study the hearing record. Finally, he complains about the outcome of the proceedings in his case. He refers to Article 6 of the Convention, which, insofar as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;"

The Court notes that the applicant's first complaint is too vague: he did not explain why he thinks that the courts in his case were not independent. Nor did he produce any evidence in support of his allegations. The sole fact

that the courts took a decision unfavourable to him does not automatically imply that they were not independent or impartial.

As regards the complaint about the applicant's inability to read the verbatim record of the court hearing, the Court notes that the applicant had a lawyer who had full access to the trial record. Further, it appears that the applicant himself waived this right and there is no evidence that he was subjected to any undue pressure in that respect by the judge or any other official.

As regards the complaint about the outcome of the proceedings, the Court recalls that "it is not for the Court to act as a court of appeal, or as sometimes is said, as a court of fourth instance from the decisions taken by domestic courts" (see *Posokhov v. Russia* (dec.), no. 63486/00, 9 July 2002). It is the role of the domestic courts to interpret and apply relevant rules of procedural or substantive law. Furthermore, it is the domestic courts which are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in the case (see, amongst many authorities, the *Vidal v. Belgium* judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32; the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B, § 34). The Court finds no indication that the procedures or decisions adopted by domestic courts in this case infringed the fairness requirement at the heart of Article 6 § 1 of the Convention.

In sum, the Court concludes that all the above complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. The applicant complains that he was not personally present at the court of appeal and could not communicate freely with his lawyers during the hearing. He refers in this respect to Article 6 of the Convention, cited above.

1. General principles

The Court recalls that the right to be present at the trial is one of the cornerstone rights of an accused (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, § 27). Moreover, Article 6 guarantees the right of an accused to participate effectively in a trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article (see, *inter alia*, *Colozza v. Italy*, cited above, § 27, and the *Barberà, Messegué and Jabardo v. Spain* judgment of 6 December 1988, Series A no. 146, § 78).

However, the Convention case-law does not require the same level of guarantees in the court of appeal as at the trial stage (see, among many other authorities, *Botten v. Norway*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, § 39). Thus, the leave to appeal

proceedings may be conducted in the absence of the accused provided that he participated personally at the trial (see *Monnell and Morris v. the United Kingdom*, judgment of 2 March 1987, Series A no. 115, § 58).

Furthermore, even where the court of appeal has full jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 (art. 6) always requires a right to a public hearing or *a fortiori* the right to be present personally (see *mutatis mutandis Fejde v. Sweden*, judgment of 29 October 1991, Series A no. 212-C, § 33). In assessing whether any personal attendance was needed, 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 court of appeal, particularly in the light of the issues to be decided and their importance for the applicant (*Belziuk v. Poland*, judgment of 25 March 1998, Reports 1998-II, p. 570, § 37).

Further, the Court recalls that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, § 34). Effective defence is impossible without the possibility for the accused to communicate with his lawyer out of hearing of third persons (see *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-..., § 133). However, this right is also not immune from restrictions, which may be justified in particular circumstances of the case.

2. Application of those principles in the present case

Turning to the present case, the Court notes the following. The applicant attended the hearings before the trial court and was fully able to present his case personally and with the assistance of his lawyers. As regards the appellate hearing before the Supreme Court, the applicant did not attend it. He remained in the detention centre, but followed the proceedings through a video communication system. In the Court's view, even though the applicant was not personally present at the hearing before the Supreme Court, his right to effective participation in the proceedings were not breached for the following reasons.

First of all, the applicant did not request his personal attendance, although the law clearly provided that such a request should be made in advance in his brief of appeal (see the "Relevant Domestic Law" part above). Nothing suggests that such a request would necessarily fail. Furthermore, there is no evidence that the applicant objected to the hearing through the video communication system in the course of it.

Secondly, the Court notes that the applicant's two lawyers were present at the appellate hearing and could have supported or expanded the arguments of the defence. It is true that during the hearing the applicant was unable to communicate with his lawyers in private. In other circumstances it

could put the defence in an unfavourable position vis-à-vis the prosecution. However, in the present case the applicant was able to consult with his lawyer in private before the hearing. Furthermore, since the applicant had two lawyers, he could choose one of them to assist him in the detention centre during the hearing and to consult with him in private. There is nothing in the domestic law that would prevent it and the applicant does not claim that such an arrangement was impossible in practice.

Thirdly, even assuming, in the applicant's favour, that he did not waive his right and had no other choice but to participate in the hearing through a video communication system, the Court recalls that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole. The Court notes in this respect that the scope of examination of the case by the Supreme Court was somehow limited. It did not examine any new evidence but just reviewed the findings of the trial court on the basis of the materials, contained in the case-file, heard the pleadings and discussed the arguments of the parties. All evidence was available to the defence and the appropriate arguments could have been prepared beforehand. As to the oral pleadings of the parties, everything suggests that the applicant was able to make oral remarks and put questions to the participants of the proceedings. He does not claim that the system worked improperly or that it in any other way limited his ability to take active part in the proceedings.

In sum, the Court concludes that, in the particular circumstances, the applicant was able to fully enjoy his rights under Article 6 §§ 1 and 3 even though he was not personally present at the court of second instance. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President