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

Press Release
issued by the Registrar of the Court

ECHR 380 (2014)
18.12.2014

Cases concerning retroactive application of criminal law in connection with 1949 mass deportation inadmissible for failure to exhaust domestic remedies

In its decision in the cases of Larionovs v. Latvia (application no. 45520/04) and **Tess v. Latvia** (no. 19363/05), the European Court of Human Rights has unanimously declared the applications inadmissible. The decision is final.

The applicants complained that the criminal law had been retroactively applied in the proceedings against them in connection with their acts during the mass deportation of Latvian inhabitants to remote places of the USSR (Union of Soviet Socialist Republics) in March 1949.

The Court found in particular that Mr Larionovs and Mr Tess, the applicants, had failed to lodge a constitutional complaint that, if successful, could have led to the reopening of the criminal proceedings and the redress of the violation of Article 7 (no punishment without law) alleged by them. The Court consequently rejected their complaint for non-exhaustion of domestic remedies.

Principal facts

Larionovs v. Latvia

The applicant, Nikolajs Larionovs, was a Latvian national. He was born in 1921 and died in 2005. His son continued his application before the Court on his behalf.

Following the occupation of Latvia by the USSR in the summer of 1940, Mr Larionovs was admitted to the Academy of the Infantry of the Soviet Army in Riga (Latvia). In June 1941, Germany attacked the USSR and by July 1941 the territory of Latvia was fully occupied by the German forces. When they attacked, Mr Larionovs was living in a border area and followed the Red Army in its retreat. Once in Russia, he was mobilised into the Red Army. In July 1944, the Red Army re-entered Latvia and on 8 May 1945, Latvian territory passed into the control of the USSR forces. Mr Larionovs was demobilised, assigned to the State security services and then sent to Latvia to serve in the local branch of the NKVD (the People's Commissariat for Internal Affairs of the Latvian Soviet Socialist Republic) – subsequently renamed "the MGB". He worked in the Latvian Soviet Socialist Republic until the end of his career and retired in 1976 having reached the grade of lieutenant-colonel.

On 9 November 1998 a preliminary investigation was opened against Mr Larionovs, who was suspected of having participated in the mass deportation of Latvian inhabitants: "*Kulaks*" – well-off farmers – as defined by Decree no. 761 of the Latvian SSR of 1947 and "nationalists" (families of those convicted for collaboration with the German occupying powers, for membership of a national resistance group or for its support in the post-war period). Approximately 14 000 Latvian families (about 40 000 persons) were thus deported from 25 to 30 March 1949 to remote places of the USSR. On 8 October 1999 Mr Larionovs was charged with a crime contrary to Article 68^1 of the 1961 Criminal Code.

His trial took place from September 2002 to September 2003. There were more than 50 hearings, during which the criminal case file (including documents concerning the deportation of 150 families) was examined. Mr Larionovs and 132 victims gave evidence. There were six adjournments because victims were unable to attend and ten adjournments owing to Mr Larionovs' health issues. In a judgment of 25 September 2003, the trial court found Mr Larionovs guilty of having committed a crime contrary to Article 68^1 of the 1961 Criminal Code.

Mr Larionovs appealed against that judgment, and in November 2013, he lodged a complaint with the Constitutional Court, arguing that Article 68[1] had not been applicable at the time of the events. On 16 February 2006 the Supreme Court dismissed the cassation appeal, noting in particular that no statutory limitations applied.

Tess v. Latvia

The applicant, Nikolay Tess, was a Russian national. He was born in 1921 and died in 2006. His wife, and subsequently his brother, continued his application before the Court.

In 1939 Mr Tess was enlisted into the Soviet army. In May 1945 he joined the NKVD of the Latvian SSR (Soviet Socialist Republic). In February 1949 he was asked to assist other divisions on a mass deportation operation (*Operation Priboi)* from Latvia. Until he retired in 1955 at the rank of major, Mr Tess worked for the KGB (the successor of the MGB).

On 19 March 1998 the prosecution opened a file into Mr Tess' activities in February/March 1949. He was suspected of having played an active role in *Operation Priboi*. In a decision of 21 March 2001 he was charged with a crime contrary to Article 68[1] of the 1961 Criminal Code. According to that decision, Mr Tess had drawn up and signed orders to arrest and deport 42 families.

His trial started in February 2002. Mr Tess applied to the Constitutional Court arguing that Articles 6[1] [i] and 68[1] of the 1961 Criminal Code were incompatible with national and international law. His request, as well as all the subsequent applications to the Constitutional Court, was rejected. The trial was suspended on several occasions, due in particular to the ill-health of several victims and of Mr Tess. On 16 December 2003 Mr Tess was found guilty of a crime contrary to Article 68[1] of the 1961 Criminal Code. The trial court judgment analysed the evidence in respect of each of the 42 cases of deportation of which he was accused.

Between February 2002 and February 2004 Mr Tess lodged two more unsuccessful constitutional complaints. On 28 November 2004 he lodged an appeal on points of law with the Senate of the Supreme Court and on 19 April 2005 the complaint was heard and dismissed. The Supreme Court agreed with the lower courts and concluded that the impugned acts had been at the time of their commission criminal offences in accordance with the general principles of law recognised by civilised nations, and that the application of the 1961 Criminal Code had been lawful and justified.

Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), the applicants complained that they had been convicted of a crime which did not constitute an offence in 1949. They further complained that the length of the proceedings against them had breached article 6 § 1 (right to a fair trial within a reasonable time).

The applications were lodged with the European Court of Human Rights on 27 September 2004.

Decision was given by a Chamber of seven judges, composed as follows:

Päivi **Hirvelä** (Finland), *President*,
Ineta **Ziemele** (Latvia),
George **Nicolaou** (Cyprus),
Ledi **Bianku** (Albania),
Nona **Tsotsoria** (Georgia),
Zdravka **Kalaydjieva** (Bulgaria),
Paul **Mahoney** (the United Kingdom),

[i] « Persons guilty of crimes against humanity, genocide, crimes against peace or war crimes may be convicted irrespective of when the crimes were committed".

and also Françoise **Elens-Passos**, *Section Registrar.*

Decision of the Court

Article 7

The Court found that the applicants' convictions had been based on the provisions of the national criminal law, namely the 1961 Criminal Code, which provided for retrospective application of the criminal law for the most serious crimes, and that the possibility of lodging a constitutional complaint for review at the end of the criminal proceedings against them had been a remedy available to Mr Larionovs and Mr Tess. Moreover, the fact that they had on several occasions lodged constitutional complaints and had requested the criminal courts to obtain preliminary rulings from the Constitutional Court indicated that they had considered these appeals as effective remedies.

As to the redress aspect of constitutional review, the Court found that the two-step remedy envisaged under Latvian law – the possibility of lodging a constitutional complaint and, if successful, the reopening of proceedings – could have provided redress in the applicants' cases, as the Latvian courts, in the renewed examination of the case, would have been bound by the findings of the Constitutional Court.

Lastly, as to the constitutional review's prospects of success, the Court found that, if a question as to the constitutionality of a provision of criminal law were to arise, the Constitutional Court, once properly seized with it, could exercise its jurisdiction. The applicants had not established that a constitutional complaint had been inadequate and ineffective in their circumstances.

The Court therefore concluded that Mr Larionovs and Mr Tess had failed to exhaust the remedy provided for by Latvian law, namely a constitutional complaint, that, if successful, could have led to the reopening of the criminal proceedings and the redress of the violation of Article 7 of the Convention alleged by them. The Court consequently rejected their complaint for non-exhaustion of domestic remedies.

Article 6

The Court considered that the applicants' next-of-kin (heirs or close family members) had had sufficient legitimate interest to continue the cases on behalf of the applicants.

It also considered that the proceedings had lasted six years and four months as concerned Mr Larionovs for two instances (trial and appeal), two constitutional claims and an appeal on points of law. In Mr Tess' case, the proceedings had lasted four years and one month for two instances as well, three constitutional claims and an appeal on points of law.

Furthermore, Mr Larionovs' case had been undeniably complex, involving sensitive and intricate questions of a historic and legal nature. Much research had been required as the case had involved the deportation of 150 families. The Court noted in particular that during the one-year trial, 132 victims had given evidence and many adjournments had been required. Subsequently, during the two years and two months of the appeal proceedings, Mr Larionovs' complaint to the Constitutional Court had been lodged and ruled upon. The significant deterioration in his health, of itself, had led to months of delay. Lastly, his appeal on points of law had been disposed of within two months.

The Court did not consider that there had been any unjustified periods of inactivity during the proceedings in Mr Tess' case either. For instance, the Court did not find the five-month period between the admissibility of the appeal and the appeal judgment or between the lodging and dismissal of the appeal on points of law, to be unreasonable, given the complexity of the case.

Consequently, the Court rejected the applicants' complaint about the allegedly excessive length of the proceedings as being manifestly ill-founded.

The decision is available only in English.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Céline Menu-Lange (tel: + 33 3 3 90 21 58 77)
Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Nina Salomon (tel: + 33 3 90 21 49 79)
Denis Lambert (tel: + 33 3 90 21 41 09)