CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 66041/01
by Irina ALDOSHKINA
against Russia

The European Court of Human Rights (First Section), sitting on 16 June 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. QUESADA, *Deputy Section Registrar,*

Having regard to the above application lodged on 27 November 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Irina Igorevna Aldoshkina, is a Russian national who was born in 1968 and lives in Samara. The respondent Government are represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

1. Background of the case

In late January 1998 the applicant, who then worked as the chief tax inspector of the Sovietskiy District Tax Inspectorate in Samara, offered to Mr and Mrs G., owners and managers of a company, to carry out an audit of the company's tax liabilities. The applicant claimed that an official audit of their company was scheduled for the first quarter of that year and a preliminary voluntary audit would have helped them to disclose and eliminate irregularities. She proposed Mr S., a senior tax inspector and her relative, as the auditor. It was agreed that S. would receive the auditor's fee in the amount of 10 percent of the established tax debts.

The applicant and S. took the company's books for the last five years. Subsequently they came to G. and claimed that the outstanding tax liabilities amounted to one thousand million Russian roubles (RUR)[1]; the applicant insisted that G. paid S. the stipulated fee of 100 million RUR. After bargaining, the fee was lowered to 20 million RUR, of which 10 million were to be paid in advance.

In mid-February 1998 Mr G. complained to the Federal Security Service that the applicant and S. had extorted a bribe from him. On 26 February 1998 a criminal investigation was opened. G. was given 10 million RUR of marked money, which he then gave to S. On leaving G.'s house, S. was apprehended by the Federal Security Service and taken into custody. According to the applicant, S. was placed in a solitary confinement cell where he committed suicide on the following night. On 31 March 1998 criminal prosecution of S. was discontinued because of his death.

A book-keeping examination commissioned by the investigator revealed that the actual amount of the outstanding tax liabilities of G.'s company had amounted to approximately six million RUR.

On 27 August 1998 the applicant was committed to stand trial on charges of abuse of position (Article 285 § 1 of the Criminal Code) and concerted extortion of a bribe (Article 290 § 4 (a) and (v) of the Criminal Code).

1. The amount is indicated without regard to the denomination of 1998. In accordance with the Presidential Decree “On the Modification of Face Value of Russian Currency and Standards of Value” of 4 August 1997, 1,000 “old” roubles became 1 “new” rouble as of 1 January 1998.

2. Criminal proceedings against the applicant

(a) Trial

On 14 September 1998 the Samara Regional Court held a directions hearing and listed the opening of the trial for 20 October 1998.

During the trial the court took evidence from Mr and Mrs G., the book-keeping expert, the applicant's superior and a co-worker. It examined the audio recording of the bargaining between G., the applicant and S. The applicant denied her guilt; she maintained that she had only attempted to help S. to earn additional money and her assessment of the outstanding tax liability of G.'s company had been entirely based on S.'s calculations.

On the last fifth day of the trial, in the final pleadings the prosecutor asked the court to characterise the applicant's actions as a fraud under Article 159 § 2 (a, v, g) of the Criminal Code. According to the applicant, her lawyer spoke after the prosecutor for some thirty minutes and then the court withdrew for deliberations.

On 28 October 1998 the Samara Regional Court delivered its judgment. The court found as follows:

> "... the [court] considers it established that [the applicant], acting in concert with S. in his interests with a view to obtaining an unlawful fee by way of deceit and abuse of confidence, in particular, by creating the illusion of performed work without drafting any [auditing] documents, knowingly deceived Mr and Mrs G., claiming that they[2] had found a serious value-added tax violation in the amount of one thousand million roubles, in order to get from them if not 10 percent of the amount of the established violations (100,000,000 roubles), then at least 20,000,000 roubles, which they have ultimately obtained: they actually received 10,000,000 roubles, but their intent was to receive 20,000,000 roubles.
>
> The investigative authorities characterised [the applicant's] acts as offences under Articles 285 § 1 and 290 § 4 (a) and (v) of the Criminal Code of the Russian Federation. The [court] considers it necessary to recharacterise her acts.
>
> Taking account of the above circumstances of the case, the [court] considers that [the applicant] committed fraud, i.e. theft of the property owned by [G.'s company] in the amount of 10,000,000 roubles by way of deceit and abuse of confidence, acting in concert with S. and using her official position – chief tax inspector – and therefore her acts are to be recharacterised... as an offence under Article 159 § 2 (a) and (v) of the Criminal Code."

The Regional Court sentenced the applicant to a fine of 1,000 minimum wages (approximately EUR 5,000) and prohibited her from holding any positions in tax authorities for three years.

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2. In the original text the sentence begins in singular and then continues in plural. It may be understood that plural forms refer to the joint actions of the applicant and S.

(b) Appeal

The applicant appealed against the judgment of 28 October 1998. She alleged, in particular, a violation of Article 254 of the RSFSR Code of Criminal Procedure in that the charge preferred by the Regional Court had been based on substantially different facts from the original charge against her, which infringed her right to defend herself. The applicant claimed her innocence and asserted that she had had no pecuniary interest whatsoever in the transaction between G. and S. The grounds of appeal submitted by the applicant's lawyer additionally indicated that the applicant's charge as set out in the indictment bill did not match – in its scope, legal characterisation and factual basis – the charge laid down in the judgment and that such recharacterisation of the offence had been a gross violation of the rights of the defence. The applicant's lawyer also advanced arguments about allegedly wrongful evaluation of evidence by the Regional Court.

The applicant submits that she could not attend the hearing before the appeal court because of financial constraints. The applicant's lawyer was present at the hearing.

On 17 March 1999 the Supreme Court of the Russian Federation heard the appeal and upheld the judgment of 28 October 1998. As to the alleged violation of the rights of the defence, the Supreme Court held as follows:

> "...All these circumstances were imputed to [the applicant], however, the legal analysis [of these circumstances] given by the investigative authorities was incorrect. By recharacterising [the applicant's] offence to a less serious one the court did not violate the requirements of Article 254 of the RSFSR Code of Criminal Procedure because all factual circumstances established in the case did not undergo a significant change".

(c) Supervisory-review proceedings

No ordinary appeal lay against the judgment of 17 March 1999. The applicant's lawyer lodged an application for supervisory review with the Presidium of the Supreme Court of the Russian Federation. He sought a reversal of the judgments passed in the applicant's case in order to redress the rights of the defence.

On an unspecified date a deputy president of the Supreme Court of the Russian Federation lodged an application for supervisory-review with the Presidium of that court. Although the text of the application has not been made available to the Court, it appears that he asked for a new recharacterisation of the applicant's actions which, in his opinion, should be qualified as an attempt to commit fraud.

On 24 May 2000 the Presidium of the Supreme Court of the Russian Federation examined the application for supervisory review. It heard the report by the judge rapporteur and statements by a deputy Prosecutor General who spoke in support of a new recharacterisation. The applicant and her counsel were not summoned to the hearing and did not attend it.

The Presidium established that the offence imputed to the applicant had not been brought to completion. In its opinion, the intent of the applicant had indeed been to obtain 20 million roubles, yet after S. had been detained by the police upon receipt of the advance, the plan could not be carried through. On that basis the Presidium recharacterised the applicant's offence as an attempt to commit fraud (Article 159 § 2 (a) and (v) of the Criminal Code in conjunction with Article 30 § 3). The applicant's sentence remained unaffected.

B. Relevant domestic law

Criminal Code of the Russian Federation

An official who uses his official position contrary to the interests of the service because of pecuniary or other personal motives, provided that such conduct has entailed a serious breach of the lawful rights or interests of citizens or organisations, or the interests of the society or the State protected by law, shall be punishable with a fine of up to 200 minimum wages, or an injunction to hold specific position for up to five years, or deprivation of liberty for up to four years (Article 285 § 1).

An official who – personally or through an intermediary – receives a bribe in the form of money, shares or other property or benefits for acts (omissions) in the interests of the briber, provided that such acts are within the professional competence of the official or the official can facilitate such acts by virtue of his position, shall be criminally liable (Article 290 § 1). The same actions if committed by a group of persons acting in concert (Article 290 § 4 (a)) or involving extortion (Article 290 § 4 (v)) shall be punishable with seven to twelve years' imprisonment, accompanied or not with a confiscation order.

Article 159 § 1 provides that fraud, i.e. theft of others' property or acquisition of rights to others' property by way of deceit or abuse of confidence, is a criminal offence. Article 159 § 2 specifies that fraud committed by a group of persons acting in concert (§ 2(a)) or through abuse of the offender's official position (§ 2 (v)) shall be punishable with a fine of up to 1000 minimum wages or two to six years' imprisonment.

The RSFSR Code of Criminal Procedure (in force at the material time)

Article 254 required that the court examined the case within the scope of the charges brought against the defendants. The charge could be amended by court, provided that such an amendment did not aggravate the situation of the defendant or violate his right to defend himself. If the amendment entailed a violation of the defence rights, the court had to remit the case for an additional investigation. It was prohibited to prefer a more serious charge

or a charge based on substantially different factual circumstances. The court could continue the trial if the amendment only concerned abandonment of certain counts or aggravating circumstances.

Chapter 30 described the power of certain State officials to contest final judgments by way of supervisory-review proceedings in which the case could be reviewed on points of law and procedure. The supervisory-review proceedings were distinct from review of a case on account of newly discovered facts. The power to lodge an application for supervisory review could be exercised by the Prosecutor General, the president of the Supreme Court of the Russian Federation, presidents of regional courts and their deputies. A party to the proceedings could petition these officials to lodge the application (Article 371).

Article 377 established that a prosecutor was to attend the supervisory-review hearing. If necessary, the convicted person and counsel could be summoned to the hearing in order to make submissions. If summoned to the hearing, the convicted person and counsel should be able to study the application for supervisory review. At the hearing, the case was presented by a judge rapporteur and then the convicted person and counsel, if present, could make oral submissions. The prosecutor made oral submissions in support of the application.

In Ruling no. 2-P of 14 February 2000 the Constitutional Court declared Article 377 incompatible with the Russian Constitution to the extent that it permitted the supervisory-review instance to decide on an application for supervisory review liable to aggravate the situation of the convicted or acquitted person. The Constitutional Court held that such person and his or her counsel should be able to study the application, they should be notified about the date and place of the hearing and given an opportunity to present their position on the arguments in the application.

The supervisory-review instance was not bound by the scope of the application for supervisory review and had to review the criminal case in its entirety. It could not, however, increase the sentence or recharacterise the defendant's actions as a more serious offence (Article 380).

COMPLAINTS

The applicant complains, without referring to specific Convention provisions, about a violation of her right to defend herself. She submits that the trial court did not give her an opportunity to defend herself against the new charge and the case should have been remitted for an additional investigation. Had the case been remitted, it would have been tried by a district court and then considered by the Samara Regional Court on appeal; as the case was not remitted, the Supreme Court of the Russian Federation automatically became the appeal instance and she did not have sufficient funds to attend a hearing in Moscow. Finally, the applicant complains that

the domestic courts incorrectly assessed evidence and reached unsubstantiated conclusions as to her guilt.

THE LAW

The applicant complained about an incorrect assessment of facts and procedural irregularities in the criminal proceedings against her. The Court will examine these complaints under Article 6 of the Convention which reads, in the relevant parts, 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:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence..."

Submissions by the parties

The Government submit that the attribution of a different legal characterisation to the applicant's actions by the trial court did not violate her rights because she had had sufficient time during the pre-trial investigation and trial to elaborate her defence position in co-operation with her counsel. The trial court characterised her actions as a less serious offence and thereby improved her position. The recharacterisation was not based on any new facts and such a change was foreseeable for the applicant. The Government further concede that the applicant and her counsel were not informed of the supervisory-review hearing on 24 May 2000. However, their presence was not required because the application for supervisory review did not purport to aggravate her situation, and their summoning was a discretionary power of the supervisory-review instance. Moreover, neither the applicant nor her counsel sought leave to appear at the hearing.

The applicant submits that throughout the investigation and trial she prepared her defence against the charges of abuse of position and bribery and it was only on the last day of the trial that the prosecutor asked the court to recharacterise the offences. Her counsel did not have enough time to prepare a new speech and the court withdrew for deliberations immediately thereafter. Furthermore, she applied to the supervisory-review instance with a view to having the judgment of 28 October 1998 quashed and the proceedings discontinued because the conclusions of the domestic courts as to her guilt did not correspond to the established facts. However, the deputy president preferred a completely different ground for supervisory-review,

and notably a new recharacterisation of her actions as an attempt to commit fraud. Moreover, neither she nor her counsel were informed about the date of the hearing before the supervisory-review instance. Nor were they aware of the contents of the application for supervisory review. For that reason they were prevented from making any submissions or comments, written or oral, and from pleading her innocence.

The Court's assessment

(a) Insofar as the applicant complained about the proceedings leading to her conviction, the Court recalls that according to Article 35 § 1 of the Convention it may only deal with a matter where it was introduced within six months from the date of the final domestic decision. On 17 March 1999 the Supreme Court of the Russian Federation upheld the applicant's conviction and there were no effective domestic remedies available to her following its judgment (see *Zhukov v. Russia* (dec.), no. 54632/00, 31 March 2005; *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999). It follows that, having lodged her application with the Court on 27 November 2000, the applicant failed to bring the complaints concerning her conviction within six months of the date of the final judgment.

It follows that this part of the application was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(b) Insofar as the applicant complained about the procedural defects of the supervisory-review proceedings, the Court notes that the applicant introduced her application six months and three days after the supervisory-review hearing had taken place. It is common ground between the parties that the applicant and her counsel were not informed of the hearing and did not attend it. In this context the Court recalls its constant case-law according to which the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment in cases where the applicant is entitled, pursuant to domestic law, to be served *ex officio* with a written copy of the final domestic decision, irrespective of whether that judgment was previously delivered orally (see, among many authorities, *Sukhorubchenko v. Russia* (dec.), no. 69315/01, 15 January 2004; *Venkadajalasarma v. the Netherlands* (dec.), no. 58510/00, 9 July 2002). Given that the applicant was neither present nor represented at that hearing, it would be reasonable to assume that she could not immediately take cognisance of the decision made and it took the text of the decision at least a few days to reach the applicant by mail. It follows therefore that this part of the application was introduced within six months in compliance with Article 35 § 1 of the Convention.

The Court considers, in the light of the parties' submissions, that this part of the application raises serious issues of fact and law under the Convention,

the determination of which requires an examination of the merits. The Court concludes therefore that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits of the case, the applicant's complaints concerning the supervisory-review proceedings;

Declares inadmissible the remainder of the application.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President