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

THIRD SECTION

DECISION

Applications nos. 1311/21 and 10219/21
Andrey Anatolyevich ANIKEYEV against Russia
and Oksana Vladimirovna YERMAKOVA against Russia

The European Court of Human Rights (Third Section), sitting on 13 April 2021 as a Chamber composed of:

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
María Elósegui,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd, *judges,*

and Olga Chernishova, *Deputy Section Registrar,*

Having regard to the above applications lodged on 30 December 2020 and 27 January 2021 respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, Mr Andrey Anatolyevich Anikeyev, is a Russian national, who was born in 1977 and lived until his arrest in Saratov.

2. The applicant in the second case, Ms Oksana Vladimirovna Yermakova, is a Russian national, who was born in 1977 and lived until her arrest in Krasnyy Poselok, Moscow Region. She is represented before the Court by Mr L.A. Abgadzhava, a lawyer practising in Moscow.

A. The circumstances of the applicants' cases

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

4. On 6 March 2020 the applicant in the first case, Mr Anikeyev, was convicted of attempted aggravated fraud by the Frunzenskiy District Court of Saratov. On 9 July 2020 the conviction was upheld on appeal by the Saratov Regional Court. On 3 August 2020 a copy of the appeal judgment was sent to the applicant. Nothing indicates that he lodged a cassation appeal against the above judgments.

5. On 15 August 2019 the applicant in the second case, Ms Yermakova, was convicted of attempted misappropriation by the Leninskiy District Court of Rostov-on-Don. On 7 April 2020 the conviction was upheld on appeal by the Rostov Regional Court. On 23 July 2020 a copy of the appeal judgment was sent to the applicant. Nothing indicates that she lodged a cassation appeal against the above judgments.

B. Relevant domestic law

6. Title 3, Section XIII of the Code of Criminal Procedure of 2002 ("Procedure for review at second instance") (the Code) stipulated in Article 390 § 2 that the decisions taken by the second-instance courts on appeal acquire binding force immediately.

7. Federal Law no. 433-FZ, which entered into force on 1 January 2013, amended the Code by introducing a new Chapter 47.1 ("Cassation review").

8. Article 401.6 provided safeguards against cassation review of final judgments and decisions where such review could aggravate the situation of a convicted person, an acquitted person, or a person in respect of whom a criminal prosecution had been terminated. First, such review was possible only within one year after these judgments or decisions had become final. Second, the cassation appeals were further restricted by the substantive criterion allowing a review only if a judgment breached the law "to an extent which distorted the essence and meaning of a judicial decision as an act of administration of justice" or where an individual has breached a pre-trial agreement with the prosecution.

9. Article 401.14 stipulated that the cassation courts had broad powers to dismiss cassation appeals; annul a judgment of a trial court and all subsequent judicial acts and terminate criminal proceedings; annul a judgment of a trial, appeal or cassation court and order new consideration on trial, appeal or cassation; or to alter a judgment or other final judicial act. Article 401.15 specifically prescribed that a cassation court annulled or altered a final and binding judgment or other judicial act only due to significant breach of criminal or procedural law, which had influenced the outcome of the proceedings, or due to a breach of a pre-trial agreement with the prosecution.

10. Article 401.2 of the Code prescribed a list of persons who were entitled to lodge a cassation appeal against any judicial act. Paragraph 3 of the same Article introduced a one-year time-limit for lodging a cassation

appeal against a judicial act which had become final and provided for a possibility to reset that time-limit on certain grounds. However, Federal Law no. 518-FZ, which entered into force on 1 January 2015 amended Article 401.2 of the Code by removing any time bars for lodging cassation appeals.

11. Federal Law 15-FZ, which entered into force on 24 February 2021, *inter alia* amended Article 401.3 of the Code by introducing a new paragraph 4, which stipulates that cassation appeals against judgments, as well as other final judicial acts, may be lodged within six months after becoming legally binding and for detained persons within six months after receiving a copy of such final and binding judicial act.

12. The transitional provisions of the Federal Law 15-FZ prescribe that all final judicial acts, which have become legally binding after 1 October 2019, and against which no cassations appeals have been lodged may be appealed to cassation courts within six months after the Federal Law's entering into force, i.e. until 24 August 2021.

COMPLAINTS

13. The applicant in the first case, Mr Anikeyev, complained under Article 6 § 1 and Article 13 of the Convention, as well as under Article 4 of Protocol No. 7 about an alleged violation of the *ne bis in idem* principle, unfairness of the criminal proceedings against him and the lack of the effective remedies in this regard.

14. The applicant in the second case, Ms Yermakova, complained under Article 6 §§ 1 and 3(d) of the Convention about the inability to cross-examine a prosecution witness G., as well as about her and her counsel's absence at the appeal hearing in the Rostov Regional Court.

THE LAW

15. In accordance with Rule 42 § 1 of the Rules of the Court, the Court decides to join the applications, given their similar factual and legal backgrounds.

16. The Court notes at the outset that the applicants have not submitted cassation appeals against the final judgments in their cases. Therefore, before considering the merits of the applicants' cases the Court must determine whether the applicants complied with Article 35 of the Convention, and, specifically, with the requirement of exhaustion of domestic remedies prescribed by Article 35 § 1 of the Convention.

17. It must be stressed at the outset that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court (see

Fressoz and Roire v. France [GC], no. 29183/95, § 37, ECHR 1999-I) and that effective and available remedies are those which are accessible, capable of providing redress in respect of the applicant's complaints, and offer reasonable prospects of success (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

A. Evolution of cassation review proceedings in Russian criminal cases

18. Prior to 2013 the Court has held that a decision taken by a second-instance criminal court at the regional level under the former cassation review in Russia is a final national decision for the purposes of Article 35 of the Convention. Accordingly, that decision has been considered as the starting point for calculation of the six-month time-limit laid down by that Article. Supervisory-review applications to higher courts of general jurisdiction and decisions taken by them on supervisory review have not been considered relevant for the purposes of calculation of that time-limit (see, in particular, *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004).

19. In 2013 the system of review of domestic judgments both in criminal and civil proceedings in Russia was modified. An appeal instance was introduced at the regional level and the first two levels of supervisory review under the former system were converted into two levels of cassation review. At that time, the criminal and civil appeal systems were broadly similar, except for the time-limits for cassation appeals, which were set at one year in criminal proceedings and at six months in civil proceedings.

20. In respect of the civil procedure reform, which introduced appeal, cassation, and supervisory-review instances, the Court found, in *Abramyan and Others v. Russia* ((dec.), nos. 38951/13 and 59611/13, §§ 76-86, 12 May 2015), that the new cassation review procedure at two separate levels of jurisdiction within six months did not give rise to the uncertainty of the previous supervisory-review procedure. Accordingly, it concluded that the reformed cassation review in civil cases constituted an ordinary remedy to be exhausted prior to lodging an application with it (see *Abramyan and Others*, cited above, § 93).

21. However, in 2014 – before the Court had expressed its opinion on 2013 criminal procedure reform – the amendments to the Code abolished the time-limits for lodging cassation appeals. Consequently, the Court has found in *Kashlan v. Russia* ((dec.), no. 60189/15, § 27, 19 April 2016) that even if the one-year time-limit in the criminal cassation review could have been reconciled with the Convention requirements for an effective remedy through the interpretation and practice of the Russian courts, the 2014 amendments had made that impossible. By abolishing the time-limit for lodging cassation appeals, the final and binding judicial acts had in practice

been amenable to appeal for an indefinite time, thus putting the new system in the same situation as the previous supervisory review system.

B. 2021 amendments to the Code

22. On 24 February 2021 Article 401.3 of the Code was amended by introducing a new paragraph 4, which has re-introduced a shorter six-month time-limit for lodging cassation appeals against final and binding judgments, as well as other final and binding judicial acts which complete criminal proceedings, such as decisions to terminate criminal proceedings (see paragraph 11 above). The transitional provisions of the Federal Law 15-FZ, which amend the Code, extend by six months the possibility of cassation review to all abovementioned final judicial acts, which have become legally binding after 1 October 2019 and against which no cassations appeals have been lodged (see paragraph 12 above).

23. These amendments rectify the defects previously identified in the decision *Kashlan* (cited above) and effectively align the cassation review in criminal proceedings with the cassation review in civil proceedings, which have been previously recognised as an effective remedy in the decision *Abramyan and Others* (cited above, §§ 93-94). Therefore, the Court considers it appropriate and justified to require any individual who intends to lodge an application in respect of a violation of his or her Convention rights to first use the remedy offered by the reformed criminal cassation review.

24. The Court further notes that the transitional provisions of the Federal Law 15-FZ, which amend the Code, prescribe that all final judicial acts, which have become legally binding after 1 October 2019, and against which no cassation appeals have been lodged, may be appealed to cassation courts within six months after the Federal Law entering into force, i.e. until 24 August 2021. Therefore, these provisions retroactively and without reservations provide a remedy to those individuals, who, like the applicants in the present case, have not previously benefited from an effective remedy, and therefore expand the scope of the protection afforded to them.

25. The Court notes that the applications were lodged before the entry into force of the amendment. It must be noted in this respect that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see, among other authorities, *Baumann v. France*, no. 33592/96, § 47, 22 May 2001) and the Court has previously done so in cases against Croatia, Italy, Russia, Slovakia, Turkey and other countries (see, for example, *Demopoulos and Others v. Turkey* [GC] (dec.), no. 46113/99, 1 March 2010; *Nogolica v. Croatia* (dec.), no. 77784/01,

5 September 2002; *Andrášik and Others v. Slovakia* (dec.), no. 57984/00, 22 October 2002; *Içyer v. Turkey* (dec.), no. 18888/02, 12 January 2006; *Stella and Others v. Italy* (dec.), no. 49169/09, 16 September 2014; and *Shmelev and Others v. Russia* (dec.), nos. 41743/17 and 16 others, 17 March 2020). In the present case it must be noted that the new remedy takes into account the defects previously identified in the Court's case-law, it provides reasonable prospects of success to the applicants and remains accessible to them – due to its retroactivity – until 24 August 2021. Therefore, the Court will consider the present applications with regard to the reformed cassation appeals procedure.

C. Conclusion

26. The Court notes that the applicants' judgments of conviction became final and binding on 9 July and 7 April 2020 respectively and that no cassation appeals have been lodged by the applicants. According to the abovementioned transitional provisions, they belong to the group of individuals, who retain the possibility to lodge their cassation appeals until 24 August 2021.

27. The Court therefore finds that in so far as the applicants have lodged complaints about a breach of their rights in criminal proceedings, the newly reformed cassation review procedure affords them, as any other person in a similar situation (see paragraph 22 above), an opportunity to obtain judicial review and, where appropriate, acknowledgement of a violation of their rights and redress domestically (see, similarly, *Shmelev and Others*, cited above, § 163). The applicants should exhaust this remedy before their complaints can be examined by the Court. Accordingly, their complaints under Articles 6, 7 and 13 of the Convention and Article 4 of Protocol No. 7 should be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 20 May 2021.

Olga Chernishova
Deputy Registrar

Paul Lemmens
President